

1. Basis of contract
- 1.1 These Terms apply to the Contract to the exclusion of any other terms you seek to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.
- 1.2 The Order constitutes your offer to purchase the Goods and/or Services in accordance with these Terms.
- 1.3 The Order shall only be deemed to be accepted when we issue written acceptance of the Order (including by fax or email), at which point the Contract shall come into existence.
- 1.4 The Contract constitutes the entire agreement between you and us. You acknowledge that you have not relied on any statement, promise or representation made or given by us or on our behalf which is not set out in the Contract.
- 1.5 Any samples, drawings, descriptive matter or advertising issued by us and any descriptions or illustrations of the Goods or descriptions of the Services contained in our catalogues or brochures are issued or published for the sole purpose of giving an approximate idea of the Goods and/or Services described in them. They shall not form part of the Contract or have any contractual force.
- 1.6 Any quotation given by us shall not constitute an offer however, acceptance by you of a quote is deemed acceptance of these terms and conditions. A quotation shall only be valid for a period of 30 days from its date of issue.
- 1.7 All of these Terms shall apply to the supply of both Goods and Services, except where application to one or the other is specified.
2. **Goods**
- 2.1 The Goods are described in our catalogue and/or the Goods Specification.
- 2.2 To the extent the Goods are to be manufactured in accordance with a Goods Specification supplied by you, you shall indemnify us 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 us in connection with any claim made against us for actual or alleged infringement of a third party's intellectual property rights arising out of or in connection with our use of the Goods Specification. This clause 2.2 shall survive termination of the Contract.
- 2.3 We reserve the right to amend the Goods Specification if required by any applicable statutory or regulatory requirements.
3. **Delivery of Goods**
- 3.1 We shall ensure that:
  - (a) each delivery of the Goods is accompanied by a delivery note which shows the date of the Order, our and your reference numbers, the type and quantity of the Goods and, if the Order is being delivered by instalments, the outstanding balance of Goods remaining to be delivered; and
  - (b) if we require you to return any packaging material to us, that fact is clearly stated on the delivery note. You must make any such packaging material available for collection at such times as we shall reasonably request. Returns of packaging materials shall be at our expense.
- 3.2 Unless otherwise agreed, we shall deliver the Goods to the location set out in the Order or to such other location as we and you may agree at any time after we notify you that the Goods are ready.
- 3.3 Delivery of the Goods shall be completed on the Goods' arrival at the location referred to in clause 3.2 above.
- 3.4 Any dates quoted for delivery of the Goods are approximate only, and the time of delivery is not of the essence. We shall not be liable for any delay in delivery of the Goods that is caused by a Force Majeure Event or your failure to provide us with adequate delivery instructions or any other instructions which are relevant to the supply of the Goods.
- 3.5 If we fail to deliver the Goods, our liability shall be limited to the costs and expenses incurred by you in obtaining replacement goods of similar description and quality in the cheapest market available, less the price of the Goods. We shall have no liability for any failure to deliver the Goods to the extent that such failure is caused by any of the matters referred to in clause 3.4 above.
- 3.6 If you fail to take accept or take delivery of the Goods after we notify you that the Goods are ready, then except where such failure is caused by a failure to comply with our obligations under the Contract in respect of the Goods:
  - (a) delivery of the Goods shall be deemed to have been completed on the tenth working day following the day on which we notified you that the Goods were ready; and
  - (b) we shall store the Goods until delivery takes place, and charge you for all related costs and expenses (including insurance).
- 3.7 If 20 working days after we notified you that the Goods were ready for delivery you have not accepted or taken delivery of them, we may resell or otherwise dispose of part or all of the Goods and, after deducting reasonable storage and selling costs, account to you for any excess over the price of the Goods or charge you for any shortfall below the price of the Goods.
- 3.8 We may deliver the Goods by instalments, which shall be invoiced and paid for separately. Each instalment shall constitute a separate contract. Any delay in delivery or defect in an instalment shall not entitle you to cancel any other instalment.
4. **Quality**
- 4.1 We warrant to you that, on delivery, and for a period of six months from the date of delivery, the Goods shall:
  - (a) conform in all material respects with their description and any applicable Goods Specification; and
  - (b) be free from material defects in design, material and workmanship.
- 4.2 Subject to clause 4.3 below, if:
  - (a) you give us notice in writing during the period referred to in clause 4.1 above within a reasonable time of discovery that some or all of the Goods do not comply with the warranty in clause 4.1 above;
  - (b) we are given a reasonable opportunity of examining such Goods; and
