

SMS ENVIRONMENTAL LTD – TERMS & CONDITIONS OF SALE

1 Definitions and interpretation

1.1 In these Conditions, unless the context requires otherwise:

1.1.1 **'Buyer'** means the person who buys or agrees to buy the Goods and Services from the Seller.

1.1.2 **'Conditions'** means these terms and conditions.

1.1.3 **'Contract'** means the contract between the Seller and the Buyer for the supply of Goods and/or Services in accordance with the Quote, the Terms & Conditions of Purchase and these Conditions.

1.1.4 **'Delivery Date'** means the date specified by the Seller when the Goods are to be delivered.

1.1.5 **'Force Majeure Event'** has the meaning given to it in clause 9.

1.1.6 **'Goods'** means the Goods as set out in the Quote.

1.1.7 **'Intellectual Property Rights'** means patents, utility models, rights to inventions, copyright and related rights, moral rights, trade marks, business names and rights in domain names, rights in get-up, goodwill and the right to sue for passing off, rights in designs, rights in computer software, database rights, rights to use, and protect the confidentiality of, confidential information (including know-how and trade secrets) and all other intellectual property rights, in each case whether registered or unregistered and including all applications and rights to apply for and be granted, renewals or extensions of, and rights to claim priority from, such rights and all similar or equivalent rights or forms of protection which subsist or will subsist now or in the future in any part of the world.

1.1.8 **'Quote'** means the quotation for the Goods and Services.

1.1.9 **'Seller'** means SMS Environmental Ltd..

1.1.10 **'Services'** means the services as set out in the Quote.

1.2 In this Contract the following rules of interpretation shall apply:

1.2.1 A person includes a natural person, corporate or unincorporated body (whether or not having separate legal personality).

1.2.2 A reference to a party includes its, successors and permitted assigns.

1.2.3 A reference to legislation or a legislative provision is a reference to it as amended or re-enacted. A reference to legislation or a legislative provision includes all subordinate legislation made under that legislation or legislative provision.

1.2.4 Any words following the terms including, include, in particular, for example or any similar expression shall be interpreted as illustrative and shall not limit the sense of the words preceding those terms.

1.2.5 A reference to writing or written excludes fax and email.

2 Description and quality of Goods

2.1 Where the Seller is contracted to supply Goods, the description of Goods is given by way of identification only and the use of such description shall not constitute a sale by description. Nevertheless the Seller will endeavour to ensure that its Goods shall be in accordance with the specification contained in the Seller's most recent literature unless stated otherwise, except that the Seller reserves the right to supply Goods incorporating variations from such specifications as a result of changes in components supplied by component manufacturers, or through unavailability of the specified components or Goods, or because the variations improve the Goods.

2.2 The Seller warrants that on delivery, and for a period of 12 months from the date of delivery (**'Warranty Period'**), the Goods shall conform in all material respects with the Seller's specification.

2.3 Subject to clause 2.4, if:

2.3.1 the Buyer gives notice in writing to the Seller during the Warranty Period within a reasonable time of discovery that some or all of the Goods do not comply with the warranty set out in clause 2.2;

2.3.2 the Seller is given a reasonable opportunity of examining such Goods; and

2.3.3 the Buyer (if asked to do so by the Seller) returns such Goods to the Seller's place of business at the Buyer's cost,

the Seller shall, at its option, repair or replace the defective Goods, or refund the price of the defective Goods in full.

2.4 The Seller shall not be liable for the Goods' failure to comply with the warranty set out in clause 2.3 if:

2.4.1 the Buyer makes any further use of such Goods after giving a notice in accordance with clause 2.3;

2.4.2 the defect arises because the Buyer failed to follow the Seller's oral or written instructions as to the storage, commissioning, installation, use or maintenance of the Goods or (if there are none) good trade practice regarding the same;

2.4.3 the defect arises as a result of the Seller following any drawing, design or specification supplied by the Buyer;

2.4.4 the Buyer alters or repairs such Goods without the written consent of the Seller;

2.4.5 the defect arises as a result of fair wear and tear, wilful damage, negligence, or abnormal working conditions; or

2.4.6 the Goods differ from the Seller's specification as a result of changes made to ensure they comply with applicable statutory or regulatory requirements.

2.5 Except as provided in this clause 2, the Seller shall have no liability to the Buyer in respect of the Goods' failure to comply with the warranty set out in clause 2.3.

