

Ballance Agri-Nutrients

GENERAL TERMS & CONDITIONS

1. INTERPRETATION

1.1 **Definitions:** In these Terms, unless the context requires otherwise:

"Acknowledgement Form" means the acknowledgement form provided by the Customer to the Supplier prior to the delivery of Products and/or Services, duly signed by the Supplier pursuant to which the Supplier acknowledges that it has received, read and understood the Health and Safety Requirements.

"Confidential Information" means any information, verbal or written, personal or otherwise including documents, plans, sketches, drawings, software, marketing strategies, market research data, product literature, trade secrets, processes, technical information, know-how and intellectual property of the Customer or any of its related or associated companies and any copies thereof but will not include public information (provided such information did not become public as a result of unauthorised disclosure by the Supplier), information independently developed or acquired, or information authorised in writing by the Customer for disclosure.

"Customer" means Ballance Agri-Nutrients Limited (NZBN 9429040142319) or any related or associated company to which the Products and/or Services are to be supplied in accordance with clause 5.1.

"Delivery Date" means the date specified by the Customer in a Purchase Order Form or as otherwise agreed in writing by the parties.

"Delivery Destination" means the destination for the delivery of the Products as specified by the Customer in a Purchase Order Form or otherwise agreed in writing by the parties.

"Environment" has the meaning set out in Section 2 of the Resource Management Act 1991 and, as the context permits or requires, Section 2 of the Hazardous Substances and New Organisms Act 1996.

"Environmental Law" means any law, including any Code of Practice or guidance published by any regulatory authority, which relates in any way to:

- (a) the Environment;
- (b) the safety, health or use of land, air, water, buildings or any other property; or
- (c) substances or activities which may affect or otherwise harm the Environment or be hazardous, and including the Resource Management Act 1991, the Building Act 2004, and the Hazardous Substances and New Organisms Act 1996.

"Environmental Requirements" means the environmental requirements, rules, policies and procedures as listed in the Acknowledgment Form and as updated and notified by the Customer to the Supplier from time to time.

"Force Majeure Event" means any of the following events or occurrences and the effects thereof: act of God or public enemy, flood, earthquake, storm, cyclone, tornado, hurricane, lightning, fire, explosion, epidemic, war, embargo, riot or civil disturbance, strike or other labour dispute (other than involving the relevant party, any related or associated company of the relevant party, any Sub-Contractor, agent, supplier or any contractor who has contracted (directly or indirectly) with the relevant party or any related or associated company of the relevant party to provide plant, materials, labour or equipment in connection with the supply of the

Services), sabotage, expropriation, confiscation or requisitioning of facilities, orders or temporary or permanent injunctions of any duly constituted court of competent jurisdiction and any other matter or event which is beyond the control of the relevant party and which the relevant party could not take reasonable measures to prevent or mitigate the effects of.

"GST" means goods and services tax payable under the Goods and Services Tax Act 1985.

"Health and Safety Requirements" means the Customer health and safety requirements rules, policies and procedures as listed in the Acknowledgement Form and as updated and notified by the Customer to the Supplier from time to time.

"Insolvency Event" means in respect of a party (other than for the purpose of solvent reconstruction or amalgamation):

- (a) a receiver, receiver and manager, liquidator, provisional liquidator, trustee, administrator, controller, inspector appointed under any companies or securities legislation, or similar official is appointed in respect of that party or any of its property, or any security over any substantial part of its assets is enforced;
- (b) the party ceases to carry on all or substantially all of its business, is unable to pay its debts when due, or is deemed unable to pay its debts under any law, or makes an assignment for the benefit of, or enters into or makes any arrangement or compromise with, that party's creditors or threatens to do so, or stops payments to its creditors generally;
- (c) the party is, becomes, or is deemed to be insolvent or bankrupt;
- (d) a distress, attachment or other execution is levied or enforced upon or commenced against any substantial part of its assets and is not stayed within 14 days;
- (e) anything having a similar effect to any of the events specified above happens under the law of any applicable jurisdiction; or
- (f) in the event that the person is an individual, anything having a similar effect to any of the events specified above happens in respect of that individual.

"KPI's" means any Key Performance Indicators agreed between the Customer and Supplier from time to time.

"Performance Standards" means any specific standards agreed in writing at the time of order.

"Price" means the price (exclusive of GST) for each Product in any Purchase Order Form issued under these Terms or any other price as agreed in writing between the parties. For the avoidance of doubt, all charges for importing Products, duty, taxes (other than GST), freight, packing, transportation, insurance and all other charges applied to the landing, delivery, unpacking and where applicable, assembly, installation and commissioning of Products, are included in the Price.

"Products" means the products described in any Purchase Order Form issued or otherwise agreed in writing.

"Purchase Order Form" means a document (whether in written or electronic form) issued by the Customer to the Supplier which:

- (a) is named as a purchase order;
- (b) states a purchase order number;

- (c) is dated;
- (d) sets out full particulars of the Products and/or Services to be provided by the Supplier including relevant dates for provision of the Products and/or Services;
- (e) identifies the person at the Customer who is requisitioning the Products and/or Services;
- (f) sets out price for the Products and/or Services, or the manner in which the price is to be determined; and
- (g) sets out the terms on which the price for the Products and/or Services is to be paid.

"Purchase Order Number" means the purchase order number recorded on a Purchase Order Form.

"Relationship Manager" means the person nominated by their respective party to represent that party in dispute resolution under clause 24.2.

"Service Specifications" means the specifications for the Services as set out in any Purchase Order Form issued under these Terms.

"Services" means the work to be undertaken by the Supplier, as specified in any Purchase Order Form issued under these Terms or as otherwise agreed in writing, and will include (where relevant) any goods to be provided by or on behalf of the Supplier in providing the services or otherwise in relation to the fulfillment of the Supplier's obligations under these Terms.

