

# **NETTEX NEW ZEALAND**

*Limited*

## **TERMS AND CONDITIONS**

### **1. DEFINITIONS**

#### **In these terms of sale:**

- (a) "**Terms**" means these terms of sale;
- (b) "**Contract**" means a contract of sale arising out of an order accepted by the Seller in its absolute discretion;
- (c) "**Credit Application**" means an application for the Seller to supply goods on credit to the Customer;
- (d) "**Customer**" means the Applicant described in PART ONE of the Credit Application;
- (e) "**due date**" means, in relation to an invoice, the date on which the price of the goods (the subject of the invoice) must be paid and will be the date specified under "Term" in the invoice;
- (f) "**goods**" means any of the products of the Seller;
- (g) "**invoice**" means the invoice issued by the Seller in relation to a Contract setting out certain terms applicable to the Contract;
- (h) "**order**" means any offer, whether oral or in writing or electronic, made by the Customer to the Seller to purchase goods from the Seller;
- (i) "**Return Number**" means that number designated by the Seller in relation to goods supplied which are to be returned to the Seller;
- (j) "**Seller**" means Nettex New Zealand Limited;
- (k) "**Site**" means the internet site identified by the url [www.nettex.co.nz](http://www.nettex.co.nz) or any similar identifier and any other website developed by or on behalf of the Seller and includes the contents of any such internet sites.
- (l) "**GST**" means goods and services tax payable by virtue of the Goods and Services Tax Act 1985 (or any statute in substitution of that Act).

### **2. CONTRACT**

- 2.1 The information displayed on the Site, including prices, does not constitute an offer to contract or enter into an agreement. When the Customer sends an order for goods, by means of the Site, that order constitutes an offer for the goods selected.
- 2.2 The Seller may vary these Terms at any time. The Terms as varied will not apply to any Contracts already in existence.
- 2.3 If there is inconsistency between the terms of an invoice and these Terms, these Terms will prevail.
- 2.4 Each related company of the Seller which supplies goods is entitled to the benefit of these Terms in accordance with the Contracts (Privity) Act 1982 and, in addition, the Seller is entitled to enforce these Terms on behalf of any related company of the Seller. However, the consent of the related companies of the Seller is not required to any variation, amendment or discharge of these Terms.

### **3. PRICES, DISCOUNT AND INTEREST**

- 3.1 Prices set out in all invoices are (unless otherwise expressly stated) payable in New Zealand currency on or before the due date and are exclusive of GST or other applicable taxes or duties that may be payable unless expressly stated otherwise.
- 3.2 The Seller may from time to time issue a list of the prices at which the Seller is willing to sell its goods in relation to certain orders. The list of prices is subject to change without notice.
- 3.3 The Seller may allow the Customer a discount or rebate on the price of goods, provided that if payment for any goods previously delivered to the Customer has not been received by the Seller on or before the due date the discount or rebate will be automatically cancelled without further notification.
- 3.4 The Seller is entitled to charge the Customer, but without prejudice to the Seller's other rights and remedies in respect of non-payment or late payment:
- (a) interest at a rate of two percent (2%) per annum above the maximum overdraft rate for amounts over \$100,000 charged by any branch of Westpac Banking Corporation (or such other trading bank as may be chosen by the Seller from time to time) on any amount outstanding as at the due date calculated on a daily basis from the day after the due date until the amount in question is paid in full;
  - (b) bank fees, commissions or any other bank charges, charged to the Seller on presentation of any cheque, promissory note or other bill of exchange of the Customer which must be paid to the Seller on demand;
  - (c) a surcharge in relation to certain orders. The surcharges will be included in the list of prices referred to in clause 3.2 and are subject to change without notice;
  - (d) an administration charge of \$25.00 where any cheque, bill of exchange or promissory note given to the Seller by the Customer is not honoured on first presentation which must be paid to the Seller on demand; and,
  - (e) bank fees, merchant fees, commissions or any other bank charges, charged to the Seller as a result of payment being made by the Customer by way of credit or debit cards which must be paid to the Seller on demand.
  - (f) Notwithstanding anything in this Clause the Seller is not obliged to afford the Customer any indulgence to make payment after the due date;
- 3.5 All other payments due by the Customer under the Contract shall be payable at the time provided in the Contract. If no time is provided, payment shall be made within 7 days of payment being demanded by the Seller.
- 3.6 All payments to be made by the Customer must be free and clear, without any set-off, counterclaim or condition.

