
Doppelmayr Lifts NZ Ltd – Terms & Conditions of Trade

1. Definitions

- 1.1 "Customer" means the person/s ordering the Works as specified in any invoice, document or order, and if there is more than one Customer is a reference to each Customer jointly and severally.
- 1.2 "DMNZ" means Doppelmayr Lifts NZ Ltd, its successors and assigns or any person acting on behalf of and with the authority of Doppelmayr Lifts NZ Ltd.
- 1.3 "GST" means Goods and Services Tax as defined within the "Goods and Services Tax Act 1985".
- 1.4 "Materials" means all goods, materials, equipment, parts and consumables supplied by DMNZ to the Customer (where the context so permits the terms 'Works' or 'Materials' shall be interchangeable for the other).
- 1.5 "PPSA" means the Personal Property Securities Act 1999;
- 1.6 "Price" means the Price payable (plus any GST where applicable) for the Works as agreed between DMNZ and the Customer in accordance with clause 6 below.
- 1.7 "Works" means all Works (including consultation, manufacturing and/or services) supplied by DMNZ to the Customer at the Customer's request from time to time (where the context so permits the terms 'Works' or 'Materials' shall be interchangeable for the other).

2. Agreement documents

- 2.1 This agreement comprises these terms and conditions and the purchase order.
- 2.2 If the Customer hires equipment from DMNZ, those hire agreements will be separate and will comprise DMNZ's hire form and terms and conditions of hire.

3. Acceptance

- 3.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of any Works.
- 3.2 These terms and conditions may only be amended with the consent of both parties in writing, and shall prevail to the extent of any inconsistency with any other document or agreement between the Customer and DMNZ.
- 3.3 The Customer acknowledges and accepts that where the project is for an extended amount of time, the Price quoted will be subject to revision on the basis of any increase in the Consumer Price Index (CPI) published by the Statistics New Zealand. The rates adjustment will be made half-yearly and the base index shall be the most recently available quarterly data to the date of the quotation or proposal.
- 3.4 Any work that is required by the Customer to be undertaken outside of DMNZ's normal business hours and/or on weekends or public holidays will attract a surcharge of fifty percent (50%) of the cost of the part of the Works undertaken outside of said normal business hours.

4. Electronic Transactions Act 2000

- 4.1 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with clause 22(1) of the Electronic Transactions Act 2000 or any other applicable provisions or regulations of that Act.

5. Change in Control

The Customer shall not change, or suffer to be changed, any legal or beneficial ownership or control of the Customer and/or its business, whether directly or indirectly, without the prior written consent of DMNZ (which shall not be unreasonably withheld).

6. Price and Payment

- 6.1 The Customer accepts that the supply of Materials/Works on credit shall not take effect until the Customer has completed a credit application with DMNZ and it has been approved with a credit limit established for the account.
- 6.2 In the event that the supply of Materials/Works request exceeds the Customer's credit limit and/or the account exceeds the payment terms, DMNZ reserves the right to refuse delivery.
- 6.3 At DMNZ's sole discretion, the Price shall be either:
 - (a) as indicated on invoices provided by DMNZ to the Customer in respect of Works performed or Materials supplied; or
 - (b) DMNZ's Price at the date of delivery of the Works according to DMNZ's current pricelist; or
 - (c) DMNZ's quoted Price which (subject to these terms and conditions) shall be binding upon DMNZ provided that the Customer shall accept DMNZ's quotation in writing within thirty (30) days. Any quotation or proposal may be conditional on the Customer's successful establishment of credit as per clause 6.1
- 6.4 DMNZ reserves the right to change the Price:
 - (a) if a variation to the Materials which are to be supplied is requested; or
 - (b) if a variation to the Works originally scheduled (including any applicable plans, specifications scope, character, quality, sequence or timing of the Works) is requested; or
 - (c) where additional Works are required due to the discovery of hidden or previously unidentified difficulties or events beyond DMNZ's reasonable control (including, but not limited to, limitations to site accessibility, prerequisite work by a third party not being properly completed, safety considerations, changes in laws, hard rock or other barriers below the surface, iron reinforcing rods in concrete, or hidden pipes or wiring in walls etc.); or
 - (d) in the event of decrease or increase to DMNZ in the cost of labour or Materials (including but not limited to foreign exchange fluctuation being greater than plus or minus two percent (2%) and/or international freight and insurance charges) which are beyond DMNZ's control.
- 6.5 Variations will be charged for on the basis of DMNZ's quotation, and will be detailed in writing, and shown as variations on DMNZ's invoice. The Customer shall be required to respond to any variation submitted by DMNZ within ten (10) working days. Failure to do so will entitle DMNZ to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.6 At DMNZ's sole discretion a non-refundable deposit may be required. DMNZ will not be required to progress the Works or deliver Materials until this deposit is received.
- 6.7 Time for payment for the Works being of the essence, the Price will be payable by the Customer on the date(s) determined by DMNZ, which may be:
 - (a) on completion of the Works (including field work or site visit as applicable); or

