

## **TERMS AND CONDITIONS OF SALE**

### **1. DEFINITIONS**

These general terms and conditions of sale apply where Durotech Industries ("Durotech") supplies products or services to a customer ("Customer") under a contract where for the purpose of these terms and conditions and unless the context otherwise requires:

"Conditions" means these Terms and Conditions of Sale;

"Contract" means the contract formed in accordance with clause 2, consisting of Durotech's proposal (if any), the relevant order and these Conditions;

"Contract amount" means the monetary value of the works good and/or services provided under the Contract payable by the Customer to Durotech;

"GST" means the tax imposed by the A New Tax System (Goods & Services) Act 1999 (Cth).

"Loss or Damage" includes all types of property, pecuniary or other loss or expense or damage, including direct indirect consequential loss or damage and loss of profits or revenue or production capacity.

### **2. CONTRACT AND FORMATION**

- 2.1. Subject to clause 2.2 a binding contract will form between the Customer and Durotech;
  - 2.1.1. if these Conditions form part of a Durotech proposal to the Customer then on receipt by Durotech of the Customer's unconditional acceptance of the proposal, evidenced by the Customer's purchase order referencing the proposal; or
  - 2.1.2. on Durotech's written acceptance of Customer's purchase order where if any counter terms and conditions are presented will immediately be negated in their entirety and superseded by these Conditions.
- 2.2. The Contract will constitute the entire contract between the parties in connection with the sale of any products and services and all prior written correspondence or material, representations or discussions shall have no effect.
- 2.3. No waiver modifications or variation of the Contract shall be valid or accepted or bind Durotech unless expressly agreed to in writing by an authorised representative of Durotech.
- 2.4. Unless otherwise stated in a proposal by Durotech any offer to supply products is valid for 30 days from the date of the offer.
- 2.5. Durotech reserves the right to vary the offer to reflect any change in cost to Durotech between the date of offer and the date of Contract.
- 2.6. Durotech reserves the right to vary the Contract sum at any time to include the costs of site allowances or changes to industrial conditions.

### **3. CANCELLATION**

- 3.1. The Customer may only cancel the Contract with Durotech's consent and only on the basis that the Customer meets all Loss or Damage incurred by Durotech as a result of the cancellation of the Contract in the timeframe specified by Durotech.
- 3.2. Durotech may suspend delivery, cease manufacturing or cancel any Contract without any liability whatsoever if the Customer at any time and as deemed by Durotech;
  - 3.2.1. breaches any terms or conditions of the contract;
  - 3.2.2. commits an act of bankruptcy, resolves to or goes into liquidation, has a receiver or manager appointed, enters into a scheme of arrangement or other composition with its creditors or otherwise becomes insolvent and is unable to pay its debts; or
  - 3.2.3. refuses or neglects to take delivery of the products described in the Contract.

### **4. PRICE VARIATION**

- 4.1. Unless otherwise stated by Durotech in the Contract Durotech may vary the prices stated in the Contract to reflect any change in costs to Durotech after the date of the Contract.
- 4.2. Where a list price applies to the products supplied by Durotech under the Contract all prices listed are (i) subject to alteration without notice, (ii) applicable to all deliveries on or after the effective date of any price alteration and (iii) do not include GST or any other government impost.

### **5. VARIATIONS TO CONTRACT**

- 5.1. The Contract amount is based on the scope of work as detailed in the information provided by the Customer to Durotech for the purpose of the Contract including where applicable plans, specifications (including standards and finishes), schedules and nominated quantities.
- 5.2. Any variations to the scope of the works or delivery arrangements or Contract shall be a variation to the Contract entitling Durotech to varying the Contract amount as stated and any other term or condition.

