

# Terms of Trade for Sale of Goods

Growing Medium, Garden Accessories, Plant and Equipment ("Goods") supplied by SUTOL NZ LTD ("the Company") are supplied to the PERSON, PARTNERSHIP OR COMPANY ("the Purchaser") for sale on the following terms and conditions:

## 1. Terms of Contract between Company and Purchaser

1.1. These Terms of Contract between the Company and Purchaser shall apply to all orders accepted by the Company or quotations approved by the Purchaser and that these Terms and Conditions shall prevail and take precedence over any written document or oral message from the Purchaser and in the case of conflict or dispute between the parties these Terms and Conditions shall prevail. Where the Company fails to enforce any of the Terms and Conditions of this contract or fails in any way to exercise its rights under this contract the Company will not be deemed to have waived these rights with respect to any Term or Condition or right.

## 1.2. Arranging Parts, Equipment, Materials, Electronic Components, Growing Medium or Accessories, (Goods) Utilities and Permits:

The Company shall quote a fixed cost for the arranging of electronic components, plant, growing medium, accessories or and utilities and permits on behalf of the Purchaser and which shall be paid separately by the Purchaser and for the ownership of the Purchaser and the Purchaser shall confirm acceptance of the fixed cost by confirming the Quotation whether the Purchaser later proceeds with the use of the Goods or installation or not.

## 2. Quotations and Price

2.1. The description given of the Goods in any estimate or written or published form or quotation has been given by way of identification to assist the Purchaser in making an offer to the Company and the use of such information does not constitute this contract as a sale by description and binding on the Company, until the Company has accepted an offer from the Purchaser and has confirmed and signed a Quotation Schedule listing a description of Conditions which is declared as a sale by description and the signed Quotation Schedule and Warranty Schedule shall be part of this Agreement. The Company may withdraw any written document before the Company accepts an offer from the Purchaser. Acceptance by the Company shall be by the Purchaser sending confirmation of the order.

2.2. No order arising out of the acceptance by the Company of a Quotation Schedule shall be cancelled without the consent of the Company, and in such cases the Purchaser will be liable to pay the Company all costs and expenses incurred by the Company in fulfilling the order to the date of cancellation; and if Goods cannot be cancelled from the original manufacturer the Purchaser will be held liable for the cost of the Goods in total.

2.3. The Quotation Schedule price excludes Goods and Services tax and may be increased if the Company suffers any cost increases which are beyond its control in the supply, production and delivery of Goods (including increases in materials and imported goods or currency exchange rates) between the date of contract (or, where the contract arises from a Quotation Schedule the date of the Quotation Schedule) and the date of delivery, where the Company can supply written evidence of such cost increases or if the Purchaser varies or alters its requirements for the Goods. Variations and alterations may result from changes to instructions from the Purchaser requiring a changed basis for the cost of Goods OR additional Goods or utilities or permits.

2.4. The Price or Quotation Schedule shall exclude the cost of delivery and insurance

2.5. The Company agrees to pass on cost reductions to the Purchaser that may result upon completion of supply if costs are less than that in the Quotation Schedule.

## 3. Sale of Goods for export from New Zealand.

3.1. The Purchaser, being a company or Incorporation not registered in New Zealand or a person who is not tax registered in New Zealand, shall agree to be bound by the terms and conditions of this agreement and also agree that New Zealand law will be the only law applied to this Agreement.

3.2. For the sale of Goods to Companies or Incorporations not registered in New Zealand or persons who are not tax registered in New Zealand the price shall be the quotation accepted by the Purchaser; and subject to any variation of this clause which will be notified to the Purchaser in writing, the price shall be paid by the Purchaser to the Company as follows:

- (a) in cleared funds prior to shipment of the Goods by the Company such as credit card payment, OR
- (b) by irrevocable letter of credit at sight and established by the Purchaser, OR
- (c) by any other means as notified to the Purchaser in writing when the order is placed.

## 4. Delivery of Goods

4.1. The Company will make every effort to ensure that Goods are supplied on time, but will not be responsible for any loss or damage to the Customer's property arising in any way from delays in delivery.

