

DOUGLAS B FOOTE LIMITED (DBF)
TERMS OF TRADE FOR GOODS AND SERVICES

1 INTERPRETATION

1.1 Definitions in the Companies Act 1993 have the meaning given to them in these terms ("**Terms**") unless the context otherwise requires:

"**Contract**" means each contract for the supply of Goods and/or Services by DBF to the Customer or any Customer Representative, including any document describing the Goods and/or Services which is produced by DBF, the provisions of a quotation (where the Contract arises from a quotation by DBF) or the provisions contained in DBF's confirmation of an order (where the Contract arises from written acceptance by DBF of an order);

"**Goods**" means all goods that are or may be supplied from time to time by DBF to the Customer or any Customer Representative;

"**GST**" means goods and services tax chargeable in accordance with the *Goods and Services Tax Act 1985*, and includes, but is not limited to, any interest, fine, penalty, charge, fee or any other amount imposed on or in respect of goods and services tax;

"**Price**" in respect of Goods and/or Services means:

- (a) if DBF has not provided a quotation in writing to the Customer in respect of those Goods and/or Services, the price specified in the most recent price list produced or published by DBF at that time (which shall include an hourly rate to apply specifically to Services), or, if there is no such price list, or the price list does not specify the price of the Goods and/or Services in question, the price certified by DBF as being its standard price at that time for those Goods and/or Services; or
- (b) if DBF has provided a quotation in writing to the Customer in respect of those Goods and/or Services, the price specified in that quotation;

"**Services**" means all services supplied from time to time by DBF (and/or any sub-contractors or agents of DBF) to the Customer or any Customer Representative, including without limitation any services in connection with the supply, installation, repair and/or servicing of the Goods; and

"**Working Day**" means any day other than a Saturday, Sunday or a statutory public holiday in Auckland, New Zealand.

2 INCORPORATION OF TERMS

2.1 **Terms of trade:** These Terms apply in respect of every supply of Goods and/or Services by Douglas B Foote Limited (**DBF**) to you ("the **Customer**") and each employee, agent, Related Company, or contractor of the Customer ("**Customer Representative**"), and are deemed to be incorporated in each Contract.

2.2 **Terms paramount:** To the extent that there is a conflict between the Terms and any invoice or other document relating to any Goods and/or Services (including any document produced by the Customer) the Terms will prevail.

2.3 **Customer bound:** The Customer will become bound by these

Terms as soon as:

- (a) the Customer or Customer Representative signs or agrees to these Terms; or
- (b) the Customer or Customer Representative orders Goods and/or Services; or
- (c) DBF supplies Goods and/or Services to the Customer or Customer Representative.

3 ORDERING PROCEDURES

3.1 **Orders:** The following provisions apply to orders for Goods and/or Services:

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

3.2 **Status of order:** The placement of an order with DBF constitutes an offer by the Customer to trade with DBF. Receipt of an order by DBF from the Customer does not constitute acceptance by DBF of that order.

3.3 **Status of quotation:** If a quotation is provided by DBF, that quotation is an invitation for the Customer to trade with DBF, but does not constitute an offer by DBF. A quotation shall remain valid for the period stated in the quotation and if no period is stated, for five Working Days from the date of the quotation.

4 PRICE AND PAYMENT

4.1 **Pricing:** The Customer shall pay the Price for those Goods and/or Services as at the date of delivery of those Goods and/or Services.

4.2 **Freight and taxes:** Unless otherwise agreed in writing by DBF, all Prices are exclusive of freight, insurance, installation, travel and delivery charges. All Prices and charges are GST exclusive.

4.3 **Payment:** Payment for Goods and/or Services supplied or invoiced, and any other charges associated with Goods and/or Services, is due on the 20th of the month following the date of any invoice issued by DBF for such Goods and/or Services (the "**due date**"). All payments shall be made in New Zealand dollars. Payment shall be made in cleared funds.

4.4 **No set-off:** The Customer shall not be entitled to withhold payment or to make any set-off or deduction from any amount due by the Customer to DBF.

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

4.6 **Default Interest:** If payment is not made in full by the due date, DBF is entitled to charge the Customer interest on the unpaid overdue balance at a rate of 5% per annum above the then current rate charged by DBF's bank, calculated on a daily basis from the due date until the date payment is received by DBF, but without prejudice to DBF's other rights and remedies in respect of non-payment or late payment.