### **6. SPECIFICATIONS**

- 6.1. Where Durotech manufactures or supplies products according to the Customer's specification the Customer shall provide to Durotech accurate information to the extent required by Durotech to enable Durotech to provide the products specified.
- 6.2. The Customer warrants to Durotech that the information and any products to be manufactured by Durotech under the Contract does not breach any copyright, registered design, patent or other rights of any third party and the Customer shall indemnify and hold harmless Durotech in relation to any such alleged or actual breach.
- 6.3. Unless otherwise stated in the Contract the products shall be manufactured, finished or applied to a standard as determined by Durotech.
- 6.4. The Customer acknowledges and accepts that Durotech is only the distributor of third party products and in no way warrants or accepts any liabilities in connection with those third party products.
- 6.5. Any correspondence in relation to the third party products should be directed to the contact details as listed on the third party product.

### **7. PAYMENTS**

- 7.1. Time for payment of the amount due from the customer to Durotech shall be of the essence. The amount due includes the Contract sum, any variations to the Contract sum and any additional charges which Durotech is entitled to apply.
- 7.2. Subject to subclauses 7.3 and 7.4 below the customer shall pay the full amount due in accordance with the credit arrangements (if any) as agreed with Durotech.
- 7.3. Where no credit arrangements have been previously agreed to by Durotech but credit has been agreed by Durotech as a condition of a particular contract the Customer shall pay the full amount due with the month following the month of invoice.
- 7.4. Where no credit arrangements have been agreed by Durotech the Customer shall pay the full amount due before any delivery of the products.
- 7.5. The customer shall pay interest at the rate of 20% per annum calculated monthly on any amount not paid by the due date.
- 7.6. Products may be returned, provided the products are in good order being in the same or substantially same condition as initially delivered, within 7 days of delivery, after which time a re-stocking and handling fee of 10% of the Contract amount will be incurred and payable by the Customer. Freight charges will be payable by the Customer at cost on all pick ups. No returns will be accepted after 6 weeks.
- 7.7. Notwithstanding any other provisions herein the Customer hereby grants Durotech the right to lodge a caveat for any property that the Customer has any form of interest in in relation ] to any debt owing to Durotech.

Date \_\_\_\_\_

\_\_\_\_\_  
Signature

## 8. DELIVERY

- 8.1. Subject to subclause 8.2 delivery shall be on reasonable notice from the Customer to Durotech and the Customer shall not be relieved from any obligation to accept or pay for products by reason of any delay in delivery.
- 8.2. Where the Contract includes a delivery schedule delivery shall be in accordance with the dates contained therein.
- 8.3. Durotech shall not be liable for failure to deliver or for delay in delivery arising from any cause whatsoever beyond Durotech's control.
- 8.4. Durotech reserves the right to delivery by instalments and failure to deliver any instalment shall not entitle the Customer to terminate the Contract.
- 8.5. Delivery is deemed to occur at either (i) the place and time the Customer appropriates the products or (ii) in the absence of the Customer at site the time the products are deposited at the site for delivery nominated by the Customer as certified by the delivery docket/manifest signed by the cartage contractor.
- 8.6. Upon delivery the Customer shall become solely liable for any Loss or Damage to the delivered products by Durotech where the Customer requests delivery of those products to a specific site.
- 8.7. Nothing in this clause shall be construed as altering the transfer of title as specified in clause 9 and in the event of any inconsistency clause 9) will take precedence.

## 9. TITLE AND RISK

- 9.1. Title in the products shall pass to the Customer upon payment of the amount due in full together with any interest due.
- 9.2. Risk in the products shall pass to the Customer upon delivery as deemed in clause 8.

## 10. DEFECTIVE PRODUCTS

- 10.1. The Customer shall immediately inspect the products at the point of delivery or collection.
- 10.2. Notice of any defects shall be given by the Customer to Durotech in writing on the delivery docket/manifest signed by the Customer and immediately returned with the cartage contractor.
- 10.3. Where the point of delivery or collection is unattended the Customer shall give notice in writing to Durotech within 24 hours before the intended time of delivery or collection and prior to installation or application, of any defects in the products.
- 10.4. If the notice in accordance with clauses 10.1 and 10.2 is not given the products shall be deemed to be in good order and condition and in accordance with the Contract and accepted by the Customer.
- 10.5. Durotech shall have the right to inspect on site any products notified by the Customer as being defective and until such inspection is completed the product should not be installed or applied.
- 10.6. Should the Customer fail to cease the product installation or application under subclause 10.5 then the Customer waives all rights and discharges Durotech from any further obligations.