"Site" means any sites owned, leased or rented by the Customer and any other sites where goods, products, equipment or material owned or leased by the Customer may be situated from time to time.

"Sub-Contractor" means any party engaged by the Supplier in the delivery of the products and services and includes all employees or workers of the Sub-Contractor.

"Terms" means these General Terms of Supply for Products and Services as amended from time to time in writing by the Customer and the Supplier.

"working day" means a day (beginning at 8 am and ending at 5 pm) other than a Saturday or Sunday or statutory holiday observed in Auckland, New Zealand.

1.2 Interpretation: In these Terms, unless the context otherwise requires:

- (a) a reference to a statute includes all regulations under and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated;
- (b) headings are inserted for convenience only and are to be ignored in construing these Terms;
- (c) all amounts are in New Zealand dollars unless expressly stated otherwise;
- (d) the singular includes the plural and vice versa; and
- (e) the word "person" includes a natural person and any body or entity whether incorporated or not.

2. TERMS OF SUPPLY

- 2.1 These Terms will govern the supply of any Products and/or Services the Supplier makes to the Customer from time to time. By supplying Products and/or Services to the Customer, the Supplier is deemed to have agreed that all Products and Services are supplied subject to these Terms.

3. THE CUSTOMER'S OBLIGATIONS

- 3.1 **Purchase Order:** The Customer will confirm orders for Products and/or Services by issuing to the Supplier a Purchase Order Form. All Purchase Orders Forms shall include a Purchase Order Number.

- 3.2 **Timing of Purchase Order delivery:** The Customer shall send all Purchase Order Forms to the Supplier at least before midday (12pm) on the working day before the Delivery Date set out in the relevant Purchase Order Form.

- 3.3 **Late Purchase Order delivery:** If the Purchase Order Form is sent after midday (12pm) on the working day before the Delivery Date set out in the relevant Purchase Order Form, the Supplier shall use its best endeavours to complete the delivery of the Products, or to provide Service(s) during the following working day, but the due date for completion of the delivery of the Products or the provision of the Services shall be the working day thereafter.

- 3.4 **No Guaranteed Volume:** Other than as specifically set out in any Purchase Order Form, the Customer does not guarantee the Supplier any specific volume of business under these Terms. All estimates provided to the Supplier by the Customer are estimates only, and the Supplier confirms that these estimates will not be relied on in any circumstances.

4. PRICE, SERVICE FEE AND PAYMENT

- 4.1 **Fees and rates:** The Customer will pay the Supplier the Price for the Products and/or Services.

- 4.2 **Time and Materials Basis:** Where the Products and/or Services are provided on a time and materials basis:

- (a) the Customer shall pay for the Products and/or Services on the basis of the time, expenses and disbursements actually and reasonably incurred by the Supplier in the provision of the Goods and/or Services, subject to any provisions agreed in writing by the parties;
- (b) the Supplier shall provide invoices to the Customer within 10 days following the end of each month that Products and/or Services have been provided;
- (c) the Supplier shall provide the Customer with a report within 10 days following the end of each month that Products and/or Services have been provided detailing:
 - (i) the tasks undertaken in that month;
 - (ii) the hours worked by each person providing the Products and/or Services and the hourly rate of each person;
 - (iii) a breakdown of all expenses and materials; and
 - (iv) such other information as the Customer may reasonably require;
- (d) the Supplier shall, on request from the Customer, provide copies of time sheets and other records necessary to enable the Customer to verify the extent of the Products and/or Services that have been provided.

- 4.3 **Lump Sum:** Where the Products and/or Services are provided for a lump sum:

- (a) the total price for the Products and/or Services shall be the amount agreed in writing between the parties; and
- (b) the Supplier submit invoices to the Customer within 10 days following the end of each month during which Products and/or Services have been provided unless agreed otherwise.

- 4.4 **Payment:** Provided that a valid tax invoice is received by the

Customer, payment shall be made by the 20th day of the month following the month in which the invoice is received. The Customer is entitled to deduct any applicable withholding tax where required by law, and shall not be required to gross up the Supplier for such tax.

4.5 **Disputed Invoices:** If the Customer disputes any portion of any amount appearing as payable on any invoice issued to it under these Terms:

- (a) the Customer shall notify the Supplier in writing;
- (b) the undisputed portion of that invoice shall remain payable on the relevant due date, determined in accordance with these Terms.
- (c) the Customer shall not be obliged to pay the disputed portion of the invoice until the dispute has been resolved by agreement between the parties or in the absence of such agreement being reached within 10 Business Days after the dispute is first notified pursuant to this clause, until the dispute is determined pursuant to clause 24.

4.6 **Set Off:** Without limiting any other rights or remedies the Customer may have, the Customer is entitled to deduct from, or set off against, any amount that is or may become payable by the Customer in relation to these Terms to the Supplier, and/or any amount that is or may become payable to the Customer by the Supplier in relation to this or any other agreement.

4.7 The Supplier acknowledges that the Customer is not obliged to pay for any Products or Services for which no Purchase Order Number has been issued.

5. SUPPLIER'S GENERAL OBLIGATIONS

5.1 **Provision of Products and/or Services:** The Supplier will provide the Products and/or Services to the Customer, or such of the Customer's related or associated companies as directed by the Customer, in accordance with these Terms. In the event that the Products and/or Services are to be provided to a related or associated company of the Customer, the parties agree that the provisions of these Terms are also for the benefit of, and are intended to be enforceable by, such related or associated company under the Contracts and Commercial Law Act 2017 Part 2 Subpart 1.

