

EXPRESS SHEETMETALS NZ LIMITED

TERMS & CONDITIONS OF TRADE



1 DEFINITIONS

- 1.1 "Express" means Express Sheetmetals NZ Limited, or any agents thereof.
- 1.2 "Customer" means and includes, any person or entity acting on behalf of and with the authority of the Customer, or any person or entity purchasing products and services from Express; and where an order has been placed with Express by an agency or third party, includes that agent or third party. Any entity purchasing Goods on behalf of the Customer expressly warrants that they are authorized by the Customer to do so and indemnifies Express on a continuing and unlimited basis for any losses or damages incurred by Express as a result of this warranty being incorrect.
- 1.3 "Goods" and "Services" means (where applicable) all goods, products, services and advice provided by Express to the Customer and shall include without limitation the design and manufacture of sheetmetal goods including air conditioning ducting and associated goods and all charges for labour, hire charges, insurance charges, construction work in terms of s 6 of the Construction Contracts Act 2002 or any fee or charge associated with the supply of Goods and Services.
- 1.4 "Price" shall mean the cost of the Goods and Services as agreed between Express and the Customer and includes all charges Express is to pay to others on the Customer's behalf subject to clause 8. of these terms.

2 ACCEPTANCE

- 2.1 Any instructions received by Express from the Customer for the supply of Goods and Services shall constitute a binding contract and acceptance of these terms.

3 COLLECTION AND USE OF INFORMATION

- 3.1 The Customer noting the requirements under the Privacy Act 1993 acknowledges, authorises and directs that Express can seek and obtain from and supply any information concerning the credit or business standing of the Customer to any other trader, merchant, firm organisation, company or other agency or source whatsoever including any credit agency or association and directs any such person or entity to supply and receive and record such information to and from Express. The Customer consents to receiving marketing and sales communication via e-mail from Express until such time as this consent is expressly withdrawn.

4 PRICE / TRADING ISSUES

- 4.1 Any advice supplied to the Customer does not constitute an offer for sale and Express reserves the right to decline any order for Goods at its sole and unfettered discretion. All prices are in NZ dollars include Goods and Services Tax and are subject to change in the event of a material increase in the cost of the supply of the Goods beyond the reasonable control of Express between the dates of order and delivery; however any quotation given by Express is subject to clause 6 of these terms. Express has the right to immediate termination of, and without any notice or liability, any agreement to supply Goods or Services. Express also has the right to require the payment of a deposit before commencing work on the Customer's order.

5 PAYMENT

- 5.1 The Customer shall pay in full and without deduction, setoff or counterclaim for the Goods on the 20th day following the date of the invoice and irrespective of whether title has passed to the Customer. Time is of the essence. Express has the right to charge interest on overdue accounts at the rate of 2.5% per month or part month on the balance outstanding from the date payment was due until payment is received. The interest shall be compounding on all amounts that remain unpaid. The right to charge interest is without prejudice to Express' other rights in respect of non or late payment.
- 5.2 Express has the right to recover from the Customer all costs and/or expenses incurred in repossession of the Goods or instructing a solicitor or debt collection agency to recover any amount overdue for payment and such costs and expenses shall also bear interest as provided for above.
- 5.3 Express shall, without prejudice to any other remedy available to it at law, be entitled to treat any failure to make payment on the due date as a repudiation of these terms by the Customer. In no event shall Express be obliged to make any delivery of Goods or perform any Services if any moneys due and payable by the Customer under this or any other contract remain outstanding.

6 QUOTATION

- 6.1 Where a quotation is given by Express for Goods and Services:
- 6.1.1 Unless otherwise agreed the quotation shall be valid for thirty (30) days from the date of issue by Express. Express reserves the right to modify or withdraw any quotation at any time and will endeavor to inform the Customer in respect of any such modification;
- 6.1.2 Where the Customer provides drawings or specifications to Express for the purposes of obtaining a quotation the said information must be clear and unambiguous. If the said information is unclear, ambiguous or incomplete and this results in additional costs to Express or a delay in the provision of services then such costs or damages can be claimed by Express from the Customer. The Customer confirms that the said information is all the information required to allow Express to provide a competitive quotation for the Goods and Services in question.

7 RISK

- 7.1 The Goods remain at Express' risk until delivery to the Customer.
- 7.2 Unless otherwise agreed in writing, the delivery terms will be Ex Works (INCOTERMS 2010) Express.
- 7.3 Delivery of Goods shall be deemed complete when delivered to the delivery point agreed with the Customer; or to any agent of the Customer, or are in the control of the Customer or when the Customer has title to the Goods; whichever is the earliest event.
- 7.4 The time agreed for delivery shall not be an essential term of these terms unless the Customer first gives written notice to Express making time of the essence.
- 7.5 Where Express delivers Goods to the Customer by instalments and Express fails to deliver or supply on or more instalments the Customer shall not have the right to cancel the order and associated contract but shall only have the right to remove the non-delivered instalment from the order and associated contract.

