

Nexus Performance Foams Limited Terms and Conditions For Sale of Goods

1. Definitions

1.1. Unless the context otherwise requires, the following definitions shall apply to these terms and conditions:

“**Company**” means Nexus Performance Foams Limited or any other company in the Skellerup Group that supplies goods to the Buyer in accordance with these terms and conditions.

“**Buyer**” means the purchaser of the goods from the Company shown on the front of this form or on any order.

“**Default rate**” means the base lending rate charged by the Company's bank plus a margin of 5 per cent per annum.

“**goods**” means those goods supplied to the Buyer.

“**accessions**”, “**commingled goods**”, “**inventory**”, “**perfect**”, “**Non-Purchase Money Security Interest**”, “**proceeds**”, “**Purchase Money Security Interest**”, “**secured party**”, “**security interest**” and “**verification statement**” have the meaning given to such terms in the PPSA or that may be taken from their use in the PPSA.

“**PMSI**” means a Purchase Money Security Interest as this term is defined in the PPSA.

“**PPSA**” means the Personal Property Securities Act 1999 and associated regulations.

“**Incoterms 2010**” means the International Rules for Interpretation of Trade Terms produced by the International Chamber of Commerce which came into force on 1 January 2011, and as amended from time to time.

2. Supply

2.1. The goods will be supplied to the Buyer on these terms and conditions unless the Company agrees in writing to change them. Receipt of an order will be deemed to be acceptance of these terms and conditions by the Buyer.

2.2. The Company will not be bound by any conditions included in the Buyer's order unless it accepts them in writing.

3. Price

3.1. The price for the goods shall be the price agreed between the Company and the Buyer at the date of the order or if no such agreement is made then the current wholesale price charged by the Company at the date of delivery. The price does not include charges for freight, taxes, insurance or duties unless otherwise agreed between the Company and the Buyer.

3.2. Any price agreed between the Company and the Buyer at the date of the order may be varied if wages, salaries, cost of materials, freight rates, taxes, government charges, insurance rates, duty and or exchange rates are increased between the date of the order and the date of delivery.

3.3. Quotations are subject to acceptance within thirty (30) days after which they shall lapse.

4. Payment

4.1. The Buyer shall pay for the goods no later than the 20th of the month following date of invoice and if the Buyer fails to pay on or before due date the Buyer shall pay interest at the Default Rate from the due date until payment.

4.2. Payment by cheque, bill of exchange or other negotiable instrument will not be considered as payment until actually paid or honoured.

4.3. The Buyer shall pay the price in full (including where any amount is in dispute) and shall have no right to set off against the price any claims which the Buyer might have against the Company.

4.4. The price shall become immediately payable regardless of the terms of payment and the Company may take immediate action to recover the price including any legal or collecting costs if the Buyer is in default under this Agreement, commits an act of bankruptcy or goes into liquidation or receivership or enters into a creditors composition or has its credit standing impaired in any other way.

4.5. In the event of sequential contracts or deliveries of goods, money paid by the Buyer to the Company will be applied by the Company to the earliest-in-time delivery or contract that is unpaid or has a portion unpaid for the purposes of determining the continued existence of PMSIs taken by the Company with respect to particular deliveries or goods.

5. Delivery

5.1. For goods being delivered to New Zealand based buyers, delivery shall be made to the Buyer when the goods are first despatched from the Company's premises unless agreed otherwise between the parties.

5.2. For goods being delivered to buyers based outside of New Zealand, unless agreed otherwise between the parties, goods will be supplied to the Buyer FOB (Incoterms 2010). Delivery will occur at the named port of shipment and the relevant provisions of Incoterms will apply accordingly, subject to these terms and conditions.

5.3. The Company will use reasonable endeavours to see that deliveries are maintained according to schedule but any period or dates quoted for delivery are to be regarded as approximate only.

