

Electrical Manufactured Solutions Limited – Terms and Conditions of Sale – January 2007

1. Definitions

1.1 In these Terms and Conditions the following words and expressions shall have the following meanings:

Buyer: the person, firm or company referred to as "the Buyer" in the Particulars of Contract.

Company: Electrical Manufactured Solutions Limited.

Contract: the Terms and Conditions set out herein together with the Particulars of Contract.

"Ex Works" Incoterms: the terms as defined by the International Chamber of Commerce Guide to Incoterms 2000 except that where there is any discrepancy between these Terms and Conditions and Ex Works Incoterms, these Terms and Conditions shall apply.

Goods: the quantity and description of items set out in the Particulars of Contract.

Particulars of Contract: the particulars set out on the Company's acknowledgement of order forms.

2. Construction of Contract

2.1 These Terms and Conditions alone (as varied in accordance with condition 2.2) shall govern and be incorporated in every contract for the supply of goods and services made by or on behalf of the Company with the Buyer. They shall apply in place of and prevail over any terms and conditions (whether or not in conflict or inconsistent with these conditions) contained or referred to in any documentation submitted by the Buyer or in any correspondence or elsewhere or implied by trade, custom, practice or course of dealing.

2.2 No variation exclusion or addition to these conditions shall be effective unless expressly stated in any written contract between the parties or otherwise agreed in writing and signed on behalf of the Company by a director or other authorised person. In the event of variation or suspension of supply of goods following the Buyer's instructions, the contract price shall be adjusted accordingly.

2.3 No servant or agent of the Company has any authority to make any representations or give any warranty in relation to the Goods or materials to be used, or to agree to any variation, exclusion or addition to these conditions unless such representation, warranty, variation, exclusion or addition is expressed in writing and authorised in accordance with condition 2.2.

2.4 These Terms and Conditions together with the Particulars of Contract and any document referred to in these Terms and Conditions represent the entire agreement between the parties in relation to the sale of Goods and supersede all previous correspondence, discussions and negotiations. In entering into this agreement the Buyer acknowledges that it does not rely on any representation, advice or recommendations (whether negligent or innocent) made before or on entering into the Contract, save for any representation, advice or recommendations made or given fraudulently.

2.5 These conditions contain exclusion, indemnity and exemption clauses and the Buyer agrees that they are fair and reasonable in all the circumstances of the Contract between the parties.

2.6 A tender or quotation of the Company shall constitute only an invitation for an order subject to these Terms and Conditions and no contract shall result until the order is confirmed in an acknowledgement of order by the Company.

2.7 Each order for Goods by the Buyer from the Company is deemed to be an offer by the Buyer to purchase Goods subject to these Terms and Conditions.

2.8 The Buyer must ensure that the terms of its order and any applicable specification are complete and accurate.

3. Property and risk

3.1 The risk in the Goods shall pass to the Buyer as soon as the Goods leave the Company's premises.

3.2 Notwithstanding delivery and the passing of risk, the Goods remain the property of the Company in full until the Buyer pays the Company in full the price in cash or cleared funds in accordance with condition 4 (together with any accrued interest), and all other amounts owed by the Buyer to the Company in respect of any other contract.

3.3 Notwithstanding any purported contrary appropriation by the Buyer, all payments made by the Buyer to the Company shall be appropriated first to the Goods which have been used/re-sold by the Buyer and then to Goods which remain in the possession or under the control of the Buyer.

3.4 Until ownership of the Goods passes to the Buyer, the Buyer must:

3.4.1 hold the Goods on a fiduciary basis as the Company's bailee;

3.4.2 store the Goods (at no cost to the Company) separately from all other goods of the Buyer or any third party in such a way that they remain readily identifiable as the Company's property;

3.4.3 not destroy, deface or obscure any identifying mark or packaging on or relating to the Goods;

3.4.4 maintain the Goods in satisfactory condition and keep them insured on the Company's behalf for their full price against all risks to the reasonable satisfaction of the Company. On request the Buyer must produce the policy of insurance to the Company; and

3.4.5 hold the proceeds of the insurance on trust for the Company and not mix them with any other money or pay the proceeds into an overdrawn bank account.