## 11. EXPRESS WARRANTY

- 11.1. If a product is defective and the Customer advises Durotech of that defect in accordance with subclauses 9(1) and 9(2) Durotech shall resupply the product but will not be liable for the removal of any defective products or the re-installation or re-application of any products or for any Loss or Damage.
- 11.2. The Customer shall take all reasonable steps to inform itself (including the reading and understanding of any relevant material safety data sheets or like documentation), its employees and agents in the use, handling, treatment and application of the products. Durotech shall not be liable for any Loss of Damage or injury arising in connection with or from the use of the products or by method of application.
- 11.3. Any design or description of use, capacity, durability, colour, manner of installation or application, information, details contained in drawings, data sheets, technical brochures or other illustrative documents (including directions for use and brochures) provided by Durotech are given as a general guide only and the Customer hereby acknowledges that is has satisfied itself as to the suitability of the products for the Customer's particular purposes, use of application and Durotech shall not be liable in any and all of these aspects.
- 11.4. Where consumer legislation implies warranties in respect of products or services and the products or services are of a kind not ordinarily acquired for personal, domestic or household use or consumption then the Customer's remedies shall be limited to those set out in clause 11.1.
- 11.5. Other than as expressly provided herein Durotech provides no other implied or express warranty to the Customer in relation to the products or services.
- 11.6. Durotech shall have no obligation under this warranty herein until the full payment by the Customer of any and all monies owed to Durotech is received and/or Customers are within and under any current applicable Customer credit limit as approved by Durotech.
- 11.7. Durotech does not warrant in any form any products produced by Durotech for the Customer under any form of toll manufacturing arrangement (i.e where Durotech manufactures the Customer's products in accordance with the specifications and full information provided by the Customer to Durotech).
- 11.8. Further the Customer hereby accepts any and all warranties in relation to the toll manufactured products (in connection with clause 11.7) and shall hold Durotech harmless from any action, claims, liability of loss in respect of any toll manufacturing.

## 12. SAMPLES

Any sample product or sample colour is provided to indicate only the general nature of the product. Durotech provides no warranty or guarantee that the product supplied shall correspond in colour texture or blend with any sample or with any previous or future product supplied.

## 13. LIEN

- 13.1. The Customer agrees that Durotech has a lien over any products supplied by Durotech under Contract for the price payable or any amount due from the Customer to Durotech until all amounts have been paid in full.
- 13.2. In the event of default of payment by the Customer, Durotech may sell such products after notice to the Customer as Durotech sees fit including disposal of the products. Any additional Loss or Damage incurred by Durotech in exercising its rights under this clause shall be a debt due and payable on demand from the Customer.

## 14. FORCE MAJEURE

Durotech shall not be liable for any delay Loss or Damage or injury arising by reason of any event beyond its control and without limiting the generality of the foregoing such events including industrial disputes, the unavailability of equipment materials or labour, fire, flood, machinery breakdown, civil disturbance, acts of God or government or similar statutory or regulatory action.

Date \_\_\_\_\_

Signature \_\_\_\_\_

## 15. PALLETS

- 15.1. All pallets delivered with the products remain the property of Durotech and shall be returned in good order and conditions to Durotech within 30 days of the delivery or on demand by Durotech.
- 15.2. Any pallet not returned by the said date shall be deemed rented by the customer at a rate as determined by Durotech

## 16. ASSIGNMENT

Any contract incorporating these terms and conditions cannot be assigned by the Customer in whole or in part unless agreed in writing by Durotech and on any terms and conditions Durotech sees fit.