2.6 These Conditions shall apply to any repaired or replacement Goods supplied by the Seller.

3 Price

All Quotes and estimates issued by the Seller and hence all contractual prices, are unless otherwise stated exclusive of carriage and all government taxes and levies (eg VAT) and any special packing required for safe delivery (eg overseas), and unless otherwise stated firm and valid for 60 days of quotation subject to their acceptance within 30 days of the date of the Quote.

4 Value Added Tax

Unless the sale fully qualifies as an export sale, or the Goods or Services are otherwise exempt from Value Added Tax and the Seller has been advised of this by the Buyer in writing prior to invoicing, the Seller will invoice and the purchaser will pay Value Added Tax on the Goods and Services.

5 Payment

5.1 The price for the Goods and/or Service shall be the price set out or referred to in the Quote.

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- 5.2 Payment for Goods and/or Services supplied under the Contract, less any mutually agreed retention shall be made within 30 days of date of invoice. If payment of the price or any part thereof is not made by the due date,
- 5.3 The Seller shall be entitled:
- 5.3.1 To charge interest on the outstanding amount at the rate of 4% p.a. above the National Westminster Bank Base Rate accruing daily
- 5.3.2 To require payment in advance of the supply of any further goods and services as long as due monies are outstanding
- 5.3.3 To refuse to supply any further goods or services whether ordered under the contract or not and without incurring any liability whatever to the Buyer for non-supply or any delay in supply.
- 5.4 All amounts due under the Contract shall be paid in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law).
- 6 Delivery
- 6.1 Where the Seller is contracted to deliver Goods, delivery will be made by any method of transportation at the Seller's option and carriage will be charged to the Buyer in addition to the ex-works price.
- 6.2 The Seller shall deliver the Goods to the location set out in the Quote or such other location as the parties may agree in writing ('**Delivery Location**') at any time after the Seller notifies the Buyer that the Goods are ready
- 6.3 Delivery of the Goods shall be completed on the completion of unloading of the Goods at the Delivery Location.
- 6.4 The Seller undertakes to use best endeavours to despatch the Goods in time to meet the promised delivery date, though any dates quoted for delivery of the Goods are approximate only, and the time of delivery is not of the essence. The Seller shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or the Buyer's failure to provide the Seller with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.
- 7 Risk and title
- 7.1 The risk in Goods will pass to the Buyer at time of collection of Goods sold 'ex works' and at time of delivery of Goods sold on a delivered basis. Goods will be at the Buyer's risk and the Buyer's responsibility from the time of such collection of delivery. In the case of receipt of damaged Goods by the Buyer or if there is a discrepancy between Goods ordered and goods supplied, the Seller will only accept liability for such damage or discrepancy if notified within 2 working days of collection or delivery of the Goods.
- 7.2 Title in the Goods will not pass to the Buyer until payment for the relevant Goods has been made in full.
- 8 Communications
- 8.1 All notices under the Contract shall be in writing.
- 8.2 Notices shall be deemed to have been duly given:
- 8.2.1 when delivered, if delivered by courier or other messenger (including registered mail) during the normal business hours of the recipient;
- 8.2.2 when sent, if transmitted by fax or email and a successful transmission report or return receipt is generated;
- 8.2.3 on the fifth business day following mailing, if mailed by national ordinary mail; or
- 8.2.4 on the tenth business day following mailing, if mailed by airmail.
- 8.3 All notices under these Terms and Conditions shall be addressed to the most recent address, email address or fax number notified to the other party.
- 9 Force Majeure
- Neither party shall be liable for any failure or delay in performing their obligations where such failure or delay results from any cause that is beyond the reasonable control of that party (a **Force Majeure Event**). Such causes include, but are not limited to: power failure, Internet Service Provider failure, industrial action, civil unrest, fire, flood, storms, earthquakes, acts of terrorism, acts of war, governmental action or any other event that is beyond the control of the party in question.
- 10 Services
- 10.1 The Seller shall supply the Services to the Buyer as set out in the Quote in all material respects.
- 10.2 The Seller shall use all reasonable endeavours to meet any performance dates for the Services specified in the Quote, but any such dates shall be estimates only and time shall not be of the essence for the performance of the Services.
- 10.3 The Seller reserves the right to amend the Services if necessary to comply with any applicable law or regulatory requirement, or if the amendment will not materially affect the nature or quality of the Services, and the Seller shall notify the Buyer in any such event.
- 10.4 The Seller warrants to the Buyer that the Services will be provided using reasonable care and skill.
- 10.5 Where the Contract is for the sale of the Seller's Services at a Buyer's site:
- 10.5.1 the Buyer shall or shall procure that:
- (a) The systems have been accurately and adequately described to their seller at the time of quotation, including disclosure of any sensitive materials that could be adversely affected by the work.
- (b) All parts of the system which need to be accessed are readily and safely accessible to the Seller's engineers.
- (c) Power points with suitable power supply are available at any point where it is required to operate electrical equipment.
- (d) All other facilities which the Seller has required the Buyer to provide are available and operational, eg adequate water supplies, drainage facilities, recirculating pumps.
- (e) The systems to be treated are fully ready for the treatment and in the case of new systems have been tested as sound.
- (f) Any units or equipment to be excluded from the treatment are already valved or looped off, unless it has been specifically agreed in writing that the Seller will do this.
- (g) Knowledgeable and responsible guidance is available to the Seller for the identification of outlets, valves, injection points etc and for the operation of pumps, fans and other system equipment when necessary.
- (h) The area is free from asbestos products.