3.5 The Buyer's right to possession of the Goods terminates immediately if:

3.5.1 the Buyer convenes a meeting of its creditors (whether formal or informal);

3.5.2 the Buyer enters into liquidation (whether voluntary or compulsory) except a solvent voluntary liquidation for the purpose only of reconstruction or amalgamation;

3.5.3 the Buyer has a receiver and/or manager, administrator or administrative receiver appointed of its undertaking or any part of it;

3.5.4 documents are filed with the court for the appointment of an administrator of the Buyer;

3.5.5 notice of intention to appoint an administrator is given by the Buyer or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of schedule B1 to the Insolvency Act 1986);

3.5.6 a resolution is passed or a petition presented to any court for the winding up of the Buyer or for the granting of an administration order in respect of the Buyer;

3.5.7 any proceedings are commenced relating to the insolvency or possible insolvency of the Buyer;

3.5.8 the Buyer suffers or allows any execution, whether legal or equitable, to be levied on its property or obtained against it or fails to observe or perform any of its obligations under the Contract or any other contract between the Company and the Buyer;

3.5.9 the Buyer is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or ceases to trade; or

3.5.10 the Buyer encumbers or in any way charges any of the Goods.

3.6 The Company reserves the right to repossess and resell any of the Goods to which it has retained title and the Buyer hereby grants an irrevocable right and licence to the Company and its employees and the agents to enter any premises where the Goods may be situated in order to repossess any Goods.

4. Payment

4.1 The price for the Goods shall be as stated on the Particulars of Contract.

4.2 Prices are exclusive of Value Added Tax which shall be an additional liability of the Buyer.

4.3 Unless otherwise expressly provided in the Contract, prices are "Ex-Works" Incoterms.

4.4 The Company shall be entitled to increase the price by the amount of any increase in input or other duties or in the cost of materials, labour or transport by the amount of any increase in the cost of such items between the date of acknowledgement of order and the date of delivery.

4.5 Prices are inclusive of the Company's standard packaging. The Company retains the right to use additional packing materials where the Company at its sole discretion believes these to be necessary which cost shall be additionally payable by the Buyer.

4.6 Unless otherwise agreed in writing, invoices shall be payable by the Buyer within 30 days of their date subject to any requirement of the Company specified in or prior to the Contract requiring the payment of an advance deposit or that the Goods will be supplied only against pro forma invoice. The Buyer will be notified of any discount which may be applicable.

4.7 The Buyer shall pay interest on all overdue amounts at the rate of 3% over the base lending rate of Lloyds TSB Bank Plc from time to time to accrue on a daily basis, from the payment date until receipt by the Company of the full amount (including any accrued interest) as cleared funds whether before or after judgment. Any monies received by the Company after the payment date may (notwithstanding any contrary stipulation by the Buyer) be applied by the Company towards payment of any interest accrued.

4.8 All payments to the Company under the Contract become payable immediately upon its termination despite any other provision.

5. Default in payment

5.1 If the Buyer cancels any order prior to delivery other than as a result of the failure of the Company to meet such order in accordance with these Terms and Conditions (subject to condition 11) the Buyer shall be liable to the Company for the price of the order save to the extent that the Company is able to resell the Goods at the same price, plus any costs or expenses incurred by the Company in respect of that order.

5.2 If the Buyer commits any default or breach of its obligations set out in these Terms and Conditions or any of the events set out in condition 3.5 occur:

5.2.1 the Company shall immediately and without further notice be entitled to terminate all outstanding contracts with the Buyer, suspend further deliveries to the Buyer, stop Goods in transit and exercise the Company's rights under the condition 3.6; and

5.2.2 any indebtedness of the Buyer to the Company (including interest accrued and any costs or expenses incurred by the Company pursuant to condition 5.1) shall immediately become due and payable.

5.3 The Company's rights and remedies contained in these Terms and Conditions are cumulative and not exclusive of any rights or remedies provided by law.

6. Delivery

6.1 Delivery of the Goods shall be "Ex-Works" Incoterms and the risk in the Goods shall pass in accordance with condition 3.1.

6.2 The Company may at its discretion agree to load the Goods and to supply them by its standard method free of charge provided that the risk passes to the Buyer as soon as the Goods leave the Company's premises or manufacturing site. Any express or next day supply shall be at the cost of the Buyer and the risk shall pass in accordance with condition 3.1.

6.3 The Company has the right in its absolute discretion to make part or instalment delivery and to invoice such instalments separately. Each part or instalment shall be treated as a separate contract for all purposes of these conditions.

6.4 Dates or periods for delivery stated in the Contract are approximate and time of delivery is not and shall not be made of the essence by notice, though the Company will make all reasonable endeavours to comply therewith. The Company's obligations to deliver shall at all times be subject to the prompt receipt of all specifications, final approved prints and any other details, drawings, documents or information essential to the proper execution of the Contract.

6.5 The Buyer may not claim for shortage in any Goods unless notified to the Company within two working days of the Buyer becoming aware of the shortage and in any case within 14 days of supply or collection on behalf of the Buyer, as the case may be.

