

## 1. INTERPRETATION

1.1 In these Terms unless the context otherwise requires:

“**Business Day**” means any day other than a Saturday, Sunday or a statutory public holiday in New Zealand.

“**Customer**” means the person which buys Goods from the Seller.

“**Seller**” means Dexion Commercial (New Zealand) Limited.

“**Contract**” means each contract for the supply of Goods by Seller or any Related Company of Seller to Customer or any Customer’s Representative, which shall include these Terms, any document evidencing or describing, whether by item or kind or otherwise, the Goods, which is produced or put forward by Seller, and the provisions of the quotation (where the Contract arises from a quotation by Seller) or the provisions contained in Seller’s confirmation of an order (where the Contract arises from written acceptance by Seller of an order by Customer).

“**Customer’s Representative**” means each employee, agent, Related Company, or contractor of the Customer.

“**Default**” means an event listed in clause 10.1.

“**Goods**” means all goods, services or property which, in each case, are supplied by Seller or any Related Company of Seller to Customer or any Customer’s Representative and, for the avoidance of doubt, in each case includes all such goods, services or property so supplied:

- (a) whether or not described by item or kind that enables them to be identified;
- (b) which are or comprise, or which are capable of being or comprising, inventory of Customer.

For the avoidance of doubt, the term Goods shall include any related or unrelated services, supplied by the Seller to the Customer.

“**PPSA**” means the Personal Property Securities Act 1999.

“**Related Company**” has the meaning in section 2(3) of the Companies Act 1993 (read as if the expression “company” in that subsection included any body corporate).

“**Seller’s Price**” in respect of Goods at any time means:

- (a) if Seller has not provided a quotation in writing to Customer in respect of those Goods, the price specified in the most recent price list produced or published by Seller at that time, or, if there is no such price list, or it does not specify the price of the Goods in question, the price certified by Seller as being its standard price at that time for those Goods; or
- (b) if Seller has provided a quotation in writing to Customer in respect of those Goods, the price specified in that quotation.

“**Terms**” means the terms of trade contained in this document.

A reference to “**Seller**” includes any Related Company of Seller which supplies Goods to Customer or a Customer’s Representative.

A reference to a “**person**” includes a corporation, association, firm, company, partnership, individual or government or local body.

The terms “**after-acquired property**”, “**at risk**”, “**inventory**”, “**lease**”, “**perfected**”, “**proceeds**”, “**purchase money security interest**”, “**rights**”, “**security interest**” and “**sell**” have the respective meanings given to them under, or in the context of, the PPSA.

1.2 Headings are used as a matter of convenience only and shall not affect the interpretation of these Terms.

## 2. INCORPORATION OF TERMS

2.1 Terms of trade: These Terms apply in respect of every supply of Goods by Seller or any Related Company of Seller to Customer or any Customer’s Representative, and are deemed incorporated in each Contract.

2.2 Terms are paramount: The Terms are paramount and, to the extent there is any conflict between the Terms and any invoice or other document relating to any Goods (including any document produced by Customer) the Terms will prevail.

2.3 Customer bound: Customer will become bound by these Terms as soon as:

- (a) Customer or a Customer’s Representative signs or agrees to these Terms; or
- (b) Customer or a Customer’s Representative orders Goods; or
- (c) Seller supplies Goods to Customer or a Customer’s Representative.

2.4 Contracts Privity Act: Each Related Company of Seller which supplies Goods is entitled to the benefit of these Terms in accordance with the Contracts (Privity) Act 1982 and, in addition, Seller is entitled to enforce these Terms on behalf of any Related Company of Seller. However, the consent of Related Companies of Seller is not required to any variation, amendment or discharge of these Terms.

## 3. ORDERING PROCEDURES

3.1 Orders: The following provisions apply to orders for Goods:

- (a) Orders must be placed in accordance with procedures from time to time laid down by Seller.
- (b) Orders shall be deemed accepted by Seller when accepted in writing or, in the absence of written acceptance, upon dispatch of the Goods by Seller. Orders for Goods may be accepted by Seller in whole or part. Acceptance of orders is at Seller’s sole discretion.
- (c) Seller may cancel or amend any order for Goods which in the opinion of Seller is impractical or uneconomic to supply.
- (d) Once an order has been accepted by Seller, it may not be changed or cancelled by Customer without the prior written consent of Seller.

