

# The Water Hydraulics Co Ltd. (TWHC)

## Terms and Conditions of Business

### 1. Definitions and interpretation

In these terms and conditions, unless the context otherwise requires, the following words have the following meanings:

**"Agreement"**: these terms and conditions including any schedule or annexure attached hereto, including, without limitation, the relevant quotation, sales order, despatch note and sales invoice;

**"Commencement Date"**: the date on which the Agreement comes into effect being the date set out on the Sales Order Acknowledgement;

**"Event of Force Majeure"**: any delay in performance or non-performance of a party's obligations under the Agreement to the extent that such delay or nonperformance is due to any cause beyond the reasonable control of that party;

**"Ex Works"** as defined in INCOTERMS 2000;

**"Goods"**: the goods (including any instalment of the goods or any parts for them) which TWHC is to supply in accordance with the Agreement;

**"Sales Order Acknowledgement"**: the list of Goods ordered by the Buyer under the Agreement.

### 2. Basis of the sale

2.1 TWHC shall sell and the Buyer shall purchase the Goods in accordance with any written order of the Buyer that is accepted by TWHC subject to these terms and conditions, which shall govern the Agreement to the exclusion of any other terms and conditions subject to which any such order is made or purported to be made by the Buyer.

2.2 Quotations issued to the Buyer by TWHC may be withdrawn or varied at any time and unless otherwise specified shall be automatically withdrawn after 30 days. No binding contract shall in any event arise until the Buyer's written order has been accepted by TWHC and confirmed in writing by TWHC issue of a Sales Order Acknowledgement. Each Sales Order Acknowledgement issued by TWHC will form the basis of a separate Agreement.

2.3 Any advice or recommendation given by TWHC or its employees or agents to the Buyer or its employees or agents as to the storage, application or use of the Goods which is not confirmed in writing by TWHC is followed or acted upon entirely at the Buyer's own risk, and accordingly TWHC shall not be liable for any such advice or recommendation which is not so confirmed.

2.4 Any samples, illustrations or descriptive material and other information contained in TWHC brochures, advertising material or elsewhere shall not form part of the Agreement and shall be treated as approximate and for guidance only unless specifically stated otherwise.

### 3. Orders and specifications

3.1 The Buyer shall be responsible for ensuring the accuracy of the terms of any order (including any applicable specification) submitted by the Buyer and for giving TWHC any necessary information relating to the Goods within a sufficient time to enable TWHC to deliver the Goods in accordance with the Agreement.

3.2 The quantity, quality and description of, and/or any specification for, the Goods shall be those set out in the Buyer's order (if accepted by TWHC).

3.3 No order which has been accepted by TWHC may be cancelled by the Buyer except with the agreement in writing of TWHC and on terms that the Buyer shall indemnify TWHC in full against all loss (including loss of profit) costs, damages, charges and expenses incurred by TWHC as a result of cancellation. If the Goods have been shipped and the Buyer subsequently cancels the order, then the Buyer will indemnify TWHC in full against a restocking fee according to the value of the Goods.

### 4. Price of the Goods

4.1 The price of the Goods shall be TWHC quoted price or, where no price has been quoted, the price listed in any TWHC published price list current at the date of acceptance of the order.

4.2 TWHC reserves the right by giving notice to the Buyer at any time before delivery, to increase the price of the Goods to reflect any increase in the cost to TWHC which is due to any factor beyond the reasonable control of TWHC, any change in delivery dates, quantities or specifications for Goods which is requested by TWHC, or any delay caused by instructions of the Buyer or failure of the Buyer to give TWHC accurate information or instructions.

4.3 Unless otherwise agreed in writing between the Buyer and TWHC all prices are given by TWHC on an Ex Works basis, the Buyer shall be liable to pay costs of packaging, transport, insurance, freight, taxes, duties or handling charges.

4.4 The Buyer is solely responsible for obtaining any export license required in the event of the resale of any of the Goods.

### 5. Payment terms

5.1 Credit accounts can only be opened at the discretion of TWHC following whatever credit reference methods TWHC deem necessary, otherwise full payment must be received before delivery to the buyer. Goods to be supplied via a Proforma Invoice will only be shipped following receipt of cleared funds. Delivery times quoted for Proforma Invoice orders are quoted after receipt of payment.