5.2 **Standard of Services:** The Supplier will, and will ensure that its employees, agents and Sub-Contractors (if any), perform the Services in a proper, professional and workmanlike manner and in accordance with the Performance Standards.

5.3 **Reliance:** The Supplier acknowledges that the Customer is relying on the expertise of the Supplier in providing the Services.

5.4 **Specified service supplier:** The Customer reserves the right to stipulate that the Services (or any part thereof) will be provided by a specific service supplier, being an employee, Sub-Contractor or principal of the Supplier. If the Customer specifies a service Supplier, it will be a fundamental term of these Terms that the specified service Supplier carries out the Services, and the Supplier will not attempt to carry out or perform the Services through or using any other principal, Sub-Contractor or employee without the prior written consent of the Customer.

5.5 **Degree of care and skill:** In addition to performing the Services in accordance with the Performance Standards, the Supplier will exercise, and will ensure that its employees, agents and Sub-Contractors (if any) exercise, that degree of care, skill, diligence and foresight in performing its obligations under these Terms which would reasonably and ordinarily be expected from a skilled and experienced operator in the Supplier's profession or industry.

5.6 **Provision and maintenance:** Unless otherwise agreed to

in writing by the Customer, the Supplier will, at its own cost and expense, provide the labour and provide and maintain any equipment and materials as may be necessary for the Supplier to carry out and perform its obligations in accordance with the terms of these Terms.

5.7 **General:** The Supplier shall at all times:

- (a) ensure that it and any Sub-Contractor of the Supplier, including all workers of the Supplier or Sub-Contractor shall comply with all relevant legislation, industry codes of practice and regulations, including without limitation, the Civil Aviation Act 1990, the Resource Management Act 1991, the Hazardous Substances and New Organisms Act 1996, and the Health and Safety At Work Act 2015.
- (b) obtain and maintain at its own cost, any and all licences, consents, authorisations and approvals necessary to lawfully provide the Products or Services to the Customer;
- (c) be responsible for ensuring that its Sub-Contractors have all licences, consents, authorisations and approvals necessary to deliver the Products or provide the Services and that all employees, employed or engaged by the Sub-Contractors have all the necessary licences, consents, authorisations and approvals that they require in relation to the delivery of the Products or the provision of the Services;
- (d) be available and ensure that any employee or Sub-Contractor is available, for such periods at such times and in such places as required to:
 - (i) assist with the delivery of the Products or the provision of the Services.
 - (ii) receive training on systems and procedures which the Supplier and/or any employee or Sub-Contractor must follow in order to meet the Suppliers obligations under these Terms; and
 - (iii) meet with the Customer on any matter in such forum as the Customer considers appropriate;
- (e) permit the Customer's representative, to inspect, test or examine (at any reasonable time) any item of plant, or equipment, (including a vehicle and its contents) of the Supplier or of any Sub-Contractor, upon such request being made;
- (f) ensure, that no employee or Sub-Contractor, while working for the Customer, or while at any Site, operates any vehicle (or other mobile plant) or is otherwise at the workplace while over any threshold values set out in AS/NZS4308:2008 relating to drugs or alcohol; and
- (g) notify the Customer immediately in the event that it receives any order or enforcement notice or similar (including without limitation under the Health and Safety at Work Act 2015 or their regulations).

5.8 Any act or omission by any employee or Sub-Contractor used for the delivery of the Products or the provision of the Services is deemed to be an act or omission of the Supplier and the Supplier shall take full responsibility for that act or omission.

5.9 **Employees, Sub-Contractors and agents:** The Supplier will ensure that all persons engaged by it in the performance of these Terms, whether as employees, Sub-Contractors, agents or otherwise, are appropriately skilled and qualified for the performance of the Services and hold all relevant certifications in respect of the performance of such Services.

5.10 **Interests of the Customer:** The Supplier will ensure that

it and all persons engaged by it in the performance of these Terms, whether as employees, agents, Sub-Contractors or otherwise, promote and advance the interests and reputation of the Customer and will not do anything that may harm, or is contrary to, the interests of the Customer.

5.11 **Timelines:** The Supplier will perform the Services with all due expedition and at the times and in the manner directed by the Customer from time to time.

5.12 **Notification of Problems:** The Supplier must advise the Customer promptly in writing:

- (a) of anything which may or is likely to materially reduce or affect the Supplier's ability to supply or deliver the Products or provide the Services, including anything relating to any premises or equipment used by the Supplier;
- (b) if the Supplier materially fails to comply with any of its obligations under these Terms;
- (c) of any serious complaints or disputes which directly or indirectly relate to the Products and/or the supply of Products; and
- (d) of any issues concerning Products that might have media or public interest.

6. DELIVERY AND RISK

6.1 **Delivery note:** A delivery note quoting the Purchase Order Number will accompany each supply of Products to the Customer, unless otherwise agreed by the parties.

6.2 **Timing of Product delivery:** The Supplier will deliver Products:

- (a) to the Customer by the Delivery Date. If no Delivery Date is specified, any Purchase Order Form sent to the Supplier before midday (12pm) on a working day, the Supplier shall deliver the Products on the following working day. If the Purchase Order is sent after midday (12pm), the Supplier shall use its best endeavours to complete the delivery of the Products on the following working day. If the Products cannot be delivered that following day, the Supplier shall deliver the Products on the next following working day;
- (b) to the Customer with all reasonable speed and due diligence; and
- (c) to the Delivery Destination.

6.3 **No acceptance:** The signing of a delivery note by a Customer representative will not be taken as acceptance of either the quality or quantity of the Products and acceptance by the Customer of the Products will be subject to subsequent inspection by the Customer's representative and use of the Products.

6.4 **Quantities:** Quantities of Products delivered must conform to the quantities ordered by the Customer.