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- (b) by way of progress payments in accordance with DMNZ's specified progress payment schedule or, if there is no progress payment schedule, monthly. Such progress payment claims may include the reasonable value of the Works, and any variations, and the value of any Materials delivered to the site but not yet installed. Such progress payment claims may be up to ninety-five percent (95%) of the completed work on submission of a draft report and/or on completion of the final report; or
 - (c) the date specified on any invoice or other form as being the date for payment; or
 - (d) failing any notice to the contrary, the date which is thirty (30) days from the end of the month in which any invoice is given to the Customer by DMNZ.
- 6.8 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Customer and DMNZ.
- 6.9 If any part of an invoice is in dispute then the Customer shall notify DMNZ in writing within fourteen (14) business days from receipt of the invoice. The Customer may only withhold payment for that part of the invoice that is in dispute and shall pay the balance of the invoice when due. DMNZ shall reserve the right to invoke the dispute resolution procedure as per clause 26.
- 6.10 Unless otherwise stated the Price does not include GST. In addition to the Price, the Customer must pay to DMNZ an amount equal to any GST DMNZ must pay for any supply by DMNZ under this or any other agreement for the sale of the Materials and/or Works. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition, the Customer must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
- 6.11 Receipt by DMNZ of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured or cleared and until then DMNZ's ownership or rights in respect of the Materials shall continue.

7. Provision of the Works

- 7.1 Subject to clause 7.2 it is DMNZ's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 7.2 The Works' commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that DMNZ claims an extension of time (by giving the Customer written notice) where completion is delayed by a variation or an event beyond DMNZ's reasonable control, including but not limited to the events in clause 6.4(c) and/or any failure by the Customer to:
- (a) make a selection;
 - (b) have the site ready for the Works;
 - (c) notify DMNZ that the site is ready; or
 - (d) provide requested information or signoff.
- 7.3 DMNZ may deliver the Works by separate instalments. Each separate instalment shall be invoiced and paid in accordance with clause 6.
- 7.4 Any time specified by DMNZ for delivery of the Works is an estimate only and DMNZ will not be liable for any loss or damage incurred by the Customer as a result of late delivery. However, both parties agree that they shall make every reasonable endeavour to enable the Works to be supplied at the time and place agreed between the parties.
- 7.5 Where performance of the Works is delayed by any act, omission or default of the Customer, its employees, agents, consultants or contractors as per clause 7.2, the Customer shall reimburse DMNZ for any associated costs incurred as a result of the delay and reasonable profit.
- 7.6 Completion of the Works is deemed to have occurred when DMNZ certifies that the Works have been completed.
- 7.7 Where DMNZ is to provide site inspection or testing services during the Works such inspection is for the purpose of checking or documenting compliance with the specification (or with appropriate engineering standards) and is not to be regarded as supervision of the Works. The provision of these services, including the provision of verbal advice by DMNZ's personnel, shall not in any way make DMNZ liable for any goods and services being provided by others during the inspection or testing.
- 7.8 Where verbal advice and/or approval is given by DMNZ's personnel it is given in good faith but DMNZ will not be liable for such advice and/or approval (in accordance with clause 27) except where confirmed by DMNZ in writing.