3.2 Status of order: The placement of an order with Seller constitutes an offer by Customer to trade with Seller and does not constitute acceptance of any offer by Seller. Receipt of an order by Seller from Customer does not constitute acceptance by Seller of that order.

3.3 Status of quotation: If a quotation is provided by Seller, that quotation is an invitation for Customer to trade with Seller, but does not constitute an offer by Seller. A quotation shall remain valid for the period stated in the quotation and if no period is stated, for five Business Days from the date of the quotation. Any modification to any quotation is effective only if Seller puts it in writing.

## 4. PRICE AND PAYMENT

4.1 Pricing: Customer shall pay to Seller in respect of all Goods supplied by Seller or any Related Company of Seller to Customer or any Customer’s Representative the Seller’s Price for those Goods as at the date of delivery of those Goods.

4.2 Freight and taxes, etc: All prices are exclusive of:

(a) freight, insurance, installation, customs duty, and any other costs; and

(b) all applicable taxes (including any goods and services tax) assessed or levied in connection with the supply of the Goods (other than any final income tax liability of Seller) and where the payment of such taxes or duties is the responsibility of Seller, the price shall be increased by the amount of such taxes or duties.

4.3 Payment: Payment for Goods, and any other charges associated with Goods, is due on the 20th of the month following the month in which those Goods are delivered. All payments shall be made in New Zealand dollars. Payment shall be made in cleared funds. If the Seller’s Price is expressed in a currency other than New Zealand dollars, the Seller’s Price shall be converted to New Zealand dollars at a rate of exchange chosen by Seller.

4.4 No set-off: Customer shall not be entitled to withhold payment or make any set off or deduction from the price of Goods supplied or from any other payment due by Customer.

4.5 Additional security: If Seller at any time deems the credit of Customer to be unsatisfactory, Seller may require Customer to grant security for payment satisfactory to Seller and may suspend performance of its obligations under any Contract until that security is provided. All costs and expenses incurred by Seller as a result of such suspension and any recommencement shall be payable by Customer.

4.6 Default Interest: Interest at 5% per annum above Seller’s bank indicator lending rate from time to time calculated on a daily basis shall be payable on any moneys outstanding by Customer to Seller from the date payment is due until the date payment is received by Seller, but without prejudice to Seller’s other rights and remedies in respect of non-payment or late payment. That interest shall be payable on demand by Seller.

4.7 Other payments: All other payments due by Customer under the Contract shall be payable at the time provided in the Contract. If no time is provided, payment shall be made within five Business Days of payment being demanded by the Seller.

## 5. DELIVERY

5.1 Delivery: The following provisions apply to delivery of Goods:

(a) Goods shall be deemed to be delivered when delivered to Customer’s premises. If no place for delivery is specified, or if Customer fails or refuses, or indicates to Seller that it will fail or refuse, to take or accept delivery, then the Goods shall be deemed to have been delivered when Seller was willing and able to deliver them.

(b) Seller may deliver Goods by instalments and each instalment shall be deemed to be a separate contract under the same provisions as the Contract. If Seller fails to deliver one or more instalments this will not entitle Customer to repudiate the Contract.

(c) Any quotations of delivery times by Seller are estimates only and not commitments. Seller shall not be bound by such quotations.

(d) Seller shall not be liable to Customer for non-delivery or delay in delivery.

(e) Seller will not consider any claim that all of the Goods ordered have not been delivered unless Customer makes a written claim to Seller within two Business Days of delivery.

(f) Customer should check all goods on arrival. Once freight docket is signed Customer assumes responsibility for the product from that point on and any damage that may be later discovered.

## 6. RISK AND SECURITY INTEREST

6.1 Risk: Risk of any loss, damage or deterioration of or to Goods shall be borne by Customer from the date of delivery of Goods in accordance with clause 5.1(a).

6.2 Security interest: Customer grants a security interest to Seller in each and every part of the Goods as security for payment for that part and of each other part or parts of the Goods and for any other amounts owing by Customer to Seller from time to time, and for the performance by the Customer of all Customer’s other obligations to Seller from time to time, (“Customer’s indebtedness and obligations”). For the purposes of section 36(1)(b) of the PPSA, and to ensure maximum benefit and protection for Seller by virtue of section 36(1)(b)(iii) of the PPSA, Customer confirms and agrees that Customer intends to and does grant to Seller, as security for Customer’s indebtedness and obligations, a security interest in all of the Customer’s present and after-acquired property except only for any such property which is or comprises items or kinds of personal property (“excepted property”):

(a) in or to which Customer has rights; and

(b) which has not been supplied by Seller to Customer, other than any excepted property which is or comprises proceeds of any of that present and after-acquired property which has been supplied by Seller to Customer.