5.4. Goods may be delivered in instalments and each delivery shall be regarded as a separate contract.

5.5. The Company may stop future deliveries until the Buyer has paid for all previous deliveries.

5.6. If the Company is unable to deliver the goods because of any cause beyond its control it may suspend delivery or cancel the Buyer's order without incurring any liability for loss or damage suffered by the Buyer. The Buyer shall not cancel or refuse delivery of any suspended order.

6. Ownership and the PPSA

6.1. Ownership of the goods shall not pass to the Buyer and any proceeds of sale of the goods shall belong to the Company until the Buyer has paid for the goods in full.

6.2. The Buyer acknowledges and agrees that the Company may register a financing statement in relation to any security interest that the Company has in respect of the goods and their proceeds on the Personal Property Securities Register and that such security interest survives until the goods are fully paid for.

6.3. Until payment to the Company has been made in full for the goods, the Buyer acknowledges and agrees that:

(a) the Company supplies the goods to the Buyer on the condition that the Company has a PMSI in the goods;

(b) in relation to goods that are inventory, the Buyer will not allow any Non Purchase Money Security Interest to arise in respect of the goods unless the Company has perfected its PMSI prior to the Buyer's possession of the goods;

(c) the Buyer will not permit the goods to become accessions or commingled with the other goods or mass if the Company has not perfected any security interest that the Company has in relation to the goods; and

(d) if the Buyer (notwithstanding clause 6.1 of this agreement) sells the goods prior to payment for the same to the Company, the Buyer will pay the proceeds arising from that dealing into a separate account with separate records so that those proceeds remain identifiable and traceable to that dealing and the goods. The Buyer agrees that there will be no other funds in the account. If the Buyer further deals with such proceeds, the Buyer will manage that dealing or dealings in a manner having the result that the proceeds remain identifiable or traceable to the original goods. If the Buyer sells the goods prior to payment for same to the Company, all claims which the Buyer holds against third parties shall be handed over to the Company.

6.4. If the Company perfects any security interest that the Company has in relation to the goods, the Buyer will not do anything that results in the Company having less than the security or priority position in respect of the PPSA that the Company assumed at the time of that perfection.

6.5. The Buyer irrevocably gives the Company and its agents the right to enter upon the Buyer's premises, without giving notice and without being in any way liable to the Buyer, or to any person or company claiming through the Buyer, if the Company has sufficient cause to exercise any rights that the Company has under section 109 of the PPSA.

