

## MPS BUILDERS MERCHANTS LIMITED

### TERMS AND CONDITIONS OF SALE

#### 1. INTERPRETATION

##### 1.1 In these Terms:

**Buyer:** means the person who accepts the Seller's Written quotation for the sole of the Goods or whose Written order for the Goods is accepted by the Seller;

**Contract:** means the contract for the sale and purchase of the Goods;

**Goods:** means the goods (including any installment of the goods or any parts for them) which the Seller is to supply in accordance with these Terms;

**Seller:** means MPS Builders Merchants Limited (registered in England and Wales under number 03068183) of Highdown House, 11 Highdown Road, Sydenham, Leamington Spa, Warwickshire, CV31 1XT;

**Supplier:** means the manufacturer or supplier of the Goods from which the Seller procures the Goods for and on behalf of the Buyer;

**Terms:** means the standard terms of sale set out in this document and (unless the context otherwise requires) includes any special terms agreed in Writing between the Buyer and the Seller;

**Writing:** includes facsimile transmission but not electronic mail or other forms of electronic communication.

1.2 A reference in these Terms to a provision of a statute shall be construed as a reference to that provision as amended, re enacted or extended at the relevant time.

1.3 The headings in these Terms are for convenience only and shall not affect their interpretation.

1.4 The Terms apply in preference to and supersede any terms and conditions referred to, offered or relied upon by the Buyer, whether in negotiation or at any stage on the dealings between the parties, with reference to the Goods which a Contract is concerned. Without prejudice to the foregoing, the Seller will not be bound by any standard or printed terms tendered by the Buyer, unless the Buyer specifically states in Writing, separately from such terms, that it wishes such term to apply and this has been acknowledged by the Seller in Writing.

#### 2. BASIS OF THE SALE

2.1 The Seller shall sell and the Buyer shall purchase the Goods in accordance with the Seller's quotation (if accepted by the Buyer), or the Buyer's order (if accepted by the Seller, subject in either case to these Terms, which shall govern the Contract to the exclusion of any other terms subject to which any such quotation is accepted or purported to be accepted, or any such order is made or purported to be made, by the Buyer.

- 2.2 No variation to these Terms shall be binding unless agreed in Writing between the authorised representatives of the Buyer and the Seller.
- 2.3 The Seller's employees or agents are not authorised to make any representations concerning the Goods unless confirmed by the Seller in Writing. In entering into the Contract, the Buyer acknowledges that it does not rely on any such representations which are not so confirmed but nothing in these Terms affects the liability of either party for fraudulent misrepresentation.
- 2.4 Any advice or recommendation given by the Seller or its employees or agents to the Buyer or its employees or agents as to the storage, application or use of the Goods, which is not confirmed in Writing by the Seller, is followed or acted upon entirely at the Buyer's own risk and accordingly the Seller shall not be liable for any such advice or recommendation which is not so confirmed. To avoid doubt, the Seller gives no advice or recommendation in respect of the quantity, quality, description or specification of the Goods and any such detail.
- 2.5 Any typographical, clerical or other error or omission in any sales literature, quotation, price list, acceptance of offer, invoice or other document or information issued by the Seller shall be subject to correction without any liability on the part of the Seller.