  - (c) if asked to do so by us, you return such Goods to our place of business at your cost; we shall, at our option, repair or replace the defective Goods, or refund the price of the defective Goods in full.
- 4.3 We shall not be liable for the Goods' failure to comply with the warranty in clause 4.1 above if:
  - (a) you make any further use of the Goods after giving a notice in accordance with clause 4.2(a) above;
  - (b) the defect arises because you failed to follow our instructions as to the storage, installation, commissioning, use or maintenance of the Goods or, if there are none, good trade practice;
  - (c) the defect arises as a result of our following any drawing, design or Goods Specification supplied by you;
  - (d) you alter or repair such Goods without our written consent;
  - (e) the defect arises as a result of fair wear and tear, wilful damage, negligence or abnormal working conditions; or
  - (f) the Goods differ from the Goods Specification as a result of changes made to ensure they comply with applicable statutory or regulatory requirements.
- 4.4 Except as provided in this clause 4, we shall have no liability to you in respect of the Goods' failure to comply with the warranty in clause 4.1 above.
- 4.5 These Terms shall apply to any repaired or replacement Goods supplied by us under clause 4.2 above.
5. **Title and risk**
- 5.1 The risk in the Goods shall pass to you on completion of delivery.
- 5.2 Title to the Goods shall not pass to you until we have received payment in full, in cash or cleared funds, for the Goods and any other goods that we have supplied to you.
- 5.3 Until title to the Goods has passed to you, you must:
  - (a) hold the Goods on a fiduciary basis as our bailee;
  - (b) store the Goods separately from all other goods held by you so that they remain readily identifiable as our property;
  - (c) not remove, deface or obscure any identifying mark or packaging on or relating to the Goods;
  - (d) maintain the Goods in satisfactory condition and keep them insured against all risks for their full price on our behalf from the date of delivery;
  - (e) notify us immediately if you become subject to any of the events listed in clauses 11.1(b) to (d) below;
  - (f) give us such information relating to the Goods as we may require from time to time; but you may use the Goods in the ordinary course of your business.
- 5.4 If before title to the Goods passes to you, you become subject to any of the events listed in clauses 11.1(b) to (d) below, or we reasonably believe that any such an event is about to happen and notify you accordingly, then, provided the Goods have not been irrevocably incorporated into another product, and without limiting our other rights or remedies, we may at any time require you to deliver up the Goods and, if you fail to do so promptly, enter any premises of yours or of any third party where the Goods are stored in order to recover them.
6. **Supply of services**
- 6.1 We shall provide the Services to you in accordance with the Service Specification in all material respects.
- 6.2 We shall use all reasonable endeavours to meet any performance dates for the Services agreed with you, but any such dates shall be estimates only and time shall not be of the essence for the performance of the Services.
- 6.3 We shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety requirement, or which do not materially affect the nature or quality of the Services, and we shall notify you in any such event.
- 6.4 We warrant to you that the Services will be provided using reasonable care and skill.
7. **Your obligations**
- 7.1 You must:
  - (a) ensure that the terms of the Order and (if submitted by you) the Goods Specification are complete and accurate;
  - (b) co-operate with us in all matters relating to the Services;
  - (c) provide us, and our employees, agents and subcontractors, with access to your premises, office accommodation and other facilities as reasonably required by us to provide the Services;
  - (d) provide us with such information and materials as we may reasonably require to supply the Services, and ensure that such information is accurate in all material respects;
  - (e) (where relevant) prepare your premises for the supply of the Services;
  - (f) obtain and maintain all necessary licences, permissions and consents which may be required for the Services before the date on which the Services are to start; and
  - (g) keep and maintain all our materials, equipment, documents and other property ("**Supplier Materials**") at your premises in safe custody at your own risk, maintain them in good condition until they are returned to us, and not dispose of or use them other than in accordance with our written instructions or authorisation.
- 7.2 If our performance of any of our obligations in respect of the Services is prevented or delayed by any act or omission by you or failure by you to perform any relevant obligation ("**Default**"):
  - (a) we shall without limiting our other rights or remedies have the right to suspend performance of the Services until you remedy the Default, and rely on the Default to relieve us from the performance of any of our obligations to the extent the Default prevents or delays such performance;
  - (b) we shall not be liable for any costs or losses sustained or incurred by you arising directly or indirectly from our failure or delay to perform any of those obligations; and
  - (c) you must reimburse us on written demand for any costs or losses sustained or incurred by us arising directly or indirectly from the Default.