6.5 **Part deliveries:** The Customer will only accept part deliveries and interim invoices if agreed to in writing prior to delivery.

6.6 **Incorrect deliveries:** The Customer may return any Products incorrectly delivered. The cost of return freight is payable by the Supplier.

6.7 **Risk:** Risk in any Products and unencumbered title in any Products will pass to the Customer upon signing of the delivery note accompanying the Products or if the parties have agreed that a delivery note will not accompany the Products.

7. PACKAGING

7.1 **Packaging:** The Supplier will package Products in an appropriate manner having regard to the type of Products

and the method of transport used.

7.2 **Disposal of packaging:** On delivery of Products to the Customer, the Supplier will remove all packaging not required by the Customer and the Supplier will be responsible for the disposal of that packaging, at its cost.

8. NON-COMPLYING PRODUCTS

8.1 **Notice of recalls:** The Supplier must give the Customer written notice immediately if it:

- (a) is required for any reason to recall or modify all or any of the Products; or
- (b) becomes aware of any non-compliance that affects or has the potential to affect the safety of all or any of the Products.

8.2 **Consultation:** If any of the events referred to in clause 8.1 occur, the Supplier shall:

- (a) consult with the Customer; and
- (b) if required by the Customer, use its best endeavours to provide replacement Products to the Customer as soon as possible.

8.3 **Alternative products:** Notwithstanding clause 8.2, the Customer reserves its rights to purchase alternative products elsewhere and recover from the Supplier any difference between the Price and the actual cost of purchase of alternative products, if the cost of the alternative products is higher than the Price.

9. SITE COMPLIANCE AND EQUIPMENT

9.1 **Access to Site:** If access to any Site is necessary for the supply of Products and/or the provision of Services to the Customer in accordance with these Terms, the Customer will allow the Supplier access at reasonable times, as necessary for the supply of those Products and/or the provision of Services.

9.2 **Refusal to Site:** The Customer may at its complete and unfettered discretion, refuse the Supplier entry on to Site, including any employee, vehicle or Sub-Contractor, if it considers it unsafe to do so, or that the employee, vehicle or Sub-Contractor does not comply with the requirements of these Terms.

9.3 **General:** Where the Supplier has access to any Site, the Supplier will, and will ensure that its employees, agents and Sub-Contractors (if any), at all times comply with:

- (a) the Health and Safety Requirements; and
- (b) the relevant Site's security and, operational requirements, rules, policies and procedures, as notified by the Customer to the Supplier from time to time.

9.4 **Acknowledgement Form:** The Supplier shall sign, date and return to the Customer the Acknowledgement Form:

- (a) prior to the Supplier commencing to supply Products and/or provide Services to the Customer pursuant to these Terms; and
- (b) promptly upon receipt of updated Health and Safety Requirements notified by the Customer to the Supplier.

10. HEALTH AND SAFETY

10.1 **Responsibility:** The Supplier will be responsible for the health and safety performance of its employees, agents and Sub-Contractors.

10.2 **Warranties:** The Supplier hereby warrants that:

- (a) all the information the Supplier has provided to the

Customer regarding its health and safety policies and systems is true and correct;

- (b) its employees and Sub-Contractors will have successfully completed any specific training required before entering any Customer Site; and
- (c) any calibrated equipment is available for use, and the Supplier's employees and Sub-Contractors have been trained in its safe use prior to the Supplier commencing to supply Products and/or provide Services to the Customer pursuant to these Terms.

10.3 **Status of warranties:** The Supplier acknowledges that these warranties are essential to the Customer's decision to purchase Products and Services from the Supplier, and that if the Customer finds the Supplier is in breach of any of the warranties it may terminate these Terms immediately without notice.

10.4 **Health and Safety:** The Supplier shall take all reasonably practicable steps and do everything reasonably practicable to ensure the health and safety of its employees, Sub-Contractors and any other person involved in the delivery of the Products or the provision of Services by the Supplier.

10.5 **General:** Without limiting its obligations under the previous clause, the Supplier shall:

- (a) comply with the Health and Safety at Work Act 2015, and all Codes of Practice and guidance published by Worksafe NZ.
- (b) comply with the Health and Safety Requirements as amended by notification in writing to the Supplier from time to time;
- (c) notify the Customer of any reasonably foreseeable risks to health and safety of the Supplier's employees and Sub-Contractors, to the Customer employees or to any other person at any Site;
- (d) ensure that all its employees or Sub-Contractors who are providing Services are adequately trained and supervised in the safe use of all machinery, tools, processes, substances, protective clothing and other equipment that may be required to provide the Services;
- (e) notify the Customer as soon as possible following a "notifiable event" (as defined by the Health and Safety at Work Act 2015) or any lost time event or any medical treatment injury event, occurring at a Site or in the course of delivering the Products or providing the Services. Notification to the Customer under these Terms may be made by telephone or in writing (including by email or other electronic means), and must be given by the fastest possible means in the circumstances (but in any event not later than 24 hours after the event).

10.6 **Duty to consult, co-operate and co-ordinate:** The Supplier shall fully co-operate with:

- (a) the Customer and any other party as is necessary to ensure that all reasonably foreseeable risks to health and safety arising out of the delivery of Products or provision of Services to or at any Site are eliminated or adequately controlled. This includes attendance at and active participation in any meeting called for this purpose;
- (b) any monitoring or review by the Customer of the Suppliers health and safety systems;
- (c) any accident investigation, or incident review or duty-holder review carried out by the Customer;
- (d) any accident investigation, or incident review or duty-

holder review carried out by any third party on any Site if the accident or incident involves the Suppliers' employees or Sub-Contractors.