### **3. ORDERS AND SPECIFICATIONS**

- 3.1 No order submitted by the Buyer shall be deemed to be accepted by the Seller unless and until confirmed by the Seller's authorised representative.
- 3.2 The Buyer shall be responsible to the Seller for ensuring the accuracy of the terms of any order (including any applicable design, drawing or specification) submitted by the Buyer and for giving the Seller any necessary information relating to the Goods within a sufficient time to enable the Seller to perform the Contract in accordance with its terms.
- 3.3 Without prejudice to the provisions of Condition 3.2, the Buyer acknowledges and agrees that any order submitted by the Buyer following its independent discussions and subsequent agreement with the Supplier of the Goods with regard to the specification, description, quality and quantity of Goods necessary to meet the Buyer's requirements shall be the sole responsibility of the Buyer and the Seller is not liable in respect thereof.
- 3.4 The Buyer further acknowledges and agrees that it does not and has not relied on any oral or written information, representation or other advice of the Seller in determining the specification, description, quality and quantity of Goods the subject of the order.
- 3.5 The quantity, quality, description and specification of the Goods shall be as set out in the Seller's quotation (if accepted by the Buyer) or the Buyer's order (if accepted by the Seller).
- 3.6 If the Goods are to be manufactured or any process is to be applied to the Goods by or on behalf of the Seller in accordance with a specification submitted by the Buyer, the Buyer shall indemnify the Seller against all loss, damages, costs and expenses awarded against

or incurred by the Seller in connection with, or paid or agreed to be paid by the Seller in settlement of, any claim for infringement of any patent, copyright, design, trade mark or other industrial or intellectual property rights of any other person which results from the Seller's use of the Buyer's specification.

3.7 The Seller reserves the right to make or procure any changes in the specification of the Goods which are required to conform with any applicable statutory or E.U. requirements or, where the Goods are to be supplied to the Seller's specification, which do not materially affect their quality or performance.

3.8 No order which has been accepted by the Seller may be cancelled by the Buyer except with the agreement in Writing of an authorised representative of the Seller and on terms that the Buyer shall indemnify the Seller in full against all loss (including loss of profit), costs (including the cost of delivery and all labour and materials used), damages, charges and expenses incurred by the Seller as a result of cancellation.

#### **4. PRICE OF THE GOODS**

4.1 The price of the Goods shall be the Seller's quoted price or, where no price has been quoted (or a quoted price is no longer valid), the price listed in the Seller's published price list current at the date of acceptance of the order. Where the Goods are supplied for export from the United Kingdom, the Seller's published export price list shall apply. All prices quoted are valid for 30 days only or until earlier acceptance by the Buyer, after which time they may be altered by the Seller without giving notice to the Buyer.

4.2 The Seller reserves the right, by giving Written notice to the Buyer at any time before delivery, to increase the price of the Goods to reflect the percentage increase in RPI over the preceding period of twelve months, any increase in the cost to the Seller which is due to any factor beyond the control of the Seller (such as, without limitation, increase in fuel costs or other third party delivery charges, any foreign exchange fluctuation, currency regulation, alteration of duties, significant increase in the costs of labour, materials or other costs of manufacture), any change in delivery dates, quantities or specifications for the Goods which is requested by the Buyer, or any delay caused by any instructions of the Buyer or failure of the Buyer to give the Seller or the Supplier adequate information or instructions.

4.3 The price is exclusive of any applicable value added tax, which the Buyer shall be additionally liable to pay to the Seller.

4.4 The Seller retains the option of supplying any Goods, ordered in imperial measurements, in the nearest equivalent metric measurement and charging for the Goods in metric measure allowing for a conversion.

#### **5. TERMS OF PAYMENT**

5.1 Subject to any special terms agreed in Writing between the Buyer and the Seller, the Seller may invoice the Buyer for the price of the Goods on or at any time after delivery of the Goods, unless the Goods are to be collected by the Buyer or the Buyer wrongfully fails