## 8 Charges and payment

- 8.1 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 our published price list in force as at the date of delivery. The price of the Goods is exclusive of all costs and charges of packaging, insurance and transport of the Goods, which shall be paid by you when you pay for the Goods.
- 8.2 The charges for Services shall be the charges set out in the Order or, if no charges are quoted, the charges shall be on a time and materials basis, calculated by reference to our standard rates in force from time to time, the cost of any materials, and the cost of any services provided by third parties and required by us for the performance of the Services.
- 8.3 We may increase the price of the Goods or charges for Services to reflect any cost increases between the date of the Contract and our supply of the Goods and/or Services.
- 8.4 Unless otherwise agreed in writing the price of the Goods and the charges for Services are exclusive of GST, which will be charged to you at the prevailing rate.
- 8.5 In respect of Goods, we shall invoice you on or at any time after completion of delivery. We reserve the right to invoice you periodically during manufacture of the Goods. In respect of Services, we shall invoice you monthly in arrears unless otherwise agreed. Our invoices must be paid in full, without deduction or set-off, by the 20<sup>th</sup> of the month following the date of invoice. Your payment is made only when funds have been fully cleared through the bank's system into our bank account.
- 8.6 If payment is not made by the due date, then without prejudice to any other rights or remedies available to us:
- (a) we may charge interest on overdue moneys on a daily basis at 5% per annum above the current overdraft rate charged by our bankers at that time, and interest shall continue to accrue both before and after judgment; and
  - (b) you will be responsible for all costs (including legal costs on a solicitor/client basis) incurred by us in recovering such moneys.
- 8.7 We may accept and apply payments from you in respect of any indebtedness, and we will not be bound by any conditions or qualifications attaching to the payments.

## 9 Intellectual property rights

- 9.1 All Intellectual Property Rights in or arising out of or in connection with the Services shall be owned by us.
- 9.2 You acknowledge that, in respect of any third party Intellectual Property Rights in the Services, your use of them is conditional on us obtaining a written licence from the relevant licensor on such terms as will entitle us to license such rights to you.
- 9.3 The Supplier Materials are our exclusive property.

## 10 Confidentiality

- You must keep in strict confidence all technical or commercial know-how, specifications, inventions, processes or initiatives which are of a confidential nature and have been disclosed to you by us or our employees, agents or subcontractors, and any other confidential information concerning our business or our products or services which you may obtain. You shall restrict disclosure of such confidential information to such of your employees, agents or subcontractors who need to know it for the purpose of discharging your obligations under the Contract, and shall ensure that such employees, agents or subcontractors are subject to obligations of confidentiality corresponding to those which bind you. This clause 10 shall survive termination of the Contract.

## 11 Termination

- 11.1 Without limiting our other rights or remedies, we may terminate the Contract with immediate effect by giving written notice to you if:
- (a) you breach the Contract or any other contract between you and us;
  - (b) you become insolvent or commit any act of bankruptcy;
  - (c) an administrator, receiver, liquidator or statutory manager is appointed over any of your assets or undertaking; or
  - (d) you make or attempt to make an arrangement or composition with your creditors.
- 11.2 Without limiting our other rights or remedies, we may suspend the supply of Services or all further deliveries of Goods under the Contract or any other contract between you and us if:
- (a) you fail to pay any amount due under the Contract on the due date for payment; or
  - (b) you become subject to any of the events listed in clauses 11.1(b) to (d) above, or we reasonably believe that you are about to become subject to any of them.
- 11.3 You may not terminate the Contract without our prior written consent.
- 11.4 On termination of the Contract for any reason:
- (a) you must immediately pay to us all of our outstanding unpaid invoices and interest and, in respect of Services supplied but for which no invoice has yet been submitted, we shall submit an invoice, which shall be payable by you immediately on receipt;
  - (b) you must return all of the Supplier Materials and any deliverables under the Services which have not been fully paid for. If you fail to do so, we may enter your premises and take possession of them. Until they have been returned, you shall be solely responsible for their safe keeping and will not use them for any purpose not connected with the Contract;
  - (c) our respective accrued rights and remedies at termination shall not be affected, including the right to claim damages in respect of any breach of the Contract which existed at or before the date of termination or expiry; and
  - (d) clauses which expressly or by implication have effect after termination shall continue in full force and effect.