### **4. ORDERS**

- 4.1 All orders accepted by the Seller will be executed at the Customer's sole risk.
- 4.2 The Seller is not obliged to accept any order placed by the Customer. If the Seller rejects an order, the Seller will not be obliged to give any reasons for that rejection.

- 4.3 A Customer is not entitled to countermand any order except with the written consent of the Seller and on terms which will indemnify the Seller against any loss or damage resulting from the countermand of the order by the Customer.
- 4.4 The party signing the Customer's Credit Application and the party placing an order, severally warrant that they are authorised by the directors of the company for whom they act or purport to act, to bind their company to these Terms.
- 4.5 Where the Seller has authorized the Customer to place orders electronically the provisions of clause 5 also apply.

## **5. INTERNET ORDERS**

- 5.1 In this clause 5:
- (a) "Password or Passwords" means one or more confidential alphanumeric characters provided by the Customer to the Seller.
  - (b) "PIN Number(s)" means one or more confidential alphanumeric characters provided by the Customer to the Seller, one or more of which when used with a matching Password allows the Customer to place an order at the Site.
- 5.2 The Customer may place an order electronically at the Site [www.nettex.co.nz](http://www.nettex.co.nz) (or such other URL as the Seller may advise the Customer or other website established by the Seller for these purposes).
- 5.3 The Customer will be liable for any order placed electronically for which a correct PIN Number and Password have been provided. The Customer acknowledges that the Seller cannot verify by way of signature or otherwise whether an order quoting a correct PIN Number and Password is the Customer and that a correct PIN Number and Password allow anybody using them to place an order in the name of the Customer.
- 5.4 The Customer must ensure that the PIN Numbers and Passwords are kept secure and not disclosed to anyone except the Seller or authorized employees of the Customer.
- 5.5 If the Customer suspects a breach of security of its PIN Number or Password, the Customer notify the Seller of the breach of security and must ensure that the Password or PIN Number are changed.
- 5.6 The Seller makes every reasonable effort to ensure that the colours of goods, displayed on the Site, are as accurate as possible. However the Customer acknowledges that the actual colours seen on the Site will depend on the configuration of the Customer's monitors and the Customer accepts that the goods, as seen by the Customer, may not be accurate.

## **6. DELIVERY**

- 6.1 Unless otherwise agreed, delivery will be made at the Seller's premises and the Customer must at its cost collect the goods at the Seller's premises when called upon to do so by the Seller.
- 6.2 The Seller's delivery notes will be deemed to be prima facie proof of delivery to the Customer of the goods described in the delivery note. In the event of a dispute as to the quantity of goods sold and delivered and their value, the onus of proving that the goods were not delivered and/or the quantity and price thereof is not in accordance with the Seller's invoices will be upon the Customer.
- 6.3 Time will not be of the essence of each Contract. Any delivery date quoted by the Seller will be approximate only and the Seller shall not be bound by such quotations. If no delivery date is quoted then the Seller will deliver the goods as soon as it can conveniently do so.