- to take delivery of the Goods, in which event the Seller shall be entitled to invoice the Buyer for the price at any time after the Seller has notified the Buyer that the Goods are ready for collection or (as the case may be) the Seller has tendered delivery of the Goods.
- 5.2 The Buyer shall pay the full invoice price of the Goods, without any deduction or set-off, by the last day of the month following the month in which the Goods are delivered and the Seller shall be entitled to recover the price, notwithstanding that the property in the Goods has not passed to the Buyer. The time of payment of the price shall be of the essence of the Contract. Receipts for payment will be issued only upon request.
- 5.3 The cost of pallets and returnable containers will be charged to the Buyer in addition to the price of the Goods, but full credit will be given to the Buyer provided they are returned undamaged to the Seller before the due payment date.
- 5.4 Payments by credit card shall be accepted, subject to a 2% surcharge.
- 5.5 If the Buyer fails to make any payment on the due date then, without limiting any other right or remedy available to the Seller, the Seller may:
- 5.5.1 cancel the Contract or suspend any further deliveries to the Buyer;
  - 5.5.2 require payment in advance of delivery in relation to any Goods not previously delivered;
  - 5.5.3 appropriate any payment made by the Buyer to such of the Goods (or the goods supplied under any other contract between the Buyer and the Seller) as the Seller may think fit (notwithstanding any purported appropriation by the Buyer); and
  - 5.5.4 charge the Buyer interest (both before and after any judgment on the amount unpaid, at the rate of six per cent per annum above the base rate of National Westminster Bank plc from time to time, until payment in full is made (a part of a month being treated as a full month for the purpose of calculating interest).
6. **DELIVERY**
- 6.1 Unless otherwise agreed in Writing by the Seller, the Seller will deliver the Goods carriage paid within the United Kingdom by such method of carriage as the Seller may choose. The Seller reserves the right to make an additional charge if the Seller incurs further costs or expense such as, but not limited to, those caused by delivery of less than a full load; complying with a request for delivery outside of the Seller's normal delivery pattern or delivery by installments.
- 6.2 The Seller shall provide labour to unload the Goods upon delivery. If the Seller's delivery vehicle is kept waiting for an unreasonable period of time or is obliged to return to complete the delivery or if the Seller has to provide labour to unload the delivery, the Seller reserves the right to levy a further charge on the Buyer.

- 6.3 If, in the Seller's reasonable opinion, there is no suitable road or access to allow delivery of the Goods to the Buyer's premises or if the condition of the road or access shall cause damage to the Seller's vehicle, the Seller shall notify the Buyer as soon as practicably reasonable and the Buyer shall be obliged to arrange for delivery of the Goods at the Buyer's cost.
- 6.4 The risk in the Goods will pass to the Buyer the moment the Goods are dispatched from the Seller's premises or the premises of the Seller's suppliers where the Goods are delivered directly from the Seller's suppliers.
- 6.5 Where the Buyer chooses to collect the Goods himself, the Seller shall give the Buyer notice of readiness for collection. It is a condition of the Contract that the Buyer shall then within seven days of service of that notice either:
- (a) collect the Goods; or
  - (b) give the Seller instructions for their delivery at the Buyer's expense.

Delivery of the Goods shall be made by the Buyer collecting the Goods at the Seller's premises at any time after the Seller has notified the Buyer that the Goods are ready for collection. If the Buyer collects the Goods from the Seller's premises, the Buyer shall be solely responsible for ensuring the correct size, weight and positioning of the load on the vehicle and the Buyer shall indemnify the Seller in respect of all claims, costs, expenses or losses incurred as a result of the Buyer collecting the Goods from the Seller.

- 6.6 Any dates quoted for delivery of the Goods are approximate only and the Seller shall not be liable for any delay in delivery of the Goods however caused. Time for delivery shall not be of the essence of the Contract unless previously agreed by the Seller in Writing. The Goods may be delivered by the Seller in advance of the quoted delivery date on giving reasonable notice to the Buyer.
- 6.7 Where the Goods are to be delivered in instalments, each delivery shall constitute a separate contract and failure by the Seller to deliver any one or more of the installments in accordance with these Terms or any claim by the Buyer in respect of any one or more installments shall not entitle the Buyer to treat the Contract as a whole as repudiated.
- 6.8 If the Seller fails to deliver the Goods (or any Installment) for any reason other than any cause beyond the Seller's reasonable control or the Buyer's fault, and the Seller is accordingly liable to the Buyer, the Seller's liability shall be limited to the excess (if any) of the cost to the Buyer (in the cheapest available market) of similar goods to replace those not delivered over the price of the Goods.
- 6.9 If the Buyer fails to collect the Goods or fails to take delivery of the Goods or fails to give the Seller adequate delivery instructions at the time stated for delivery (otherwise than by reason of any cause beyond the Buyer's reasonable control or by reason of the Seller's fault) then, without limiting any other right or remedy available to the Seller, the Seller may:

