

# TERMS AND CONDITIONS OF SALE

## Tyco Flow Control Pumping Systems

A Division of Tyco Flow Control Pacific Pty Ltd ABN 83 000 922 690

### Terms and Conditions of Sale

#### 1. General

Unless the context otherwise requires:

**Agreement** means the agreement between Tyco and Customer for the supply of Goods by Tyco to Customer and shall be constituted in its entirety by these Terms and Conditions of Sale and, if any, Tyco's quotation and the Confidential Credit Application and Agreement;

**Credit Arrangement** means the credit terms available to Customer pursuant to an application by Customer for the provision of Goods on credit submitted to Tyco using Tyco's standard credit application form and accepted in writing by Tyco (referred to as the Confidential Credit Application and Agreement);

**Customer** means the party to whom Tyco has agreed to supply Goods pursuant to the Agreement;

**Goods** means the goods and/or services agreed to be supplied by Tyco and purchased by Customer pursuant to the Agreement;

**GST** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* or, if that Act does not exist means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act;

**Guarantee** means the guarantee document provided by Customer or Customer's directors, shareholders or principals to Tyco to guarantee the performance of the Agreement by Customer;

**Proprietary Information** means any and all information and intellectual property relating to the Goods or the installation or operation of the Goods including but not limited to patents, designs, drawings, instruction booklets, specifications, circuit drawings, componentry, trade secrets, trade marks and copyright in such information and intellectual property;

**Purchase Order** means the written purchase order by Customer to Tyco for the supply of the Goods;

**Tyco** means Tyco Pumping Systems, a division of Tyco Flow Control Pacific Pty Ltd ABN 83 000 922 690. Tyco Pumping Systems encompasses the brand names Southern Cross, Everflow Pumps, Turbomaster Pumps, Encon Modular Tanks, Meyers Engineering Services and Australian Panel Tanks.

**Tyco Group** means that group of companies that has as its ultimate parent Tyco International Ltd.

#### 2. Quotations and purchase orders

- Subject to the clause immediately below, quotations from Tyco are valid for a period of 30 days from the date of issue or as otherwise specified in the quotation. Prices given in any quotation by Tyco are applicable to that quotation only, and will not apply in any other instances. A quotation from Tyco is not an offer to sell.
- In order to purchase the Goods, Customer must place with Tyco a Purchase Order setting out an order number, Tyco's quotation number (if applicable), full description of the Goods to be purchased, the delivery date, delivery point and any other information required by Tyco. The Purchase Order may be accepted or rejected by Tyco at Tyco's sole discretion.
- A contract shall be formed by and upon Tyco accepting from Customer a Purchase Order pursuant to the clause immediately above and each contract shall be governed by the Agreement.
- The Agreement shall take precedence over any other representations, agreements, arrangements or understandings relating to the Goods and any matters in connection with the Goods.
- Any conditions or terms of purchase submitted by Customer deviating from or inconsistent with the Agreement will not bind Tyco, notwithstanding any statement by Customer in its Purchase Order that its terms and conditions prevail over the Agreement.
- Where the Goods to be supplied contain raw materials, the price and availability of which is unpredictable (for example, PVC, copper, steel), and there is a lack of available such raw material either to enable Tyco to supply the Goods or to supply the Goods at the price stated in the Purchase Order, Tyco may, at its sole option:
  - expend additional time to make reasonable efforts to attempt to locate raw material, and if raw material cannot be located, serve notice of immediate termination of the Purchase Order under the Agreement; or
  - endeavour to reach agreement with Customer on an increase in the purchase price for the Goods, and if agreement cannot be reached, serve notice of immediate termination of the Purchase Order under the Agreement; or
  - serve notice of immediate termination of the Purchase Order under the Agreement.

In no case shall Tyco have any liability to Customer as a result of termination, but Customer shall pay to Tyco the purchase price of Goods actually supplied or to be supplied under the Purchase Order under the Agreement.

#### 3. Payment of purchase price

- Unless otherwise agreed in writing, Tyco accepts Purchase Orders subject to the condition that Customer agrees to pay the purchase price appearing on Tyco's price list for those Goods current as at the date that Tyco accepts the Purchase Order.
- A copy of Tyco's price list for the Goods is available on request. All prices on Tyco's price list are subject to alteration without notice.

