

## **TERMS AND CONDITIONS**

### **BACKGROUND**

- A. These Terms and Conditions of Sale between SPINEFEX INDUSTRIES PTY LTD ("SFX") and the Customer (the "Customer") shall apply to all orders for the supply of electrical or manufactured products, parts and materials and installation relating to the sale, repair and overhaul of **Lifeguard** electrical engineering machinery ("Goods") and mechanical designs and drawings and labour for installation and commissioning of Goods and technical workmanship for repair, maintenance and installation or other contracting following written instructions or reasonable oral instructions from the Customer ("Services").
- B. These terms and conditions shall prevail and take precedence over any document or oral message from the Customer. Where SFX fails to enforce any terms or conditions under this contract the Customer acknowledges that SFX will not be deemed to have waived these rights with respect to any term or condition or right.
- C. The Customer and SFX acknowledge that these Terms and Conditions of Trade constitute a Security Agreement as defined by the *Personal Property Securities Act 2009* ("PPSA"). For the purposes of the PPSA, Collateral shall include all and any Goods supplied by SFX and the proceeds from the sale of all Goods. The Customer also agrees not to allow any person to file a finance statement over any of the Collateral secured by this Security Agreement without the prior written consent of SFX.
- D. Upon signing the SFX Credit Application OR signing acceptance of a SFX quotation OR providing an order to SFX, the Customer agrees that these Terms and Conditions of Sale shall apply.

### **AGREEMENT**

#### **1 Quotation and Price**

- 1.1. SFX shall confirm the price of Goods and Services in its price list or as a quotation and the Customer shall confirm acceptance of the price or quotation by signing the quotation or providing an order.
- 1.2. The quotation price may be increased if SFX suffers any cost increases which are beyond its control in the supply, production and delivery of Goods (including increases in import costs and changes in currency) between the date of contract (or, where the contract arises from a quotation the date of the quotation) and the date of delivery, where SFX can supply written evidence of such cost increases or if the Customer varies or alters its requirements for the Goods or Services. Variations and alterations may result from changes to instructions from the Customer requiring a changed basis for the cost of Goods or Services OR additional parts, materials, or Services. Any variations regarding price or supply to that agreed in the quotation or order that may be agreed between the parties during the period of supply shall be in writing and take precedence over that part of the quotation or order so affected.
- 1.3. No quotation shall constitute an offer unless signed by SFX and SFX may withdraw any quotation before the Customer's signed acceptance. The quotation price will be exclusive of GST and shall be valid for a period of thirty (30) days. Insurance and other handling charges shall be the responsibility of the Customer. SFX will arrange at the Customer's expense, to deliver all goods to the address given by the Customer. The method of delivery will be at the discretion of SFX and would be within the usual duration of normal carrier service. Should urgency or special delivery be required, all related costs will be borne by the Customer. SFX will endeavour to deliver all orders in a single dispatch. If stock holdings at time of dispatch cannot fill the order SFX may in its discretion split the deliveries at no extra cost to the Customer.

#### **2 No cancellation for Make to Order Goods**

- 2.1. Upon acceptance of a Company quotation by the Customer or Customer order to SFX for Goods or Services that are designed or procured specifically for the Customer (meaning nonstandard or indented to order) cannot be cancelled without the Customer paying the full cost of the manufacture or procurement of the Goods or Services to the time of cancellation.

#### **3 Payment**

- 3.1. Payment shall be made according to the terms stated in the terms of the SFX quotation being:
  - (a) full payment upon delivery OR,
  - (b) full payment within seven (7) days of delivery OR,
  - (c) full payment by NET 30 DAYS
- 3.2. The Customer shall make payment of all amounts due to SFX without any delay or deduction whether by way of set-off or counterclaim even under dispute of the invoice.
- 3.3. The Customer agrees that SFX has sole discretion to apply payments from the Customer to any transaction or Company invoice notwithstanding that the Customer may have applied the payment to a particular transaction or invoice.