- 6.4 No claim of any nature will lie against the Seller for goods lost or damaged in transit through whatever cause, including negligence, and any carrier of the goods will be deemed to be the agent of the Customer even where such carrier has been engaged by the Seller.
- 6.5 All claims in respect of goods delivered, including a claim for short delivery of goods for reasons other than those set out in clause 6.4 and clause 7.4, must be made in writing and delivered to the Seller within 7 days of the delivery of the goods (whether or not at the Seller's premises), failing such claim the Customer will be deemed to have accepted the delivery of the goods and will be deemed to have waived its right to claim against the Seller.
- 6.6 Strikes, differences with workmen, accidents to or failure of machinery, failure of usual sources of supply of materials, war, civil commotion, act of terrorism, commercial exigencies, acts of government or quasi government or legislation, interruptions (temporary or permanent) to utilities including power and telecommunications, or other contingencies beyond the control of the Seller, will be sufficient excuse for any delay in or suspension of delivery of an order. The Seller may with the consent of the Customer cancel the order, after which the Customer will have no further claim on the goods. If the order is not so cancelled, the Seller will complete delivery as soon as possible.
- 6.7 If the Seller delivers the goods at the direction of the Customer to a place other than to the premises of the Seller pursuant to clause 6.1 then the Customer must pay all the transportation charges for delivery of the goods (including freight charges). The transportation charges will be payable by the Customer to the Seller within 7 days from the date of the demand by the Seller.

## **7. RETURNS**

- 7.1 Goods returned without the consent of the Seller will not be accepted for credit and the Seller will be entitled to:-
- (a) return the goods at the Customer's expense to the Customer which expenses will be payable on demand by the Seller; or
  - (b) hold the goods as a pledge in respect of the Customer's indebtedness to it, whether liquidated or not, and sell the goods and apply the proceeds of sale to the amount owing by the Customer.
- 7.2 For the purpose of clause 7.1, the consent means:
- (a) written consent, or
  - (b) a Return Number provided by the Seller to the Customer.
- 7.3 If the Seller consents to the return of the goods, other than as a result of default on the part of the Seller, the Seller will be entitled to charge a handling fee equivalent to 15% of the price of the returned goods quoted on the relevant invoice. All transportation charges (including freight charges) must be paid by the Customer. The handling fee and transportation charges will be payable by the Customer to the Seller within 7 days from the date of the return of the goods concerned.
- 7.4 The Customer must inspect the goods prior to reselling or cutting the goods.
- 7.5 Once the goods have been resold or cut the Customer has no right to return the goods under any circumstances whatsoever.

## **8. BREACH**

- 8.1 If:-

- (a) the Customer defaults in performance of its obligations under any Contract (including failure to make payment on the due date); or
- (b) any cheque, promissory note or other bill of exchange given to the Seller by the Customer is not honoured on first presentation; or
- (c) an application or order is made for the winding-up or sequestration of the Customer or an application or order is made to place the Customer under official management; or
- (d) the Customer endeavours to or enters into, or is likely to enter into, any arrangement, compromise or composition with any of its creditors; or
- (e) the Customer fails to satisfy any judgement against it within 7 days after date of judgement; or
- (f) the Customer breaches any of the terms of any Contract with the Seller, all of which are deemed to be material; or
- (g) any of the assets of the Customer or any of the goods in the possession of the Customer which have not been paid in full, are seized under legal process issued against the Customer; or
- (h) a receiver, receiver and manager, liquidator, controller, administrator, official manager, trustee or similar official is appointed over any of the assets or undertakings of the Customer; or
- (i) the Customer ceases to carry on, or threatens to cease carrying on, business, the Seller will have the right and option without prejudice to any other rights or remedies and in addition to all rights under these Terms or at law or in equity to do any one or more of the following:
  - (i) continue to enforce its rights and recover from the Customer such payments and any other amounts owing as and when they fall due;  
claim immediate payment of all moneys due by the Customer in respect of all Contracts which will immediately become due and payable, notwithstanding the due date for payment of any invoice or any extended terms agreed by the Seller;
  - (ii) cancel all or some of the Contracts with the Customer, upon which event the Customer will immediately return the goods to the Seller and the Customer will in addition be liable to the Seller for any loss or damage of whatever nature that the Seller may have suffered or may suffer in consequence of the cancellations; or
  - (iii) require security for the Customer's obligations to the Seller's satisfaction.

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

8.3 Payments by the Customer shall be applied in reduction of amounts owing by the Customer in such order as the Seller determines.

## 9. CHANGE OF CONTROL

9.1 The Customer must give written notice to the Seller if:

- (a) its business is sold, change of name or address or restructure of business,
- (b) the Customer being a company, there is an issue of, or a transfer of, 50% or more of its issued share capital to any third party (the "**Buyer**").