6.9.1 treat the Buyer's failure as a repudiation of the Contract and terminate the Contract with immediate effect; in that case the Seller may do any of the following, either alone or in any combination:

- (a) dispose of the Goods as it thinks fit;
- (b) retain any payments made by the Buyer before termination of the Contract;
- (c) recover from the Buyer any costs incurred in respect of the costs of storage of the Goods or of their disposal, together with damages for any other losses caused by the Buyer's breach; or

6.9.2 arrange for the storage of the Goods, in which case:

- (a) the Goods shall be stored at the Buyer's risk;
- (b) the cost of storage shall be for the Buyer's account and the Buyer will indemnify the Seller against all costs incurred by the Seller in arranging such storage;
- (c) the Buyer will pay the Seller a reasonable fee for its services in arranging for storage of the Goods;
- (d) the Seller may at any time give the Buyer notice to collect the Goods and, if the Buyer fails to comply with such notice, treat the Buyer's breach as repudiatory, in accordance with Condition 6.9.1 above, or continue to store them in accordance with this Condition.

## **7. RISK AND PROPERTY**

7.1 Notwithstanding delivery and the passing of risk in the Goods, or any other provision of these Terms, the property in the Goods shall not pass to the Buyer until the Seller has received in cash or cleared funds payment in full of the price of the Goods and all other goods agreed to be sold by the Seller to the Buyer for which payment is then due.

7.2 Until such time as the property in the Goods passes to the Buyer, the Buyer shall hold the Goods as the Seller's fiduciary agent and bailee, and shall keep the Goods separate from those of the Buyer and third parties and properly stored, protected and insured and identified as the Seller's property, but the Buyer may resell or use the Goods in the ordinary course of its business.

7.3 Until such time as the property in the Goods passes to the Buyer (and provided the Goods are still in existence and have not been resold), the Seller may at any time require the Buyer to deliver up the Goods to the Seller and, if the Buyer fails to do so forthwith, enter on any premises of the Buyer or any third party where the Goods are stored and repossess the Goods.

7.4 The Buyer shall not be entitled to pledge or in any way charge by way of security for any indebtedness any of the Goods which remain the property of the Seller, but if the Buyer does so all moneys owing by the Buyer to the Seller shall (without limiting any other right or remedy of the Seller) forthwith become due and payable.

8. **WARRANTIES AND LIABILITY**

8.1 Subject to the following provisions the Seller warrants that the Goods will correspond with their specification at the time of delivery and will be free from defects in material and workmanship for a period of four months from the date of their initial use or four months from delivery, whichever is the first to expire.

8.2 The above warranty is given by the Seller subject to the following conditions:

8.2.1 the Seller shall be under no liability in respect of any defect in the Goods arising from any drawing, design or specification supplied by the Buyer or any Supplier;

8.2.2 the Seller shall be under no liability in respect of any defect arising from fair wear and tear, wilful damage, negligence, abnormal working conditions, failure to follow the Seller's instructions (whether oral or in Writing), misuse or alteration or repair of the Goods without the Seller's approval;

8.2.3 the Seller shall be under no liability under the above warranty (or any other warranty, condition or guarantee) if the total price for the Goods has not been paid by the due date for payment;

8.2.4 the above warranty does not extend to parts, materials, equipment or Goods not manufactured by the Seller, in respect of which the Buyer shall only be entitled to the benefit of any such warranty or guarantee as is given by the Supplier or manufacturer to the Seller, and only to the extent that the Seller has the right to pass through to the Buyer the benefit of any such warranty.