#### **4 Interest for Late Payment**

- 4.1. SFX may charge the Customer interest on any monies outstanding under this contract on a daily basis at a rate equal to 5% above SFX's bank indicator lending rate. Interest is payable from the date payment was due until the date SFX receives payment. SFX's right to charge interest is without prejudice to SFX's other rights or remedies for the Customer's default in failing to pay on the due date.

#### **5 Sale of Goods to Companies or incorporations not registered in Australia**

- 5.1. For the Sale of Goods to Companies or incorporations not registered in Australia, the price shall be the price ruling at the date of delivery or shall be a quotation confirmed by the Customer; and subject to any variation of this clause which will be notified to the Customer in writing, the price shall be paid by the Customer to SFX as follows:
  - (a) in cleared funds prior to shipment of the Goods by SFX, OR
  - (b) by irrevocable letter of credit at sight and established by the Customer OR
  - (c) by credit card remittance authority left with SFX

#### **6 Suspension of Contract for Non Payment**

- 6.1. If at any time SFX reasonably deems the credit of the Customer to be unsatisfactory, it will require the Customer to provide at the Customer's cost, security for payment and/or SFX may suspend performance of its obligations including suspension of the supply of Goods or Services under this contract.
- 6.2. SFX may secure any or all Goods previously supplied by SFX and in possession of the Customer under the Retention of Title clause to the value of the outstanding amount owed until payment is made in full OR until security is provided to SFX's satisfaction and SFX may require the Customer to pay all costs incurred as a result of suspension and re-commencement of supply including debt collection and legal costs.

#### **7 Delivery**

- 7.1. When the Customer uplifts the Goods from the SFX's premises this shall constitute delivery. Where the Customer requests SFX to transport the Goods to the site of the Customer by SFX or its agent this shall also constitute delivery. Completion of installation, repair or servicing of the Goods or Customer's property described in the order or quotation shall constitute delivery of Services.

- 7.2. The Customer agrees that risk in the Goods shall pass to the Customer once the Goods are delivered. Risk shall commence once the Goods are in the care of a carrier (being the agent of the Customer) and the Customer agrees that SFX shall not be liable for damage caused by the carrier.
- 7.3. The Customer agrees that SFX shall not be responsible for the validity of the person accepting the Goods on behalf of the Customer at the time of delivery.
- 7.4. Goods or Services that are finished items but only part of an order may be delivered by instalments at SFX's discretion and in such case each delivery will be regarded as a separate contract and any Goods or Services delivered shall be paid by the Customer in accordance with the terms of payment.
- 7.5. Where SFX has performed part or all of the supply of Goods or Services at a time agreed by the Customer but where delivery is delayed because of any act, omission or delay by the Customer or where the Customer has not rendered its site safe under the Work Health and Safety Regulations, SFX will require the Customer to pay that portion of the contract price which represents the costs incurred by SFX in carrying out supply and SFX may also charge reasonably incurred stand by costs while the Customer renders the site ready.
- 7.6. SFX will make every effort to ensure delivery of Goods and Services on time but will not be liable for any loss or damage or consequential loss to the Customer arising from delays in delivery.

## **8 Personal Property Securities Act 2009**

- 8.1. The Customer shall inform its creditors of the terms upon which it buys Goods from SFX and that SFX may create and register a Purchase Money Security Interest under the PPSA for any and all Goods.
- 8.2. The Customer agrees to inform any Trustee in Bankruptcy or Liquidator of the Customer or any Receiver of the Customer's business or assets of the rights of SFX and title to the proceeds of sale.
- 8.3. The Security Agreement is a continuing security and will operate irrespective of any intervening payment or settlement of account until a release has been signed by SFX. The security interest granted in the Collateral has the same priority in relation to any and all of the Goods supplied to the Customer at any time.