- The total purchase price, unless otherwise stated in the Purchase Order, includes GST but does not include any delivery charges, packaging, freight, assembly costs, installation costs, costs and charges of third party suppliers such as electricians, insurance or any statutory, sales, excise, or other taxes, duties or imposts, all of which may be added to the purchase price or otherwise will be paid by Customer or reimbursed by Customer to Tyco, as Tyco may elect.
- Payment of the purchase price must be made in accordance with Customer's Credit Arrangement. If no agreement is in place payment terms will be 25% of the order value with the placement of the order and the balance prior to despatch or as agreed in writing by both parties.
- Customer must not set off any money owing or alleged to be owing by Tyco against money due by Customer to Tyco.
- Customer acknowledges that Tyco is a member of the Tyco Group. Customer agrees that Tyco and/or any other Tyco Group company is entitled to exercise a right of set off to the extent Customer is indebted to Tyco or to any Tyco Group company against any monies due by Tyco to Customer or any Tyco Group company on this or any other account.
- If Customer does not pay money by the due date for payment, without prejudice to any other rights which it may have against Customer, Tyco may require Customer to pay on demand interest at the Westpac Indicator Lending Rate effective from time to time plus 4% per annum calculated from the due date on daily balances of amounts unpaid.
- The Vendor reserves the right to implement a minimum order value for any Goods and to amend any such value without notice.

#### 4. Cancellation of orders

Customer may not alter or cancel a Purchase Order without Tyco's prior written consent. If Tyco agrees to alter or cancel the Purchase Order, Customer will indemnify Tyco against any loss, damage and expense incurred by Tyco in relation to the alteration or cancellation of that Purchase Order, including the cost of return freight, return shipping to factory of origin, items purchased from third parties for inclusion in the Goods and all labour and engineering costs incurred by Tyco in the execution or part execution of the Goods and including compensation payable to any of Tyco's suppliers and loss of profit.

#### 5. Return of Goods and credits

- Customer is deemed to have accepted the Goods unless it makes a claim in accordance with the clause immediately below.
- Customer may reject any Goods that are wrongly supplied or oversupplied by notifying Tyco of the claim and providing full particulars of the claim in writing within 5 days of receipt of those Goods. Tyco may dispute any such claim.
- Goods referred to in the clause immediately above may be returned to Tyco for credit if all of the following is complied with:
  - the Goods are returned to Tyco's premises by prior arrangement and with Tyco's written approval within 7 days of delivery, at no cost to Tyco, unless delivered as the result of an administrative error by Tyco, in which case Tyco will bear the cost of return;
  - the Goods are accompanied by a dispatch note stating Tyco's original invoice number and reason for return; and
  - the Goods are returned in an unsoiled, undamaged and resaleable condition in their original packing.
- Customer must not return any Goods to Tyco unless it has complied with the two clauses immediately above and has done all things necessary to permit Tyco to examine the Goods to Tyco's satisfaction within that period.
- Without limiting any other clause in the agreement, if the vendor accepts the return of goods as ordered by the customer, the Vendor may charge a restocking fee up to 20% of the Price payable for the Goods. The Restocking fee will be a minimum of \$50.

#### 6. Delivery and storage

- All quoted delivery or consignment dates are estimates only. Tyco is not obliged to meet such dates and will not be liable to Customer by reason of delays caused by any reason whatsoever.
- Tyco is deemed to have delivered the Goods when the Goods are made available to Customer for physical collection by or on behalf of Customer at Customer's nominated delivery point (**Delivery**). Any unloading or loading shall be Customer's responsibility, unless Tyco otherwise agrees in writing.
- Tyco may deliver the Goods by instalments (where, in Tyco's opinion, this is reasonable) and issue interim invoices to Customer.
- Without limiting any other provision of the Agreement, failure by Customer to pay any instalment, or any other amount when due, will entitle Tyco to withhold or delay delivery of any remaining Goods ordered.
- If Customer is unable to collect the Goods at Customer's nominated delivery point on the delivery day, Tyco may (at its option and without limiting its other rights and remedies) arrange suitable storage of the Goods, whether at its premises or elsewhere, and Customer must pay or reimburse all costs and expenses of storage, insurance, demurrage, handling and other charges associated with such storage. Notwithstanding Customer's inability to collect the Goods, Delivery is deemed to have occurred.