6.3 Customer cooperation: Customer shall do anything that Seller reasonably requires to ensure that Seller has a perfected security interest in all the Goods and a purchase money security interest in each part of the Goods to the extent of the purchase price for that part.

6.4 Allocation of payments: Seller may allocate amounts received from Customer in any manner Seller determines, including in any manner required to preserve any purchase money security interest it has in any Goods.

6.5 Costs of financing statement: Customer shall reimburse Seller for all costs and/or expenses incurred or payable by Seller in relation to registering, maintaining or releasing any financing statement in respect of any security interest under the Contract.

6.6 Verification statement: Customer waives the right to receive a copy of the verification statement confirming registration of a financing statement or financing change statement relating to the security interest.

6.7 Customer acknowledgements: Customer:

(a) agrees that if, at any relevant time, Seller does not at that time have priority over all other secured parties in respect of any part of the Goods, then Customer and Seller will, for the purposes of section 109(1) of the PPSA, be deemed, in accordance with the entitlement to do so under section 107(1) of the PPSA, to have contracted out of that section but specifically on the basis that, as between them and only to the extent of that part of the Goods and the operation and application of the PPSA, that section 109(1) (but amended only by the deletion of the words “with priority over all other secured parties”) is reinstated and contracted back into; and

(b) agrees that nothing in section 114(1)(a), 133 and 134 of the PPSA shall apply to any Contract, or the security under any Contract, and waives Customer’s rights under sections 121, 125, 129, 131 and 132 of the PPSA.

6.8 Appointment of receiver: At any time after a Default occurs, Seller may (whether or not Seller has exercised any other right) appoint any person to be a receiver of all or any of the Goods. In addition to, and without limiting or affecting any other powers and authorities conferred on a receiver (whether under the Receiverships Act 1993 or at law or otherwise), a receiver has the power to do all things in relation to the Goods as if the receiver has absolute ownership of the Goods.

## 7. SELLER'S WARRANTIES

7.1 Warranty: Seller will (subject to clauses 7.3 and 8) repair or make good any defects in materials and workmanship in Goods arising within the period specified in the Contract or, where no period is specified, within one month from the date of delivery. No claim shall be accepted under such warranty unless written notice of the claim is received by Seller within five Business Days after the defect is discovered nor shall any claim be accepted:

- (a) if any attempt to repair the Goods is made by any person or persons not authorised by Seller to effect those repairs;
- (b) if the Goods have been dismantled or modified without the approval of Seller; or
- (c) if the Goods have not been stored, maintained or used in a proper manner.

Seller shall not be obliged to carry out any work nor be under any liability under this clause for so long as Customer is in default in relation to any payment or in the performance of any obligation under any Contract.

7.2 Place of repairs: Any repairs to the Goods shall be effected at such place as Seller may specify. Customer shall be responsible for, and bear the costs of, transporting to Seller any Goods to be repaired or made good.

7.3 Goods not manufactured by Seller: If any Goods supplied to Seller by other manufacturers are the subject of a claim under clause 7.1, Customer shall be entitled to such benefits as Seller may receive under any warranty given to Seller by that manufacturer to the extent that Seller is able to pass these on to Customer. However, clause 7.1 does not apply to Goods which are not manufactured by Seller.

7.4 Contracts Privity: If Customer on-sells any goods purchased from Seller to a third party which is not a Related Company, that third party shall have no claim against the Seller under this section 7 or these Terms.

## 8. LIABILITY

8.1 Exclusion of warranties conditions, etc: To the fullest extent permissible at law;

(a) All representations, terms, warranties, guarantees, or conditions whether implied by statute, common law or custom of the trade or otherwise, including, but not limited to, implied warranties, guarantees or conditions of merchantability and/or fitness for a particular purpose, are excluded.

(b) Seller shall have no liability to Customer or any Customer's Representative for anything, other than a breach by Seller of an express provision of these Terms (including but not limited to negligence on the part of Seller or its employees or agents).

8.2 No representations: Customer acknowledges that it does not rely on any representation or statement made by or on behalf of Seller or its employees or agents other than the express provisions of these Terms.

8.3 No liability for consequential losses, etc: Seller shall not be liable for any loss of profits or any consequential, indirect or special damage or loss of any kind suffered by Customer or any Customer's Representative.

8.4 Limitation of liability: Notwithstanding anything else contained in any Contract, the liability of Seller to Customer shall not in aggregate exceed the invoice price of the Goods in respect of which the liability arises.

8.5 Indemnity: Customer shall indemnify Seller against:

(a) any claim against Seller by Customer's employees, agents, contractors, customers or any other persons (whether similar to the foregoing or not) in respect of any loss, damage or injury arising from any cause relating to or concerning the Goods; and

(b) any liability or cost incurred by Seller as a result of any breach by Customer of any provision of these Terms.

8.6 Consumer Guarantees Act: Customer agrees as follows:

(a) Nothing in any Contract is intended to have the effect of contracting out of the provisions of the Consumer Guarantees Act 1993 ("CGA") except to the extent permitted by the CGA, and all provisions of the Contract shall be read as modified to the extent necessary to give effect to that intention.

(b) Customer shall not, in relation to the supply by Customer of the Goods, give or make any undertaking, assertion or representation in relation to the Goods without the prior approval in writing of Seller.

(c) Customer shall, in relation to any supply of the Goods by Customer, contract out of the provisions of the CGA to the extent that the Customer is entitled to do so under the CGA.

## 9. RETURNS, EXCHANGES AND REFUND POLICY

9.1 Returns: Seller may in its absolute discretion, accept a request by Customer to return Goods to Seller for credit, exchange or refund. If Seller accepts any request by Customer under this clause, such acceptance will be conditional on Customer:

(a) delivering, at its expense, the relevant Goods to Seller at Customer's cost in the same condition and packaging in which they were delivered to Customer, with a copy of Seller's invoice, within five Business Days of Seller's acceptance; and

(b) complying with such other terms and conditions as the Seller may apply in respect of that return; and

(c) incurring a re-stocking fee.

9.2 Risk: Any return of Goods to Seller is at Customer's own risk. Seller is not responsible for unauthorised returns. Seller may dispose of, on such basis as Seller sees fit and without liability to Customer, any Goods returned otherwise than in accordance with clause 9.1.

## 10. DEFAULT

10.1 Default: A Default occurs if any one or more of the following occurs:

(a) Customer defaults in performance of its obligations under any Contract (including failure to make payment on due date).

(b) Customer defaults in performance of its obligations under any other contract with Seller.

(c) Customer becomes insolvent or is adjudicated bankrupt or an application is made for its liquidation or administration or a liquidator, receiver or administrator is appointed in respect of its assets.

(d) Customer enters into, or is likely to enter into, any composition or arrangement with its creditors.

(e) Customer no longer carries on business or threatens to cease carrying on business.

(f) A change of ownership or effective control of Customer occurs or the nature of Customer's business is materially altered.

(g) Any Goods are at risk.

(h) Any other event which Seller considers may materially adversely affect the ability of Customer to perform any of its obligations under any Contract.

10.2 Enforcement upon default: If a Default occurs, Seller may at its option, without prejudice to any other rights or remedies, do any one or more of the following:

(a) Require all moneys outstanding to be immediately due and payable and enforce the security interest created by clause 6.

(b) Require security for Customer's obligations to Seller's satisfaction.

(c) Suspend all Contracts in which case the Seller shall not be obliged to perform any of its obligations under any Contract during the period of suspension including, without limitation, delivery of Goods ordered by the Customer. Any suspension shall not prevent Seller from terminating any Contract during the period of suspension.

(d) Require Customer to stop selling or otherwise disposing of the Goods.

(e) Enter upon Customer's premises where the Goods are situated and take possession of and remove the same without being responsible for any damage caused, and resell those Goods and apply the proceeds in satisfaction or reduction of amounts owing by Customer.

(f) Terminate all or any Contracts.

10.3 Other costs: Customer shall pay all costs incurred by Seller, (including costs on a solicitor/client basis and debt collectors' costs) incurred in the recovery or attempted recovery of outstanding moneys and/or the enforcement of these Terms.

10.4 Priority of payments: Payments by Customer shall be applied in reduction of amounts owing by Customer in such order as Seller determines.

## 11. USE OF INFORMATION

11.1 Customer agrees that:

(a) the Seller may obtain any information about the Customer from any person, company or agency for the purposes of credit assessment, debt collection or direct marketing, and the Customer consents to any such person or company providing information to the Seller;

(b) the Seller may provide information about the Customer to any person, company or agency for the purposes of assessing the Customer's creditworthiness; and

(c) the Seller may use or disclose any information obtained from the Customer, or otherwise obtained as a result of assessing the creditworthiness of the Customer, to assist it to carry out its usual business functions.

11.2 The Customer may have rights under the Privacy Act 1993 to access, and if necessary to request the correction of, personal information (as that term is defined in the Privacy Act 1993) held by the Seller.

## 12. GENERAL

12.1 Severability: If any provision of any Contract is or becomes unenforceable, illegal or invalid for any reason it shall be deemed to be severed from the Contract without affecting the validity of the remainder of the Contract and shall not affect the enforceability, legality, validity or application of any other provision of the Contract.

12.2 Notice provisions: Any notice to be given by a party to the other shall be in writing and shall be given by:

(a) personal delivery;

(b) mailing by pre-paid post, and shall be deemed to be given two days after the date of mailing; or

(c) facsimile transmission, and shall be deemed to be given at the time specified in the facsimile transmission report of the facsimile from which the transmission was made which evidences full transmission, free of errors, to the facsimile number of the party given notice, to the address or facsimile number specified on the first page of these Terms or to such other address or number as is notified in writing by a party to the other.

12.3 Force majeure: Neither party shall be liable for any failure or delay in complying with any obligation imposed on that party under a Contract if:

(a) the failure or delay arises directly or indirectly from a cause reasonably beyond that party's control and not due to the default or insolvency, or an intentional act or omission, of that party;

(b) that party, on becoming aware of the cause, promptly notifies the other party in writing of the nature and expected duration of, and the obligation affected by the cause; and

(c) that party uses its reasonable endeavours to mitigate the effect of the cause on that party's obligations and to perform that party's obligations on time despite the cause, but nothing in this clause shall excuse a party from any obligation to make a payment when due under the Contract.

12.4 Amendment: Seller may vary these Terms at any time by notice in writing to Customer. Any such variation will take effect from acceptance of the first order for Goods following a notice of the variation being given to Customer.

12.5 Assignment: Customer may not assign all or any of its rights or obligations without the prior written consent of Seller.

12.6 Inconsistency: To the extent that these Terms are inconsistent with any other arrangement between the parties, these Terms will prevail unless otherwise agreed in writing between the parties.

12.7 Waiver: The rights, powers, exemptions and remedies of Seller shall remain in full force notwithstanding any neglect, forbearance or delay in their enforcement. Seller shall not be deemed to have waived any provision of a Contract unless such waiver is in writing signed by Seller or an authorised officer of Seller. Any such waiver, unless the contrary is expressly stated, shall apply to, and operate only in, a particular transaction, dealing or matter.

12.8 Confidentiality: To the extent that any confidential information is passed by a party to the other, the other party must keep that information confidential.

12.9 Errors or omissions: Clerical errors or omissions, whether in compilation or otherwise in any order, quotation, acknowledgement, invoice or other such documentation, are subject to correction by Seller.

12.10 Privacy Act: Customer authorises Seller to contact any credit agency, referee or any other source in order to check, exchange or provide information in relation to Customer and Customer authorises each such source to provide to Seller any information about Customer. If Customer is a natural person the Privacy Act 1993 entitles Customer to have access to personal information held by Seller about Customer and to request correction of that personal information.

12.11 Relationships: Nothing in the making or performance of a Contract creates the relationship of partnership, joint venture or agent and principal between the parties. The relationship between the parties is the relationship of independent parties contracting for goods and services.

12.12 Governing law: Each Contract is governed by New Zealand law and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand in respect of any dispute or proceeding arising out of any Contract.

12.13 UN Convention: The United Nations Convention on contracts for the international sale of goods does not apply.

12.14 Acknowledgement: The Customer acknowledges that it has received a copy of these Terms and in particular that each Contract constitutes a "security agreement" for the purposes of the PPSA, and that Seller may register a financing statement.

Signature

Print Name

Date