## **9 Risk, Ownership and Title**

- 9.1. Risk of any loss, damage, or deterioration of or to the Goods shall be borne by the Customer from the time of delivery and the Customer shall properly insure the Goods from theft, fire or loss damage. Where the Customer fails to insure the Goods upon delivery and suffers loss or damage to the Goods, and where the Goods remain unpaid, the Customer agrees to pay SFX for the full cost of the Goods.
- 9.2. The Customer agrees that SFX has legal and equitable right to title in all and any Goods supplied that remain unpaid and ownership shall only pass to the Customer when the contract price is paid. For as long as ownership in the Goods is retained by SFX the Customer may only use the Goods in such a way that they are identifiable as the property of SFX.
- 9.3. If the Goods including the value of Services, the subject of this contract, have become the constituent of mixed with or attached to any other goods or property of the Customer, then a proportion of the value of those goods or property to the value of SFX's Goods or value of Services shall belong to SFX.
- 9.4. Where the Goods or Services remain unpaid the Customer hereby irrevocably gives SFX, its agents or servants, the free and uninterrupted right to enter its premises during normal business hours in accordance with the PPSA, to search for, inspect and remove any of the Goods supplied in which SFX has retained ownership and the Customer will not hold SFX responsible for any economic or consequential loss that the Customer may suffer as a result of the Goods being removed or dismantled from the property of the Customer. SFX may resell possessed Goods and credit the Customer with the proceeds of sale (less depreciation, wear and tear) and the Customer will still be liable for any outstanding monies.

## **10 Title upon Sale to a Third Party**

- 10.1. Notwithstanding that property in the Goods is retained by SFX the Customer is hereby authorised to use or sell the Goods in the ordinary course of business and to deal with such proceeds as fiduciary agent and bailee of SFX until the Customer pays SFX in full without deduction or setoff: provided that such authority may be revoked by written notice at any time if SFX deems the credit of the Customer to be unsatisfactory or if the Customer is in default of its obligations under the contract or any other contract between SFX and the Customer.
- 10.2. Where any Goods in respect of which title has not passed to the Customer are sold by the Customer pursuant to the authority granted, any book debt created upon sale of such Goods and the proceeds of sale of such Goods when received by the Customer shall be held upon trust by the Customer for SFX. Proceeds of sale so received by the Customer shall be held as a separate fund in trust for SFX and shall first be applied towards the satisfaction of all indebtedness of the Customer to SFX.

## **11 Company Warranty & Liability**

- 11.1. SFX's liability in respect of any claim shall relate only to specific defects in the Goods arising from faulty manufacture or from damage proven to occur before delivery by SFX or arising from defective Services. Without limiting the guarantees to consumers under Australian Consumer Law, where the Customer uses the Goods for any other purposes than that specified by SFX in its publications or packaging the Customer agrees to be responsible for the fitness of the Goods for the purposes required by the Customer, and SFX shall not be responsible and the warranty shall not apply to Goods where the Customer fails to ascertain the fitness of the Goods for purposes intended by the Customer.
- 11.2. The warranty of Lifeguard manufactured products and parts shall be twelve (12) months unless the warranty of the original manufacturer of the Goods is longer.
- 11.3. Where the Customer requires SFX to repair any Goods outside of the warranty period the Customer shall accept the full cost of the Services including freight charged by SFX.
- 11.4. Where SFX accepts liability for damage or defect under its warranty and elects to repair or replace Goods or Services it shall repair or replace the Goods to their original condition but where this cannot be done SFX will refund the purchase price in full.
- 11.5. SFX offers no warranty in respect to second hand equipment and does not hold that such equipment is of any particular quality or fit for any particular purpose.
- 11.6. Except where bound by Australian Consumer Law, SFX shall not be liable for any loss of profits or any consequential, indirect or special loss, damage or injury of any kind whatsoever suffered by the Customer or any other person arising directly or indirectly from any breach of any of SFX's obligations arising under or in connection with the contract including delays in the delivery of Goods or Services or from any cancellation of the contract or from any negligence, misrepresentation or other act or omission on the part of SFX, its servants, agents or contractors.
- 11.7. SFX shall not be liable for any breach or failure to perform any of its obligations under this contract where such breach or failure is caused by war, civil commotion, hostilities, strike or lockout, act of God, fire, governmental regulations or directions, or any other force majeure event beyond SFX's reasonable control. The occurrence of such an event shall not give the Customer a right of cancellation of the contract.

