

Industrial & Farm Services Limited T/A Thinkwater Bay of Plenty – Terms & Conditions of Trade

1. **Definitions**
 - 1.1 "IFSL" shall mean Industrial & Farm Services Limited T/A Thinkwater Bay of Plenty, its successors or assigns or any person acting on behalf of and with the authority of Industrial & Farm Services Limited T/A Thinkwater Bay of Plenty.
 - 1.2 "Customer" shall mean the Customer (or any person acting on behalf of and with the authority of the Customer) as described on any quotation, work authorisation or other form as provided by IFSL to the Customer.
 - 1.3 "Guarantor" shall mean that person (or persons) who agrees to be liable for the debts of the Customer on a principal debtor basis.
 - 1.4 "Goods" shall mean all Goods supplied by IFSL to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined) and includes Goods described on any invoices, quotation, work authorisation or any other forms as provided by IFSL to the Customer.
 - 1.5 "Services" shall mean all services supplied by IFSL to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
 - 1.6 "Price" shall mean the price payable for the Goods as agreed between IFSL and the Customer in accordance with clause 4 of this contract.
2. **Consumer Guarantees Act 1993**
 - 2.1 If the Customer is acquiring Goods for the purposes of a trade or business, the Customer acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods by IFSL to the Customer.
3. **Acceptance**
 - 3.1 Any instructions received by IFSL from the Customer for the supply of Goods and/or the Customer's acceptance of Goods supplied by IFSL shall constitute acceptance of the terms and conditions contained herein.
 - 3.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
 - 3.3 Upon acceptance of these terms and conditions by the Customer the terms and conditions are binding and can only be amended with the written consent of IFSL.
 - 3.4 The Customer shall give IFSL not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer or any change in the Customer's name and/or any other change in the Customer's details (including but not limited to, changes in the Customer's address, facsimile number, or business practice). The Customer shall be liable for any loss incurred by IFSL as a result of the Customer's failure to comply with this clause.
 - 3.5 Goods are supplied by IFSL only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Customer's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
 - 3.6 Any advice, recommendation, information, assistance or service provided by IFSL in relation to Goods or Services supplied is given in good faith and as per the manufacturer's own advice, and as such shall be accepted without liability on the part of IFSL. Further, it shall be the responsibility of the Customer to confirm the accuracy and reliability of the same in light of the use to which the Customer makes or intends to make of the Goods or Services.
4. **Price and Payment**
 - 4.1 At IFSL's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by IFSL to the Customer in respect of Goods supplied; or
 - (b) IFSL's quoted Price (subject to clause 4.2) which shall be binding upon IFSL provided that the Customer shall accept IFSL's quotation in writing within thirty (30) days.
 - 4.2 IFSL reserves the right to change the Price in the event of a variation to IFSL's quotation. Any variation from the plan of scheduled Services or specifications of the Goods (including, but not limited to, any variation as a result of additional Services required due to unforeseen circumstances) will be charged for on the basis of IFSL's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
 - 4.3 IFSL may submit detailed progress payment claims in accordance with the specified payment schedule. Such payment claims may include the reasonable value of authorised variations and the value of any Goods delivered to the site but not yet installed.
 - 4.4 At IFSL's sole discretion payment shall be due before delivery of the Goods.
 - 4.5 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due twenty (20) days following the end of the month in which the invoice is dated.
 - 4.6 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Customer and IFSL.
 - 4.7 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.
5. **Delivery of the Goods**
 - 5.1 At IFSL's sole discretion delivery of the Goods shall take place when the Customer takes possession of the Goods at the Customer's nominated address (in the event that the Goods are delivered by IFSL or IFSL's nominated carrier).
 - 5.2 At IFSL's sole discretion the costs of delivery are in addition to the Price.
 - 5.3 The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Customer is unable to take delivery of the Goods as arranged then IFSL shall be entitled to charge a reasonable fee for redelivery.
 - 5.4 Delivery of the Goods to a third party nominated by the Customer is deemed to be delivery to the Customer for the purposes of this agreement.
 - 5.5 The failure of IFSL to deliver shall not entitle either party to treat this contract as repudiated.
 - 5.6 IFSL shall not be liable for any loss or damage whatsoever due to failure by IFSL to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of IFSL.