## 17. MEASUREMENT AND PAYMENT

Unless otherwise stated in the Contract the measurement of quantities for the purpose of calculating payments due to Durotech shall be on the basis of the quantities shown on the delivery docket receipt/manifest.

## 18. UNANTICIPATED AND LATENT CONDITIONS

- 18.1. Should Durotech encounter physical and/or latent conditions on the site or its surrounding which Durotech considers could not reasonably have been anticipated at the date of the offer then;
- 18.1.1. Durotech shall advise the Customer of the existence of such changed conditions and the measure necessary to deal with the conditions and
- 18.1.2. All additional work carried out by Durotech or any Loss or Damage incurred by Durotech as a result of the unanticipated or latent conditions shall be at the Customer's expense.

## 19. DELAY IN INSTALLATION

- 19.1. Unless otherwise stated in the Contract the installation of products shall be carried out in accordance with the program of works as agreed between the Customer and Durotech
- 19.2. Where the program of works is delayed or suspended for any reason or cause outside the control of Durotech all additional Loss or Damage incurred by Durotech by reason of such delay or suspension shall be borne by the Customer.
- 19.3. Durotech shall not be liable for any Loss or Damage incurred by the customer arising out of delay or suspension of the work under the Contract howsoever caused..

## 20. INSTALLATION OR APPLICATION OF PRODUCTS

- 20.1. Where Durotech installs or applies products or provides services (including toll manufacturing) according to the Customer's designs, plans, specifications or directions (the "information") the Customer warrants to Durotech that the information is correct accurate and sufficient for the specified purpose.
- 20.2. Durotech shall not be liable for any Loss or Damage or injury howsoever arising in connection with the installed, applied or manufactured products as a result of the information supplied by the Customer.

## 21. ACCEPTANCE OF INSTALLATION OR APPLICATION

- 21.1. At the completion of any installation or application works Durotech shall notify the Customer within 7 days of such notification and the Customer shall provide to Durotech a list of any items or work which the Customer considers to be outstanding or defective.
- 21.2. Durotech shall not be liable for any outstanding work or defects which are not notified with this clause or clause 9.

## 22. STATUTORY REQUIREMENTS

Should any such term or condition be deemed by legislation to be void, voidable or unenforceable then that term or condition shall be severed and the remaining terms and conditions shall continue with full force and effect.

## 23. NOTICES

All notices given under or in connection with a contract shall be in writing and given or delivered to the recipient at its address as specified in the contract or at its registered offices.

## 24. DISPUTE RESOLUTION

- 24.1. The Customer and Durotech hereby agree that any and all claims (contractual, statutory, common law or otherwise), disputes, or suits that in any way, directly or indirectly, arise out of or relate to the contract shall first be submitted to non-binding mediation before a neutral mediator jointly selected by the parties.
- 24.2. In the absence of resolution by mediation, all such claims shall be settled by arbitration in accordance with the Australian Centre for International Commercial Arbitration's rules current at the date of the reference of the dispute to arbitration. Any such mediation and/or arbitration shall take place in Sydney, Australia.
- 24.3. Any claims, disputes or suits between the parties hereto shall be governed by, and construed and enforced in accordance with, the laws and courts of the New South Wales and the courts competent to determine appeals from those courts.

## 25. GOVERNING LAW

The contract is governed by and subject to the laws of New South Wales and any competent court within that State.

## 26. CONFIDENTIAL INFORMATION

- 26.1. If at any time Durotech discloses to the Customer or the Customer becomes aware of confidential information of Durotech including information relating to products, formula, recipe, materials, systems, procedures, processes, tests or equipment or information that by its very appearance and content is of a commercial or confidential nature or can be reasonably construed as being of a commercial or confidential nature the Customer shall not use the information for any purpose not approved by Durotech and shall not disclose that confidential information to any person without Durotech's written approval.
- 26.2. Should the Customer be in possession of any such confidential information the Customer warrants that it will on discovery of the confidential information contact and inform Durotech of the information in the Customer's possession and take all action necessary to maintain the confidential nature of the information.

