

Excel Switchgear Limited – Terms & Conditions of Trade

1. Definitions

- 1.1 "Agreement" shall mean the terms and conditions contained herein.
- 1.2 "Seller" shall mean Excel Switchgear Limited its successors and assigns or any person acting on behalf of and with the authority of Excel Switchgear Limited.
- 1.3 "Buyer" shall mean the Buyer (or any person acting on behalf of and with the authority of the Buyer) as described on any quotation, work authorisation or other form as provided by the Seller to the Buyer.
- 1.4 "Guarantor" shall mean that person (or persons), or entity, who agrees to be liable for the debts of the Buyer on a principal debtor basis as recorded in the Credit Account Application.
- 1.5 "Goods" shall mean Goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined) and includes Goods described on any invoices, quotation, work authorisation or any other forms as provide by the Seller to the Buyer.
- 1.6 "Services" shall mean all services supplied by the Seller to the Buyer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.7 "Terms" shall mean these Terms & Conditions of Trade.
- 1.8 "Price" shall mean the price payable for the Goods as agreed between the Seller and the Buyer in accordance with clause 3 of this contract.

2. Acceptance

- 2.1 Any instructions received by the Seller from the Buyer for the supply of Goods and/or the Buyer's acceptance of Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Buyer has entered into this Agreement, the Buyers shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Buyer the terms and conditions are binding and can only be amended with the written consent of the Seller.
- 2.4 The Buyer shall give the Seller not less than fourteen (14) days prior written notice of any proposed change of ownership of the Buyer or any change in the Buyer's name and/or any other change in the Buyer's details (including but not limited to, changes in the Buyer's address, facsimile number, or business practice). The Buyer shall be liable for any loss incurred by the Seller as a result of the Buyer's failure to comply with this clause.

3. Price And Payment

- 3.1 At the Seller's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by the Seller to the Buyer in respect of Goods supplied; or
 - (b) the Seller's quoted Price (subject to clause 3.2) which shall be binding upon the Seller provided that the Buyer shall accept the Seller's quotation in writing within thirty (30) days.
- 3.2 The Seller reserves the right to alter the quotation:
 - (a) because the Buyer has requested variations to the supply of Goods; and/or
 - (b) because of circumstances beyond the Seller's control.
- 3.3 For orders less than \$30 a handling charge of \$10 per order may be charged.
- 3.4 At the Seller's sole discretion a deposit shall be required.
- 3.5 At the Seller's sole discretion payment may be due on delivery of the Goods.
- 3.6 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due twenty (20) days following the end of the month in which a statement is posted to the Buyer's address or address for notices.
- 3.7 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to in writing between the Buyer and the Seller.
- 3.8 Unless expressly included in any quotation or order for Goods, GST and other taxes and duties assessed in connection with the supply of the Goods are not included in the Price and will be the responsibility of the Buyer. Where the payment of such taxes or duties is the responsibility of the Seller at law, the Price will be increased by the amount of such taxes or duties.
- 3.9 Clerical errors or omissions, whether in computation or otherwise, will be subject to correction.

4. Delivery Of Goods

- 4.1 At the Seller's sole discretion delivery of the Goods shall take place when:
 - (a) the Buyer takes possession of the Goods at the Seller's address; or
 - (b) the Buyer takes possession of the Goods at the Buyer's nominated address (in the event that the Goods are delivered by the Seller or the Seller's nominated carrier).
- 4.2 The costs of delivery are:
 - (a) in addition to the Price; and
 - (b) payable by the Buyer.
- 4.3 The Buyer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Buyer is unable to take delivery of the Goods as arranged then the Seller shall be entitled to charge a fee for redelivery.
- 4.4 Delivery of the Goods to a third party nominated by the Buyer is deemed to be delivery to the Buyer for the purposes of this Agreement.
- 4.5 The Seller may deliver the Goods by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the provisions of this Agreement.
- 4.6 The failure of the Seller to deliver shall not entitle either party to treat this Agreement as repudiated.
- 4.7 Time will not be of the essence in respect of the delivery of Goods. The Seller will not be responsible for any delay in the delivery of Goods and the Buyer will not be entitled to cancel orders because of any such delay. Dates for delivery of Goods are given in good faith and are not to be treated as a condition of sale or purchase.
- 4.8 The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Goods (or any part of them) promptly or at all.