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(i) All works to be carried out during normal working hours unless otherwise stated.

(j) Free use of welfare facilities are available for SMS Environmental Ltd personnel.

10.5.2 Once the Seller has received and accepted an instruction to commence work on site on a particular day:

(a) At least 2 full working days' notice of cancellation of the visit must be given, otherwise the Buyer will be charged and will pay the Seller for one full day's work at the contract price for each man involved.

(b) If the Seller on arrival at site, has to abort the visit through no fault of the Seller the visit will be similarly charged and paid for.

10.5.3 The Seller shall be fully indemnified by the Buyer against the consequences of any damage or harm caused as a result of the Seller's work through causes outside the Seller's control or reasonable knowledge, or by unauthorised use of the Seller's materials or equipment on site.

10.5.4 It is the Buyer's responsibility to inspect the system and be satisfied with the work done before the Seller is due to leave the site.

10.5.5 Results of microbiological analyses of samples taken more than 6 hours after completion of disinfection Services by the Seller are not acceptable as evidence about the effectiveness of the Seller's disinfection.

10.5.6 Where work is prevented, protracted or delayed, or return visits to site are necessary, because the above conditions have not been met, or for any cause outside the Seller's control or responsibility, then the Seller may charge and the Buyer will pay the Seller proportionately extra for the resulting additional time and/or work expended/undertaken by the Seller.

11 Order Cancellation

11.1 If the Seller accepts the cancellation of any Goods or Services ordered by the Buyer, the Seller shall be entitled to invoice the Buyer for the greater of the following:

11.1.1 the sum equal to the costs it has incurred and/or for which it shall be liable as a result of the order; or

11.1.2 the sum equal to not less than 20% of the order value.

12 Confidentiality

12.1 Each party undertakes that it shall not at any time disclose to any person any confidential information concerning the business, assets, affairs, customers, clients or sellers of the other party or of any member of the group of companies to which the other party belongs, except as permitted by clause 12.2.

12.2 Each party may disclose the other party's confidential information:

12.2.1 to its employees, officers, representatives, contractors or subcontracts or advisers who need to know such information for the purposes of exercising the party's rights or carrying out its obligations under or in connection with the Contract. Each party shall ensure that its employees, officers, representatives or advisers to whom it discloses the other party's confidential information comply with this clause 12; and

12.2.2 as may be required by law, a court of competent jurisdiction or any governmental or regulatory authority.

12.3 No party shall use any other party's confidential information for any purpose other than to exercise its rights and perform its obligations under or in connection with the Contract.

13 Intellectual property rights

13.1 The Buyer acknowledges that all Intellectual Property Rights in the Goods belong to the Seller or the relevant third-party owners (as the case may be), and the Buyer shall have no rights in or to the Goods other than the right to use the Goods in accordance with these Conditions.

13.2 All Intellectual Property Rights in or arising out of or in connection with the Services (other than Intellectual Property Rights in any materials provided by the Buyer) shall be owned by the Seller.

13.3 The Seller grants to the Buyer, or shall procure the direct grant to the Buyer of, a fully paid-up, worldwide, non-exclusive, royalty-free licence during the term of the Contract to use the Goods in accordance with this Contract and for the purpose of receiving the Services.

13.4 The Buyer shall not sub-license, assign or otherwise transfer the rights granted by clause 13.3.

13.5 The Buyer grants the Seller a fully paid-up, non-exclusive, royalty-free non-transferable licence to copy and modify any materials provided by the Buyer to the Seller for the term of the Contract for the purpose of providing the Services to the Buyer.