## 12 Limitation of liability

- 12.1 We shall not be liable to you, 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. Our total liability to you 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 not exceed \$[10,000].
- 12.2 Except as set out in these Terms, all warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract. In particular, where you are acquiring the Goods and/or Services for the purposes of a business (as provided in sections 2 and 43 of the Consumer Guarantees Act 1993), that Act shall not apply.
- 12.3 This clause 12 shall survive termination of the Contract.
- 13 **Force majeure**  
We shall not be liable for any failure or delay in performing our obligations under the Contract to the extent that such failure or delay is caused by a Force Majeure Event. A Force Majeure Event means any event beyond our reasonable control, which by its nature could not have been foreseen, or, if it could have been foreseen, was unavoidable, and includes strikes, lock-outs or other industrial disputes and defaults of suppliers or subcontractors.
- 14 **Personal Property Securities Act 1999**
- 14.1 You acknowledge and agree that, by accepting these Terms, you grant us a security interest over the Goods and their proceeds (by virtue of the retention of title in clause 5).
- 14.2 You undertake to:
- (a) do all acts and provide us on request with all information we require to register our financing statement or financing change statement on the Personal Property Securities Register; and
  - (b) advise us immediately in writing of any proposed change in your name or other details on the Personal Property Securities Register.
- 14.3 You:
- (a) waive your right to receive a verification statement in respect of any financing statement or financing change statement relating to the security interest;
  - (b) waive your rights and, with our agreement, contract out of your rights under sections 116, 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA; and
  - (c) agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these Terms and, with our agreement, contract out of such sections.
- 14.4 Unless the context otherwise requires, the terms and expressions used in this clause 14 have the meanings given to them in, or by virtue of, the PPSA.

## 15 General terms

- 15.1 **Assignment:** You may not assign the benefit or burden of the Contract without our prior written consent.
- 15.2 **Notices:** 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 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, or sent by pre-paid fastpost, commercial courier, facsimile or email. The parties specifically consent to service under the construction contracts Act 2002 by way of email and/or to their billing address. A notice or other communication shall be deemed to have been received (i) if delivered personally, when left at the address referred to in this clause, (ii) if sent by pre-paid fastpost, at 9:00am on the second working day after posting, (iii) if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed or (iv) if sent by fax or email, one working day after transmission. The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action.
- 15.3 **Waiver:** No delay or failure by us to exercise our rights under the Contract operates as a waiver of those rights. The partial exercise of those rights does not prevent their further exercise in the future.
- 15.4 **Severability:** If a court decides that part of the Contract is unenforceable, the part concerned shall be deleted from the rest of the Contract, which will then continue in force.
- 15.5 **Amendments:** We may amend these Terms from time to time by notice to you in writing.
- 15.6 **Governing law:** The Contract will be interpreted in accordance with and governed by the laws of New Zealand, and the New Zealand courts will have non-exclusive jurisdiction in respect of all matters between us.

## 16 Defined terms and interpretation

- 16.1 In these Terms, the following words have the following special meanings:

"**Contract**" means the contract between us and you for the supply of Goods and/or Services in accordance with these Terms;

"**Force Majeure Event**" has the meaning given to it in clause 13;

"**Goods**" means the goods (or any part of them) set out in the Order;

"**Goods Specification**" means any specification for the Goods, including any relevant plans or drawings, agreed in writing by you and us;

"**Intellectual Property Rights**" means all patents, rights to inventions, copyright and related rights, trade marks, design rights and other intellectual property rights of any kind;

"**Order**" means your order for the supply of Goods and/or Services, as set out in your purchase order form, your acceptance of our quotation, or overleaf (as the case may be);

"**PPSA**" means the Personal Property Securities Act 1999;

"**Services**" means the services, including any deliverables set out in the Order, supplied by us to you as set out in the Services Specification;

"**Service Specification**" means the description or specification for the Services provided in writing by us to you;

"**Supplier Materials**" has the meaning set out in clause 7.1(g);

"**Terms**" means these terms and conditions (as amended from time to time);

"**we**", "**our**", "**us**" means Spray Marks Road Marking Limited, Advanced Maintenance Ltd, Roadmarkers Otago Ltd and any other of its related companies (as defined in the Companies Act 1993) from time to time; and

"**you**" means the customer who purchases the Goods and/or Services from us.

- 16.2 For convenience, these Terms have been grouped under different headings, but the headings do not affect the meaning of these Terms. In these Terms references to any law include any changes to that law which are in force from time to time.