8. Risk

- 8.1 Where DMNZ:
- (a) is supplying Materials only, all risk in and for the Materials shall immediately pass to the Customer on delivery and the Customer must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place at the time that either:
 - (i) the Customer or the Customer's nominated carrier takes possession of the Materials at DMNZ's address; or
 - (ii) the Materials are delivered by DMNZ or DMNZ's nominated carrier to the Customer's nominated delivery address (even if the Customer is not present at the address).
 - (b) is to both supply and install Materials, then DMNZ shall maintain appropriate insurance policy until the Works are completed. Upon completion of the Works, all risk for the Works shall immediately pass to the Customer.
- 8.2 Without prejudice to the provisions of clause 8.1, if the Customer specifically requests DMNZ to leave Materials outside DMNZ's premises or to deliver the Materials to an unattended location, then such materials shall always be left at sole risk of the Customer and it shall be the Customer's responsibility to ensure the Materials are adequately insured. In the event that such Materials are lost, damaged or destroyed when they are at the Customer's risk, then replacement of the Materials shall be at the Customer's expense.
- 8.3 The Customer warrants that any structures to which the Materials are to be affixed are able to withstand the installation of the Materials and that any electrical connections (including, but not limited to, meter boxes, main switches, circuit breakers, and electrical cable) are of suitable capacity to handle the Materials once installed. If, for any reason (including the discovery of asbestos, defective or unsafe wiring, or dangerous access), DMNZ reasonably forms the opinion that the Customer's premises are not safe for the installation of Materials to proceed, then DMNZ shall be entitled to delay installation of the Materials (and the provisions of clause 7.2 above will apply) until DMNZ is satisfied that it is safe for the installation to proceed.
- 8.4 Where the Customer has supplied goods for DMNZ to complete the Works, the Customer acknowledges and accepts responsibility for the suitability of purpose, quality and any faults inherent in the goods. DMNZ shall not be responsible for any defects in the goods, or for any loss or damage to the Works (or any part thereof) howsoever arising from the use of goods supplied by the Customer.

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- 8.5 The Customer acknowledges that DMNZ is only responsible for parts that are replaced by DMNZ, and in the event that other parts/materials, subsequently fail, and/or cause any of the Works or Materials to fail, the Customer is solely responsible for such loss and the Customer agrees to indemnify DMNZ against any loss or damage to the Works or Materials, or caused by such other parts/materials, or any part thereof howsoever arising.
- 8.6 If, during the course of installation when the Works are being conducted within and around switchboards, the same is found to be defective or deemed to be unsafe by DMNZ, then DMNZ shall notify the Customer immediately. The power if isolated will not be re-energised until such time as the existing condition has been rectified and made safe in accordance to the Electricity (Safety) Regulations 2010. The Customer accepts and agrees that any costs associated with the rectification works on the switchboard including any Materials and labour shall be to the Customer's account.
- 8.7 Any live Works or Works undertaken near live conductors where it is safe to do so shall be dealt with in accordance with New Zealand wiring standards being "Safe working on or near low-voltage electrical Installations and equipment", the Health and Safety at Work Act 2015 and all related regulations and codes of practice. DMNZ's live works' procedures are designed to eliminate risk of injury to DMNZ's employees, damage to the Customer's installations and unexpected power disconnections. It may in some cases require disconnection and isolation of the installation to undertake such Works for which additional charges may be applicable. This shall be invoiced in accordance with clause 6.4.
- 8.8 The Customer acknowledges that Materials supplied may:
- (a) fade or change colour over time; and
 - (b) expand, contract or distort as a result of exposure to heat, cold, or weather; and
 - (c) mark or stain if exposed to certain substances; and
 - (d) be damaged or disfigured by impact or scratching.