# TERMS AND CONDITIONS OF SALE

## Tyco Flow Control Pumping Systems

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### Terms and Conditions of Sale ...continued

#### 7. Title and risk

- (a) Title to the Goods shall remain with Tyco until all monies owing by Customer to Tyco have been paid in full (whether such monies are payable under a specific contract or on any other account).
- (b) Until such time as Customer has paid in full all monies owing to Tyco, Customer shall:
  - (i) store the Goods separately and mark them so that they are clearly and easily identifiable as Tyco's property and, if Supplier requests, inform Tyco of the location of the Goods;
  - (ii) hold the Goods as bailee for Tyco, subject to Customer's right to deal with the Goods in the ordinary course of Customer's business (**Bailment**);
  - (iii) indemnify Tyco against any claim arising out of the possession, use or disposal of the Goods by Customer or repossession or attempted repossession by Tyco.
- (c) If:
  - (i) a payment is not made in accordance with the Agreement;
  - (ii) Customer commits any other breach of the Agreement;
  - (iii) Customer becomes bankrupt, has an administrator, a receiver or a receiver and manager appointed, goes into liquidation (whether voluntarily or otherwise), or is wound up, dissolved or declared insolvent, then Tyco may at any time, without notice to Customer and without prejudice to any other rights that it may have against Customer:
    - (i) terminate the Agreement and the Bailment;
    - (ii) suspend some or all its obligations to Customer under the Agreement; and/ or
    - (iii) enter upon any premises owned or occupied by Customer where Tyco reasonably believes the Goods may be stored and repossess the Goods without being liable for any damages caused.
- (d) If Customer sells the Goods before payment in full to Tyco, or uses the Goods in a manufacturing or construction process of its own or some third party, Customer holds the proceeds on trust for Tyco in respect of those Goods, and must keep such proceeds in a separate account until the liability to Tyco is discharged and must immediately pay that amount to Tyco.
- (e) The risk in the Goods passes to Customer at the time of Delivery.

#### 8. Insurance

Customer must keep the Goods insured against all risks for Goods of that kind from the time the risk in the Goods passes to Customer until the time that title to the Goods passes to Customer. Customer holds the proceeds of that insurance on trust for Tyco up to the amount it owes Tyco in respect of those Goods, and must keep such proceeds in a separate account until the liability to Tyco is discharged and must immediately pay that amount to Tyco.

#### 9. Limitation of liability for Goods

- (a) Other than is provided for in this clause 9, Tyco makes no warranties or representations to Customer.
- (b) Tyco warrants the Goods to be free from defects in workmanship and materials under normal use and service for the periods as detailed in our warranty schedule (**Warranty Period**). This warranty does not cover costs of recovery of the Goods from the site or damage, fault, failure or malfunction due to external causes including accident, abuse, misuse, mechanical or electrical overload, abrasion, corrosion, incorrect installation, failure to perform required preventative maintenance or normal wear and tear.
- (c) During the Warranty Period, to the extent permitted by law, Customer's sole remedy with respect to breach of warranties set out in the clause immediately above will be to repair or replace (as Tyco may elect) any such defective Goods at Tyco's expense. The replacement or repaired Goods shall be covered by the unexpired portion of the Warranty Period in respect of the original Goods or for a period of 90 days, whichever is the greater.
- (d) For equipment forming part of the Goods, which equipment is not manufactured by Tyco, the original manufacturer's warranty will apply. Tyco's liability for such equipment shall not exceed the liability of the manufacturer.
- (e) In respect of Goods that are not ordinarily acquired for personal, domestic or household use or consumption, the liability of Tyco for a breach of any condition or warranty implied by law is limited at Tyco's option to the repair the Goods or supply replacement Goods.
- (f) Tyco's liability under the Agreement will be reduced by the amount of any contributory loss or damage to the extent caused by Customer's act or omission.
- (g) Customer acknowledges and agrees that, to the extent permitted by law, Tyco has no liability in contract, tort (including negligence or breach of statutory duty), by statute or otherwise for loss or damage (whether direct or indirect) of profits, opportunity, revenue, goodwill, bargain, production, contracts, business or anticipated savings, corruption or destruction of data or for any indirect, special or consequential loss or damage whatsoever.
- (h) Tyco's total liability under any contract and the Agreement shall not exceed the total dollar amount of the Goods purchased by Customer under each contract.