5. Risk

- 5.1 If the Seller retains ownership of the Goods nonetheless, all risk for the Goods passes to the Buyer on delivery.
- 5.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Buyer, the Seller is entitled to receive all insurance proceeds payable for the Goods. The production of this Agreement by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

6. Title

- 6.1 The Seller and Buyer agree that ownership of the Goods shall not pass until:
 - (a) the Buyer has paid the seller all amounts owing for the particular Goods; and
 - (b) the Buyer has met all other obligations due by the Buyer to the Seller in respect of all contracts between the Seller and the Buyer.
- 6.2 Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Seller's ownership or rights in respect of the Goods shall continue.
- 6.3 It is further agreed that:
 - (a) were practicable the Goods shall be kept separate and identifiable until the Seller shall have received payment and all other obligations of the Buyer are met; and
 - (b) until such time as ownership of the Goods shall pass from the Seller to the Buyer the Seller may give notice in writing to the Buyer to return the Goods to the Seller. Upon such notice being given the rights of the Buyer to obtain ownership or any other interest in the Goods shall cease; and
 - (c) the Buyer is only a bailee of the Goods and until such time as the Seller has received payment in full for the Goods then the Buyer shall hold any proceeds from the sale or disposal of the Goods on trust for the Seller in a separate account for which separate records are kept; and
 - (d) until such time that ownership in the Goods passes to the Buyer, if the Goods are converted into other products, the parties agree that the Seller will be the owner of the end products; and
 - (e) if the Buyer fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Buyer, or any premises where the Goods are situated as the invitee of the Buyer and take possession of the Goods, and the Seller will not be liable for any reasonable loss or damage suffered as a result of any action by the Seller under this clause. The Buyer indemnifies the Seller to the full extent of any loss or damage as a result of any action by the Seller under this clause.

7. Personal Property Securities Act 1999 ("PPSA")

- 7.1 Upon assenting to these terms and conditions in writing the Buyer acknowledges and agrees that:
 - (a) these terms and condition constitute a security agreement for the purposes of the PPSA; and
 - (b) a security interest is taken in all of the Buyer's present and after-acquired property that the Seller has supplied to the Buyer or in which Goods supplied or financed by the Seller have been attached or incorporated.
 - (c) the preceding clause provides the Seller with a security interest in the Buyer's after-acquired property in terms of section 43 of the PPSA.
- 7.2 The Buyer undertakes to:
 - (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Seller may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, the Seller for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods thereby;
 - (c) to be responsible for the full costs incurred by the Seller (including actual legal fees and disbursements on a solicitor/client basis) in obtaining an order pursuant to section 167 of the PPSA and/or otherwise enforcing any security interest created by these Terms, including subordination agreements;
 - (d) not register a financing change statement or a change demand in respect of the Goods without the prior written consent of the Seller;
 - (e) immediately advise the Seller of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales;
 - (f) to give the Seller not less than 14 days' prior written notice of any proposed change to the Buyer's name or any other changes to Buyer's details, including a change of address, email address or trading name;
 - (g) on request by the Seller to immediately obtain from any third parties such waivers as the Seller may at any time require to protect its security position.
- 7.3 The Seller and the Buyer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 7.4 The Buyer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA.
- 7.5 Unless otherwise agreed to in writing by the Seller, the Buyer waives its right to receive a verification statement in accordance with Section 148 of the PPSA.
- 7.6 The Buyer shall unconditionally ratify any actions taken by the Seller under clauses 7.1 to 7.5.

8. Payment Allocation

- The Seller may in its discretion allocate any payment received from the Buyer towards any invoice that the Seller determines and may do so at the time of receipt or at any time afterwards. On any default by the Buyer the Seller may reallocate any payments previously received and allocated. In the absence of payment allocation by the Seller, payment will be deemed to be allocated in such manner as preserves the maximum value of the Seller's Purchase Money Security Interest (as defined in the PPSA) in the Goods.