8 DELIVERY

- 8.1 Where the customer requests Express to deliver the goods to the Customer or any other nominated location the Customer authorises Express to charge the customer for delivery at Express' then current delivery rates, or when delivery is performed by a third party, at the third party quoted rate plus 20%.

9 COMMENCEMENT AND COMPLETION

- 9.1 Without limitation to Express's rights and remedies under these terms, Express shall not be liable for any delay to the start date or completion date of any Services provided under these terms caused by but not limited to the following:
 - 9.1.1 A failure or delay on the part of the Customer complying with its obligations under these terms;
 - 9.1.2 A delay on the part of a territorial authority or any other authority providing consent for the Services;
 - 9.1.3 Inclement weather;
 - 9.1.4 Variations to these terms or any other contract as between Express and the Customer;
 - 9.1.5 Unforeseen health and safety requirements;
 - 9.1.6 The unavailability or shortage of materials;
 - 9.1.7 The unavailability of subcontractors;
 - 9.1.8 The use of the dispute resolution procedures contained in these terms; or
 - 9.1.9 Any other matter outside Express's reasonable control.

10 SERVICES

- 10.1 Where Express has agreed, at the request of the Customer, to provide installation Services the Customer must:
 - (a) provide Express, its agents, employees and subcontractors with suitable access to the premises (including for any necessary vehicles and equipment) and an electrical supply and other amenities reasonably required to perform such installation Services;
 - (b) ensure the premises comply with all applicable laws, particularly those laws relevant to the health and safety of those persons performing the installation Services;
 - (c) ensure the premises are in a state ready for the installation Services and are structurally sound;
 - (d) obtain (at its cost) any necessary permits, licences, consents and approvals required for the performance of the installation Services in accordance with all applicable laws;
 - (e) provide safe and secure storage at the premises for materials and equipment used in providing the installation Services;
 - (f) ensure that all other trades persons at the premises (other than Express employees or subcontractors) carry out works in accordance with all applicable laws and industry standards and cooperate reasonably with Express employees and subcontractors;
 - (g) in the event an independent contractor is engaged to carry out all or part of the installation Services:
 - (i) agrees it appoints Express as the Customer's agent to enter into a contract with the contractor for the provision of installation Services on such terms as Express deems appropriate in its discretion; and
 - (j) fully reimburse Express for the cost of the contractor.

11 DEFECTS

- 11.1 The Customer shall inspect the Goods on supply and shall within 24 hours of supply notify Express of any alleged defect. Any claim by the Customer of damage or loss should then be endorsed on the carrier's receipt and a detailed claim in writing for any damage or loss must be received by the carrier and Express within 5 working days of the date of Express' delivery docket. All claims and notifications in terms of this clause must be sent by recorded delivery and failure to comply with these conditions may invalidate any claim at the Express's discretion. The Customer shall afford Express an opportunity to inspect the Goods. If the Customer fails to initially notify Express of any alleged default within 24 hours of supply, the Goods shall be conclusively presumed to be in accordance with the terms and conditions and Quotation and free from any defect.
- 11.2 The Consumer Guarantees Act 1993 and/or the Fair Trading Act 1986 may imply warranties or conditions or impose obligations upon Express which cannot by law (or which can only to a limited extent by law) be excluded or modified. In respect of any such legally mandatory terms or conditions imposed on Express, Express' liability shall only apply to the minimum extent required by that statute or provision and those legal obligations shall be restricted and modified so that only the legally essential obligations

contained in those statutes apply to any Goods supplied by Express. If such statutory provisions nevertheless do not apply, then Express's liability under this contract shall be limited at Express' sole discretion to:

- (a) replacing or, if appropriate, repairing the defective Goods; or
- (b) refunding the price paid by the Customer to Express for the defective Goods.

11.3 Express may (in its discretion) accept the Goods for credit but this may incur a handling fee of 20% of the value of the returned Goods plus any freight. In this event, the Goods must be returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.

11.4 The guarantees contained in the Consumer Guarantees Act 1993 are excluded where the Customer acquires Goods from Express for the purposes of a business in terms of Section 2 and 43 of that Act.