10.7 **Drug and alcohol testing:** The Customer may, at its option and at any time, require that any employee, Sub-Contractor or other person engaged by the Supplier in the delivery of the Products or provision of Services, undergoes drug and alcohol testing in a manner required by the Customer and that the results of such testing are immediately made available to the Customer. Without limiting the extent of this testing, the Customer may conduct random, post-incident, or reasonable cause testing for drugs or alcohol. The Customer may carry out the testing using its own employees or Sub-Contractors, or may require the Supplier to carry out the testing. Without limitation, the Customer may declare that any employee or Sub-Contractor is not to be engaged in the delivery of any Products or the provision of any Services and may withdraw its consent to any employee or Sub-Contractor where the Customer considers, acting reasonably, that the performance of that employee or Sub-Contractor is affected by drugs or alcohol. It is the Supplier's responsibility to ensure that the employment agreements and Sub-Contractor agreements of the relevant employees or Sub-Contractors contain provisions authorising drug and alcohol testing as required by these Terms.

10.8 **Other obligations:** The Supplier shall:

- (a) ensure that none of its employees or Sub-Contractors, and none of the employees of its Sub-Contractors, shall operate any Customer plant or equipment unless expressly authorised in writing by the Customer to operate that plant or equipment on that Site;
- (b) on or before the 5th working day of each month, provide to the Customer the hours worked for the Customer in the preceding month and a list of all incidents, accidents, near miss events or other health, safety or environmental reports as specified in the KPI's. To avoid doubt, this will be a single detailed list and will be in addition to reporting incidents or events as they happen (within 24 hours of the incident occurring); and
- (c) Notify the Customer of every occasion of any enforcement actions by Worksafe NZ or any other regulator relevant to these Terms.

11. ENVIRONMENTAL AND OTHER RISK MANAGEMENT

11.1 **Environmental risk mitigation:** To the extent the Products and/or Services to be supplied by the Supplier involve environmental or other risks, the Supplier will take all possible steps to minimise such risks.

11.2 Without limiting its obligations under any other provision of these Terms the Supplier shall:

- (a) comply with Environmental Law;
- (b) comply with the Environmental Requirements;
- (c) ensure that all its employees and Sub-Contractors who are providing Services are adequately trained and supervised.

12. WARRANTIES

12.1 **Product warranties:** The Supplier warrants to the Customer that:

- (a) clear title to all Products supplied by it will pass to the Customer at the time title passes;
- (b) ownership, possession, use or resale of any Products by the Customer will not infringe any proprietary or other intellectual property right or interest of any person;

- (c) all:
- (i) facts, information, representations and statements made or given to the Customer or its employees, agents, representatives or advisers by the Supplier's employees, agents and Sub-Contractors (if any) are true and accurate in all respects and there is no information or circumstance pertaining to the Products that has not been disclosed to the Customer; and
 - (ii) information published in whatever form but not given directly to the Customer or its employees, agents, representatives or advisers by the Supplier's employees, agents and sub- contractors (if any) is true, complete and accurate;
- (d) all Products supplied by the Supplier:
- (i) are of merchantable quality and are fit for their intended purpose;
 - (ii) comply in all respects with all applicable laws and standards both in New Zealand and overseas;
 - (iii) conform to the design, quality, quantity, configuration and description specified to the Customer and to the samples (if any) provided to the Customer;
 - (iv) are free from any defect (including any latent defect) in design, materials and workmanship and/or faults;
 - (v) are appropriately packed and shall be securely stored until completion of delivery and installation (if applicable) to minimise damage, deterioration and theft; and
 - (vi) are new and unused on delivery unless otherwise agreed with the Customer, and if a shelf life is applicable, at least 95% of that shelf life remains on delivery,
- and:
- (vii) it will ensure that the designer, manufacturer or supplier of the Products, so far as is reasonably practicable, ensured that the product, plant, substance, or structure is designed, manufactured, supplied, installed or commissioned to be without risks to the health and safety of persons in accordance with legislative requirements;
 - (viii) it will notify the Customer of all of the reasonably foreseeable hazards and risks associated with the Products or Services, including but without limiting legislative requirements, must provide all instructions, relating to the installation, commissioning, use, storage, handling, transportation, cleaning and maintenance of the Products or Services;
 - (ix) it will carry out, or arrange the carrying out of, any calculations, analysis, testing, or examination that may be necessary for the performance of the Products and Services to the standards requested by the Customer or by legislation and must ensure that the Products and Services are fit for the purpose for which they were intended and are able to be used in a workplace without risk;
 - (x) the manufacturer will give to each person to whom the manufacturer provides the plant, substance, or structure adequate information concerning—
 - (A) each purpose for which the plant, substance, or structure was designed or manufactured; and
 - (B) the results of any calculations, analysis, testing, or examination referred to in subsection (ix), including, in relation to a substance, any hazardous properties of the substance identified by testing; and
 - (C) any conditions necessary to ensure that the plant, substance, or structure is without risks to health and safety when used for a purpose for which it was designed or manufactured or when carrying out any activity referred to in subsection 12.1(d); and
- (xi) it will carry out its obligations under these Terms with reasonable care, skill and diligence and will employ techniques of a high quality and standard and in accordance with best industry practices.
- 12.2 **Service warranties:** The Supplier will ensure, and warrants, that all of the Services performed under these Terms will comply strictly with the relevant Service Specifications and with all other terms of these Terms, and that such Services will be fit for the purpose intended by the Customer and will be performed in a proper, professional and workmanlike manner and in accordance with any Performance Standards.
- 12.3 **Warranties Additional:** The warranties set out in these Terms are additional to any other warranties and guarantees given by the Supplier or implied by law.
13. **WARRANTY CLAIMS**
- 13.1 **Remedy:** If the Customer notifies the Supplier in writing of a breach of warranty, the Supplier shall, at its expense, promptly remedy each claim to the Customer's satisfaction.
- 13.2 **Failure to remedy:** If the Supplier fails to promptly remedy a warranty claim or if the Customer determines that an urgent or other situation so justifies, the Customer may itself or via a third party, remedy the breach and recover the cost of doing so from the Supplier.
- 13.3 **Report:** Upon request, the Supplier shall promptly, at its own cost, supply the Customer with a report describing the work carried out in the remediation or rectification of any warranty claim.
14. **THIRD PARTY WARRANTIES**
- 14.1 **Third party:** The Supplier will pass to the Customer, or if the Supplier is unable to do so will hold for the Customer's benefit, all warranties provided by third parties in respect of any Products supplied by a third party.
- 14.2 **Third party claims:** If the Supplier is unable to pass a third party warranty to the Customer, the Supplier shall be responsible for making all or any warranty claims on any Products supplied by third parties to the Customer at no cost to the Customer.
15. **LIABILITY AND INSURANCE**
- 15.1 **Supplier's indemnity:** In addition to the indemnity contained in clause 17.7, the Supplier agrees to indemnify the Customer for any liability incurred by the Customer in respect of any loss, cost, expense, or action, suit, claim, demand, cost or expense (including, without limitation, damage to property, plant or equipment) arising as a direct or indirect result of any act or omission by the Supplier or the Supplier's employees, agents or Sub-Contractors in breach of any warranty or obligation under these Terms,