4.2. Where the Company has performed part or all of the supply of Goods at a time agreed by the Purchaser but where delivery is delayed because of any act, omission or in delay by the Purchaser or where the Purchaser has not rendered the site safe under environmental or Health and Safety Employment Regulations, the Company will require the Purchaser to pay that portion of the contract price which represents the costs incurred by the Company in carrying out supply and the Company may also charge storage costs while the Purchaser renders the site ready.

4.3. Where the Purchaser has arranged for the supply of plans, specifications materials, parts or other Goods by declaration in the Quotation Schedule it shall be the sole responsibility of the Purchaser that supply is satisfactory for the purposes they are intended and if the Company uses such supply and incurs costs where supply is not fit for purpose or in accordance with environment or engineering or building codes or local government laws, the Purchaser shall pay the Company for all costs incurred in the Company's supply.

4.4. Goods may be delivered in instalments and in such case each delivery will be regarded as a separate contract and Goods delivered will be subject to the same payment terms. Failure or delay by the Company in making delivery by instalments shall not entitle the Purchaser to cancel or repudiate the contract.

## 5. Security Interests

- 5.1.** The Purchaser undertakes to do all such acts and execute all such documents as the Company may require to ensure that SUTOL NZ Ltd has a perfected first-ranking security interest(s) in the Products under the **Personal Property Securities Act 1999** ("PPSA"). In consideration of the Company entering into this agreement, the Purchaser irrevocably and unconditionally nominates and appoints the Company as the Purchaser's lawful attorney with full power to execute any required PPSA documentation and do any required acts on behalf of the Purchaser should the Purchaser fail to do so.
- 5.2.** The Purchaser waives any rights it may have now or in the future to receive a copy of any verification statement(s) under the PPSA and agrees that as between the Company and the Purchaser, the Purchaser will have no rights under (or by reference to) sections 114(1)(a), 116, 117(1)(c), 119, 120(2), 121, 125, 129, 131, 132, 133 and 134 of the PPSA.
- 5.3.** The Purchaser will, at the company's request, indemnify the company for any costs the company incurs in enforcing its security interest under the PPSA.
- 5.4.** The Products supplied to the Purchaser and secured by these Terms, together with any credit advanced by the supply of any services, are described on each of SUTOL NZ Ltd invoices.
- 5.5.** The Purchaser agrees that it will supply the Company, within 2 business days of its written request, with copies of all security interests registered over the Purchaser's present and after-acquired personal property, and the Purchaser authorises the Company as its agent to request information from any secured party relating to any security interest which is held in any present or after-acquired personal property which is or has been in the Purchaser's possession or control.
- 5.6.** Immediately upon request by the Company, the Purchaser must at its cost procure from any person considered by the Company to be relevant to its security position such agreements and waivers as the Company may at any time require to the intent that the Company will have a first-ranking security interest(s) under the PPSA in the Products until all sums owing by the Purchaser to the Company have been paid.

## 6. Payment

- 6.1.** Payment will be made by deposit and other payment terms declared in the Quotation Schedule before Goods will be despatched and final payment is to be made in full without deduction or setoff according to the terms set out in the Quotation Schedule.
- 6.2.** If payment is not made in full by the due date, the Company is entitled to charge the Purchaser interest on the unpaid overdue balance at the rate of 5% per annum above the current rate charged by the Company's bank calculated from the due date of payment down to the actual date of payment, and the Company may at its option suspend the sale and secure the Goods in its possession regardless of the term of this contract until the overdue amounts are paid in full.
- 6.3.** If at any time the Company reasonably deems the credit of the Purchaser to be unsatisfactory, it may require the Purchaser to provide at the Purchaser's cost, security for payment and/or the Company may suspend performance of any of its obligations under this Contract until security is provided to the Company's satisfaction and the Company may require the Purchaser to pay all costs incurred as a result of suspension and re-commencement of supply of Goods.