5.2 Subject to any special terms agreed in writing between the Buyer and TWHC, TWHC shall be entitled to invoice the Buyer with the price of the Goods on or at any time after delivery of the Goods, unless the Buyer wrongfully fails to take delivery of the Goods, in which event TWHC shall be entitled to invoice the Buyer for the price at any time after TWHC has tendered delivery of the Goods.

5.3 The Buyer shall pay the price for the Goods not later than 30 days following the due date of the invoice relating to the Goods. All payments shall be made in full without deduction in respect of any set-off or counterclaim.

5.4 Where the nature of the sale is project or consultancy work requiring purchases from a third party, which account for a significant proportion of the total contract price, TWHC reserve the right to ask for a stage payment of 35% of the total contract price, on receipt of order, to partially cover the cost of such purchases. This payment will be required in full before commencement of the project / consultancy. This payment will be deducted from the final invoice value.

5.5 If the Buyer fails to make any payment on the due date then without prejudice to any other right or remedy available to TWHC, TWHC shall be entitled to:

- (a) Cancel the Agreement or suspend any further deliveries to the Buyer;
- (b) Appropriate any payment made by the Buyer to such of the Goods (or the goods supplied under any other contract between the Buyer and TWHC) as TWHC may think fit (notwithstanding any purported appropriation by the Buyer); and
- (c) charge the Buyer interest (both before and after any judgment) on the amount unpaid, at the rate of 8 per cent per annum over the official dealing rate as defined in the Late Payment of Commercial Debts (Rate of Interest) (No.3) Order 2002 (such interest being deemed to accrue from day to day and being compounded on the last day of each calendar month) until payment is made.

## **6. Delivery**

6.1 Delivery of the Goods shall be made by TWHC delivering the Goods to the address provided by the Buyer on the Sales Order Acknowledgement or by the Buyer collecting the Goods from TWHC premises, as agreed between the parties.

6.2 TWHC shall endeavour to deliver the Goods by the date quoted for delivery on the Sales Order Acknowledgement but such date is not guaranteed nor shall the time for delivery be of the essence unless previously agreed by TWHC in writing. The date quoted for delivery shall be extended by a reasonable period if there is any delay caused by any Event of Force Majeure. The Goods may be delivered by TWHC in advance of the quoted delivery date by prior written agreement between the parties.

6.3 Where the Goods are to be delivered in instalments, each delivery shall constitute a separate contract and failure by TWHC to deliver any one or more of the instalments in accordance with these terms and conditions or any claim by the Buyer in respect of any one or more instalments shall not entitle the Buyer to treat the Agreement as a whole as repudiated.

6.4 If the Buyer fails to take delivery of the Goods or fails to give TWHC adequate delivery instructions at the time stated for delivery (otherwise than by reason of any Event of Force Majeure) then without prejudice to any other right or remedy available to TWHC, TWHC may:

- (a) Store the Goods until actual delivery and charge the Buyer for the reasonable costs (including insurance) of storage; or
- (b) Sell the Goods at the best price readily obtainable and (after deducting all reasonable storage and selling expenses) account to the Buyer for the excess over the price under the Agreement or charge the Buyer for any shortfall below the price under the Agreement.

## **7. Risk and property**

7.1 Risk of damage to or loss of the Goods shall pass to the Buyer at the time of delivery or, where a third party carrier is nominated by the Buyer, on delivery to that carrier or, if the Buyer wrongfully fails to take delivery of the Goods, the time when TWHC has tendered delivery of the Goods.

7.2 Notwithstanding delivery and the passing of risk in the Goods, or any other provision of the Agreement, title to the Goods shall not pass to the Buyer until TWHC has received in cash or cleared funds payment in full of the price of the Goods and all other goods agreed to be sold by TWHC to the Buyer for which payment is then due.

7.3 Until such time as the property in the Goods passes to the Buyer, the Buyer shall:

- (a) Hold the Goods as TWHC's fiduciary agent and Bailee;
- (b) keep the Goods separate from those of the Buyer and third parties and properly stored, protected, insured and identified as TWHC property; and
- (c) Be entitled to resell or use the Goods in the ordinary course of its business (unless TWHC revokes such entitlement). On any such sale or use of the Goods the Buyer shall sell or use those Goods as have been longest in its possession.

7.4 Until such time as title to the Goods passes to the Buyer (and provided that the Goods are still in existence and have not been resold) TWHC shall be entitled:

- (a) on no less than 1 day's notice and during normal business hours of the Buyer to enter upon any premises where the Goods are stored to inspect them; and
- (b) at any time to require the Buyer to deliver up the Goods to TWHC and, if the Buyer fails to do so forthwith, to enter upon any premises of the Buyer or any third party where the Goods are stored and repossess the Goods.