any legislation, regulation, bylaw, code or standard or out of or referable to any damage, injury or loss caused by or resulting from any willful act, omission or negligence or recklessness of the Supplier or its employees, agents or sub-contractors.

- 15.2 **Insurances:** The Supplier will carry the insurances required by the Customer from time to time. In each case, the insured sum will be not less than the following:

Insurance	Amount that may be paid out arising out of one single accident or event:
Public Liability insurance	\$1,000,000 for Services including non-critical plant and operations; or \$10,000,000 if Services relate to critical plant
Motor Vehicle Third Party insurance	\$5,000,000
Professional Indemnity insurance	\$2,000,000

- 15.3 **Evidence of insurances:** The Supplier will (on request by the Customer) provide evidence of the insurances required pursuant to clause 15.2 in a form satisfactory to the Customer.

- 15.4 **The Customer's Limited Liability:** Except to the extent of direct damage or loss to the Supplier caused by a breach of these Terms by the Customer and to the extent allowed by law, the Customer has no liability (in contract, tort, or equity, including negligence) to the Supplier or any other person in respect of these Terms.

16. CONFIDENTIAL INFORMATION

- 16.1 **Confidentiality:** Except as required by law or by the rules of any applicable stock exchange, the Supplier will ensure that neither they nor any of their employees, agents or Sub-Contractors will, during or after the term of these Terms, make any announcement or disclosure as to the subject matter or any of the terms of these Terms, or use, exploit or disclose to any person any Confidential Information supplied directly or indirectly by the Customer or any of its related or associated companies, or otherwise acquired by the Supplier pursuant to these Terms, without the prior written consent of the Customer.

17. INTELLECTUAL PROPERTY

- 17.1 **Licences and Authorisations:** Where any licence or any other authorisation from any person is required to own, possess, use or resell any Products, the Supplier must inform the Customer of the requirements prior to the supply of any Products and:

- if the Customer is not prepared to accept those requirements, then the Customer may terminate these Terms without any compensation to the Supplier and the Supplier shall refund any amount paid under these Terms to the Customer; or
- at the Customer's request, the Supplier will, within the Price, procure an irrevocable licence (on a no-cost non-exclusive and transferable basis) for the Customer to own, possess, use and resell any Products on an unrestricted basis.

- 17.2 **Current Intellectual Property:** Any intellectual property (including, without limitation, all rights to, and any interests in, any patent, design, trade mark, copyright, know-how, trade secret and any other proprietary right or form of intellectual property (whether protectable, by registration or not), customer list, agency agreement, purchase agreement, specification, formula, drawing, programme,

design, system, process, logo, mark, or style) ("**Intellectual Property**") which is not developed under these Terms but which is used for the purposes of these Terms ("**Current Intellectual Property**"), will remain the property of its current owner.

- 17.3 **Modifications and additions:** Intellectual Property, including any modification or addition to Current Intellectual Property, which is created, made or discovered by the Supplier in the course of the Supplier designing or producing any Products specifically for the Customer, or providing the Services to the Customer, will be disclosed to the Customer and will be the absolute property of the Customer without the need for any party to execute any further document, provided that nothing in this clause will vest in the Customer any proprietary rights in, or prevent the Supplier from using, either for the Customer or any other customer, any techniques, knowledge, information, practices or codes which are:

- generic in nature and were known to the Supplier prior to the supply of Products; or
- developed by the Supplier during the term of the supply and relate to standard practices adopted within the Supplier's profession or industry.

- 17.4 **Applications and instruments required:** The Supplier, if and whenever required to do so (whether during or after termination of these Terms), will at the expense of the Customer apply or join in applying for letters patent, registration, filing or other similar protection in New Zealand or any other part of the world for any such invention, improvement, design, process, system, copyright or proprietary works created, made or discovered and execute all instruments and deal with things necessary for vesting the relevant letters patent or other similar protection being obtained and all right, title and interest in and to the same in the Customer absolutely and as sole legal and beneficial owner.

- 17.5 **Attorney:** The Supplier irrevocably appoints the Customer as its attorney with full power to act in the name and on its behalf in fulfilling all of the matters set out in clause 17.3 as fully and effectively as the Supplier, as appropriate, could do personally.