6. **Risk**
 - 6.1 If IFSL retains ownership of the Goods nonetheless, all risk for the Goods passes to the Customer on delivery.
 - 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, IFSL is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by IFSL is sufficient evidence of IFSL's rights to receive the insurance proceeds without the need for any person dealing with IFSL to make further enquiries.
7. **Title**
 - 7.1 IFSL and Customer agree that ownership of the Goods shall not pass until:
 - (a) the Customer has paid IFSL all amounts owing for the particular Goods; and
 - (b) the Customer has met all other obligations due by the Customer to IFSL in respect of all contracts between IFSL and the Customer.
 - 7.2 Receipt by IFSL of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then IFSL's ownership or rights in respect of the Goods shall continue.
 - 7.3 It is further agreed that:
 - (a) where practicable the Goods shall be kept separate and identifiable until IFSL shall have received payment and all other obligations of the Customer are met; and
 - (b) until such time as ownership of the Goods shall pass from IFSL to the Customer IFSL may give notice in writing to the Customer to return the Goods or any of them to IFSL. Upon such notice being given the rights of the Customer to obtain ownership or any other interest in the Goods shall cease; and
 - (c) the Customer is only a bailee of the Goods and until such time as IFSL has received payment in full for the Goods then the Customer shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Customer owes to IFSL for the Goods, on trust for IFSL; and
 - (d) until such time that ownership in the Goods passes to the Customer, if the Goods are converted into other products, the parties agree that IFSL will be the owner of the end products; and
 - (e) if the Customer fails to return the Goods to IFSL then IFSL or IFSL's agent may (as the invitee of the Customer) enter upon and into land and premises owned, occupied or used by the Customer, or any premises where the Goods are situated and take possession of the Goods, and IFSL will not be liable for any reasonable loss or damage suffered as a result of any action by IFSL under this clause.
8. **Personal Property Securities Act 1999 ("PPSA")**
 - 8.1 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that:
 - (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
 - (b) a security interest is taken in all Goods previously supplied by IFSL to the Customer (if any) and all Goods that will be supplied in the future by IFSL to the Customer.
 - 8.2 The Customer undertakes to:
 - (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which IFSL may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, IFSL for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;
 - (c) not register a financing change statement or a change demand without the prior written consent of IFSL; and
 - (d) immediately advise IFSL of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
 - 8.3 IFSL and the Customer agree that nothing in sections 114(1)(e), 133 and 134 of the PPSA shall apply to these terms and conditions.
 - 8.4 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 126, 127, 129, 131 and 132 of the PPSA.
 - 8.5 Unless otherwise agreed to in writing by IFSL, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
 - 8.6 The Customer shall unconditionally ratify any actions taken by IFSL under clauses 8.1 to 8.5.
9. **Defects**
 - 9.1 The Customer shall inspect the Goods on delivery and shall within five (5) days of delivery (time being of the essence) notify IFSL of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford IFSL an opportunity to inspect the Goods within a reasonable time following delivery if the Customer believes the Goods are defective in any way. If the Customer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which IFSL has agreed in writing that the Customer is entitled to reject, IFSL's liability is limited to either (at IFSL's discretion) replacing the Goods or repairing the Goods.
10. **Returns**
 - 10.1 Returns will only be accepted provided that:
 - (a) IFSL has agreed in writing to accept the return of the Goods; and
 - (b) the Goods are returned at the Customer's cost within seven (7) days of the delivery date; and
 - (c) IFSL will not be liable for Goods which have not been stored or used in a proper manner; and
 - (d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
 - 10.2 IFSL may (in its discretion) accept the return of Goods for credit but this may incur a handling fee of twenty-five percent (25%) of the value of the returned Goods plus any freight.
 - 10.3 Non-stocklist items or Goods made to the Customer's specifications are under no circumstances acceptable for credit or return.
11. **Warranty**
 - 11.1 For Goods not manufactured by IFSL, the warranty shall be the current warranty provided by the manufacturer of the Goods. IFSL shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.
 - 11.2 In the case of second hand Goods, the Customer acknowledges that he has had full opportunity to inspect the same and that he accepts the same with all faults and that no warranty is given by IFSL as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. IFSL shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.
 - 11.3 The Customer acknowledges that any warranty supplied by IFSL or the manufacturer of the Goods shall become void in the event that those Goods used for any application other than the intended purpose.
12. **Default and Consequences of Default**
 - 12.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at IFSL's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
 - 12.2 In the event that the Customer's payment is dishonoured for any reason the Customer shall be liable for any dishonour fees incurred by IFSL.
- 12.3 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify IFSL from and against all costs and disbursements incurred by IFSL in pursuing the debt including legal costs on a solicitor and own client basis and IFSL's collection agency costs.
- 12.4 Without prejudice to any other remedies IFSL may have, if at any time the Customer is in breach of any obligation (including those relating to payment) IFSL may suspend or terminate the supply of Goods to the Customer and any of its other obligations under the terms and conditions. IFSL will not be liable to the Customer for any loss or damage the Customer suffers because IFSL has exercised its rights under this clause.
13. **Security and Charge**
 - 13.1 Despite anything to the contrary contained herein or any other rights which IFSL may have howsoever:
 - (a) where the Customer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Customer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to IFSL or IFSL's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Customer and/or the Guarantor acknowledge and agree that IFSL (or IFSL's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should IFSL elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify IFSL from and against all IFSL's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) the Customer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint IFSL or IFSL's nominee as the Customer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 13.1.
14. **Cancellation**
 - 14.1 IFSL may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Customer. On giving such notice IFSL shall repay to the Customer any sums paid in respect of the Price. IFSL shall not be liable for any loss or damage whatsoever arising from such cancellation.
 - 14.2 In the event that the Customer cancels delivery of the Goods the Customer shall be liable for any loss incurred by IFSL (including, but not limited to, any loss of profits) up to the time of cancellation.
 - 14.3 Cancellation of orders for Goods made to the Customer's specifications or non-stocklist items will definitely not be accepted, once production has commenced.
15. **Privacy Act 1993**
 - 15.1 The Customer and the Guarantor/s (if separate to the Customer) authorises IFSL to:
 - (a) collect, retain and use any information about the Customer and/or Guarantors, for the purpose of assessing the Customer's and/or Guarantors creditworthiness or marketing products and services to the Customer and/or Guarantors; and
 - (b) disclose information about the Customer and/or Guarantors, whether collected by IFSL from the Customer and/or Guarantors directly or obtained by IFSL from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Customer and/or Guarantors.
 - 15.2 Where the Customer and/or Guarantors are an individual the authorities under clause 15.1 are authorities or consents for the purposes of the Privacy Act 1993.
 - 15.3 The Customer and/or Guarantors shall have the right to request IFSL for a copy of the information about the Customer and/or Guarantors retained by IFSL and the right to request IFSL to correct any incorrect information about the Customer and/or Guarantors held by IFSL.
16. **Unpaid IFSL's Rights**
 - 16.1 Where the Customer has left any item with IFSL for repair, modification, exchange or for IFSL to perform any other service in relation to the item and IFSL has not received or been tendered the whole of the Price, or the payment has been dishonoured, IFSL shall have:
 - (a) a lien on the item;
 - (b) the right to retain the item for the Price while IFSL is in possession of the item;
 - (c) a right to sell the item.
 - 16.2 The lien of IFSL shall continue despite the commencement of proceedings, or judgement for the Price having been obtained.
17. **Customer's Disclaimer**
 - 17.1 The Customer hereby disclaims any right to rescind, or cancel any contract with IFSL or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Customer by IFSL and the Customer acknowledges that the Goods are bought relying solely upon the Customer's skill and judgment.
18. **General**
 - 18.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
 - 18.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the courts of Tauranga.
 - 18.3 IFSL shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by IFSL of these terms and conditions or where the Goods are defective.
 - 18.4 In the event of any breach of this contract by IFSL the remedies of the Customer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
 - 18.5 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by IFSL nor to withhold payment of any invoice because part of that invoice is in dispute.
 - 18.6 IFSL may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
 - 18.7 IFSL reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which IFSL notifies the Customer of such change.
 - 18.8 The provisions of the Contractual Remedies Act 1979 shall apply to this contract as if section 15(d) were omitted from the Contractual Remedies Act 1979.
 - 18.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
 - 18.10 The failure by IFSL to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect IFSL's right to subsequently enforce that provision.