9.2 The Customer undertakes to procure that the purchaser of the business executes an additional Credit Application and/or the Buyer executes a Guarantee in accordance with clause 2 of the Credit Application.

The Customer will remain responsible for all goods ordered (and accepted by the Seller) in the name of the Customer or its business prior to the sale of the business until such time as the Seller at its discretion and in writing, releases the Customer from its liability.

## 10. WARRANTIES

- 10.1 The Customer must inspect the goods prior to reselling or cutting the goods.
- 10.2 The Customer agrees that, to the extent permitted by law, the Customer is solely responsible for confirming that the goods meet the guarantees imposed by the Consumer Guarantees Act 1993 ("CGA") prior to the goods being resold or cut.
- 10.3 To the extent permitted by law the Seller makes no warranty or representation of any kind whether express or implied as to the merchantability, condition, durability or fitness for the purpose for which the goods are to be used and any implied warranty as to latent defects is expressly excluded.
- 10.4 Subject to clause [10.5], in no event whatsoever will the Seller be responsible for any indirect, consequential, special or punitive loss, damage, cost, charge or expense or for any loss of profits, revenue, loss of opportunity or other economic loss suffered, incurred or sustained by the Customer or otherwise of whatsoever nature and kind and howsoever arising including through the negligence of the Seller, its agents or employees.
- 10.5 Where legislation implies any condition or warranty, and that legislation prohibits the Seller from excluding or modifying that condition or warranty, and/or the Seller's liability under it, to the extent permitted by law, the Seller's liability for breach of such condition or warranty will be limited to one or more of the following:
- (a) the replacement of the relevant goods or the supply of equivalent goods;
  - (b) the repair of the relevant goods;
  - (c) the payment of the cost of replacing the relevant goods; or
  - (d) the payment of the cost of having the relevant goods repaired;
  - (e) and the Seller may in its absolute discretion determine which of the foregoing limits will apply in any case.
  - (f) Each of the terms contained in these Terms which exclude liability on the part of the Seller will be a separate and divisible term, and if any such term becomes unenforceable for any reason whatever, that term is severable from and will not affect the validity of the other terms.
- 10.6 The Customer agrees as follows:
- (a) Nothing in any Contract is intended to have the effect of contracting out of the provisions of the 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) The Customer shall not, in relation to the supply by the Customer of the goods, give or make any undertaking, assertion or representation in relation to the goods without the prior approval in writing of the Seller.
- 10.7 The Customer shall, in relation to any supply of the goods by the Customer, contract out of the provisions of the CGA to the extent that the Customer is entitled to do so under the CGA.
- 10.8 Without limiting clause [10.1 to 10.7], above, if a consumer, as defined in the CGA ("**Consumer**") seeks any remedy under the CGA for a breach of any guarantee imposed by the CGA from the Customer, the

Seller's liability to the Customer, if any, will be limited to the matters listed in clause [10.5] above (and the Seller may in its absolute discretion determine which of the foregoing limits will apply in any case) and, in particular, the Seller will not be liable to the Customer for any liability arising from any further work carried out to the goods, after they have been provided to the Customer, to create the final product sold to the Consumer or work to replace or repair the final product sold to the Consumer.

10.9 If the Seller is found liable to any Consumer under the CGA or otherwise, the Customer agrees to indemnify the Seller for any liability to the Consumer beyond the applicable matter listed in clause [10.5] above as selected by the seller in its sole discretion, including but not limited to the liability arising from any further work carried out on the goods, after they have been provided to the Customer, to create the final product sold to the Consumer.

## 11. OWNERSHIP

11.1 Ownership of goods delivered by the Seller to the Customer will not pass from the Seller to the Customer until such time as the goods the subject of any Contract and all other goods supplied by the Seller to the Customer have been paid in full.

11.2 Notwithstanding clause 11.1 all risk of loss, damage or other injury to the goods will pass from the Seller to the Customer on delivery in accordance with clause 6.1 of these Terms.