9. Access

- 9.1 The Customer shall ensure that DMNZ has clear, free and safe access to the work site and any necessary equipment, materials and information at all times to enable them to undertake the Works. DMNZ shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of DMNZ.
- 9.2 It is the responsibility of the Customer to ensure that access is suitable for the weight of laden trucks, front end loaders or other equipment as may be deemed necessary by DMNZ.

10. Underground Locations

- 10.1 Prior to DMNZ commencing any work, the Customer must advise DMNZ of the precise location of all underground services on the site and clearly mark the same. The underground services the Customer must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
- 10.2 Whilst DMNZ will take reasonable care to avoid damage to any underground services, the Customer agrees to indemnify DMNZ in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 10.1.
- 10.3 Where Works are delayed and/or varied due to services not precisely located and notified as per clause 9.1 additional charges may be applicable in accordance with clause 6.4 and the provisions of clause 7.2 above will apply.

11. Compliance with Laws

- 11.1 The Customer and DMNZ shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works.
- 11.2 The Customer shall obtain (at the expense of the Customer) all licenses and approvals that may be required for the Works or the supply of Materials, except those that can only be obtained by DMNZ.
- 11.3 The Customer agrees that the site will comply with the Health and Safety at Work Act 2015 and all related regulations relating to the sites and any other relevant safety standards or legislation.

12. Representations

- 12.1 The Customer acknowledges and agrees that no representations were made prior to the entering into of this agreement and that, in entering into this agreement, it does not rely on, and shall have no remedy in respect of, any statement, illustration, description, representation, warranty or understanding (whether negligently or innocently made) of any person (whether a party to this agreement or not) other than as expressly set out or referred to in this agreement.
- 12.2 The Customer accepts that the accuracy of any information or figures provided by DMNZ regarding the performance of Materials is subject to the effect operating conditions.

13. Insurance

- 13.1 DMNZ shall obtain
- (a) public liability insurance of at least ten million dollars (\$10m); and
 - (b) if agreed in writing with the Customer, contract works insurances for an amount equal to or greater than the value of the contract works.
- 13.2 The insurance policies in clause 13.1 above shall name DMNZ as an insured party and shall contain a waiver of subrogation against co-insured. If agreed in writing with the Customer, DMNZ may name the Customer as an insured party in such policies.
- 13.3 The Customer is responsible for obtaining any and all further insurance coverage where such insurance is required by law or industry practice.

14. Title

- 14.1 DMNZ and the Customer agree that ownership of the Materials shall not pass until:
- (a) the Customer has paid DMNZ all amounts owing to DMNZ; and
 - (b) the Customer has met all of its other obligations to DMNZ.

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- 14.2 It is further agreed that, until ownership of the Materials passes to the Customer in accordance with clause 14.1:
- (a) the Customer is only a bailee of the Materials and must return the Materials to DMNZ on request.
 - (b) the Customer holds the benefit of the Customer's insurance of the Materials on trust for DMNZ and must pay to DMNZ the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed.
 - (c) the Customer must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Customer sells, disposes or parts with possession of the Materials then the Customer must hold the proceeds of any such act on trust for DMNZ and must pay or deliver the proceeds to DMNZ on demand.
 - (d) the Customer should not alter the Materials or affix them to other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of DMNZ and must sell, dispose of or return the resulting product to DMNZ as it so directs.
 - (e) the Customer irrevocably authorises DMNZ to enter any premises where DMNZ believes the Materials are kept and recover possession of the Materials.
 - (f) DMNZ may recover possession of any Materials in transit whether or not Delivery has occurred.
 - (g) the Customer shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of DMNZ.
 - (h) DMNZ may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Customer.

