Koffman

Terms of Trade

Koffman Limited

1. Definitions

1.1. In these Terms the following words, terms and phrases shall have the meaning given to them as follows except where the subject or context is inconsistent:

1.1.1. Koffman shall mean Koffman Limited its successors and assigns or any person acting on behalf of and with the authority of Koffman Limited.

1.1.2. Client shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described in the relevant Quotation.

1.1.3. Contract means an agreement for Goods and/or Services to be supplied by Koffman to the Client comprising these Terms and an accepted Quotation.

1.1.4. Goods shall mean all goods supplied by Koffman to the Client and includes goods, materials and products described in a Quotation or as otherwise agreed between the parties.

1.1.5. Price shall mean the entire price payable by the Client for the Goods and/or Services as provided in the Quotation but subject to any variation or allowance to the quotation price in accordance with clauses 4 and 5 of these Terms.

1.1.6. Project means the entire scope of the Goods and/or Services being provided by Koffman in respect of the Site referred to in the Quotation.

1.1.7. Quotation means a quotation from Koffman setting out the particulars of the supply of Goods and/or Services which shall form part of a Contract.

1.1.8. Services shall mean all building work services to be supplied by Koffman to the Client as provided in a Quotation or otherwise agreed between the parties.

1.1.9. Site means the property and buildings described in a Quotation where Koffman is to complete the supply of Goods and perform the Services.

1.1.10. Terms means these terms of trade to be read and construed with a Quotation provided by Koffman to a Client.

1.1.11. Working day means working day as it is defined in the Property Law Act 2007.

2. Interpretation

2.1. For the purposes of these Terms unless the context requires otherwise:

2.1.1. Person includes a natural person, company or trust or any other organisation or body corporate;

2.1.2. Words importing the singular or plural number include the singular and plural number respectively;

2.1.3. Where the Client is more than one person, the liability of each Client shall be joint and several.

2.2. Section headings are for reference purposes only and shall not affect interpretation.

2.3. These Terms shall be governed by New Zealand laws, and all prices and payments shall be in New Zealand currency and payable in New Zealand. All prices and rates are stated exclusive of GST which is to be added where appropriate.

3. Contract Process

3.1. Koffman shall supply the Client with one or more Quotations for a Project.

3.2. A Contract shall come into existence on acceptance of a Quotation by the Client. Acceptance of a Quotation by a Client constitutes acceptance of these Terms and acknowledgement the Client has read and agreed to these Terms.

3.3. A Client is deemed to have accepted a Quotation by communicating its acceptance of the Quotation to Koffman in any manner, including but not limited to, verbal or email acknowledgement, instructions to proceed, or payment of any amount under the Quotation.

3.4. The Client cannot cancel a Contract once formed and is bound to pay the Price unless otherwise agreed in writing by Koffman.

3.5. Any date or time for the provision of Goods and/or Services agreed by Koffman is approximate only and can be extended for any reasonable cause for delay. Koffman will use its best endeavours to provide the Goods and/or Services within any timeframe agreed with the Client. Failure to meet a timeframe shall not entitle the Client to cancel a Contract.

4. Price and Payment

4.1. The Price for the Goods and/or Services provided under a Contract shall be the entire price payable by the Client as provided in the Quotation but subject to any variation or allowance to the quotation price in accordance with clauses 4.2 and 5 of these Terms.

4.2. Koffman reserves the right to change the Price in the event of a variation of the Goods and Services to be provided by Koffman from those specified in the corresponding Quotation. Any variation of the Goods and/or Services described in a Quotation (including, but not limited to, any variation as a result of additional works required due to unforeseen circumstances or as a result of increases to Koffman in the cost of materials and labour) will be charged to the Client at a price provided by Koffman based on the actual additional cost of labour and materials plus a margin nominated by Koffman. Any such variation shall be specified on the relevant payment claim.

4.3. The Price shall be paid by the Client to Koffman on the date(s) and in the manner stated in the Quotation. In the event that a Quotation does not provide payment details then the Price shall be paid by the Client on monthly invoice or payment claims by Koffman. All progress payments are non-refundable.