6.6 Where the Company has arranged for supply of the Goods the Buyer may not claim for any damage caused in transit unless notified to the Company within two working days of the Buyer becoming aware of the damage and in any case within 14 days of supply.

6.7 Any liability of the Company for shortage in supply or damage in transit shall be subject to the Company being reasonably satisfied that such shortage or damage has occurred.

6.8 If the Buyer does notify the Company of a shortage, in accordance with condition 6.5 above, and the Company is reasonably satisfied that such shortage has occurred, the Buyer may not reject the Goods and the breach is to be treated as a breach of warranty.

6.9 Subject to these conditions the Company is not liable for any direct, indirect or consequential loss (all three of which terms include, without limitation, loss of profits, loss of business and depletion of goodwill) costs, damages, charges or expenses caused directly or indirectly by any delay in the delivery of the Goods (even if caused by the Company's negligence) or any non delivery of the Goods for any cause whatsoever outside the Company's complete control.

6.10 The Company may by notice in writing:

6.10.1 extend the period for its performance of the Contract by specifying a reasonable additional period for performance; or

6.10.2 cancel the Contract to the extent that it is unfulfilled or production and/or delivery is delayed by more than three months as a result of technical changes introduced by the Buyer to the Goods or in the event that the Buyer fails to provide information in writing on quantity, quality, description and any specification of the Goods within seven days of service of a written notice by the Company on the Buyer requiring delivery of such information. In the event that the Company elects to terminate the Contract, then the Company shall be entitled to receive payment for the Goods of an amount equal to the cost of such Goods together with a profit margin which is equivalent as a percentage over cost to the Company to that percentage over cost to which it would have been entitled as a percentage of cost on the overall Contract had it been completed. The determination of such shall be made by the Company and shall be final and binding on the Buyer as amount due by the Buyer to the Company upon termination in respect of Goods supplied under the Contract.

6.11 The Company may at its discretion agree to the return by the Buyer of the Goods provided that:

6.11.1 unless otherwise agreed in writing, the Company shall make a handling charge of 25 per cent. of the invoice value of the Goods; and

6.11.2 the Goods are less than 18 months old as shown on the production date stamp on the product and/or packaging; and

6.11.3 the Goods are returned in their original packaging and are in a re-salable condition.

6.12 The Buyer shall have accepted the Goods when he intimates to the Company that he has accepted them or when the Goods have been delivered and he does any act in relation to them which is inconsistent with the ownership of the Company, even though title in the Goods has not yet passed, regardless of whether or not he has actually accepted the Goods.

6.13 Delay in the delivery of the Goods does not entitle the Buyer to terminate or rescind the Contract. Samples

6.14 Where a Company provides the Buyer with samples of Goods then the following conditions shall apply:

6.14.1 subject to condition 6.14.3 these Terms and Conditions of sale shall not apply to the samples in the Buyer's possession;

6.14.2 the samples shall, if not purchased by the Buyer, be returned to the Company within one month of the date of supply; and

6.14.3 if the Buyer fails to return the samples in accordance with condition 6.14.2, the Company may invoice the Buyer for the full value of the samples which shall be payable in accordance with condition 4.6 and these Terms and Conditions shall apply in full.

6.15 Testing – The Company may at its sole discretion agree to undertake such performance tests on the Goods as the Buyer may request in writing.

Where the Company so agrees the following conditions shall apply:

6.15.1 all requests shall be in writing and in such sufficient detail so as to enable the Company to make a considered decision as to whether or not it will perform the tests;

6.15.2 the Buyer shall pay an additional sum to the Company for the performance of such tests;

6.15.3 the Buyer shall hold all test results in confidence and will not release them (or allow their release) to any third party;

6.15.4 such tests will be carried out as far as reasonably practicable in accordance with the Buyer's instructions;

6.15.5 any test results provided by the Company are for the Buyer's reference only and do not amount to a representation or warranty as to the nature, standard or quality of any Goods provided by the Company; and

6.15.6 all test results shall relate exclusively to the sample or samples tested in accordance with this condition 6.15, so that no undertaking is given by the Company in relation to products which are similar in size, standard and nature to those actually tested. If the Buyer makes payment in accordance with condition 6.15.1, the Company shall make available the test results within any time agreed.

7. Description

7.1 All descriptive specifications, drawings and particulars or weights and dimensions submitted with any tender or quotation of the Company are approximate only and the description and illustrations in the Company's catalogues, price lists and other advertising matter are intended merely to give a general idea of the Goods and shall not constitute any term of the Contract.