#### 10. Proprietary Information

- (a) Customer acknowledges that all Proprietary Information and all right, title and interest therein are the sole property of or licensed by Tyco and Customer shall gain no right, title or interest in the Proprietary Information whatsoever. Customer specifically acknowledges Tyco's exclusive rights to ownership of any modification, translation or adaptation of the Proprietary Information and any other improvement or development based thereon, whether developed, supplied, installed or paid for by or on behalf of Customer or any buyer of Customer or otherwise.
- (b) Customer must not and must not permit any person reasonably within its control nor procure any person to modify, copy, clone or reverse engineer the Goods, or copy, modify or decompile any of Tyco's documentation relating to the Goods.
- (c) The Customer indemnifies, and agrees to keep indemnified the Vendor against any loss, costs, expenses, damages and harm suffered or incurred by the vendor in connection with or arising from the breach by the Customer of any of the provisions of this clause and/ or any claims arising against the Vendor arising out of matters referred to above.

#### 11. Installation

- (a) This clause applies if the Vendor installing the Goods
- (b) Unless otherwise agreed by the Vendor, the customer will do both of the following:
  - i. Be solely responsible at its own expense to obtain any permits or authorities required to install the goods at the site
  - ii. Prepare the site in accordance with the specifications and requirements of the vendor at the customer's costs.

#### 12. Export/re-export/resale

- (a) The Goods supplied are intended for use only in Australia, unless Tyco otherwise agrees. If Customer exports or re-exports the Goods, it is Customer's responsibility to ensure that the Goods and the use to which they are put comply with the laws of the destination.
- (b) Customer acknowledges that the Goods purchased by Customer may not be sold, leased or otherwise transferred to or utilised by a terrorist organisation, a party listed on any US denied persons or entities list or by an end-user engaged in activities related to weapons of mass destruction, including but not limited to activities related to design, development, production or use of nuclear materials, nuclear facilities or nuclear weapons, missiles or support of missile projects, or chemical or biological weapons.
- (c) If Customer resells the Goods, it shall not, in connection with their resale, pay or offer to pay, money or any thing of value to any government official, entity or organization, any political party, any candidate for public office, or their employees or relatives, for the purpose of influencing purchasing decisions or for any other improper purpose.

#### 13. Miscellaneous

- (a) The fact that Tyco fails to do, or delays in doing, something it is entitled to do under the Agreement, does not amount to a waiver of its right to do it. Tyco must agree in writing to any waiver.
- (b) If a clause or part of a clause can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from the Agreement, but the rest of the Agreement is not affected.
- (c) Tyco shall not be liable for any failure to fulfil or any delay in fulfilling any obligation arising under the Agreement if the failure or delay has been caused directly or indirectly by any act of God, war or other civil commotion, strikes, lockouts, stoppages and restraints of labour, breakdown of machinery, inability to obtain raw materials or fuel, fire or explosion, any government action or any other cause beyond Tyco's reasonable control and not as a consequence of Tyco's negligence.
- (d) Any notice to be given to a party under the Agreement must be in writing and must be sent by post, facsimile or email to the address of that party shown in the quotation, Purchase Order or order acknowledgment. Notice is deemed to have been given at the time it would have been received in the normal course of post if sent by post, or if otherwise given at the time it was actually received.
- (e) The Agreement is governed by and must be interpreted in accordance with the laws of the State or Territory where Tyco supplies the Goods and the Goods are delivered. Where there are multiple places of supply and/or delivery, Tyco may elect the State or Territory in Australia that shall have jurisdiction over the Agreement. Customer unconditionally submits to the non-exclusive jurisdiction of the courts of the State or Territory determined in accordance with this clause.
- (f) Where there is more than one Customer then the liability of each shall be joint and several.
- (g) The rights and remedies provided in the Agreement will not affect any other rights or remedies available to Tyco.
- (h) Customer shall not assign this Agreement without Tyco's prior written consent.