14 Liability

14.1 References to liability in this clause 14 include every kind of liability however arising under or in connection with the Contract including which may be suffered by the Buyer (or any person claiming under or through the Buyer), whether the same are suffered directly or indirectly or are immediate or consequential, and whether the same arise in liability in contract, tort (including negligence), misrepresentation, restitution or otherwise.

14.2 Nothing in the Contract limits any liability for:

14.2.1 death or personal injury caused by negligence;

14.2.2 fraud or fraudulent misrepresentation;

14.2.3 breach of the terms implied by section 12 of the Sale of Goods Act 1979 or section 2 of the Supply of Goods and Services Act 1982 (title and quiet possession);

14.2.4 defective products under the Consumer Protection Act 1987; or

14.2.5 any liability that legally cannot be limited.

14.3 Subject to clauses 14.2 and 14.3, the Seller's total liability to the Buyer shall not exceed the sum equal to the total amount paid by the Buyer under this Contract in the 6 months leading up to the event giving rise to the first claim against the Supplier.

14.4 Subject to clause 14.2, the following types of loss are wholly excluded.

14.4.1 loss of profits;

14.4.2 loss of sales or business;

14.4.3 loss of agreements or contracts;

14.4.4 loss of anticipated savings;

14.4.5 loss of use or corruption of software, data or information;

14.4.6 loss of or damage to goodwill; and

14.4.7 indirect or consequential loss.

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14.5 All references to 'the Seller' in this clause 14 shall, for the purposes of this clause only, be treated as including all employees, subcontractors and suppliers of the Seller and its affiliates, all of whom shall have the benefit of the exclusions and limitations of liability set out in this clause.

15 Termination

15.1 Without affecting any other right or remedy available to it, either party may terminate the Contract with immediate effect by giving written notice to the other party if:

15.1.1 the other party takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), obtaining a moratorium, being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing to carry on business or, if the step or action is taken in another jurisdiction, in connection with any analogous procedure in the relevant jurisdiction;

15.1.2 the other party suspends, or threatens to suspend, or ceases or threatens to cease to carry on all or a substantial part of its business; or

15.1.3 the other party's financial position deteriorates so far as to reasonably justify the opinion that its ability to give effect to the terms of the Contract is in jeopardy

15.2 Without affecting any other right or remedy available to it, the Seller may terminate the Contract with immediate effect by giving written notice to the Buyer if the Buyer fails to pay any amount due under the Contract on the due date for payment.

15.3 Without affecting any other right or remedy available to it, the Seller may suspend the supply of Services or all further deliveries of Goods under the Contract or any other contract between the Buyer and the Seller if the Buyer becomes subject to any of the events listed in sub clauses 15.1.1 to 15.1.3 or the Seller reasonably believes that the Buyer is about to become subject to any of them.

16 Variation

Neither the Seller nor the Buyer shall be bound by any variation, waiver of, or addition to the Contract except as agreed by both parties in writing and signed on their behalf.

17 No waiver

No waiver by the Seller of any breach of these Conditions by the Buyer shall be considered as a waiver of any subsequent breach of the same or any other provision.

18 Severance

In the event that one or more of these Conditions is found to be unlawful, invalid or otherwise unenforceable, that / those provisions shall be deemed severed from the remainder of these Conditions (which shall remain valid and enforceable).

19 Third party rights

Unless it expressly states otherwise, the Contract does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Contract.

20 Order of precedence

20.1 If there is any conflict or ambiguity between the Quote, the Terms & Conditions of Purchase and these Conditions, the term contained in the highest document in the following list shall have priority over one contained in a document lower in the list:

20.2 the Quote;

20.3 the Terms & Conditions of Purchase;

20.4 and these Conditions

21 Entire agreement

The Contract constitutes the entire agreement between the parties. Each party acknowledges that in entering into the Contract it does not rely on any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in the Contract. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in the Contract.

22 Law and jurisdiction

22.1 These Conditions (including any non-contractual matters and obligations arising therefrom or associated therewith) shall be governed by, and construed in accordance with, the laws of England and Wales.

22.2 Any dispute, controversy, proceedings or claim between the Seller and the Buyer relating to these Conditions (including any non-contractual matters and obligations arising therefrom or associated therewith) shall fall within the jurisdiction of the courts of England and Wales.