## 7. Ownership of Title and Risk

- 7.1.** Risk of any loss, damage or deterioration of or to the Goods shall be borne by the Purchaser from the time of delivery of the Goods into the Purchaser's care and control and the Purchaser shall insure the Goods for fire and loss damage.
- 7.2.** Regardless of the specifications for making the Goods the Purchaser agrees that the Company has legal and equitable right to title in the Goods and ownership shall only pass to the Purchaser when the contract price is paid. For as long as ownership in the Goods is retained by the Company, the Purchaser will store the Goods separately and in such a way that they are identifiable as the property of the Company and shall properly store, protect and insure the Goods from fires and loss damage.
- 7.3.** Notwithstanding that property in the Goods is retained by the Company, the Purchaser is hereby authorised to sell the Goods in the ordinary course of business and to deal with such proceeds as fiduciary agent and bailee of the Company until the Purchaser pays the Company in full without deduction or setoff: provided that such authority may be revoked by written notice at any time if the Company deems the credit of the Purchaser to be unsatisfactory or if the Purchaser is in default of its obligations under the contract or any other contract between the Company and the Purchaser.
- 7.4.** Where Goods in respect of which property has not passed to the Purchaser are sold by the Purchaser pursuant to the authority granted in clause 6.3 any book debt created upon sale of such Goods and the proceeds of sale of such Goods, when received by the Purchaser, shall be held upon trust by the Purchaser for the Company and any proceeds of sale so received by the Purchaser shall be placed in trust for the Company and in a separate bank account and shall first be applied towards the satisfaction of all indebtedness of the Purchaser to the Company.
- 7.5.** If the Goods, the subject of this contract, have become the constituent of mixed with or attached to any other goods, meaning Goods that are sold by the Company and those goods are sold by the Purchaser prior to the Company receiving payment, then a portion of the proceeds of that sale, attributable to the Company's Goods, shall be the property of the Company, and the Purchaser shall ensure that such proceeds are at all times held in a separate fund in trust for the Company.
- 7.6.** This reservation of title and ownership is effective whether or not the Goods have been altered from that supplied or mixed with other materials or fixed to a building or property owned by the Purchaser. Where such Goods are mixed and are severable but not identifiable or where it is impractical to remove the Goods without incurring loss to an innocent third party, the Company is co-owner of the building or property in proportion to the contribution made by the Goods to the value of the Purchaser's building or property.
- 7.7.** The Purchaser further agrees that it cannot sell property or part property in which the Company has title under the clauses in Section 6 to any third party without the written permission of the Company and can only negotiate a sale by declaring the Company's reservation and value of title to the third party and receive any proceeds from sale as the fiduciary agent and bailee of the Company and hold such proceeds in a separate trust account and pay the Company for the outstanding monies owed.
- 7.8.** In any event where Goods remain unpaid by the Purchaser, the Company has unreserved right to enter the property of the Purchaser or its agents during normal business hours and remove Goods in which the Company has retained title relating to the unpaid amount and the Purchaser will not hold the Company responsible for any economic or consequential loss that the Purchaser may suffer as a result, whether the Goods are attached to other goods or building or property owned by the Purchaser, or not.

## **8. Intellectual Property**

**8.1.** The Purchaser agrees that where the Company supplies intellectual property in the form of patents, trademarks and copyrights or written instructions, drawings, plans, manuals and other technical information the ownership of such intellectual property shall always remain with the Company and the Purchaser further agrees that it shall not use the intellectual property in any manner whatsoever whether in complete form or in any way adapting or altering unless the Purchaser has paid the Company in full.

**8.2.** Where the Company has followed plans, specifications and instructions being oral or written provided by the Purchaser, the Purchaser shall indemnify the Company against damages, costs and expenses in respect of which the Company may become liable by following such plans, specifications and instructions and including those arising from the infringement of designs, patents, copyrights or trademarks by the Purchaser.

## **9. Variations**

**9.1.** Any variations regarding price or supply to that agreed in the Quotation Schedule that may be later agreed between the parties during the period of supply shall be in writing and take precedence over that part of the Quotation Schedule so affected.

## **10. Warranty and Guarantees**

**10.1.** In accordance with the Quotation Schedule the warranty on Goods or parts or materials or equipment supplied by the Company as a constituent part of the Goods but not manufactured by the Company shall be the warranty of the original manufacturer.