8.3 Subject as expressly provided in these Terms, and except where the Goods are sold to a person dealing as a consumer (within the meaning of the Unfair Contract Terms Act 1977), all warranties, conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law.

8.4 Where the Goods are sold under a consumer transaction (as defined by the Consumer Transactions (Restrictions on Statements) Order 1976) the statutory rights of the Buyer are not affected by these Terms.

8.5 A claim by the Buyer which is based on any defect in the quality or condition of the Goods or their failure to correspond with specification shall (whether or not delivery is refused by the Buyer) be notified to the Seller within seven days from the date of delivery or (where the defect or failure was not apparent on reasonable inspection) within a reasonable time after discovery of the defect or failure. If delivery is not refused, and the Buyer does not notify the Seller accordingly, the Buyer shall not be entitled to reject the Goods and the Seller

shall have no liability for such defect or failure, and the Buyer shall be bound to pay the price as if the Goods had been delivered in accordance with the Contract.

8.6 Where a valid claim under the warranty at Condition 8.1 in respect of any of the Goods which is based on a defect in the quality or condition of the Goods or their failure to meet specification is notified to the Seller in accordance with these Terms, the Seller may replace the Goods (or the part in question) free of charge or, at the Seller's sole discretion, refund to the Buyer the price of the Goods (or a proportionate part of the price), in which case the Seller shall have no further liability to the Buyer.

8.7 Except in respect of death or personal injury caused by the Seller's negligence, or liability for defective products under the Consumer Protection Act 1987, the Seller shall not be liable to the Buyer by reason of any representation (unless fraudulent), or any implied warranty, condition or other term, or any duty at common law, or under the express terms of the Contract, for:

8.7.1 Indirect, special or consequential losses (all three of which terms include, without limitation, loss of profit, loss of business, depletion of goodwill and like loss);

8.7.2 loss;

8.7.3 damages;

8.7.4 injury;

8.7.5 costs;

8.7.6 expenses; or

8.7.7 other claims for compensation

whatsoever (whether caused by the negligence of the Seller, its employees or agents or otherwise) which arise out of or in connection with:

(a) the supply of the Goods (including any delay in supplying or any failure to supply the Goods in accordance with the Contract or at all); or

(b) their use or resale by the Buyer,

and the entire liability of the Seller under or in connection with the Contract shall not exceed the price of the Goods, except as expressly provided in these Terms.

8.8 The Seller shall not be liable to the Buyer or be deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform, any of the Seller's obligations in relation to the Goods, if the delay or failure was due to any cause beyond the Seller's reasonable control. Without limiting the foregoing, the following shall be regarded as causes beyond the Seller's reasonable control:

8.8.1 Act of God, explosion, flood, tempest, fire or accident;

- 8.8.2 war or threat of war, sabotage, insurrection, civil disturbance or requisition;
  - 8.8.3 acts, restrictions, regulations, bye laws, prohibitions or measures of any kind on the part of any governmental, parliamentary or local authority;
  - 8.8.4 import or export regulations or embargoes;
  - 8.8.5 strikes, lock outs or other industrial actions or trade disputes (whether involving employees of the Seller or of a third party);
  - 8.8.6 difficulties in obtaining raw materials, labour, fuel, parts or machinery;
  - 8.8.7 third party failure or delay in supply of the Goods; or
  - 8.8.8 power failure or breakdown in machinery.
- 8.9 To avoid doubt and without prejudice to the remaining Terms, the Buyer acknowledges and agrees that the Seller is operating as a facilitator in the supply chain from the manufacturer of the Goods to the Buyer and accordingly the Seller does not, save as aforesaid, accept liability for Goods supplied under any Contract which the Seller has not manufactured.
- 8.10 Nothing in these Terms shall operate to preclude the Buyer from seeking any remedy from the Supplier or from enforcing the terms of any contract between the Seller and its Supplier, to the extent that the Buyer has a right to do so under any such terms.