## 27. LIMITATION OF LIABILITY

Durotech and its directors, employees, consultants, contractors and agents shall not be liable to the Customer (i) under or in connection with the contract (ii) in tort for negligence or otherwise (iii) otherwise at law (including by statute to the extent it is possible to exclude liability) and in equity generally including without limitation for restitution for unjust enrichment for any Loss or Damage which is not expressly provided for by contract. To the extent that Durotech is liable under contract then Durotech's liability to the Customer will be reduced to the extent the Customer contributed to the Loss or Damage and in any event and in the aggregate is limited to the Contract sum.

## 28. SURVIVAL OF OBLIGATIONS

The following clauses 1, 2, 3, 9, 10, 11, 21, 24, 26, 27 and 28 will survive termination or completion of the Contract.

Date \_\_\_\_\_

\_\_\_\_\_  
Signature

**TO BE COMPLETED BY INDIVIDUAL APPLICANTS AND DIRECTORS OF CORPORATE APPLICANTS AND GUARANTORS WHO ARE INDIVIDUALS.**

**SPECIFIC AGREEMENTS AND ACKNOWLEDGMENT BY APPLICANTS**

**We/I,**

1. Acknowledge having been informed that under Section 18E(8)© of the Privacy Act you are allowed to give a credit reporting agency personal information about me/us.

The information which may be given to any agency is covered by Section 18(E)(1) of the Act and includes:

- Full name, including former names, sex, day of birth.
- A maximum of three addresses consisting of a current or last known address and two immediately previous addresses.
- Name of current or last known employer.
- Driver's licence number
- The fact that I/we have applied for Credit and the amount.
- The fact that you are a current credit provider to me/us.
- Payments that become overdue more than 60 days and for which collection action has commenced.
- Advice that payments are no longer overdue.
- Cheques drawn by me/us that have been dishonoured more than once.
- In specified circumstances that in your opinion I/we have committed a serious credit infringement.
- That credit provided by you to me/us has been paid or otherwise discharged.

2. Advise that, if you consider it relevant to assessing this application for credit, I/we, agree in accordance with the provisions of Section 18K(1)(b) of the Act to your obtaining from a credit report containing personal information about me/us.

3. Advise that if you consider it relevant to collecting overdue payments in respect of commercial credit provided to me/us, I/we in accordance with the provisions of Section 18k(1)(h)(l) of the Act to your obtaining from a credit reporting agency a Credit report containing personal information about me/us.

4. Advise that if you consider it relevant to collecting overdue payments in respect of commercial credit provided to me/us credit arrangements, in accordance with the provisions of Section 18K(1)(b) of the Act. I/we understand that this information can include any information about my/our credit worthiness, credit standing, credit history or credit capacity which credit providers are allowed to give or receive from each other under the Act.

5. Agree that you may seek from any credit providers, named in a credit report issued by a credit reporting agency, information about my/our credit arrangements, in accordance with the provisions of Sect 18N(1)(b) of the Act.

6. Understand that this information can include any information about my/our credit worthiness, credit standing, credit history or credit capacity which providers are allowed to give or receive from each other under this Act.

7. Agree that you may obtain a report containing information about my/our commercial activities of commercial credit worthiness from a business that provides information about commercial credit worthiness of a person for the purpose of assessing my/our application(s) for personal credit. This is in accordance with Section 18L(4) of the Act.

I/We understand the information may be used for any of the following purposes:

- To assess an application by me/us for credit.
- To notify other credit providers of default by me/us.
- To exchange information with other credit providers as to the status of this account where I/we are in default with other credit providers.
- To assess my/our credit worthiness.

Date \_\_\_\_\_

\_\_\_\_\_  
Signature