

Simplex Fire Products - Terms and Conditions of Sale

Definition

Where the context permits:

Agreement means the agreement between the Vendor and the Customer for the supply of Goods by the Vendor to the Customer and shall be constituted by these Terms and Conditions of Sale and if any, the Vendor's quotation, Credit Arrangement and Guarantee.

Credit Arrangement means the credit terms available to the Customer pursuant to an application by the Customer for the provision of Goods on credit submitted to the Vendor using the Vendor's standard credit application form and accepted in writing by the Vendor.

Customer means the person with whom the Vendor has agreed to supply Goods pursuant to the Agreement.

Goods means the goods and services agreed to be supplied by the Vendor and purchased by the Customer pursuant to the Agreement.

GST has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), or, if that Act does not exist means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act.

Guarantee means the guarantee document provided by the Customer or the Customer's directors, shareholders or principals to the Vendor to guarantee the performance of the Agreement by the Customer.

Proprietary Information means any and all information and intellectual property relating to the Goods or the installation or operation of the Goods including but not limited to patents, designs, drawings, instruction booklets, specifications, circuit drawings, componentry, trade secrets, trade marks and copyright in such information and intellectual property.

Vendor means, Tyco Australia Pty Ltd, ABN 80 008 399 004 trading as Simplex Fire Products.

Quotations and Purchase Orders

- 1 Quotations from the Vendor are valid for a period of 30 days from the date of issue or otherwise specified in the quotation. Prices given in any quotation by the Vendor are applicable to that quotation only and will not apply in any other instances. A quotation from the Vendor is not an offer to sell.
- 2 In order to purchase the Goods, the Customer must place with the Vendor a purchase order. If the purchase order is in writing, it must set out an order number, the Vendor's quotation number (if applicable), full description of the Goods to be purchased, the delivery date, delivery point and any other information required by the Vendor. The purchase order may be accepted or rejected by Vendor.
- 3 A contract shall be formed by and upon the Vendor accepting in writing a purchase order from the Customer pursuant to clause 2 or by the Vendor delivering the Goods to the Customer and each contract shall be governed by the Agreement.
- 4 The Agreement shall take precedence over any other representations, agreements, arrangements or understandings relating to the Goods and any matters in connection therewith.
- 5 Any conditions or terms of purchase submitted by the Customer deviating from or inconsistent with the Agreement will not bind the Vendor notwithstanding any statement by the Customer in its purchase order that its terms and conditions prevail over the Agreement.
- 6 The Vendor may at its discretion, as a condition of acceptance of a purchase order require the Customer to provide to the Vendor cash deposit, Guarantee, bank guarantee or enter into a Credit Arrangement prior to delivery of the Goods.

Payment of purchase price

- 7 Purchase orders are accepted by the Vendor subject to the condition that the Customer agrees to pay the purchase price appearing on the Vendor's price list for those Goods current on the date the order is accepted by the Vendor, or as otherwise quoted by the Vendor in writing.
- 8 Copies of the Vendor's price list current as at the date of the purchase order are available on request. All prices are subject to alteration without notice.
- 9 The purchase price, unless otherwise expressly stated, does not include any delivery charges, packaging, freight, assembly costs, installation costs, costs and charges of third party suppliers such as electricians, insurance or any statutory, sales, excise, GST, or other taxes, duties or imposts, all of which may be added to the purchase price or otherwise will be paid by the Customer or reimbursed by the Customer to the Vendor, as the Vendor may elect.
- 10 Payment of the purchase price must be made in full within 30 days after the date of the invoice or otherwise in accordance with the Customer's Credit Arrangement as amended in writing by the Vendor from time to time.
- 11 The Customer must not set off any money owing or alleged to be owing by the Vendor against money due by the Customer to the Vendor.
- 12 The Customer acknowledges that the Vendor is a member of a group of companies which have as their ultimate parent Tyco International Ltd. (**Tyco Group**). The Customer agrees that the Vendor and/or any other Tyco Group company is entitled to exercise a right of set off to the extent the Customer is indebted to the Vendor or to any Tyco Group company against any monies due by the Vendor to the Customer or any Tyco Group company on this or any other account.
- 13 If the Customer does not pay money by the due date for payment, without prejudice to any other rights which it may have against the Customer, the Vendor may require the Customer to pay upon demand interest at the Westpac Indicator Lending Rate effective from time to time plus 4% per annum calculated from the due date on daily balances of amounts unpaid.
- 14 If GST is payable on a supply pursuant to the Agreement, the Customer must also pay to the Vendor an additional amount equal to the GST payable. This clause does not apply to the extent that the purchase price is expressly stated to be GST inclusive. The Customer must pay the GST amount at the same time as the Customer must pay the purchase price.