15. PPSA

- 15.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 15.2 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Materials that have previously been supplied and that will be supplied in the future by DMNZ to the Customer.
- 15.3 The Customer undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which DMNZ may reasonably require to:
 - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - (ii) register any other document required to be registered by the PPSA; or
 - (iii) correct a defect in a statement referred to in clause 15.3(a)(i) or 15.3(a)(ii);
 - (b) indemnify, and upon demand reimburse, DMNZ for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Materials charged thereby;
 - (c) not register a financing change statement in respect of a security interest without the prior written consent of DMNZ;
 - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials and/or collateral (account) in favour of a third party without the prior written consent of DMNZ;
 - (e) immediately advise DMNZ of any material change in its business practices of selling the Materials which would result in a change in the nature of proceeds derived from such sales.
- 15.4 DMNZ and the Customer agree that sections 114(1)(a), 133 and 134 of the PPSA do not apply to the security agreement or the security interest created by these terms and conditions.
- 15.5 The Customer hereby waives its rights to:
- (a) receive a statement of account under section 116 of the PPSA;
 - (b) receive notice of DMNZ's proposal to retain Materials and/or collateral (account) under section 120(2) of the PPSA;
 - (c) object to DMNZ's proposal to retain any collateral under section 121 of the PPSA;
 - (d) not have goods damaged when DMNZ (or any person on its behalf) removes an accession under section 125 of the PPSA;
 - (e) receive notice of the removal of an accession under section 129 of the PPSA; and
 - (f) apply to the Court for an order concerning the removal of an accession under section 131 of the PPSA.
- 15.6 Unless otherwise agreed to in writing by DMNZ, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 15.7 The Customer shall unconditionally ratify any actions taken by DMNZ under clauses 15.3 to 15.5.
- 15.8 Subject to any express provisions to the contrary (including those contained in this clause 15), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

16. Security and Charge

- 16.1 In consideration of DMNZ agreeing to supply the Materials, the Customer grants a security interest in all Materials supplied to the Customer, and all of its present and future rights in relation to any Materials supplied to the Customer, to DMNZ to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 16.2 The Customer indemnifies DMNZ from and against all DMNZ's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising DMNZ's rights under this clause.
- 16.3 The Customer irrevocably appoints DMNZ and each director of DMNZ as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 16 including, but not limited to, signing any document on the Customer's behalf.

17. Warranties

- 17.1 Subject to clause 18.4, DMNZ represents, warrants and undertakes that:
- (a) DMNZ will perform the Works, or shall ensure that the Works are performed, with reasonable care and skill;
 - (b) the Works and Materials will be fit for the purpose for which works of the same kind are commonly provided and for any other purpose as specifically agreed in writing between the parties;
 - (c) unless otherwise specified, all Materials required for use in the Works are of merchantable quality and be free from material defects;
 - (d) the Works will be executed in accordance with this agreement and all applicable legislation and regulations;

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- (e) all Materials required for use in the Works will be supplied to the Customer free of any third party security interests, liens, charges or encumbrances;
 - (f) all DMNZ staff are appropriately supervised, qualified, competent and skilled to perform the relevant part of the Works in respect of which they are engaged; and
 - (g) any equipment used by DMNZ will be in a safe working condition and comply with all applicable legislation and regulations.
- 17.2 To the extent permitted by law, DMNZ makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works, except as set out in this agreement.