**10.2.** It shall be the sole responsibility of the Purchaser that property surfaces under the ownership, care or responsibility of the Purchaser is of adequate strength to support loads including weight and depth checks relating to equipment and methods the Company will use in its supply and the Purchaser further agrees that it will not hold the Company liable in any way for damage to property surfaces, footpaths, crossings, gardens or any other part of the surface caused by delivery as a result of failure of the Purchaser's responsibility in this regard.

**10.3.** It shall be the sole responsibility of the Purchaser to define all boundary and survey pegs for property sites under the ownership, care or responsibility of the Purchaser to enable care in delivery and the Purchaser further agrees to pay the Company according to payment terms and also pay storage charges where delivery has been delayed.

**10.4.** The Company warrants that it will supply the Goods as the description defined in the Quotation Schedule and Warranty but that it will not be held responsible for the fitness of the Goods except that it will replace, or at its option repair, Goods supplied under this Contract that are defective and make good any defect in workmanship of the Goods provided that the Purchaser notifies the Company in writing of any defect within (30) thirty days of delivery and subject to the manufacturers' warranty conditions

**10.5.** The Company shall not be liable for any loss of profits or any consequential, indirect or special loss, damage or injury of any kind whatsoever suffered by the Purchaser or any other person arising directly or indirectly from any breach of any of the Company's obligations arising under or in connection with the contract including delays in the delivery of Goods or from any cancellation of the contract or from any negligence, misrepresentation or other act or omission on the part of the Company, its servants, agents or contractors. In any event, the liability of the Company is limited to the value of Goods supplied.

**10.6.** The Company shall not be liable for any breach or failure to perform any of its obligations under this contract where such breach or failure is caused by war, bad weather, adverse environmental conditions, civil commotion, hostilities, strike or lock out, act of God, fire, governmental regulations or directions, or reasons force majeure caused beyond the Company's reasonable control. The occurrence of such an event shall not give the Purchaser a right of cancellation of any contract.

**10.7.** Notwithstanding anything herein before contained in this section 9 or contained elsewhere in the contract the liability of the Company whether in contract or pursuant to any cancellation of the contract or in act or otherwise however, in respect of all claims for loss, damage or injury arising from breach of any of the Company's obligations arising under or in connection with the contract, from any cancellation of this contract or from any negligence, misrepresentation or other act or omission on the part of the Company, its servants, agents or contractors shall be linked at the Company's option, to the price of the Goods or replacement of the Goods.

## **11. Claims for Returned, Damaged or Defective Goods.**

**11.2.** The Company may at its discretion, repair any damaged or defective Goods or make a reasonable allowance on the purchase of Goods to replace the Goods provided:

- (a) The Purchaser returns the Goods within seven (7) days of delivery together with a copy of the invoice and packing slip and a claim specifically identifying the damage or defect(s); and
- (b) The Supplier has reasonable opportunity to investigate the claim.

If the Purchaser does not comply with the above requirements, the Purchaser will be deemed to have accepted the Goods and the Company will not incur any liability whatsoever in relation to the Goods.

**11.3** The Company will not accept any claim by the Purchaser for any reasons where the Purchaser may be prejudiced by the defect or failure of the Goods including economic loss, consequential loss or other form of loss whatsoever and this guarantee will not apply, where:

- (a) the defect or failure is due to or resulting from damage or misuse, negligent maintenance or care while in the possession of the Purchaser or failure to follow care instructions or the Goods have not been used for the purpose for which they were designed or the Goods used by persons not technically competent with the design of the Goods or how to use the Goods.
- (b) the defect, or failure is due to defective materials, instructions or plans supplied by the Purchaser.
- (c) the defect or failure is due to non operation of the Goods due to the Purchaser or Purchaser employees or agents not complying with environmental, Health and Safety in Employment or any other laws of New Zealand or the country where the Goods are being supplied.
- (d) the defect or failure is caused by Purchaser misinterpretation of written instructions for care given by the Company.
- (e) the defect or failure is due to acts, defaults or omissions outside the control of the Company (force majeure)

**11.4.** Where the Company elects to replace damaged or defective Goods, in accordance with the Warranty it may replace the Goods as soon as reasonably practicable with substituted Goods that will be fit for purpose and such substituted goods shall become subject to the provisions of this Agreement in the same manner as the Goods for which they shall have been substituted. If the Company cannot make replacement within 48 hours of notification

of the Goods becoming defective, the Company will repair the Goods and if repair is not practicable, will credit the Purchaser the full payment that has been made for that part of the Goods that are defective or damaged.