5 DELIVERY

5.1 **Delivery:** The following provisions apply to the delivery of Goods and/or Services:

- (a) Goods shall be deemed to be delivered when delivered to the care and control of the Customer or Customer Representative. If the Customer or Customer Representative fails or refuses to take or accept delivery, then the Goods shall be deemed to have been delivered when DBF was willing and able to deliver them.
- (b) Services shall be deemed to be delivered upon completion of the Services.
- (c) DBF may deliver Goods by instalments and each instalment shall be deemed to be a separate contract under the same provisions as the Contract. If DBF fails to deliver one or more instalments this will not entitle the Customer to repudiate the Contract.
- (d) Whilst DBF will make every effort to ensure that Goods and/or Services are supplied on time, DBF will not be liable to the Customer for any loss, damage or liability arising in any way from any delay in delivery.

6 RISK AND SECURITY INTEREST

6.1 **Risk:** Risk of any loss, damage or deterioration of or to Goods and/or Services shall be borne by the Customer from the date of delivery set out in clause 5.1(a) or 5.1(b) (as applicable).

6.2 **Retention of title:** Title to any Goods and/or Services supplied by DBF shall remain with DBF until all monies owing by the Customer to DBF has been made in full.

- (a) For so long as title to the Goods is retained by DBF, the Customer will store the Goods separately and in such a way that they are identifiable as the property of DBF and shall properly store, protect and insure the Goods from fire, loss and damage.
- (b) If the Customer sells any Goods whilst monies remain owing by the Customer to DBF, the proceeds of such sale shall be held on trust for DBF and immediately paid to DBF by the Customer to cover the amount owing by the Customer to DBF.
- (c) DBF's retention of title in the Goods is effective notwithstanding that the Goods may have subsequently been altered from that supplied by DBF or attached, fixed or

incorporated into any marine craft or other property of the Customer. Where the Goods are attached, fixed or incorporated into a marine craft or other property of the Customer and are severable but not identifiable, or where it is impractical to remove the Goods without incurring loss to an innocent third party, DBF is deemed to be the co-owner of the marine craft or other property to which the Goods have been attached, fixed or incorporated in proportion to the contribution made by the Goods to the value of the marine craft or other property.

6.3 **PPSA:** Terms defined in the *Personal Property Securities Act 1999* ("PPSA") and not defined in clauses 6.4 to 6.8 shall have the meaning given to them in the PPSA.

6.4 **Security interest:** Until all sums due to DBF by the Customer have been paid in full, DBF has a security interest in all Goods supplied by DBF to the Customer.

6.5 **Customer cooperation:** The Customer shall do anything that DBF reasonably requires to ensure that DBF has a perfected security interest in all of the Goods and a purchase money security interest in each part of the Goods the extent of the Price for that part.

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

6.7 **Waiver:** The Customer waives its right to receive notice confirming registration of a financing statement or financing change statement relating to the security interest.

6.8 **Repossession:** The Customer gives irrevocable authority to DBF to enter any premises occupied or owned by the Customer, or on which Goods are situated, at any reasonable time following a Default by the Customer (as defined in clause 10.1) to remove and repossess any Goods. DBF shall not be liable for any costs, damages, expenses or losses incurred by the Customer or any third party as a result of DBF taking any action that is reasonably necessary in order to exercise this right. DBF may either resell any repossessed Goods and credit the Customer's account with the net proceeds of sale (after deduction of all repossession, storage, selling and other costs) or may retain any repossessed Goods and credit the Customer's account with the invoice value thereof less such sum as DBF reasonably determines on account of wear, tear, depreciation, obsolescence, loss of profit and costs. By signing these Terms, the Customer waives its right to receive advance notice of any repossession of Goods by DBF pursuant to this clause 6.8 and to object to such repossession pursuant to sections 120 and 121 of the PPSA.

7 WARRANTIES

7.1 **Warranty:** DBF warrants the Goods and/or Services will comply with the specifications set out in the order accepted by DBF for a period of twelve (12) months (in respect of Goods) and for a period of three (3) months (in respect of Services). DBF does not warrant that the Goods and/or Services are fit for the intended purposes of the Customer.

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7.2 **Defects:** DBF will (subject to clauses 7.4 and 8) repair or make good any defects in materials and workmanship in Goods and/or Services 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 by DBF under such warranty unless written notice of the claim is received by DBF within five Working Days after the defect is discovered nor shall any claim be accepted if:

- (a) the defect is due to or resulting from damage or misuse or negligent maintenance or care while in the Customer or Customer Representative's possession;
- (b) the defect is due to defective drawings, instructions or plans supplied by the Customer or Customer Representative;
- (c) any attempt to repair the Goods is made by any person or persons not authorised by DBF to effect those repairs;
- (d) the Goods have been dismantled or modified without the approval of DBF; or
- (e) the Goods have not been stored, maintained or used in a proper manner.