18. Defects and defective returns

- 18.1 The Customer must inspect all Materials on delivery (or the Works on completion) and must within seven (7) days of delivery or completion notify DMNZ in writing of any evident defect/damage, shortage in quantity, or failure to comply with the agreement. The Customer must notify any other alleged defect in the Materials/Works as soon as reasonably possible after any such defect becomes evident. Upon notification the Customer must allow DMNZ to inspect the Materials or to review the Works provided and, if the Material is found to be defective, clause 18.3 will apply.
- 18.2 The Customer shall notify DMNZ as soon as reasonably practicable on becoming aware of a defect in the Works or the Materials and shall follow DMNZ's reasonable instructions regarding the care of the Works and Materials:
- 18.3 Subject to clause 18.4, and unless otherwise agreed in writing with the Customer, if the Customer notifies DMNZ of any failure by the Works or any Materials to comply with the warranties under clause 17.1 within 12 months of completion of the Works or delivery of the Materials then:
- (a) for any defective Works, DMNZ may, at its option, either re-perform or rectify the defective Works;
 - (b) for any defective Materials DMNZ may, at its option, either repair or replace the defective Materials;
 - (c) if DMNZ is required to rectify, re-supply, or re-perform, repair or replace any Works or Materials under this agreement or the Consumer Guarantees Act 1993 (**CGA**), but is unable to do so, then DMNZ may refund any money the Customer has paid for the Works or Materials but only to the extent that such refund shall take into account the value of Works or Materials which have been provided to the Customer which were not defective; or
- 18.4 Notwithstanding clauses 17.1, 18.1 to 18.2 but subject to the CGA, DMNZ shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Customer failing to properly maintain or store any Materials;
 - (b) the Customer using the Materials or the Works for any purpose other than that for which they were designed;
 - (c) the Customer continuing to use any Materials after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - (d) interference with the Works by the Customer or any third party without DMNZ's prior approval;
 - (e) the Customer failing to follow any instructions or guidelines provided by DMNZ;
 - (f) fair wear and tear, any accident, or event beyond the reasonable control of DMNZ, or damage caused by a person other than DMZ or its employees, agents or subcontractors.

19. Non-defective returns

- 19.1 Subject to clause 19.2 DMNZ will accept returns of non-defective Materials (excluding non-standard Materials specifically manufactured or ordered by DMNZ for the Customer) for return. The Customer will pay handling fees of twenty percent (20%) of the value of the returned Materials plus any delivery costs, except where returns arise from a breach of this agreement, negligence, or error by DMNZ.
- 19.2 DMNZ will not be required to accept returns of Materials where:
- (a) the Materials are not returned within a reasonable time, but not later than 30 days of delivery; nor
 - (b) the Materials are not returned in the same condition as they were delivered.

20. Intellectual Property

- 20.1 Where DMNZ has designed, drawn, created written plans, reports, specifications, bills of quantities, calculations, other documents or a schedule of Works in connection with the performance of its obligations under this agreement, then the copyright in all such documents shall remain vested in DMNZ, and shall only be used by the Customer at DMNZ's discretion. Under no circumstances may such documents be used without the express written approval of DMNZ. Where the Customer has paid DMNZ the full Price, the Customer shall have a licence to use the copyrighted documents for the purposes of completing and using the Works or Materials.
- 20.2 If during the course of providing the Works, DMNZ researches, develops, discovers or first reduces to practice a concept, product or process which is capable of being patented or commercialised, then such concept, product or process shall be and remain the property of DMNZ and the Customer shall not use, infringe or otherwise appropriate the same without first obtaining the written consent of DMNZ. DMNZ shall be solely responsible for the cost of commercialisation of any such concept, product or process.
- 20.3 The Customer warrants that it has the right to use, and allow others to use, any and all designs, specifications or other such intellectual property given or licenced by the Customer to DMNZ or specified in the Customer's order. The Customer agrees to indemnify DMNZ against any actions taken by a third party against DMNZ as a result of a breach of this clause.
- 20.4 The Customer agrees that DMNZ may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which DMNZ has created for the Customer.

21. Default and Consequences of Default

- 21.1 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 DMNZ's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 21.2 If the Customer owes DMNZ any money the Customer shall indemnify DMNZ from and against all costs and disbursements incurred by DMNZ in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, DMNZ's contract default fee, and bank dishonour fees).