- 6.6. If the Company is a secured party under the PPSA:
 - (a) parties contract out of part g of the PPSA in the following manner: the rights and obligations contained in sections 114(1)(a),125,129,132,133, and 134 of that Part do not apply between the Company and the Buyer; and
 - (b) the Buyer waives its rights granted in sections 121 and 131 of the PPSA. Further, in accordance with section 148 of the PPSA, the Buyer waives its right to receive any financing statement or financing change statement from the Company.
- 6.7. The Buyer will assist the Company by completing any formalities or providing any information required by the Company such that the Company may establish and maintain the best security position that it is entitled to under the PPSA.
7. **Risk**
 - 7.1. The risk in the goods shall pass to the Buyer upon delivery, as defined under either clause 5.1 or 5.2, even though ownership of the goods may not have passed to the Buyer.
8. **Import and Export Licences**
 - 8.1. Where an import licence, a foreign exchange control authorisation or similar authorisation is required, the Buyer shall use best endeavours to obtain it sufficiently prior to the expected date of import. Subject to clause 8.2, if the requisite licence or authorisation cannot be obtained in time to effect timely delivery or within a reasonable time subsequent, the particular contract to deliver goods shall be voidable at the Company's option by giving notice to the Buyer. The Company may, in addition, postpone or delay performance of its obligations pending the obtaining of any such licence or authorisation.
 - 8.2. The Buyer shall immediately notify the Company of the grant or any absolute or qualified refusal to grant a requisite import licence, or authorisation, or both.
9. **Description**
 - 9.1. The Buyer shall rely upon its own judgement as to the nature, quality and condition of the goods and their suitability for any purpose and not upon any representation made by the Company. Any description of the goods given by the Company shall not constitute a sale by description.
 - 9.2. An inspection by the Buyer of a sample of the goods shall not constitute a sale by sample.
10. **Supply for Business Purposes**
 - 10.1. This clause 10 shall apply where the Buyer is not a consumer (as defined in the Consumer Guarantees Act 1993).
 - 10.2. All representations or terms (including any condition or warranty expressed or implied by law, statute or otherwise) not expressly included in these terms and conditions are hereby expressly excluded.
 - 10.3. Subject to clause 10.4, the Company's liability arising from or in connection with the supply of any goods, and whether in contract, equity or tort (including negligence) or otherwise relating to these terms and conditions shall be limited to the price of the goods or the actual loss or damage suffered which ever shall be the lesser.
 - 10.4. Under no circumstances will the Company be liable under the law of contract, equity or tort (including negligence) or otherwise any for indirect or consequential loss of any kind whatsoever.
 - 10.5. The Buyer agrees to indemnify and keep indemnified the Company from and against all costs, damages and expenses incurred by or recovered against the Company in respect of any claim for infringement of any letters patent or registered design through the manufacture or sale of goods where the Buyer has instructed the Company to produce those goods or has provided the relevant materials to the Company.
11. **Supply to consumers**
 - 11.1. The provisions of the Consumer Guarantees Act 1993 shall apply where the Buyer is in New Zealand and acquires the goods as a consumer for the purposes of the Consumer Guarantees Act. Nothing in these terms will affect any rights the Buyer has under the Consumer Guarantees Act 1993.
12. **Damage or Loss in Transit**
 - 12.1. The Company will arrange the freight of the goods if requested by the Buyer in which case the Company shall insure the goods and charge the cost of the freight and the insurance to the Buyer.
 - 12.2. If the goods are damaged, lost or destroyed in transit the Buyer shall make a claim against the insurer and in doing so shall comply with the insurer's requirements with regard to the claim.
13. **Cancellation**
 - 13.1. The Buyer shall not be entitled to cancel any order or any part of an order without the written consent of the Company and then only if it agrees to reimburse the Company for all costs (including the costs of reallocating labour and materials and tooling costs) directly or indirectly incurred by the Company to the date of cancellation.
 - 13.2. The Company shall be entitled to cancel any order if the Buyer being a company or body corporate shall go into liquidation or receivership or being a person shall become bankrupt, or if the Company or the Buyer is refused any requisite export or import permits in respect of the goods, or if the Buyer is in default of any payment obligation to the Company in respect of any previous order.
14. **Enforceability**
 - 14.1. Each provision of these terms and conditions is severable in whole or in part and if any provision is held to be illegal or unenforceable for any reason, only the illegal or unenforceable portion shall be affected and the remainder shall remain in full force and effect.
15. **Industrial Property Rights**
 - 15.1. Notwithstanding the Company's right to charge a fee for development costs, and unless there is an express written term to the contrary, the property in all designs, sketches, formulations and specifications and all dies, tools and other manufacturing items shall be and remain that of the Company.
16. **Privacy Act**
 - 16.1. The Buyer agrees that the Company may obtain information about the Buyer and the Buyer consents to any person providing the Company with such information. The Company may also collect personal information of individuals associated with the Buyer, which shall be collected and held by the Company in accordance with its privacy policy found at www.nexusfoams.com and may be accessed by those individuals in accordance with such policy.
 - 16.2. The Buyer agrees that the Company may use any information it has about the Buyer relating to the Buyer's credit worthiness and may give that information to any other person including any credit or debt collection agency for credit assessment and debt collection purposes.
 - 16.3. The Buyer must notify the Company of any change in circumstances that may affect the accuracy of information provided by the Buyer to the Company.
17. **Governing law**
 - 17.1. These terms and conditions are governed by the laws of New Zealand and any disputes will be heard in the exclusive Jurisdiction of the New Zealand courts.