## 9. **INDEMNITY**

- 9.1 If a claim is made against the Buyer that the Goods infringe or that their use or resale infringes the patent, copyright, design, trade mark or other industrial or intellectual property rights of any other person, then unless the claim arises from the use of a drawing, design or specification supplied by the Buyer, the Seller shall indemnify the Buyer against all loss, damages, costs and expenses awarded against or incurred by the Buyer in connection with the claim, or paid or agreed to be paid by the Buyer in settlement of the claim, provided that:
- 9.1.1 the Seller is given full control of any proceedings or negotiations in connection with the claim;
  - 9.1.2 the Buyer shall give the Seller all reasonable assistance for the purposes of any such proceedings or negotiations;
  - 9.1.3 except pursuant to a final award, the Buyer shall not pay or accept the claim, or compromise any such proceedings without the consent of the Seller (which shall not be unreasonably withheld);
  - 9.1.4 the Buyer shall do nothing which would or might vitiate any policy of insurance or insurance cover which the Buyer may have in relation to such infringement, and

this indemnity shall not apply to the extent that the Buyer recovers any sums under any such policy or cover (which the Buyer shall use its best endeavours to do);

9.1.5 the Seller shall be entitled to the benefit of, and the Buyer shall accordingly account to the Seller for, all damages and costs (if any) awarded in favour of the Buyer which are payable by, or agreed with the consent of the Buyer (which consent shall not be unreasonably withheld) to be paid by, any other party in respect of any such claim; and

9.1.6 without limiting any duty of the Buyer at common law, the Seller may require the Buyer to take such steps as the Seller may reasonably require to mitigate or reduce any such loss, damages, costs or expenses for which the Seller is liable to indemnify the Buyer under this Condition.

## 10. **INSOLVENCY OF BUYER**

10.1 This Condition 10 applies if.

10.1.1 the Buyer makes a voluntary arrangement with its creditors or (being an individual or firm) becomes bankrupt or (being a company) becomes subject to an administration order or goes into liquidation (otherwise than for the purposes of amalgamation or reconstruction); or

10.1.2 an encumbrancer takes possession, or a receiver is appointed, of any of the property or assets of the Buyer; or

10.1.3 the Buyer ceases, or threatens to cease, to carry on business; or

10.1.4 the Seller reasonably apprehends that any of the events mentioned above is about to occur in relation to the Buyer and notifies the Buyer accordingly.

10.2 If this Condition applies then, without limiting any other right or remedy available to the Seller, the Seller may cancel the Contract or suspend any further deliveries under the Contract without any liability to the Buyer, and if the Goods have been delivered but not paid for the price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.

## 11. **GENERAL**

11.1 A notice required or permitted to be given by either party to the other under these Terms shall be in Writing addressed to that other party at its registered office or principal place of business or such other address as may at the relevant time have been notified pursuant to this provision to the party giving the notice.

11.2 A Contract shall not be assigned or transferred, nor the performance of any obligation sub-contracted, in either case by the Buyer, without the prior Written consent of the Seller.

- 11.3 No waiver by the Seller of any breach of the Contract by the Buyer shall be considered as a waiver of any subsequent breach of the same or any other provision.
- 11.4 If any provision of the Contract is held by a court or other competent authority to be invalid or unenforceable in whole or in part the validity of the other provisions of the Contract and the remainder of the provision in question shall not be affected.
- 11.5 Any dispute arising under or in connection with the Contract or the sale of the Goods shall be referred to arbitration by a single arbitrator appointed by agreement or (in default) nominated on the application of either party by the President for the time being of the Law Society.
- 11.6 The Contract shall be governed by the laws of England, and the Buyer agrees to submit to the non exclusive jurisdiction of the English courts.

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