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- 21.3 Further to any other rights or remedies DMNZ may have under this agreement, if a Customer has made payment to DMNZ and the transaction is subsequently reversed, the Customer shall be liable for the amount of the reversed transaction in addition to any further costs incurred by DMNZ under this clause 21 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Customer's obligations under this agreement.
- 21.4 Without prejudice to DMNZ's other remedies at law, DMNZ shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and/or terminate this agreement and all amounts owing to DMNZ shall, whether or not due for payment, become immediately payable, if:
- (a) any money payable to DMNZ becomes overdue and is not paid within 10 business days of the Customer receiving a demand from DMNZ or, in DMNZ's opinion, the Customer will be unable to make a payment when it falls due;
 - (b) the Customer has exceeded any applicable credit limit provided by DMNZ and DMNZ has reasonably refused to increase the credit limit;
 - (c) the Customer becomes insolvent or bankrupt, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - (d) a receiver, manager, administrator, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

22. Guarantee

If you are a director/trustee/partner of the Customer and/or listed as the Guarantor then you agree, in your personal capacity, to guarantee all of the Customer's obligations and amounts which are payable to DMNZ at any time by the Customer under this agreement or otherwise and acknowledge that we may demand and recover from you, as a primary obligation, any amounts which are payable to us by the Customer instead of, or as well as, demanding payment from the Customer.

23. Cancellation

- 23.1 Without prejudice to any other remedies DMNZ may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions DMNZ may suspend or terminate the supply of Works or Materials to the Customer. DMNZ will not be liable to the Customer for any loss or damage the Customer suffers because DMNZ has exercised its rights under this clause (including, but not limited to, any loss of profits).
- 23.2 DMNZ may cancel any contract to which these terms and conditions apply or cancel delivery of the Materials or Works at any time before the Works are commenced or Materials are delivered by giving written notice to the Customer. On giving such notice DMNZ shall repay to the Customer any sums paid in respect of the Price, less any amounts owing by the Customer to DMNZ for Works already performed. DMNZ shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 23.3 In the event that the Customer cancels the delivery of Works or Materials, the Customer shall be liable for any and all direct and indirect expenses and/or losses incurred by DMNZ (including, but not limited to, any loss of profits).
- 23.4 Orders for products made to the Customer's specifications, or for non-stocklist items, may not be cancelled by the Customer once production has commenced or an order has been placed by DMNZ.
- 23.5 Termination or cancellation of this agreement shall be without prejudice to the rights of the parties that existed prior to such termination or cancellation.

24. Privacy Act 1993

- 24.1 The Customer agrees that DMNZ may obtain information about the Customer from the Customer or any other person in the course of the DMNZ's business, including credit assessment, debt collecting and direct marketing activities, and the Customer consents to any person providing the DMNZ with such information.
- 24.2 The Customer agrees that the DMNZ may use any information it has about the Customer relating to the Customer's creditworthiness and, subject to this agreement, give that information to any other person (including other companies in the DMNZ's group) for credit assessment or debt collection purposes. The Customer agrees that any other information collected by the DMNZ about the Customer is accessed or collected for the use of the DMNZ and any company in its group in the course of its business, including direct marketing activities. Under the Privacy Act 1993, the Customer has rights of access to, and correction of, its personal information.

25. Unpaid Seller's Rights

- 25.1 Where the Customer has left any item with DMNZ for repair, modification, exchange or for DMNZ to perform any other service in relation to the item and DMNZ has not received or been tendered the whole of any monies owing to it by the Customer, DMNZ shall have, until all monies owing to DMNZ are paid:
- (a) a lien on the item; and
 - (b) the right to retain or sell the item, such sale to be undertaken in accordance with any legislation applicable to the sale or disposal of uncollected goods.
- 25.2 The lien of DMNZ shall continue despite the commencement of proceedings, or judgment for any monies owing to DMNZ having been obtained against the Customer.

26. Dispute Resolution

- 26.1 If a dispute arises between the parties to this agreement then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to bind it to an agreed resolution of the dispute.
- 26.2 In the event that the dispute cannot be so resolved, and in any event 28 days after a party's notice of dispute, the matter in dispute may be referred to arbitration in accordance with the Arbitration Act 1996, except that clauses 4 and 5 of the Second Schedule to the Arbitration Act 1996 shall not apply. Either party may refer a matter to arbitration by giving to the other party notice in writing stating the subject matter and details of the dispute and that party's desire to have the matter referred to arbitration.