4.4. Koffman has the discretion to issue either invoices or payment claims in the form required under the Construction Contracts Act 2002. The due date for payment to Koffman is the 10th working day after the date of any invoice or payment claim, unless otherwise provided in the Quotation. A payment schedule issued by the Client shall be made in the form required by the Construction Contracts Act 2002 and be provided to Koffman no later than the 5th working day after the date of the corresponding payment claim.

4.5. Time for payment is of the essence and, without prejudice to any other rights of Koffman, if the Client fails to pay any sum payable pursuant to a Contract when due:

4.5.1. Koffman may treat the Contract as repudiated by the Client or may suspend delivery of the Goods or performance of the Services until payment is made in full, without incurring any liability whatsoever;

4.5.2. The Client shall pay interest to Koffman at the default penalty interest rate of twenty percent (20%) per annum above the outstanding until the date when payment of all monies payable is received in full; and

4.5.3. The Client shall be liable for all expenses and costs (including storage and legal costs) in relation to Koffman enforcing or attempting to enforce a Contract or in recovering monies due.

4.6. The Client shall not be entitled to make any deduction from the Price in respect of any set-off or counterclaim, or withhold any payment by way of retention without the prior written approval of Koffman.

4.7. Payment may be made by cash, bank cheque, direct credit, or by any other method as agreed to between the Client and Koffman. No contract cancellation is allowed once product order has been received.

5. Allowances

5.1. If there is an actual rise or fall in the price of employed labour, or in the price of materials, or freight charges to the Site, between the date of the Quotation and the date on which labour is employed or materials delivered to the Site then Koffman may adjust the Price in accordance with clause 4.2. Any adjustment in accordance with this clause shall be specified on the relevant invoice or payment claim.

5.2. The Price shall also be adjusted by the difference between any items listed as provisional sums in a quotation and the actual expenditure incurred by Koffman in procuring, and constructing/installing the

items to which the provisional sums relate. Any adjustment in accordance with this clause shall be specified on the relevant invoice or payment claim.

6. Performance and Warranties

6.1. Koffman warrants that it will deliver the Goods and carry out the Services under a Contract with the reasonable care, skill and diligence expected of an experienced supplier and contractor. Koffman also provides the statutory warranties as specified in the Building Act 2004.

6.2. Koffman shall, except to the extent expressly provided in clause 6.1, be under no liability to the Client (whether in contract, tort or otherwise) for any loss (including but not limited to, loss of profits and consequential loss) of any kind whatsoever arising out of the provision of Goods and/or Services under a Contract. If, notwithstanding this clause, Koffman is found to be liable to the Client in any circumstances then the maximum total amount Koffman will be liable for under a Contract shall be an amount equivalent to the Price.

6.3. In the event that the Services are supplied for business purposes the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 shall not apply.

6.4. The Client and Koffman shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Goods and/or Services.

6.5. The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required in respect of the Goods and/or Services unless otherwise agreed in writing by Koffman.

6.6. The Client agrees that the site will comply with any occupational health and safety laws relating to building/construction site and any other relevant safety standards or legislation.

6.7. Where the Services involve additions or alterations to an existing building or structure then the following shall apply:

6.7.1. Koffman shall not be liable for any loss or damage suffered by the Client in relation to the Goods or Services provided, or other buildings or structures where such loss or damage results from the state or condition of the Client's existing building or structure which could not have reasonably been foreseen by Koffman; and

6.7.2. The Client shall be responsible for the cost of any variation required under these Terms because the existing building or structure contains non-standard, non-compliant or sub-standard construction or materials which were not reasonably foreseeable by Koffman prior to entering into a Contract.

7. Site

7.1. The Client shall ensure that Koffman has clear and free access to the Site at all reasonable times to enable Koffman to undertake the provision of Goods and/or Services. Koffman 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 Koffman.

7.2. Prior to Koffman commencing any work the Client must advise Koffman of the precise location of all underground services on the Site and location of the legal boundary and clearly mark the same. The underground mains and services the Client 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 the Site.