In any event, DBF shall not be obliged to carry out any work to make good any defects nor be under any liability under this clause for so long as the Customer is in default in relation to any payment or in the performance of any obligation under any Contract.

7.3 **Customer obligations:** It shall be the sole responsibility of the Customer to ensure that property surfaces under the ownership, care or responsibility of the Customer are of adequate strength to support loads including vibration, weight and loading checks relating to equipment and methods DBF will use in its supply of Goods and/or Services and the Customer agrees that it will not hold DBF liable in any way for any damage to the Goods or property surfaces as a result of the Customer's failure to comply with this clause.

7.4 **Place of repairs:** Any repairs to the Goods and/or Services shall be effected at such place as DBF may specify.

7.5 **Goods not manufactured by DBF:** If any Goods supplied to DBF by other manufacturers are the subject of a claim under clause 7.2, the Customer shall be entitled to such benefits as DBF may receive under any warranty given by that manufacturer to DBF to the extent that DBF is able to pass these benefits on to the Customer. However DBF's obligation to repair or make good under clause 7.1 does not apply to Goods which are not manufactured by DBF.

7.6 **Product descriptions:** The description given of any Goods to be made to order for the Customer relating to drawings, weights, loadings, pressure dimensions and any other descriptive matters has been given for identification purposes only. It is the Customer's responsibility to determine whether the Goods are fit for their intended purpose.

8 LIABILITY

8.1 **Exclusion of warranties conditions, etc:** To the fullest

extent permissible at law, 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.

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

8.3 **No liability for consequential losses:** DBF shall not be liable for any loss of profits or any consequential, indirect or special damage or loss of any kind suffered by the Customer or any Customer Representative.

8.4 **Limitation of liability:** Notwithstanding anything else contained in any Contract, the total aggregate liability of DBF to the Customer and the Customer Representative (whether in contract, tort (including negligence), misrepresentation or otherwise and whether in connection with an act or omission of DBF or any sub-contractor or agent of DBF) shall not exceed the invoice price of the Goods and/or Services in respect of which the liability arises.

8.5 **Indemnity:** The Customer shall indemnify DBF against:

- (a) any liability or cost incurred by DBF as a result of the negligence or willful acts or omissions of the Customer or any breach by the Customer of any provision of these Terms; and
- (b) any liability or cost incurred by DBF as a result of any plans, patterns, drawings supplied by the Customer being incorrect.

8.6 **Consumer Guarantees Act:** Where the Customer is 'in trade' (within the meaning of the *Consumer Guarantees Act 1993* ("CGA")), the parties each confirm, acknowledge and agree that:

- (a) they are each 'in trade';
- (b) the Goods and/or Services are supplied to the Customer and acquired by the Customer 'in trade' and for a business purpose; and
- (c) the statutory guarantees and implied terms, covenants and conditions contained in the CGA are excluded to the fullest extent permitted at law and do not apply.

8.7 **Fair Trading Act:** Where the Customer is 'in trade' (within the meaning of the *Fair Trading Act 1986* ("FTA")), the parties each confirm, acknowledge and agree that:

- (a) they are each 'in trade';
- (b) the Goods and/or Services are supplied to the Customer and acquired by the Customer 'in trade'; and
- (c) to the fullest extent permitted by law, the parties agree to contract out of sections 9, 12A and 13 of the FTA.

8.8 **Customer guarantees to third parties:** The Customer shall not give or make any undertaking, assertion or representation in relation to the Goods and/or Services without the prior written approval of DBF.

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9 RETURNS, EXCHANGES AND REFUND POLICY

- 9.1 **Returns:** DBF may in its absolute discretion, accept a request by the Customer to return Goods to DBF for a credit, exchange or refund. If DBF accepts any request by the Customer under this clause, such acceptance will be conditional on the Customer:
- (a) delivering, at its expense, the relevant Goods to DBF at the Customer's cost in the same condition and packaging in which they were delivered to the Customer, with a copy of DBF's invoice, within five Working Days of DBF's acceptance of the Customer's request; and
 - (b) complying with such other terms and conditions as DBF may apply in respect of that return which, in the case of any Goods returned to DBF 10 or more days after delivery shall include payment of a surcharge equal to 20% of the total amount invoiced by DBF in respect of the returned Goods.
- 9.2 **Risk:** Any return of Goods to DBF is at the Customer's own risk. DBF is not responsible for unauthorised returns. DBF may dispose of on such basis as DBF sees fit and without liability to the 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) the Customer defaults in performance of its obligations under any Contract (including failure to make payment on the due date);
 - (b) the Customer becomes insolvent or is adjudicated bankrupt or an application is made for its liquidation or a liquidator or receiver is appointed in respect of its assets;
 - (c) the Customer enters into, or is likely to enter into, any composition or arrangement with its creditors;
 - (d) the Customer no longer carries on business or threatens to cease carrying on business;
 - (e) any other event which DBF considers may materially adversely affect the ability of the Customer to perform any of its obligations under any Contract.
- 10.2 **Enforcement upon default:** If a Default occurs, DBF may, at its option and 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) suspend all Contracts with the Customer in which case DBF shall not be obliged to perform any of its obligations under any Contract during the period of suspension including, without limitation, delivery of Goods and/or Services ordered by the Customer or Customer Representative. Any suspension shall not prevent DBF from terminating any Contract during the period of suspension;
 - (c) require the Customer to stop selling or otherwise disposing of the Goods;
 - (d) enter upon the 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 the Customer; and/or