- 11.5.** The Company may at its discretion, give credit for returned Goods incorrectly ordered by the Purchaser which are delivered to within ten (10) days at the Purchasers cost in the same condition and packaging in which they were dispatched, with a copy of the invoice. The Company may deduct fifteen (15%) of the value of the Goods as administration and handling costs.
- 11.6** The Purchaser agrees that claims shall not be considered in respect of Goods which:
- 11.7.** are not intact and in original condition
- (i) have been abused or improperly stored or suffered damage while in the care or possession of the Purchaser
  - (ii) have been sold to the Purchaser on a non-refundable basis
  - (iii) have been sold to the Purchaser by auction or in non-standard lots
  - (iv) are more than (12) twelve months after the date of delivery and outside of the warranty set out in the WARRANTY SCHEDULE to this Agreement.
  - (v) in the case of discrepancies in order quantity or type of Goods where the claim is not in writing within (10) ten working days of receipt of the Goods.

## **12. Grounds for Termination by the Company**

- 12.1.** This Agreement may be terminated by the Company immediately on written notice to the Purchaser, if an Event of Default of payments due to the Company by the Purchaser occurs, and the Company may enter the premises or property of the Purchaser where the Goods are stored and remove them.
- 12.2.** Default will also mean, if the Purchaser:
- (a) Fails to commence operation of the contract or provide orders for Goods under this contract on or before commencement date.
  - (b) Fails to comply with any warrant conditions or standards for the care of the Goods issued by the Company.
  - (c) Shall commit any act of bankruptcy, or enter into any composition or arrangement with creditors.
  - (d) Where the Purchaser is a Company do any act which would render it liable to be liquidated or if a resolution is passed or proceedings commenced for the liquidation of the Company or if a Receiver is appointed in respect of all or any assets of the Company.

**No release from obligations.** Terminations of this agreement shall not relieve the Purchaser of its obligations to pay all money owed by it to the Company on any account whatsoever, which money shall be payable immediately notwithstanding that the date for payment of the money may not have arrived. Termination of this agreement shall not relieve the Purchaser from liability arising from any antecedent breach of the terms of this agreement.

- 12.3. Immediate Steps Upon Termination.** Upon the termination of this agreement for any reason, all rights of the Purchaser granted by this agreement shall terminate and the Purchaser will not be entitled to receive any rebate or refund of the whole or any part of the money paid pursuant to this agreement.

## **13. Consumer Guarantees Act 2003.**

- 13.1.** Nothing in these terms is intended to have the affect of contracting out of the provisions of the Consumer Guarantees Act 2003 except to the extent permitted by that Act where the Purchaser acquires the Goods in a business to business situation and all provisions of these terms shall be read as modified to the extent necessary to give effect to that intention.
- 13.2.** The Purchaser shall not, give or make any undertaking, assertion or representation in relation to the Goods to any other person or company without the prior approval in writing of the Company, and the Purchaser shall indemnify the Company against any liability or cost incurred by the Company as a result of any breach by the Purchaser of this provision.

## **14. Applicable Law Dispute and Arbitration**

- 14.1.** In the event of any dispute between the Company and the Purchaser arising out of this Agreement, the substantive laws of New Zealand law shall apply and such dispute shall be referred to an arbitrator under the laws of New Zealand to be agreed between the parties and upon failure to reach agreement arbitration be conducted in accordance with the New Zealand Arbitration Act 1996 and any amendments thereof and such arbitration and legal hearings shall be conducted in New Zealand.

## **15. Guarantor**

- 15.1.** Where the Purchaser is a company, the person(s) referred to as guarantor(s) in this Agreement shall personally guarantee the obligations of the Customer.