7.3. Koffman will take all care to avoid damage to any underground services and the Client agrees to indemnify Koffman 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 under clause 7.2.

8. Substitution of Materials

8.1. Koffman may substitute Goods or related product or materials if they are not able to be obtained as required. The substituted materials or product shall be as similar to the original as is practical in the circumstances. Koffman shall consult with the Client if a substituted material or product is likely to be significantly different from the original material or product. Any material difference in the cost of a substituted material or product shall be effected as a variation under clause 4.

9. Ownership and Intellectual Property

9.1. Koffman shall retain sole ownership of all Goods supplied under a Contract until the date that payment of the entire Price is received by Koffman. Koffman shall retain indefinite ownership of its copyright and all other intellectual property rights which may be involved with a Contract.

9.2. The Client undertakes not to disseminate, reproduce, store or transmit any such material without first obtaining the written consent of Koffman. The Client indemnifies Koffman against any loss, costs or harm arising from a breach of this clause.

9.3. The Client warrants that all designs or instructions to Koffman will not cause Koffman to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify Koffman against any action taken by a third party against Koffman in respect of any such infringement.

9.4. The Client hereby authorises Koffman to utilise images of the Project in advertising and marketing materials by Koffman.

10. Receiving Goods

10.1. Ownership and title to all Goods supplied by Koffman shall remain with Koffman until full and final payment of the entire Price has been received by Koffman. The Client shall have no right to sell, encumber, or otherwise deal with the Goods until ownership has passed.

10.2. Final payment in full is due and must be received by Koffman before the Goods will be released from the unloading depot. Koffman reserves the right to withhold release of the Goods until this condition is satisfied.

10.3. The Client must inspect all Goods within two (2) working days of the container being unloaded at the depot or delivery point. This inspection requirement is a condition of Koffman's shipping insurance and must be strictly observed.

10.4. Failure by the Client to carry out an inspection within the timeframe specified in clause 10.3 shall be deemed acceptance by the Client that the Goods were received in good condition, free of damage, and in accordance with the order. Koffman shall have no liability for any damage or discrepancy notified after this period has elapsed.

10.5. The Client is responsible for ensuring that its own insurance covers the Goods from the point of release from the unloading depot and during all subsequent transport to the Site. Koffman's shipping insurance does not extend beyond the unloading depot, and Koffman accepts no liability for loss or damage to the Goods during transit to the Site.

11. Default

11.1. In the event that:

11.1.1. The amounts payable by the Client to Koffman are overdue by 5 working days or more, or the Client fails to meet any other obligation to Koffman under a Contract; or

11.1.2. The Client becomes insolvent, has a receiver appointed in respect of all or some of its assets, makes or is likely to make an arrangement with its creditors or has a liquidator (provisional or otherwise) appointed or is placed under statutory or official management; or

11.1.3. The Client no longer carries on business or threatens to cease carrying on business; or

11.1.4. The ownership or effective control of the Client is transferred or the nature of the Client's business is materially altered;

11.1.5. Then, in addition to and without prejudice to its other remedies, Koffman shall be entitled to cancel all or any part of a Contract with the Client which remains unperformed and all amounts outstanding under a Contract shall immediately become due and payable.

12. Disputes Resolution

12.1. If Koffman or the Client considers that a matter in relation to a Contract is in dispute, that party must serve notice on the other party advising the other party of the nature of the dispute.

12.2. Both parties must use their best efforts to resolve any dispute through good faith negotiations.

12.3. If a dispute cannot be resolved within 10 working days of notice being given then either party may serve further written notice on the other referring the dispute to mediation.

12.4. The mediator must be agreed between the parties. However, if the parties cannot agree on a mediator within 5 working days of the matter being referred to mediation, a mediator must be appointed by the President of the Arbitrators and Mediators Institute of New Zealand.

12.5. Each party must pay its own costs associated with the mediation.

12.6. Despite the dispute, each party must continue to perform its obligations under the contract as far as practicable given the nature of the dispute.