11.5 Subject to the provisions contained above:

- (a) any Goods supplied but not manufactured by the Express shall be covered only by the express warranty, if any, of the manufacturer of such Goods and any such warranty shall be void if the Customer replaces any Goods supplied or proposed to be supplied by Express with Goods supplied by any other entity;
- (b) Express shall be under no liability to the Customer in respect of any Goods that have been improperly stored, handled, operated or which have not been installed, operated or maintained according to any instructions given by Express to the Customer or contained in supplier furnished manuals;
- (c) In no event shall Express be responsible for any consequential loss, penalties, expenditure, damages or losses suffered or incurred by the Customer arising out of any delay in delivery or caused by or arising out of any use of or dealing with the Goods, whether arising from any defect in the Goods, installation of the Goods, finishing works carried out to the Goods, unsuitability for the Customer's purpose, negligence by the Express or its employees or agents in any other way.

12 AGENCY

12.1 The Customer authorises Express to contract either as principal or agent for the provision of Goods and Services.

12.2 Where Express enters into a contract to the type referred to in clause 12.1 of these terms it shall be read with and form part of these terms and the Customer agrees to pay any amounts due under that contract.

13 TITLE AND SECURITY (PERSONAL PROPERTY SECURITIES ACT 1999) ("PPSA")

13.1 Upon making an order the Customer grants to Express a first ranking security interest over the Goods (plus any proceeds) and over all its present and after acquired personal property except only for any such property (and its proceeds) in or to which the Customer has rights and which has not been supplied by Express to the Customer. On request, the Customer must properly execute any documents and do anything else required by Express to ensure that this security interest constitutes a perfected security interest (as defined by the PPSA) including executing any amendments to these terms as reasonably required by Express executing any new, replacement or additional security document and providing any information to Express to enable it to complete a financing statement or a financing change statement (as defined by the PPSA). The Customer must not agree to any other person or entity filing a financing statement over the Goods without the prior written consent of Express and to notify Express immediately it becomes aware of any other entity taking steps to file a financing statement over the Goods.

13.2 Express shall retain full legal and equitable title in all supplied Goods and title to all supplied Goods shall not pass to the Customer and there shall be no right to deal with, on-sell or encumber or mortgage Goods until all payments (including delayed or deferred payments on a credit basis and any enforcement costs or penalty interest) have been paid in full and without deduction, setoff or counterclaim to Express.

13.3 The Customer gives irrevocable authority to Express to enter any premises occupied by the Customer or on which Goods are situated at any reasonable time after default by the Customer or before default if Express believes (in its reasonable opinion) a default is likely and to remove and repossess any Goods and any other property to which Goods are attached or in which Goods are incorporated. Express shall not be liable for any costs, damages, expenses or losses incurred by the Customer or any third party as a result of this action, nor liable in contract or in tort or otherwise in anyway whatsoever unless by statute such liability cannot be excluded. Express may either resell any repossessed Goods and credit the Customer's account with the net proceeds of sale (after deduction of all repossession, storage, selling and other costs as set out in these terms) or may retain any repossessed Goods and credit the Customer's account with the invoice value thereof less such sum as Express reasonably determines on account of wear and tear, depreciation, obsolescence, loss or profit and costs.

13.4 Where Goods are retained by Express pursuant to clause 13.3 of these terms, the Customer waives the right to receive notice under s.120 of the PPSA & to object under s.121 of the PPSA.

13.5 The following events shall constitute defaults by the Customer:

- 13.5.1 Non payment of any sum by the due date.
- 13.5.2 The Customer intimates that it will not pay any sum by the due date.
- 13.5.3 Any Goods are seized by any other creditor of the Customer or any other creditor intimates that it intends to seize Goods.
- 13.5.4 Any Goods in the possession of the Customer are materially damaged while any sum due from the Customer to Express remains unpaid.
- 13.5.5 The Customer is bankrupted or put into liquidation or administration or if a receiver or manager is appointed to the Customer or to any of the Customer's assets.
- 13.5.6 A Court judgment is entered against the Customer and remains unsatisfied for seven (7) days.
- 13.5.7 Any material adverse change in the financial position of the Customer.

13.6 If the Credit Repossession Act 1997 applies to any transaction between the Customer & Express, the Customer has the rights provided in that Act despite anything contained in these terms.

14 PAYMENT AND CREDIT ALLOCATION

14.1 Express may in its discretion allocate any payment received from the Customer or any credit applied to the Customer account towards any invoice and or costs as provided for in these terms that Express determines and may do so at the time of receipt or at any time afterwards and on default by the Customer may reallocate any payments previously received and allocated. In the absence of any payment allocation by Express, payment shall be deemed to be allocated in such manner as preserves the maximum value of Express' security interest in the Goods.