7.5 The Buyer shall not be entitled to pledge or in any way charge by way of security for any indebtedness any of the Goods that remain the property of, but if the Buyer does so, all monies owing by the Buyer to TWHC shall (without prejudice to any other right or remedy of TWHC) forthwith become due and payable.

7.6 The provisions set out in this clause shall be without prejudice to the obligation of the Buyer to purchase the Goods.

## **8. Notification of Claims**

8.1 Any claim for non-delivery of any Goods shall be notified in writing by the Buyer to TWHC within 14 days of the date of TWHC invoice.

8.2 Any claim which is based on any defect in the quality or condition of the Goods or their failure to correspond with specification shall (whether or not delivery is refused by the Buyer) be notified to TWHC within 14 days from the date of delivery or (where the defect or failure was not apparent on reasonable inspection) within a reasonable time after discovery of the defect or failure.

8.3 If delivery is not refused, and the Buyer does not notify TWHC of any claim in accordance with the provisions of this clause, the Buyer shall not be entitled to reject the Goods and TWHC shall have no liability for such defects or failure, and the Buyer shall be bound to pay the price as if the Goods had been delivered in accordance with the Agreement.

#### **9. Warranties, liability and remedies**

9.1 TWHC warrants that the Goods will correspond with their specification at the time of delivery and will be free from defects in material and workmanship for a period of 12 months from the date of despatch or 5000 hours of duty, whichever comes first.

9.2 The above warranty is given by TWHC subject to the following conditions:

(a) TWHC shall be under no liability in respect of any defect arising from fair wear and tear, wilful damage, negligence, failure to follow TWHC instructions (whether oral or in writing), misuse, alteration, or repair of the Goods without TWHC prior written approval;

(b) TWHC shall be under no liability under the above warranty (or any other warranty, condition or guarantee) if the total price for the Goods has not been paid by the due date for payment;

(c) the above warranty does not extend to parts, materials or equipment not manufactured by TWHC, in respect of which the Buyer shall only be entitled to the benefit of any such warranty or guarantee as is given by the manufacturer to TWHC; and

(d) if any warranty claim proves to be the fault of other equipment connected to or used with TWHC equipment, then TWHC reserves the right to charge the Buyer for time, materials and travel expenses incurred in rectifying the fault.

(e) TWHC has not knowingly infringed any intellectual property rights of any third party but does not warrant or give any assurance to the Buyer that any Goods do not infringe the intellectual property rights of any third party.

TWHC shall indemnify and keep the Buyer fully indemnified against all losses, liabilities costs and expenses in respect of claims on the grounds that the Goods or any part of them or anything done by TWHC pursuant to this Agreement infringes any intellectual property rights of any third party provided that TWHC is given immediate and complete control of such claim, that the Buyer does not prejudice the defense of such claim and that the Buyer shall give to TWHC all reasonable assistance with such claim.

TWHC shall have the right to replace or change all or any part of the Goods to avoid any actual or alleged infringement of third party intellectual property rights and the foregoing states the entire liability of TWHC in respect of the infringement of any third party intellectual property rights.

9.3 Subject to clause 9.4 below, the express terms of the Agreement are in lieu of all warranties, conditions, terms, undertakings and obligations implied by statute, common law, custom, trade usage, and course of dealing or otherwise, all of which are excluded to the fullest extent permitted by law.

9.4 Where the Goods are sold under a consumer sale (as defined by the Consumer Transactions (Restriction on Statements) Order 1976) the statutory rights of the Buyer are not affected by these terms and conditions.

#### **Liability and remedies**

9.5 Subject to clause 9.6 below, the entire liability of TWHC shall be limited as follows:

(a) If TWHC fails to deliver the Goods for any reason other than an Event of Force Majeure and TWHC is accordingly liable to the Buyer, TWHC liability shall be limited to the excess (if any) of the cost to the Buyer (in the cheapest available market) of similar goods to replace those not delivered over the price of the Goods.

(b) Where any valid claim in respect of any of the Goods which is based on any defect in the quality or condition of the Goods or their failure to meet specification is notified to TWHC in accordance with these terms and conditions, TWHC shall, at its sole discretion, repair or replace the Goods (or the part in question) free of charge or refund to the Buyer the price of the Goods (or a proportionate part of the price) but TWHC shall have no further liability to the Buyer. Faulty goods returned to TWHC will be shipped at the Buyer's expense.