## **12 Claims for Defective Goods or Services, Discrepancies and Shortages**

- 12.1. Without limiting statutory consumer remedies SFX may, at its discretion, repair or replace any damaged or defective Goods or Services provided that the Customer advises SFX of the claim within thirty (30) days of the defect or damage occurring together with a claim specifically identifying the damage or defect(s) with a copy of the original invoice; and provided that the Customer does not continue to use the Goods once the defect is known or the damage occurs. Discrepancies and shortages of parts must be notified to SFX in writing with ten (10) days of delivery.

### **13 Goods Incorrectly Ordered by the Customer**

- 13.1. Provided that Goods are not specially procured or indented to order for the Customer SFX at its discretion may give credit for returned Goods that are incorrectly ordered by the Customer and which are not damaged or defective. SFX will deduct twenty per cent (20%) of the value of the Goods as an administration and handling cost provided the Goods are delivered to SFX within fourteen (14) days after original delivery and at the Customer's cost and in the same condition and packaging in which they were dispatched, with a copy of the invoice.

### **14 When Claims will not be considered**

- 14.1. SFX's liability in respect of any claim shall relate only to specific manufacturing defects in the Goods. The Customer agrees that SFX will not consider claims from the Customer in respect of Goods which:
- (a) are not intact and in original condition subject to normal wear and tear;
  - (b) have been improperly stored and suffered damage;
  - (c) have been used for purposes other than specified in Company publications;
  - (d) have been altered from the condition in which they were supplied or repaired by persons other than SFX;
  - (e) have not been maintained according to information in Company publications or packaging
- 14.2. If the Customer does not comply with the above requirements for warranty and claims the Customer will be deemed to have accepted the Goods and SFX will not incur any liability whatsoever in relation to the Goods (without limiting the rights of redress for consumers contained in Australian Consumer Law).

### **15 Intellectual Property**

- 15.1. The Customer agrees that where SFX provides intellectual property to assist the Customer in the form of patents, trademarks and copyrights or written instructions, drawings, publications and training manuals and other information the ownership of such intellectual property shall always remain with SFX, and the Customer further agrees that it shall not use the intellectual property in any manner by way of adapting or altering without first obtaining the express written permission of SFX.
- 15.2. Where SFX has followed plans, drawings, specifications and instructions being oral or written provided by the Customer, the Customer shall indemnify SFX against damages, costs and expenses in respect of which SFX may become liable by following such plans, drawings, specifications and instructions and including those arising from the infringement of patents, copyrights or trademarks by the Customer.

### **16 Dispute and Mediation**

- 16.1. In the event of any dispute between SFX and the Customer arising out of this Contract, the Customer agrees to pay the undisputed part of the outstanding monies owed and such dispute shall be referred to a Mediator to be agreed between the parties and the costs shall be equally shared.

### **17 Guarantor(s)**

- 17.1. Where the Customer is a company or partnership or trust the person(s) referred to as the signatory (s) signing on behalf of the company or partnership or trust on the Credit Application forming part of this contract shall personally guarantee the obligations of the Customer (jointly and severally) to pay outstanding monies to SFX and to indemnify SFX against non-payment by the Customer. Any personal liability of a signatory or signatories hereto shall not exclude the Customer from liability and obligations of this contract and SFX may have recourse to either the Customer or the Guarantor(s) (or both) at their discretion with regard to enforcing any obligations and/ or liability arising under this contract.