- 17.6 **No transfer:** The parties agree that except as is expressly provided for in these Terms, use by one party of Intellectual Property provided by the other party pursuant to these Terms will not transfer any right, title or interest therein.

- 17.7 **Indemnity:** The Supplier agrees to indemnify the Customer against all liability, loss, damages, expenses, fees and costs arising out of any claim, settlement or proceedings brought by any third party against the Customer where use or development of any Intellectual Property constitutes an infringement of copyright or any other Intellectual Property rights of a third party.

18. RELATIONSHIP

- 18.1 **Independent Contractor:** The Supplier acknowledges that it is an independent contractor to the Customer and nothing in these Terms may be construed to make a party a partner, servant, agent, employer or employee of the other.

- 18.2 **Representations:** The Supplier acknowledges that, except to the extent otherwise expressly provided in these Terms, it has no right or authority to assume or create any obligations of any kind or to make any representations or warranties, whether express or implied, for or on behalf of the Customer or to bind the Customer in any respect.

19. TAXATION

- 19.1 **GST and other taxes and duties:** any rates of remuneration specified are exclusive of GST and all other taxes or duties levied or assessed in connection with the supply of the Products and/or Services, unless otherwise expressly stated. The Customer will pay to the Supplier any GST payable in respect of remuneration paid or payable to

the Supplier.

- 19.2 **Supplier's outgoings and liabilities:** The Supplier will be wholly responsible for the Supplier's own outgoings and liabilities including, but not limited to, income tax, GST and Accident Rehabilitation and Compensation Insurance Corporation premiums, payments and levies.

20. TERMINATION

- 20.1 **General rights of termination:** Without prejudice to any other right or remedy it may have, whether under these Terms, under statute or otherwise, either the Customer or the Supplier may terminate these Terms by written notice to the other party if:

- (a) the other party breaches any material obligation of that party under these Terms and;
 - (i) the breach is not capable of being remedied; or
 - (ii) the breach is capable of being remedied and the defaulting party fails to remedy the breach to the non-defaulting party's satisfaction within 14 days after notice in writing has been given to the defaulting party requiring such breach to be remedied; or
- (b) an Insolvency Event occurs in respect of the other party.

For the avoidance of doubt, the Supplier acknowledges that each of any Performance Standards constitutes a material obligation of the Supplier for the purposes of this Agreement.

- 20.2 **Termination where Products and/or Services no longer required:** Unless otherwise agreed to in writing by the Customer, the Customer may terminate these Terms by giving one month's prior written notice to the Supplier, if it no longer requires the relevant Products and/or Services.

- 20.3 **Return of information:** Unless otherwise agreed to in writing by the Customer, on termination of these Terms, the Supplier will immediately deliver all books, records, software, documents, plans, letters, papers and other material of any description and in every format whether written, contained on magnetic tape, disc or stored in any computer or otherwise which relate to the Customer or any related or associated company of the Customer (including all copies of or extracts from the same within the Supplier's possession or control relating to the business, affairs, property, customers, clients, suppliers or principals of the Customer or any related or associated company of the Customer) and in respect of computer records, the Supplier will delete all such records held by the Supplier on any computer system after delivering a legible written copy or machine-readable disc of such records to the Customer.

- 20.4 **Survival:** Termination of these Terms will not affect clauses 13, 14, 15, 16, 17, 22, 23, 24 or 25, or any other provisions of these Terms which are intended to continue after termination and will also be without prejudice to any claim by any party against any other party arising out of any breach or non-performance by a party of any obligations assumed by or imposed on that party under these Terms at any time prior to termination.

- 20.5 **Other termination rights:** The rights of termination provided for in this section 20 are in addition to the rights of termination provided for in clauses 1.1(a) and 21.2 and clause 2.1.

- 20.6 **Fraud by Supplier:** The Customer shall be entitled, by giving written notice to the Supplier, to immediately suspend or terminate these Terms (or part of it) if the Supplier in the reasonable opinion of the Customer has or may have carried on any fraudulent activity with respect to the Products and/or Services being provided under these Terms.

- 20.7 **Additional Rights of the Customer:** Without prejudice to any other right or remedy it may have, whether under these

Terms, under statute or otherwise, where:

- (a) any Products:
 - (i) are not delivered by the Delivery Date or to the Delivery Destination (subject to clause 3.3 and 6.2);
 - (ii) fail to comply with the requirements of these Terms or the Sale of Goods Act 1908;
 - (iii) are destroyed or damaged prior to acceptance by the Customer; or
- (b) any warranty claim is not promptly dealt with by the Supplier,

the Customer may exercise any of the following rights:

- (a) withhold any payment otherwise due to the Supplier until the matter is resolved to the Customer's satisfaction.
- (b) return to the Supplier any Products already delivered, at the Supplier's risk and expense. If Products are returned to the Supplier, the Customer:
 - (i) will no longer be obliged to pay for them; or
 - (ii) if paid for, shall receive a refund (without any deduction) from the Supplier or may set-off the amount paid against any amount the Customer may owe the Supplier;
- (c) suspend (in whole or in part) these Terms immediately by written notice to the Supplier;
- (d) purchase alternative products elsewhere and recover from the Supplier any difference between the Price and the actual cost of purchase of alternative products, if the cost of the alternative products is higher than the Price.

21. FORCE MAJEURE

- 21.1 **Obligations suspended:** Where either the Customer or the Supplier is unable, wholly or in part, by reason of a Force Majeure Event, to carry out any obligation under these Terms and:

- (a) that party (upon becoming aware of the Force Majeure Event) gives the other party immediate written notice of the nature and expected duration of, and the obligation affected by, the Force Majeure Event; and
- (b) that party uses all reasonable endeavours to:
 - (i) mitigate the effects of the Force Majeure Event on that party's obligations under these Terms; and
 - (ii) perform that party's obligations under these Terms despite the Force Majeure Event,

that obligation is suspended so far as it is affected by the Force Majeure Event during its continuance.