9.6 Nothing in this Agreement shall exclude or limit liability either party may have for negligently causing death or personal injury, for any fraudulent misrepresentation nor for any breach of its obligations implied by Section 12, Sale of Goods Act 1979 or Section 2, Supply of Goods and Services Act 1982.

9.7 TWHC shall not be liable to the Buyer in contract, tort (including without limitation negligence), statutory duty, pre-contract or other representations or otherwise arising out of or in connection with the Agreement for:

(a) Consequential, indirect or special loss or damage; or

(b) Any loss of goodwill or reputation; or

(c) Any economic losses (including loss of revenues, profits, contracts, business or anticipated savings). In each case whether advised of the possibility of such loss or damage and howsoever incurred.

#### **10. Force Majeure**

Neither party shall be deemed to be in breach of the Agreement, or otherwise be liable to the other, by reason of any Event of Force Majeure provided that the party affected by it shall promptly take reasonable steps to mitigate any losses and/or effects of it and promptly give the other party written notification of the nature and extent of such losses and/or effects and the parties shall enter into bona fide discussions with a view to agreeing upon alternative arrangements as may be fair and reasonable.

#### **11. Insolvency of Buyer**

11.1 This clause applies if:

(a) The Buyer makes any voluntary arrangement with its creditors or becomes subject to an administration order or (being an individual or firm) becomes bankrupt or (being a company) goes into liquidation (otherwise than for the purpose of a solvent amalgamation or reconstruction);

(b) an encumbrancer takes possession, or a receiver is appointed, over any of the property or assets of the Buyer;

(c) the Buyer ceases, or threatens to cease, to carry on business; or

(d) TWHC reasonably apprehends that any of the events mentioned above is about to occur in relation to the Buyer and notifies the Buyer accordingly.

11.2 If this clause applies then, without prejudice to any other right or remedy available to TWHC, TWHC shall be entitled to cancel the Agreement or suspend any further deliveries under the Agreement without liability to the Buyer, and if the Goods have been delivered but not paid for the price shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary. If the price is not paid by or on behalf of the Buyer within 7 days of the payment becoming due and payable, TWHC shall be entitled to enter into the Buyer's premises to take possession of the Goods and the Buyer shall provide all reasonable assistance to TWHC in such repossession.

## **12. General**

12.1 Any notice to either party under these terms and conditions shall be in writing signed by or on behalf of the party giving it and shall, unless delivered to a party personally, be left at or sent by prepaid first class post, prepaid recorded delivery, telex, email or facsimile to the address of the party as notified in writing from time to time.

12.2

(a) The Agreement and any right, power or privilege shall not be deemed to be waived in whole or in part except where agreed by both parties in writing.

(b) The non-enforcement of any of the terms or conditions of the Agreement or any right, power or privilege by either party shall not be construed as a waiver of any of that party's other rights nor affect the other provisions of the Agreement.

12.3 To the extent that any provision of the Agreement is found by any court or competent authority to be invalid, unlawful or unenforceable in any jurisdiction, that provision shall be deemed not to be a part of the Agreement, it shall not affect the enforceability of the remainder of the Agreement nor shall it affect the validity, lawfulness or enforceability of that provision in any other jurisdiction.

12.4 No variation of the Agreement shall be effective unless it is in writing and signed by or on behalf of each of the parties.

12.5 Any reference in these terms and conditions to any provision of a statute shall be construed as a reference to that provision as amended, re-enacted or extended at the relevant time.

12.6 The Agreement sets out the entire agreement and understanding between the parties and supersedes all prior agreements, understandings or arrangements whether oral or written between the parties in respect of the subject matter of the Agreement. Neither party shall be liable in respect of any representation made prior to and not contained in the Agreement unless it was made fraudulently.

12.7 Nothing in the Agreement shall be so construed as to constitute either party to be an agent of the other and the Buyer will not represent itself as an agent, authorised reseller or legal representative of TWHC.

12.8 Exclusion of third party rights unless expressly provided in the Agreement, no term of the Agreement is enforceable pursuant to the Contracts (Rights of Third Parties) Act 1999 by any person who is not a party to it.

## **13. Governing law and jurisdiction**

13.1 The Agreement shall be governed by and construed in accordance with English law and the parties irrevocably submit for all purposes in connection with the Agreement to the exclusive jurisdiction of the English Courts.