Cancellation of orders

- 15 Purchase orders may not be altered or cancelled without the written consent of the Vendor. If the Vendor agrees to alter or cancel the purchase order, the Customer will indemnify the Vendor against any loss, damage and expense incurred by the Vendor in relation to the cancellation or alteration of that purchase order including the cost of return freight, return shipping to factory of origin, items purchased from third parties for inclusion in Goods and all labour and engineering costs incurred by the Vendor in the execution or part execution of the Goods and including compensation payable to any supplier of the Vendor and loss of profit.

Return of Goods and credits

- 16 The Customer is deemed to have accepted the Goods unless it makes a claim in accordance with clause 17.
- 17 The Customer may reject any Goods which are wrongly supplied or oversupplied by notifying the Vendor of the claim and providing full particulars of the claim in writing within 5 days of receipt of those Goods. The Vendor may dispute any such claim.
- 18 Goods referred to in clause 17 may be returned to the Vendor for credit if all of the following is complied with:
 - 18.1 The Goods are returned to the Vendor's premises by prior arrangement and with the Vendor's written approval within 7 days of delivery, at no cost to the Vendor, unless delivered as the result of an administrative error by the Vendor, in which case the Vendor will bear the cost of return;
 - 18.2 The Goods are accompanied by a dispatch note stating the Vendor's original invoice number and reason for return; and
 - 18.3 The Goods are returned in an unsoiled, undamaged and resaleable condition in their original packing.
- 19 The Customer must not return any Goods to the Vendor unless it has complied with clauses 17 and 18 and has done all things necessary to permit the Vendor to examine the Goods to the Vendor's satisfaction within that period.

Delivery and storage

- 20 All quoted delivery or consignment dates are estimates only. The Vendor is not obliged to meet such dates and will not be liable to the Customer by reason of delays caused by any reason whatsoever.
- 21 The Vendor is deemed to have delivered the Goods when the Goods are made available to the Customer for physical collection by or on behalf of the Customer at the Customer's nominated delivery point (**Delivery**). Any unloading or loading shall be the Customer's responsibility, unless otherwise agreed in writing by the Vendor.
- 22 The Vendor may deliver the Goods by instalments (where in the Vendor's opinion this is reasonable to do so) and issue interim invoices to the Customer.
- 23 Without limiting any other provision in the Agreement, failure by the Customer to pay any instalment, or any other amount when due, will entitle the Vendor to withhold or delay delivery of any remaining Goods ordered.
- 24 If the Customer is unable to collect the Goods from the Customer's nominated delivery point on the delivery day, the Vendor may (at its option and without limiting its other rights and remedies) arrange suitable storage of the Goods, whether at its premises or elsewhere and the Customer must pay or reimburse all costs and expenses of storage, insurance, demurrage, handling and other charges associated with such storage. Notwithstanding the Customer's inability to collect the Goods, Delivery is deemed to have occurred.

Title and risk

- 25 Title to the Goods shall remain with the Vendor until all monies owing to the Vendor by the Customer has been paid in full (whether such monies are payable under a specific contract or any other account whatsoever).

- 26 Until such time that the Customer has paid in full all monies owing to the Vendor, the Customer shall:
- 26.1 keep the Goods stored separately and marked so that they are clearly and easily identifiable as the Vendor's property and inform the Vendor of the location of the Goods, if requested;
- 26.2 hold the Goods as bailee for the Vendor subject to its right to deal with the Goods in the ordinary course of the Customer's business;
- 26.3 indemnify the Vendor against any claim arising out of the possession, use or disposal of the Goods by the Customer or repossession or attempted repossession by the Vendor.
- 27 If:
- 27.1 a payment is not made in accordance with the Agreement;
- 27.2 the Customer commits any other breach of the Agreement;
- 27.3 the Customer becomes bankrupt or has an administrator, a receiver or a receiver and manager appointed or goes into liquidation, whether voluntarily or otherwise, or is wound up or dissolved or declared insolvent;
- then the Vendor may at any time, without notice to the Customer and without prejudice to any other rights which it may have against the Customer:
- 27.4 terminate the Agreement and the bailment referred to in Clause 26;
- 27.5 suspend some or all its obligations under the Agreement with the Customer; and/or
- 27.6 enter upon any premises owned or occupied by the Customer where the Vendor reasonably believes the Goods may be stored and repossess the Goods without being liable for any damages caused.
- 28 If the Customer sells the Goods before payment in full to the Vendor, or uses the Goods in a manufacturing or construction process of its own or some third party, the Customer holds the proceeds on trust for the Vendor in respect of those Goods, and must keep such proceeds in a separate account until the liability to the Vendor is discharged and must immediately pay that amount to the Vendor.
- 29 The risk in the Goods passes to the Customer at the time of Delivery.

Insurance

- 30 The Customer must keep the Goods insured against all risks for Goods of that kind from the time the risk in the Goods passes to the Customer until the time the property in the Goods passes to the Customer. The Customer holds the proceeds of that insurance on trust for the Vendor up to the amount it owes the Vendor in respect of those Goods, and must keep such proceeds in a separate account until the liability to the Vendor is discharged and must immediately pay that amount to the Vendor.