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- 26.3 The arbitration shall be by one arbitrator to be agreed upon by the parties or, in the event that an arbitrator cannot be agreed within 10 business days of the relevant dispute being referred to arbitration, then an arbitrator for the matter in dispute shall be appointed by the President for the time being of the Arbitrators' and Mediators' Institute of New Zealand Inc (or his or her nominee).
- 26.4 The seat of the arbitration shall be Christchurch.
- 27. Limitation of Liability**
- 27.1 To the maximum extent permitted by law DMNZ's liability to the Customer arising out of or in connection with this agreement (including the performance or non-performance of the Works), whether under the law of contract, in tort, in equity, under statute or otherwise, shall be limited in aggregate to:
- (a) the Price or
 - (b) fifty thousand dollars (\$50,000) if no amount is specified in the quotation.
- 27.2 DMNZ shall not be liable to the Customer for:
- (a) the acts, omissions or defaults of other contractors or consultants engaged by the Customer (including consultants or contractors engaged by DMNZ as agent for the Customer);
 - (b) any changes, alterations or additions to the Works made by third parties without the express approval of DMNZ;
 - (c) the accuracy of any quantity and cost estimates;
 - (d) any business interruption, loss of profit, loss of revenue, loss of opportunity, loss of operation or production, loss of goodwill, or loss of use, or any indirect or consequential loss suffered by the Customer (whether arising in contract, tort or otherwise); or
 - (e) any loss, damage or claim to the extent that such loss, damage or claim was caused by or contributed to by the Customer or its employees, agents, consultants or contractors.
- provided that such exclusions shall not apply in the event of fraud by DMNZ.
- 27.3 DMNZ shall not be liable to any third party for any claim whatsoever arising out of or in connection with the Works, and the Customer indemnifies DMNZ accordingly.
- 27.4 DMNZ shall be deemed to have been discharged from all liability in respect of the Works, whether under the law of contract, tort or otherwise, at the expiration of one (1) year from the completion of the Works, and the Customer (and persons claiming through or under the Customer) shall not be entitled to commence any action or claim whatsoever against DMNZ (or any employee, contractor or sub-consultant of DMNZ) in respect of the Works after this date.
- 28. Service of Notices**
- 28.1 Any written notice given under this agreement shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
 - (b) by leaving it at the address of the other party as stated in documents appended to this agreement;
 - (c) by sending it by registered post to the address of the other party as stated in documents appended to this agreement;
 - (d) if sent by facsimile transmission to the fax number of the other party as stated in documents appended to this agreement (if any), on receipt of confirmation of the transmission;
 - (e) if sent by email to the other party's last known email address.
- 28.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
- 29. General**
- 29.1 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. 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.
- 29.2 The contracting parties' obligations arising under this agreement shall be governed by the Doppelmayr code of conduct available at <http://www.doppelmayr.com> (**Code of Conduct**). The contracting parties declare themselves to be aware of the Code of Conduct and agree to comply with the provisions contained therein.
- 29.3 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and the parties submit to the non-exclusive jurisdiction of the Courts of New Zealand.
- 29.4 Neither party to this agreement may assign this agreement, any payment or any other right, benefit or interest under this agreement without the written consent of the other party (which shall not be unreasonably withheld). DMNZ may elect to subcontract out any part of the Works but shall not be relieved from any liability or obligation under this agreement by so doing. Furthermore, the Customer agrees and understands that they have no authority to give any instruction to any of DMNZ's sub-contractors without the authority of DMNZ.
- 29.5 The Customer agrees that DMNZ may amend these terms and conditions by notifying the Customer in writing. These changes shall be deemed to take effect from the date on which the Customer accepts such changes, or otherwise at such time as the Customer makes a further request for DMNZ to provide Works to the Customer.
- 29.6 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 29.7 Both parties warrant that they have the power to enter into this agreement and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this agreement creates binding and valid legal obligations on them.