7.2 Performance figures stated in the Contract shall be subject to recognised tolerance and rejection limits.

8. Fitness for purpose and satisfactory quality

8.1 Except as set out in this condition 8, all conditions, warranties and representations, express or implied by statute, common law or otherwise, in relation to the Goods, are excluded.

8.2 The Company warrants to the original Buyer that (subject to conditions 8.3 to 8.5, inclusive, and 9) upon delivery, and for a period of 12 months from the date of delivery, the Goods will:

8.2.1 be of satisfactory quality within the meaning of the Sale of Goods Act 1984;

8.2.2 be reasonably fit for any particular purpose for which the Goods are being bought if, before delivery, the Buyer notifies that purpose to the Company in writing and the Company confirms in writing that it is reasonable for the Buyer to rely on the skill and judgement of the Company.

8.3 The Company is not liable for a breach of any of the warranties in condition 8.2 unless:

8.3.1 the Buyer gives written notice of the defective Goods to the Company within seven days of the time when the Buyer discovers or ought reasonably to have discovered the defect; and

8.3.2 the Company is given a reasonable opportunity after receiving the notice of examining such Goods and the Buyer (if asked to do so by the Company) returns such Goods to the Company's place of business at the Buyer's cost for the examination to take place there.

8.3.3 the actual applied voltage use in connection with the device is within the limits namely from 15% below to 6% above the normal voltage;

8.3.4 when applicable the Goods have been mounted in an enclosure of good quality which effectively excludes dust and moisture;

8.4 The Company is not liable for a breach of any of the warranties in condition 8.2 if:

8.4.1 the Buyer makes any further use of the Goods after giving notice under condition 8.3.1;

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

8.4.3 the Buyer alters or repairs such Goods without the written consent of the Company;

8.4.4 with regard to radio interference, unless otherwise agreed in writing, the Buyer has failed to apply any necessary suppression at the point of installation;

8.4.5 short circuit protection (either HRC fuses or circuit breakers) exceeds the maximum capacity called for in the Company's catalogue; or

8.4.6 contact welding has been caused by short circuit.

8.5 Any Goods alleged to be faulty shall be returned if so required by the Company at the Buyer's cost to such place in the United Kingdom as the Company may specify and if, subject to conditions 8.3 and 8.4, the alleged complaint is in the reasonable opinion of the Company justified the Company will refund such cost and will at its own cost and without further cost to the Buyer at its option either repair or replace the same and supply the repaired or substituted Goods to the Buyer whereupon the Company shall be under no further liability to the Buyer in respect of such Goods.

8.6 If the Company complies with condition 8.5 it has no further liability for a breach of any of the warranties in condition 8.2 in respect of any defective Goods.

9. Limitation of liability

9.1 The following provisions of condition 9 set out the entire financial liability of the Company (including any liability for the acts or omissions of its employees, agents and subcontractors) to the Buyer in respect of: 9.1.1 any breach of these Terms and Conditions; and 9.1.2 any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract.

9.2 All warranties, conditions and other terms implied by statute or common law (except the conditions implied by section 12 of the Sale of Goods Act 1979) are, to the fullest extent permitted by law, excluded from the Contract.

9.3 Nothing in these Terms and Conditions shall operate to exclude or restrict the Company's liability for death or personal injury resulting from the Company's negligence or other liability to the extent that such liability cannot, by law or otherwise be restricted or excluded.

9.4 Subject to conditions 9.2 and 9.3:

9.4.1 the Company's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Contract is limited to the Contract price; and

9.4.2 the Company is not liable to the Buyer for any pure economic loss, loss of profit, loss of business, depletion of goodwill or otherwise (in each case whether direct, indirect or consequential) or any claims for consequential compensation whatsoever and however caused which arise out of or in connection with the Contract.

10. Patents and trademarks etc.

10.1 The Buyer shall not remove from the Goods any imprint or insignia affixed upon it recording any patent, trademark, copyright or other intellectual property right applicable to it and all other copyrights, patents, design rights, trade marks and other intellectual property rights in the Goods (whether or not registered) shall remain the exclusive property of the Company, unless otherwise agreed in writing by the Company.

10.2 Any reference by the Company to patents, copyright, registered designs, trademarks and analogous forms of protection shall not constitute a warranty of the validity thereof.

10.3 In the event that Goods are manufactured or any process is applied to the Goods by the Company in accordance with a specification submitted by the Buyer, the Buyer shall indemnify the Company against all loss, damages, costs and expenses awarded against or incurred by the Company in connection with or paid or agreed to be paid by the Company in settlement of any claim for infringement of any patent, copyright, design, trademark or other industrial or intellectual property rights of any other person which results from the Company's use of the Buyer's specification.