- (e) terminate all or any Contracts.

- 10.3 **Other costs:** The Customer shall pay all costs incurred by DBF, (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.
- 10.4 **Priority of payments:** Payments by the Customer shall be applied in reduction of amounts owing by the Customer in such order as DBF determines.
- 10.5 **Termination:** Termination of a Contract shall not relieve the Customer of its payment obligations under the Contract or from liability arising from any antecedent breach of the terms of the Contract.

11 GENERAL

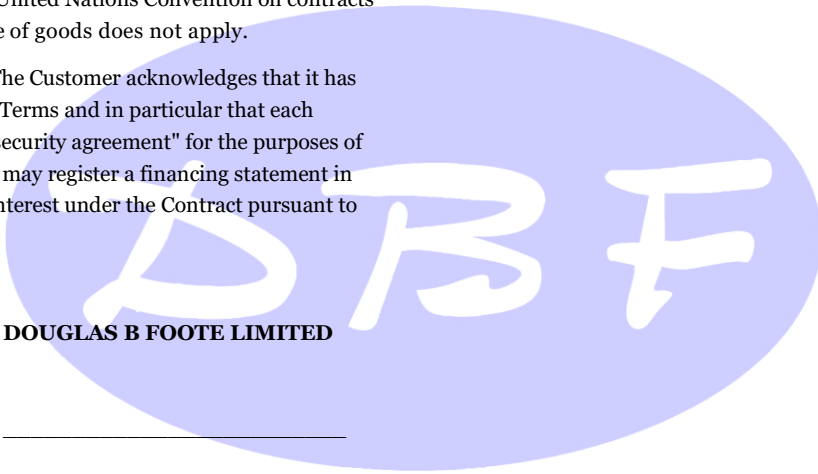
- 11.1 **Severability:** If any provision of any Contract is or becomes unenforceable, illegal or invalid for any reason it shall be deemed to be severed from the Contract without affecting the validity of the remainder of the Contract and shall not affect the enforceability, legality, validity or application of any other provision of the Contract.
- 11.2 **Notice provisions:** Any notice to be given by a party to the other shall be in writing and shall be delivered by hand or sent by prepaid express post (next day delivery) or email to the addressee's address for notices specified in the Contract or as otherwise agreed by the parties. A notice given in accordance with this clause takes effect when taken to be received (or at a later time specified in it) and is taken to be received:
- (a) If hand delivered, on delivery;
 - (b) If sent by prepaid post, on the second Working Day after the date of posting;
 - (c) If sent by email, on the date and time at which it enters the recipient's information system (unless the sender receives a notice from the recipient's email server or internet service provider that the message has not been delivered to the recipient),
 - (d) but if the delivery or receipt is not on a Working Day, or is after 5.00pm on a Working Day, the notice is taken to be received at 9.00am on the next Working Day.
- 11.3 **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

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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.

- 11.4 **Amendment:** DBF may vary these Terms at any time by notice in writing to the Customer. Any such variation will take effect from acceptance of the first order for Goods and/or Services following a notice of the variation being given to the Customer.
- 11.5 **Assignment and sub-contracting:** The Customer may not assign all or any of its rights or obligations without the prior written consent of DBF. DBF may engage third party sub-contractors or agents to perform all or any part of the Services.
- 11.6 **Confidentiality:** To the extent that any confidential information is passed by a party to the other, the other party must keep that information confidential.
- 11.7 **Governing law:** Each Contract is governed by New Zealand law.
- 11.8 **UN Convention:** The United Nations Convention on contracts for the international sale of goods does not apply.
- 11.9 **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 DBF may register a financing statement in respect of any security interest under the Contract pursuant to clause 6.



FOR COMPANY: **DOUGLAS B FOOTE LIMITED**

FOR PURCHASER: _____

AS GUARANTOR FOR
PURCHASER: _____

DATE: _____