- 21.2 **Termination:** If by reason of a Force Majeure Event, the delay or non-performance of either the Customer's or the Supplier's obligations will continue for more than 20 consecutive days, or for an aggregate of 20 days in any 12 month period, whichever of the Customer or the Supplier who is not relying on the Force Majeure Event, may terminate these Terms by written notice to the other party and the Guarantor.

22. NOTICES

- 22.1 **Service:** Every notice or other communication given under or in connection with these Terms will be in writing and addressed to the relevant party and delivered personally,

posted by pre-paid mail or sent by facsimile to the address as is notified by that party to the other parties.

22.2 **Receipt:** Notices or other communications are deemed served:

- (a) when given personally, upon delivery;
- (b) when sent by prepaid mail, three days after posting; and
- (c) when sent by e mail to an agreed Customer address,.

23. ASSIGNMENT AND SUB-CONTRACTING

23.1 **No assignment or sub-contracting:** The Supplier may not assign or sub-contract any of its rights or obligations under these Terms, except with the prior written consent of the Customer. If the Customer consents to an assignment or sub-contracting by the Supplier pursuant to this clause, the Supplier must comply with any reasonable conditions the Customer imposes as part of that consent.

23.2 **Continuation of services:** The Supplier acknowledges that approval of a new contractor or a Sub-Contractor by the Customer may not be immediate and that pending approval the supplier must continue to provide the Services. The Customer reserves the right to engage another Supplier to provide the Services if the Supplier fails to do so and the Supplier shall upon demand reimburse the Customer for any costs it incurs. This clause does not limit any other claims the Customer may have under these Terms or otherwise.

23.3 **Consent to assignment:** Consent to assignment of these Terms will not be unreasonably withheld, except that the Customer is entitled to withhold its consent in the case of an assignment or proposed assignment to any person which is a competitor of the Customer. The restriction in this clause does not apply to permitted sub-contracting to an approved Sub-Contractor.

23.4 **Supplier's obligations continue:** The assignment or sub-contracting by the Supplier of any of its rights or obligations under these Terms in whole or in part will not relieve the Supplier in any way whatsoever from its responsibility for due performance of these Terms in accordance with its terms and conditions.

24. DISPUTE RESOLUTION

24.1 Any difference, disagreement or dispute between the parties in relation to these Terms or any of their terms or as to any of the parties respective obligations under these Terms shall be dealt with in accordance with this clause 24.

24.2 In the first instance the dispute shall be referred to a meeting between the Relationship Managers of the parties which shall be held within 10 Business Days. If that meeting cannot resolve the dispute within that time period the dispute shall be escalated to a meeting of the Chief Executives of the Supplier and the Customer, or their delegates (who shall have authority from the Chief Executive to resolve the dispute), such meeting to be held within a further 10 Business Days.

24.3 If the meeting of Chief Executives or their delegates cannot resolve the dispute within a further 5 Business Days, either party shall be free to take such action as it sees fit, including the commencement of court proceedings.

24.4 Nothing in this clause 24 applies to any dispute arising in connection with any attempted renegotiation of these Terms or an application by either party for urgent interlocutory relief.

24.5 **Interim or preliminary relief:** The provisions of clause 24.1 will not limit or affect the right of the Customer, the Supplier or any Guarantor to apply to a court at any time for any interim or preliminary relief in respect of the Dispute.

25. KEY PERFORMANCE INDICATORS

25.1 This clause 25 applies only if there are KPIs. The Supplier acknowledges that the KPIs have the following purposes:

- (a) enabling the Customer to measure the productivity, effectiveness, health, safety and efficiency in relation to the Supplier's performance; and
- (b) setting performance targets for the Supplier, the achievement of which will assist to ensure that the Customer meets its obligations to its customers and at law.

25.2 The KPIs will be measured in accordance with any reporting and review requirements agreed between the Customer and Supplier.

25.3 The Supplier shall promptly notify the Customer of any failure by the Supplier to meet any KPIs.

25.4 Without limitation to any other rights or remedies of the Customer under these Terms, the following shall apply if the Supplier fails to achieve any KPIs:

- (a) within 10 Business Days of the date on which either party notifies the other of a failure by the Supplier to meet any KPI, the Customer may, by written notice, require the Supplier to attend a meeting with the Customer on a date and at a location nominated by the Customer; and
- (b) at that meeting, the parties shall:
 - (i) each ensure that it is represented by a person with sufficient authority to bind that party in the manner contemplated in this clause;
 - (ii) discuss the reasons for the Suppliers failure to achieve the KPIs;
 - (iii) use their reasonable endeavours to agree on the remedial actions that the Supplier shall take to ensure that it is able to meet the KPIs; and
 - (iv) minute the meeting and each sign a copy of those minutes as an agreed record of the meeting.

25.5 Without limitation to any other rights or remedies of the Customer under these Terms, if the Supplier fails to comply with its obligations to meet any of the KPIs on a total of at least three occasions (whenever occurring and irrespective of which KPIs the Supplier has failed to comply with on each occasion) and the Customer has requested the Supplier to attend a meeting for the purposes of clause 1.1(a) in respect of at least two failures occurring prior to the third or later failure, the Supplier shall be deemed to have committed a breach of the Terms entitling the Customer to terminate these Terms under clause 1.1(a)(i) and 1.1(b).

25.6 Without limiting any rights or obligations of the Customer in relation to the KPIs, the Supplier and the Customer will review performance under these Terms on a quarterly basis against the KPIs and discuss any areas of improvement required.