10.4 In the event that the Buyer receives notice of any infringement of any patent, trademark, copyright or other intellectual property right of the Company the Buyer shall immediately notify the Company of the circumstances of the infringement.

11. Force majeure

11.1 The Company shall not be liable to the Buyer or deemed to be in breach of contract by reason of any delay in performing, or any failure to perform any of the Company's obligations in relation to the delivery of the Goods, if the delay or failure was due to any cause beyond the Company's reasonable control.

11.2 Without prejudice to the generality of the foregoing the following shall be regarded as causes beyond the Company's reasonable control:

11.2.1 acts of God, explosion, flood, fire, theft, accident or epidemic;

11.2.2 war or threat of war, sabotage, civil disturbance, requisition, national emergency or acts of terrorism;

11.2.3 acts, restrictions, regulations, byelaws, prohibitions or measures of any kind on the part of any Governmental or local authority;

11.2.4 import or export regulations or embargoes;

11.2.5 strikes, lockouts, shortened working hours or other industrial actions or trade disputes (whether involving employees of the Company or those of any subcontractor or of a third party);

11.2.6 difficulties in obtaining raw materials, labour, fuel, parts or machinery;

11.2.7 delays in transport, accidents, power failure or breakdown in machinery; and

11.2.8 delay in the supply to the Company of full, final and correct technical information reasonably required by the Company in order to perform the Contract.

12. Use of the Goods and maintenance of the Goods

12.1 Manufacturers, designers, importers or suppliers of articles for use at work have a duty to ensure, so far as is reasonably practicable, that the article will be safe and without risk when properly used. An article is not regarded as being "properly used" if it is used without regard to any relevant information or advice relating to its use made available by the manufacturer, designer, importer or supplier.

12.2 Having regard to these provisions, the following is given as a guide to the information which is readily available to the Buyer, in order that the obligations of all concerned may be met as fully as is reasonably practicable. This information relates to those products detailed in the Company's offer/catalogues or associated literature.

12.3 Information on the design, construction and installation of the Company's products, to ensure that so far as is reasonably practicable they are safe and without risk to health when properly used, may be found in:

12.3.1 relevant standards, specifications and codes of practice;

12.3.2 Regulations for Electrical Installations (published by the Institution of Electrical Engineers); and

12.3.3 catalogue and product leaflets of the Company. This information may be obtained by specific request to the Company.

12.4 It is important that the products concerned should be installed, commissioned, operated and maintained by or under the supervision of competent persons in accordance with good engineering practice and the relevant:

12.4.1 Regulations for Electrical Installations (published by the Institution of Electrical Engineers);

12.4.2 codes of practice;

12.4.3 statutory requirements; and

12.4.4 instructions specifically advised by the Company and, where appropriate, with particular reference to information marked on the product and/or supplied with the product.

12.5 The Buyer must take such steps as are necessary to ensure that any appropriate information relevant to the Company's products is made available by the Buyer to anyone concerned.

12.6 The Buyer shall ensure that the Goods supplied shall be maintained in accordance with the product information supplied by the Company and insofar as the Goods are resold the Buyer shall ensure that such information is received by all customers.

12.7 The Buyer shall inspect the Goods regularly and shall notify the Company upon becoming aware of or upon being notified of any defects, malfunction or deterioration in the state of the Goods.

13. General

13.1 Any notice required or authorised to be given hereunder shall be in writing and may be served by facsimile, electronic mail, or first class letter sent to the Company's address or any other address notified for the purpose and shall be deemed to be served in the case of a letter three days after proven despatch provided that any other mode of service shall be valid if the said notice or other communication is actually received by the addressee.

13.2 A failure to exercise or delay in exercising a right or remedy provided by these Terms and Conditions does not constitute a waiver of the right or remedy or a waiver of other rights or remedies. No single or partial exercise of the right or remedy provided by these Terms and Conditions or by law, prevents further exercise of the right or remedy or the exercise of another right or remedy.

13.3 The Buyer may not assign, transfer or subcontract or purport to assign, transfer or subcontract a right or obligation under these Terms and Conditions without the prior written approval of the Company.

13.4 If any part of these Terms and Conditions shall be held invalid or unenforceable, such determination shall not affect the validity or enforceability of any remaining portion, which shall remain in full force and effect as if the offending part had never been incorporated in these Terms and Conditions.

13.5 No persons other than the Buyer and the Company shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of any contract.

13.6 Each right or remedy of the Company under the Contract is without prejudice to any other right or remedy of the Company whether under the Contract or not.

13.7 These Terms and Conditions are governed by, and shall be construed in accordance with, English law and the English courts shall have exclusive jurisdiction as regards any dispute arising out of or in connection with these Terms and Conditions.