11.3 The Customer will indemnify and keep indemnified the Seller against loss, damage or other injury to the goods from the date of delivery of the goods to the Customer until full payment as provided in clause 11.1 has been received by the Seller.

## 12. RISK AND SECURITY INTEREST

12.1 The Customer grants a security interest to the 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 the Customer to the Seller from time to time, and for the performance by the Customer of all the Customer's other obligations to the 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 the Seller by virtue of section 36(1)(b)(iii) of the PPSA, the Customer confirms and agrees that the Customer intends to and does grant to the Seller, as security for the 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 the Customer has rights; and
- (b) which has not been supplied by the Seller to the Customer,
- (c) other than any excepted property which is or comprises proceeds of any of that personal and after-acquired property **which has been supplied by the Seller to the Customer.**

12.2 The Customer shall do anything that the Seller reasonably requires to ensure that the 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.

12.3 The Seller may allocate amounts received from the Customer in any manner the Seller determines, including in any manner required to preserve any purchase money security interest it has in any goods.

- 12.4 The Customer shall reimburse the Seller for all costs and/or expenses incurred or payable by the Seller in relation to the registering, maintaining or releasing any financing statement in respect of any security interest under the Contract.
- 12.5 The 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.
- 12.6 The Customer:
- (a) agrees that if, at any relevant time, the Seller does not at that time have priority over all other secured parties in respect of any part of the goods, then the Customer and the 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 the Customer's rights under sections 121, 125, 129, 131 and 132 of the PPSA.

### **13. CERTIFICATE**

- 13.1 The Customer agrees that a certificate signed by any employee of the Seller or any partner of the Seller's auditors setting out the balance owing by the Customer to the Seller for goods sold will be final, binding and conclusive upon the Customer and the guarantors referred to in clause 2 of the Credit Application.

### **14. PRIVACY**

- 14.1 The Seller may hold information relating to the Customer that the Customer has provided (such as on a Credit Application form or order form) or that the Seller has obtained from another source (such as the Customer's trade references). This information may include the Customer's name, address, email address, business and details of goods ordered.
- 14.2 This information may be held and used by the Seller in connection with its usual business functions and activities, including credit checking.
- 14.3 The Customer authorises the Seller to contact any credit agency, referee or any other source in order to check, exchange or provide information in relation to the Customer and the Customer authorises each source to provide to the Seller any information about the Customer for the purposes of credit checking.
- 14.4 If the Customer is a natural person, the Privacy Act 1993 entitles the Customer to have access to personal information held by the Seller about the Customer and to request correction of that personal information.

### **15. GENERAL**

- 15.1 No concession, latitude or indulgence allowed by the Seller to the Customer may be construed as a waiver or abandonment of any of its rights under the Terms or act as any estoppel against the Seller.

- 15.2 If any provision of these Terms 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.
- 15.3 In the event of a breach by the Customer of any Contract, the Customer will be liable to and hereby indemnifies the Seller against all costs, charges and expenses incurred by the Seller as a consequence of that breach including but not limited to all legal costs, charges and expenses incurred calculated on a solicitor and client basis.
- 15.4 Each party shall make all applications, execute all documents and do all acts and things necessary to implement and to carry out its obligations under these Terms.
- 15.5 Any Notice given under these Terms must be served on the Customer at the last known place of business or residence of the Customer or on the Seller at Nettex New Zealand Limited, PO Box 108059, Symonds Street, Auckland.
- 15.6 All Contracts, invoices and these Terms are governed by, and shall be construed in accordance with, the laws of New Zealand. The Customer hereby submits to the non-exclusive jurisdiction of the Courts of New Zealand in respect of any dispute or proceeding arising out of any Contract.
- 15.7 These Terms constitute the entire agreement, understanding and agreement (express and implied) between the Seller and the Customer relating to the subject matter of these Terms and supersede and cancel any previous agreement, understanding and arrangement relating thereto whether written or oral.
- 15.8 Headings are for reference purposes only and do not affect interpretation of these Terms.