9. Buyer's Disclaimer

- 9.1 The Buyer hereby disclaims any right to rescind, or cancel any contract with the Seller or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Buyer by the Seller and the Buyer acknowledges that the Goods are bought relying solely upon the Buyer's skill and judgment.

10. Defects

- 10.1 The Buyer shall inspect the Goods on delivery and shall within fourteen (14) days of delivery (time being of the essence) notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Buyer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery if the Buyer believes the Goods are defective in any way. If the Buyer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Seller has agreed in writing that the Buyer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods.

- 11. Returns**
- 11.1 Returns will only be accepted provided that:
- the Buyer has complied with the provisions of clause 10.1; and
 - the Seller has agreed in writing to accept the return of the Goods; and
 - the Goods are returned at the Buyer's cost within thirty (30) days of delivery date; and
 - the Seller will not be liable for Goods which have not been stored or used in a proper manner; and
 - the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
- 11.2 The Buyer will not be entitled to cancel an order to return Goods other than as allowed pursuant to these Terms.
- 11.2 Returned goods shall incur restocking and handling fees.
- 12. Warranty**
- 12.1 To the extent permitted by statute, no warranty is given by the Seller as to the quality or suitability of the Goods for any purpose and any implied warranty, is expressly excluded. The Seller shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.
- 13. Consumer Guarantees Act 1993**
- 13.1 If the Buyer is acquiring Goods for the purposes of a trade or business, the Buyer acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods by the Seller to the Buyer.
- 14. Compliance**
- The Buyer will be responsible for obtaining any necessary permits or certificates of compliance required under any legislation, regulation, bylaw or rule with respect to the installation and operation of the Goods.
- 15. Intellectual Property**
- 15.1 Where the Seller has designed, drawn or written Goods for the Buyer, then the copyright in those designs and drawings and documents shall remain vested in the Seller, and shall only be used by the Buyer at the Seller's discretion.
- 15.2 The Buyer warrants that all designs or instructions to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Buyer's order and the Buyer agrees to indemnify the Seller against any action taken by a third party against the Seller in respect of any such infringement.
- 16. Default & Consequences Of Default**
- 16.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and one half percent (2.5%) per calendar month (and at the Seller's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 16.2 In the event that the Buyer's payment is dishonoured for any reason the Buyer shall be liable for any dishonour fees incurred by the Seller.
- 16.3 If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in pursuing the debt including legal costs on a solicitor and own client basis and the Seller's collection agency costs.
- 16.4 Without prejudice to any other remedies the Seller may have, if at any time the Buyer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Buyer and any of its obligations under this Agreement. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller has exercised its rights under this clause.
- 16.5 If any account remains overdue after thirty (30) days then an amount of the greater of \$20.00 or 10.00% of the amount overdue (up to a maximum of \$200) shall be levied for administration fees which sum shall become immediately due and payable.
- 16.6 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Buyer which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable in the event that:
- any money payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to meet its payments as they fall due; or
 - the Buyer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer.
- 17. Security And Charge**
- 17.1 Despite anything to the contrary contained herein or any other rights which the Seller may have howsoever, where the Buyer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Buyer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Buyer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
- 17.2 Should the seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Buyer and/or Guarantor shall indemnify the Seller from and against all the Seller's costs and disbursements including legal cost on a solicitor and own client basis.
- 17.3 The Buyer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Seller or the Seller's nominee as the Buyer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 17.
- 18. Cancellation**
- 18.1 The Seller may cancel any contract to which this Agreement applies or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Buyer. On giving such notice the Seller shall repay to the Buyer any sums paid in respect of the Price. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.