12.7. At any stage the parties may agree to suspend any dispute resolution under these Terms due to any adjudication proceedings under the Construction Contracts Act 2002, but in the absence of any such agreement the provisions of these Terms shall continue to apply and neither party shall be entitled to suspend or delay any dispute resolution due to adjudication proceedings.

13. Security

13.1. In the event that the Client fails to pay any monies due under a Contract by the due date for payment and the Client is the legal owner of the Site then the Client agrees to grant Koffman a registerable mortgage over the Site to secure the amounts owing. The mortgage is to be in the current form of an all obligations mortgage produced by the Auckland District Law Society and approved by the Registrar General of Land. Such right to mortgage shall entitle Koffman to lodge a caveat where appropriate to secure any unpaid monies under these Terms.

13.2. The Client irrevocably appoints Koffman to be its attorney for the purpose of giving and executing a mortgage pursuant to clause 13.1 above.

13.3. In agreeing to these Terms the Client acknowledges and agrees that:

13.3.1. These Terms constitute a security agreement for the purposes of the Personal Property Securities Act 1999 (PPSA); and

13.3.2. A security interest is taken in all Goods previously supplied by Koffman to the Client (if any) and all Goods that will be supplied in the future by Koffman to the Client.

13.4. The Client undertakes to:

13.4.1. Sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which Koffman may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;

13.4.2. Indemnify, and upon demand reimburse, Koffman for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;

13.4.3. Not register a financing change statement or a change demand without the prior written consent of Koffman; and

13.4.4. Immediately advise Koffman of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.

13.5. Koffman and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.

13.6. The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.

13.7. Unless otherwise agreed to in writing by Koffman, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.

13.8. The Client shall unconditionally ratify any actions taken by Koffman under clauses 13.3 to 13.7.

14. Insurance

14.1. The Client shall be responsible for all insurances for the Site and any structures on the Site.

15. Guarantee

15.1. In consideration of Koffman entering into a Contract at the request of the person named as the guarantor on a Quotation, the Guarantor guarantees payment of the Price, the performance of the Client under the Terms and indemnifies Koffman against any loss Koffman might suffer should these Terms be lawfully disclaimed or abandoned by any liquidator, receiver or other person. The Guarantor agrees that it may be treated as the Client for all purposes and Koffman shall be under no obligation to take proceedings against the Client before taking proceedings against the Guarantor. Should there be more than one Guarantor their liability shall be joint and several.

16. Miscellaneous

16.1. If any clause or term of these Terms is held to be invalid or unenforceable the invalidity or unenforceability shall be deemed eliminated or modified to the minimum possible extent necessary to make the remainder of the Terms enforceable.

16.2. Failure by Koffman to insist upon strict performance by the Client of any of these Terms shall not be a waiver of any rights of Koffman on any subsequent occasion.

16.3. The Client may not assign or transfer or purport to assign or transfer any of its rights or obligations under or in connection with a Contract to any other person whatsoever.

16.4. Koffman reserves the right to sub-contract the performance of a Contract or any part of the Contract to any other party or person without the prior written consent of the Client.

16.5. The Client agrees that Koffman may obtain information about the Client from any source including credit assessment, debt collecting and direct marketing activities and the Client consents to any person providing Koffman with such information.

16.6. Koffman shall not be liable for any delay, alteration or failure to perform its obligations under a Contract where occasioned by any event beyond that party's reasonable control and is recognised as a force majeure event.

16.7. The Client shall pay the costs and expenses including legal fees incurred by Koffman in exercising any of its rights or remedies or enforcing any of the Terms.

16.8. Any notice given by one party to the other shall be deemed to have been delivered 48 hours after posting to the recipients registered office or last known address, and shall be deemed to have been delivered immediately if forwarded by facsimile or email to the recipient.

16.9. The Goods and/or Services are supplied by Koffman only on these Terms to the exclusion of anything contrary which may have previously been agreed between the parties (written or otherwise).

16.10. Koffman reserves the right to review the Terms at any time. If following a review there is to be a change to the Terms then that change will take effect from the date on which Koffman notifies the Client of such change.