Limitation of liability for Goods and warranties

- 31 To the extent permitted by law, the Vendor makes no warranties or representations to the Customer except to the extent set out in the Agreement.
- 32 The Vendor warrants the Goods to be free from defects in workmanship and materials under normal use and service for a period of [1 calendar year] from the Delivery ("Warranty Period"). This warranty does not cover costs of recovery of the Goods from the site, return of the Goods to the site, re-installation of the Goods at the site, the costs of travel and subsistence for the Vendors representatives, or damage, fault, failure or malfunction due to external causes including accident, abuse, misuse, mechanical or electrical overload, abrasion, corrosion, [incorrect installation], failure to perform required preventative maintenance or normal wear and tear.
- 33 During the Warranty Period, the Customer's sole remedy with respect to breach of warranties set out in clause 32 will be repair or replace by the Vendor (as the Vendor may elect) any such defective Goods at the Vendor's expense. The replacement or repaired Goods shall be covered by the unexpired portion of the Warranty Period in respect of the original Goods or for a period of [90 days], whichever is the greater.
- 34 For equipment forming part of the Goods which equipment is not manufactured by the Vendor, then the original manufacturer's warranty will apply. The Vendor's liability for such equipment shall not exceed the liability of the manufacturer.
- 35 Certain legislation, including the Trade Practices Act 1974 (Cth), may imply warranties or conditions or impose obligations which cannot be excluded, restricted or modified except to a limited extent. The Agreement must be read subject to any such statutory provisions. If such statutory provisions apply, to the extent to which the Vendor is entitled to do so, the Vendor's liability will be limited at its option to:
- 35.1 in the case of supply of goods, the replacement of goods or supply of equivalent goods, the payment of the cost of replacing the goods or acquiring equivalent goods, the payment of the cost of having the goods repaired or the repair of the goods; and
- 35.2 in the case of services, the supply of the services again or the payment of the cost of having the service performed again.
- 36 The liability of the Vendor under the Agreement will be reduced by the amount of any contributory loss or damage to the extent caused by the act or omission of the Customer.
- 37 The Customer acknowledges and agrees that, to the extent permitted by law, the Vendor has no liability in contract, tort (including negligence or breach of statutory duty), by statute or otherwise for loss or damage (whether direct or indirect) of profits, opportunity, revenue, goodwill, bargain, production, contracts, business or anticipated savings, corruption or destruction of data or for any direct or indirect, special or consequential loss or damage whatsoever.

Proprietary Information

- 38 The Customer acknowledges that all Proprietary Information and all right title and interest therein are the sole property of or licensed by the Vendor and the Customer shall gain no right title or interest in the Proprietary Information whatsoever. The Customer specifically acknowledges the Vendor's exclusive rights to ownership of any modification, translation or adaptation of the Proprietary Information and any other improvement or development based thereon whether developed, supplied, installed or paid for by or on behalf of the Customer or any buyer of the Customer or otherwise.

Re-export

- 39 The Goods supplied are intended for use only in Australia. If re-exported by the Customer it is the Customer's responsibility to ensure that the Goods and the use to which they are put comply with the laws of that country.
- 40 The Customer acknowledges that the Goods purchased by the Customer may not be sold, leased or otherwise transferred to or utilised by, an end-user engaged in activities related to weapons of mass destruction including but not limited to activities related to design, development, production or use of nuclear materials, nuclear facilities or nuclear weapons, missiles or support of missiles projects or chemical or biological weapons.

Miscellaneous

- 41 The fact that the Vendor fails to do, or delays in doing, something it is entitled to do under the Agreement, does not amount to a waiver of its right to do it. Any waiver must be agreed in writing by the Vendor.
- 42 If a clause or part of a clause can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from these Terms and Conditions of Sale, but the rest of the Agreement is not affected.
- 43 The Vendor shall not be liable for any failure to fulfil or any delay in fulfilling any obligation arising from the Agreement if the failure or delay has been caused directly or indirectly by any act of God, war or other civil commotion, strikes, lockouts, stoppages and restraints of labour, breakdown of machinery, inability to obtain raw materials or fuel, fire or explosion, any government action or any other cause beyond the reasonable control of the Vendor and not a consequence of the Vendor's negligence.
- 44 Any notice to be given to a party under the Agreement must be in writing and must be sent by post, facsimile or email to the address of that party shown in the quotation, purchase order or order acknowledgment. Notice is deemed to have been given at the time it would have been received in the normal course of post if sent by post, or if otherwise given at the time it was actually received.
- 45 The Agreement is governed by and must be interpreted in accordance with the laws of the State or Territory where the Vendor supplies the Goods. The Customer unconditionally submits to the non-exclusive jurisdiction of the courts of that State or Territory.
- 46 Where there is more than one Customer then the liability of each shall be joint and several.
- 47 The rights and remedies provided in the Agreement will not affect any other rights or remedies available to the Vendor.
- 48 The Agreement cannot be assigned by the Customer without the prior written consent of the Vendor.