- 18.2 In the event that the Buyer cancels delivery of the Goods the Buyer shall be liable for any loss incurred by the Seller (including, but not limited to, any loss of profits) up to the time of cancellation.
- 19. Personal Guarantee of Company Directors or Trustees**
- 19.1 If the Buyer is a Company or Trust, the Director(s) or Trustee(s) accepting these Terms also sign in their personal capacity and by doing so:
- jointly and severally personally guarantee as principal debtors the payment to the Buyer of any and all moneys payable by the Buyer to the Seller; and
 - indemnify the Seller against non-payment by the Buyer and/or any loss the Seller might suffer should these Terms be lawfully disclaimed by any liquidator, receiver or other person.
- 19.2 Any personal liability of a signatory to this contract will not exclude the Buyer in any way from the liabilities and obligations contained in these Terms.
- 19.3 The signatories in their personal capacities and the Buyer will be jointly and severally liable for the payment of all sums due under these Terms.
- 19.4 The signatories may for all purposes be treated as the Buyer and the Seller shall be under no obligation to take proceedings against the Buyer before taking proceedings against the signatories in their personal capacities.
- 20. Assignment**
- 20.1 The Buyer will not assign all or any of its rights or obligations or any debt under these Terms without the written consent of the Seller.
- 20.2 The Seller may assign or sub-contract any part of the provision of the Goods which is to be performed under any contract.
- 20.3 Nothing in this clause prevents the Seller from taking legal action to enforce payment of any debt due, or to seek interlocutory or injunctive relief.
- 21. Changes of General Terms & Conditions**
- 21.1 The Buyer may at any time refuse an order by the Buyer or decline to approve an application by the Buyer for any reason.
- 21.2 The existence of an account with the Vendor does not automatically entitle the Buyer to credit in the future.
- 22. Privacy Act 1993**
- 22.1 The Buyer and the Guarantor authorises the Seller to:
- collect, retain and use any information about the Buyer and/or Guarantors, for the purpose of assessing the Buyer's and/or Guarantors creditworthiness or marketing products and services to the Buyer and/or Guarantors; and
 - disclose information about the Buyer and/or Guarantors, whether collected by the Seller from the Buyer and/or Guarantors directly or obtained by the Seller from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Buyer and/or Guarantors.
- 22.2 Where the Buyer and/or Guarantors are an individual the authorities under clause 22.1 are authorities or consents for the purposes of the Privacy Act 1993.
- 22.3 The Buyer and/or Guarantors shall have the right to request the Seller for a copy of the information about the Buyer and/or Guarantors retained by the Seller and the right to request the Seller to correct any incorrect information about the Buyer and/or Guarantors held by the Seller.
- 23. Unpaid Seller's Rights**
- 23.1 Where the Buyer has left any item with the Seller for repair, modification, exchange or for the Seller to perform any other service in relation to the item and the Seller has not received or been tendered the whole of the Price, or the payment has been dishonoured, the Seller shall have:
- a lien on the item;
 - the right to retain the item for the Price while the Seller is in possession of the item;
 - a right to sell the item.
- 23.2 The lien of the Seller shall continue despite the commencement of proceedings, or judgment for the Price having been obtained.
- 24. General**
- 24.1 If any of the provisions contained in this Agreement shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 24.2 These Terms constitute the entire agreement and supersede and extinguish any other prior agreements and understandings between the Seller and the Buyer.
- 24.3 If there is any inconsistency between these Terms and any order submitted by the Buyer or any other arrangement between the Seller and the Buyer, these Terms will prevail unless agreed in writing by the parties.
- 24.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the Courts of New Zealand.
- 24.3 The Seller shall be under no liability whatsoever to the Buyer for any indirect loss and/or expense (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of this Agreement.
- 24.4 In the event of any breach of this Agreement by the Seller the remedies of the Buyer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 24.5 The Buyer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Buyer by the Seller.
- 24.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.
- 24.7 The Seller reserves the right to review this Agreement at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Seller notifies the Buyer of such change.
- 24.8 The provision of the Contractual Remedies Act 1979 shall apply to this Agreement as if section 15(d) were omitted from the Contractual Remedies Act 1979.
- 24.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 24.10 The failure by the Seller to enforce any provision of this Agreement shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision.