



# Terms and Conditions

## 1. INTERPRETATION

### 1.1 Definitions:

#### Business Day

a day (other than a Saturday, Sunday or public holiday) when banks in London are open for business.

#### Conditions

the terms and conditions set out in this document as amended from time to time in accordance with clause 11.3.

#### Contract

the contract between KMS and the Customer for the sale and purchase of the Goods in accordance with these Conditions.

#### Customer

the person or firm who purchases the Goods from KMS.

#### Force Majeure Event

an event or circumstance beyond a party's reasonable control.

#### Goods

the goods (or any part of them) set out in the Order.

#### Installation

the installation of the Goods at the Customer's premises by KMS.

KMS

KMS (Europe) Ltd registered in England and Wales with company number 04873085 whose registered office is at Innovation House, 3 Sarus Court, Manor Park. Runcorn. Cheshire. WA7 1UL

Order

the Customer's order for the Goods, as set out in the Customer's purchase order form.

Specification

any specification for the Goods, including any related plans and drawings, that is agreed in writing by the Customer and KMS.

1.2 Interpretation:

(a) a reference to a statute or statutory provision is a reference to such statute or provision as amended or re-enacted. A reference to a statute or statutory provision includes any subordinate legislation made under that statute or statutory provision, as amended or re-enacted.

(b) any phrase introduced by the terms including, include, in particular or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.

(c) a reference to writing or written includes faxes and emails.

## **2. BASIS OF CONTRACT**

2.1 These Conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.

2.2 The Order constitutes an offer by the Customer to purchase the Goods in accordance with these Conditions. The Customer is responsible for ensuring that the terms of the Order and any applicable Specification submitted by the Customer are complete and accurate.

2.3 The Order shall only be deemed to be accepted when KMS issues a written acceptance of the Order, at which point the Contract shall come into existence.

2.4 Any samples, drawings or advertising produced by KMS and any descriptions or illustrations contained in KMS's catalogues or brochures are produced for the sole purpose of giving an approximate idea of the Goods

referred to in them. They shall not form part of the Contract nor have any contractual force.

2.5 A quotation for the Goods given by KMS shall not constitute an offer. A quotation shall only be valid for a period of 28 days from its date of issue.

### **3. GOODS**

3.1 The Goods are described in KMS's catalogue as modified by any applicable Specification.

3.2 To the extent that the Goods are to be manufactured in accordance with a Specification supplied by the Customer, the Customer shall indemnify KMS against all liabilities, costs, expenses, damages and losses (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other professional costs and expenses) suffered or incurred by KMS in connection with any claim made against KMS for actual or alleged infringement of a third party's intellectual property rights arising out of or in connection with KMS's use of the Specification. This clause 3.2 shall survive termination of the Contract.

3.3 KMS reserves the right to amend the specification of the Goods and any applicable Specification if required by any applicable statutory or regulatory requirements.

### **4. DELIVERY AND INSTALLATION**

4.1 KMS shall deliver the Goods to the location set out in the Order or such other location as the parties may agree (Delivery Location) at any time after KMS notifies the Customer that the Goods are ready.

4.2 KMS shall ensure that:

(a) each delivery of the Goods is accompanied by a delivery note that shows the date of the Order, the type and quantity of the Goods (including the code number of the Goods, where applicable), special storage instructions (if any) and, if the Goods are being delivered by instalments, the outstanding balance of Goods remaining to be delivered; and

(b) if KMS requires the Customer to return any packaging materials to KMS, that fact is clearly stated on the delivery note. The Customer shall make any such packaging materials available for collection at such times as KMS shall reasonably request. Returns of packaging materials shall be at KMS's expense.

4.3 Delivery is completed on the completion of unloading of the Goods at the Delivery Location.

4.4 KMS shall supply to the Customer, within a reasonable time before delivery of the Goods, such information and assistance as may be necessary to enable the Customer to prepare its premises for Installation and the Customer shall co-operate with KMS in all matters relating to Installation.

4.5 If KMS are providing Installation, the services will be provided with reasonable skill and care.

4.6 Any dates quoted for delivery and/or Installation are approximate only, and the time of delivery is not of the essence. KMS shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or the Customer's failure to provide KMS with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.

4.7 KMS may deliver the Goods by instalments, which shall be invoiced and paid for separately. Any delay in delivery or defect in an instalment shall not entitle the Customer to cancel any other instalment.

4.8 If KMS fails to deliver the Goods, its liability shall be limited to the costs and expenses incurred by the Customer in obtaining replacement goods of similar description and quality in the cheapest market available, less the price of the Goods. KMS shall have no liability for any failure to deliver the Goods to the extent that such failure is caused by a Force Majeure Event or the Customer's failure to provide KMS with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.

4.9 If the Customer fails to accept delivery of the Goods within three Business Days of KMS notifying the Customer that the Goods are ready, then, except where such failure or delay is caused by a Force Majeure Event or KMS's failure to comply with its obligations under the Contract:

(a) delivery of the Goods shall be deemed to have been completed at 9.00 am on the third Business Day after the day on which KMS notified the Customer that the Goods were ready; and

(b) KMS shall store the Goods until delivery takes place, and charge the Customer for all related costs and expenses (including insurance).

4.10 If ten Business Days after the day on which KMS notified the Customer that the Goods were ready for delivery the Customer has not accepted delivery of them, KMS may resell or otherwise dispose of part or all of the Goods and, after deducting reasonable storage and selling costs, account to the Customer for any excess over the price of the Goods or charge the Customer for any shortfall below the price of the Goods.

## **5. QUALITY**

5.1 KMS warrants that on delivery, and for a period of 12 months from the date of delivery (warranty period), the Goods shall:

- (a) conform in all material respects with their description and any applicable Specification; and
- (b) be free from material defects in design, material and workmanship; and
- (c) be of satisfactory quality (within the meaning of the Sale of Goods Act 1979).

5.2 Subject to clause 5.3, if:

- (a) the Customer gives notice in writing to KMS during the warranty period within a reasonable time of discovery that some or all of the Goods do not comply with the warranty set out in clause 5.1;
- (b) KMS is given a reasonable opportunity of examining such Goods; and
- (c) the Customer (if asked to do so by KMS) returns such Goods to KMS's place of business at the Customer's cost,

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

5.3 KMS shall not be liable for the Goods' failure to comply with the warranty set out in clause 5.1 in any of the following events:

- (a) the Customer makes any further use of such Goods after giving notice in accordance with clause 5.2;
- (b) the defect arises because the Customer failed to follow KMS's oral or written instructions as to the commissioning, installation, use and maintenance of the Goods or (if there are none) good trade practice regarding the same;
- (c) the defect arises as a result of KMS following any drawing, design or Specification supplied by the Customer;
- (d) the Customer alters or repairs such Goods without the written consent of KMS;
- (e) the defect arises as a result of fair wear and tear, wilful damage, negligence, or abnormal storage or working conditions; or
- (f) the Goods differ from their description and any applicable Specification as a result of changes made to ensure they comply with applicable statutory or regulatory requirements.

5.4 Except as provided in this clause 5, KMS shall have no liability to the Customer in respect of the Goods' failure to comply with the warranty set out in clause 5.1.

5.5 The terms implied by sections 13 to 15 of the Sale of Goods Act 1979 are, to the fullest extent permitted by law, excluded from the Contract.

5.6 These Conditions shall apply to any repaired or replacement Goods supplied by KMS.

## **6. TITLE AND RISK**

6.1 The risk in the Goods shall pass to the Customer on completion of delivery.

6.2 Title to the Goods shall not pass to the Customer until KMS receives payment in full (in cash or cleared funds) for the Goods and any other goods that KMS has supplied to the Customer in respect of which payment has become due, in which case title to the Goods shall pass at the time of payment of all such sums.

6.3 Until title to the Goods has passed to the Customer, KMS shall:

(a) store the Goods separately from all other goods held by the KMS so that they remain readily identifiable as Customer's property;

(b) not remove, deface or obscure any identifying mark or packaging on or relating to the Goods;

(c) maintain the Goods in satisfactory condition and keep them insured against all risks for their full price from the date of delivery;

(d) notify Customer immediately if it becomes subject to any of the events listed in clause 8.1; and

(e) give customer such information relating to the Goods as KMS may require from time to time.

6.4 If before title to the Goods passes to the Customer the Customer becomes subject to any of the events listed in clause 8.1, then, without limiting any other right or remedy KMS may have:

(a) the Customer's right to use the Goods in the ordinary course of its business ceases immediately; and

(b) KMS may at any time, require the Customer to deliver up all Goods in its possession that have not been resold, or irrevocably incorporated into another product; and if the Customer fails to do so promptly, enter any

premises of the Customer or of any third party where the Goods are stored in to recover them.

## **7. PRICE AND PAYMENT**

7.1 The price of the Goods shall be the price set out in the Order, or, if no price is quoted, the price set out in KMS's published price list in force as at the date of delivery.

7.2 The price of Installation shall be confirmed in writing to the Customer prior to the Order being accepted.

7.3 KMS may, by giving notice to the Customer at any time up to 10 Business Days before delivery, increase the price of the Goods to reflect any increase in the cost of the Goods that is due to:

(a) any factor beyond KMS's control (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials and other manufacturing costs);

(b) any request by the Customer to change the delivery date(s), quantities or types of Goods ordered, or the Specification; or

(c) any delay caused by any instructions of the Customer or failure of the Customer to give KMS adequate or accurate information or instructions.

7.4 The price of the Goods:

(a) excludes amounts in respect of value added tax (VAT), which the Customer shall additionally be liable to pay to KMS at the prevailing rate, subject to the receipt of a valid VAT invoice; and

(b) excludes the costs and charges of packaging, insurance, transport of the Goods and Installation which shall be invoiced to the Customer.

7.5 KMS may invoice the Customer for the Goods and Installation on or at any time after the completion of delivery and Installation, unless the Order is for bulk Goods when KMS shall invoice the Customer in advance of delivery and Installation.

7.6 Unless otherwise agreed in writing by KMS, the Customer shall pay the invoice in full and in cleared funds within 30 days of the date of the invoice. Payment shall be made to the bank account nominated in writing by KMS. Time for payment is of the essence.

7.7 If the Customer fails to make any payment due to KMS under the Contract by the due date for payment, then the Customer shall pay interest on the overdue amount at the rate of 5% per annum above The Bank of

England's base rate from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment. The Customer shall pay the interest together with the overdue amount.

7.8 The Customer shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding (except for any deduction or withholding required by law). KMS may at any time, without limiting any other rights or remedies it may have, set off any amount owing to it by the Customer against any amount payable by KMS to the Customer.

## **8. TERMINATION**

8.1 Without limiting its other rights or remedies, KMS may terminate this Contract with immediate effect by giving written notice to the Customer if:

(a) the Customer commits a material breach of any term of the Contract and (if such a breach is remediable) fails to remedy that breach within 7 days of that party being notified in writing to do so;

(b) the Customer takes any step or action in connection with its entering administration, provisional liquidation or any composition or arrangement with its creditors (other than in relation to a solvent restructuring), being wound up (whether voluntarily or by order of the court, unless for the purpose of a solvent restructuring), having a receiver appointed to any of its assets or ceasing to carry on business;

(c) the Customer suspends, threatens to suspend, ceases or threatens to cease to carry on all or a substantial part of its business; or

(d) the Customer's financial position deteriorates to such an extent that in KMS's opinion the Customer's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy.

8.2 Without limiting its other rights or remedies, KMS may suspend provision of the Goods under the Contract or any other contract between the Customer and KMS if the Customer becomes subject to any of the events listed in clause 8.1(a) to clause 8.1(d), or KMS reasonably believes that the Customer is about to become subject to any of them, or if the Customer fails to pay any amount due under this Contract on the due date for payment.

8.3 Without limiting its other rights or remedies, KMS may terminate the Contract with immediate effect by giving written notice to the Customer if the Customer fails to pay any amount due under the Contract on the due date for payment.



8.4 On termination of the Contract for any reason the Customer shall immediately pay to KMS all of KMS's outstanding unpaid invoices and interest.

8.5 Termination of the Contract shall not affect any of the parties' rights and remedies that have accrued as at termination, including the right to claim damages in respect of any breach of this Contract that existed at or before the date of termination.

8.6 Any provision of the Contract that expressly or by implication is intended to come into or continue in force on or after termination shall remain in full force and effect.

## **9. LIMITATION OF LIABILITY**

9.1 Nothing in these Conditions shall limit or exclude KMS's liability for:

(a) death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors (as applicable);

(b) fraud or fraudulent misrepresentation;

(c) breach of the terms implied by section 12 of the Sale of Goods Act 1979;  
or

(d) any matter in respect of which it would be unlawful for KMS to exclude or restrict liability.

9.2 Subject to clause 9.1:

(a) KMS shall under no circumstances whatsoever be liable to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, for any loss of profit, or any indirect or consequential loss arising under or in connection with the Contract; and

(b) KMS's total liability to the Customer in respect of all other losses arising under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed 100% of the price of the Goods.

## **10. FORCE MAJEURE**

Neither party shall be in breach of this Contract nor liable for delay in performing, or failure to perform, any of its obligations under this Contract if such delay or failure result from a Force Majeure Event. If the period of delay or non-performance continues for 8 weeks, the party not affected may terminate this Contract by giving 2 weeks written notice to the affected party.

## **11. GENERAL**

### **11.1 Assignment and other dealings.**

(a) KMS may at any time assign, transfer, mortgage, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract.

(b) The Customer may not assign, transfer, mortgage, charge, subcontract, declare a trust over or deal in any other manner with any or all of its rights or obligations under the Contract without the prior written consent of KMS.

### **11.2 Entire agreement.**

(a) This Contract constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

(b) Each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this agreement. Each party agrees that it shall have no claim for innocent or negligent misrepresentation or negligent misstatement based on any statement in this agreement.

**11.3 Variation.** No variation of this Contract shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

**11.4 Waiver.** No failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

**11.5 Severance.** If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted. Any modification to or deletion of a provision or part-provision under this clause shall not affect the validity and enforceability of the rest of the Contract.

### **11.6 Notices.**

(a) Any notice or other communication given to a party under or in connection with the Contract shall be in writing, addressed to that party at its registered office (if it is a company) or its principal place of business (in

any other case) or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally, sent by pre-paid first class post or other next working day delivery service or commercial courier.

(b) A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in clause 11.6(a); if sent by pre-paid first class post or other next working day delivery service, at 9.00 am on the second Business Day after posting; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed.

(c) The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.

11.7 Third party rights. No one other than a party to this Contract shall have any right to enforce any of its terms.

11.8 Governing law. The Contract, and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation, shall be governed by and construed in accordance with the law of England and Wales.

Jurisdiction. Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Contract or its subject matter or formation.