14.2 Payments are to be made to Express as per the terms of invoice.

15 LIABILITY

15.1 Except as otherwise provided by clause 11.2 of these terms Express shall not be liable for:

15.1.1 Any loss or damage of any kind whatsoever including consequential loss whether suffered or incurred by the Customer or another person and whether in contract or tort (including negligence) or otherwise and irrespective of whether such loss or damage arises directly or indirectly from Goods and Services provided by Express to the Customer; and

15.1.2 The Customer shall indemnify Express against all claims & losses of any kind however caused or arising & without limiting the scope of this clause whether caused or arising as a result of the negligence of Express or otherwise brought by any person in connection with any matter, act, omission, or error by Express its agents or employees in connection with the Goods and Services.

16.3 Notwithstanding anything contained in these terms, the liability of Express, whether in contract or pursuant to any cancellation of the contract or in tort or otherwise howsoever, in respect of all claims for loss, damage or injury arising from the breach of any of Express' obligations arising under or in connection with the contract, from any cancellation of the contract or from any negligence on the part of Express, its servants, agents or contractors shall not in aggregate exceed the price of the Goods or services provided under that contract.

16 CONSUMER GUARANTEES ACT

16.1 The guarantees contained in the CGA are excluded where the Customer acquires Goods & Services from Express for the purposes of a business in terms of section 2 and 43 of the CGA

17 CANCELLATION

17.1 Any cancellation or suspension of any order shall not affect Express' claim for money due at the time of cancellation or suspension or for damages for any breach of the agreement to supply the Goods and/or Services or the Customer's obligations to Express under these terms.

18 DISPUTE RESOLUTION

18.1 Any dispute or difference arising out of or in connection with this contract, or the subject matter of this contract, including any question regarding its existence, validity or termination (a "Dispute") which remains unresolved for a period of seven (7) days, the parties shall each designate a senior manager or officer to review and use best endeavours to develop a workable resolution to the disagreement or dispute.

18.2 If no agreement has been reached in discussions between the senior managers or officers within fourteen (14) days of referral to them, either party may give written notice of its intention to refer such dispute or difference to mediation.

18.3 The mediator will be appointed by the President of the Arbitrators' and Mediators' Institute of New Zealand Incorporated upon the application of any party. The mediation will be conducted in accordance with the Mediation Protocol of the Arbitrators' and Mediators' Institute of New Zealand Incorporated in force at the time the Dispute is referred to mediation.

18.4 All costs related to the Mediation will be borne by the party that is deemed to be at fault at the conclusion of the matter, by the mediator.

19 VARIATIONS

19.1 The Customer and Express may agree to vary any Goods or supply of Services provided under these terms so long as any variation does not impose an unreasonable burden on Express.

19.2 Where practicable, any variation to the Goods and Services will be recorded in writing and include the estimated cost of the variation, however any failure to include the cost shall not disqualify Express from its entitlement to be paid for the variation.

19.3 If a variation results in the omission of any Services to be carried out by Express, Express shall be entitled to recover any costs incurred as a result of the omission of the Services.

19.4 If a variation results in additional Services to be carried out by Express due to requirements of a territorial authority or other legislative requirements then the costs associated with this are to be borne by the Customer. Similarly, if the requirement to carry out any additional Services or use additional Goods due to an error or defect in any drawings or specifications supplied to Express by the Customer, the cost of such additional Goods or Services shall be borne by the Customer.

20 MISCELLANEOUS

20.1 Express shall not be liable for delay or failure to perform its obligations if the cause of the delay or failure is beyond its control.

20.2 Failure by Express to enforce any of these terms shall not be deemed to be a waiver of any of the rights of obligations Express has under these terms.

- 20.3 If any of these terms shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining terms shall not be affected, prejudiced or impaired.
- 20.4 The Customer shall not assign all or any of its rights or obligations under these terms without the prior written consent of Express.
- 20.5 In the case of any conflict between these terms or any other document provided by Express, these terms shall prevail. These terms shall not be modified or varied unless expressed in writing and agreed to by Express and the Customer.
- 20.6 The Customer in making an order or offer for the Goods any medium it does so on the basis that the Customer has read, understood and agrees to be bound by these terms having relied solely upon its own judgment. Should the Customer have any queries regarding these terms it should seek independent legal advice before making an order/offer. Express is not responsible for any incorrect interpretation of these terms by the Customer.
- 20.7 Express retains all rights in or to any intellectual property associated with the Goods or Services irrespective of their sale or delivery to the Customer.
- 20.8 Save as for expressly provided in these terms, no amendment to these terms will be effective unless in writing and signed by a duly authorized senior representative of each party.
- 20.9 The intellectual property of Express and the Customer shall remain their own property.
- 20.10 Prices quoted by Express do not include GST. The price of Goods and services shall be deemed to be increased by the amount of any GST applicable to the supply of the Goods or Services. Any alteration to the supply of Goods or Services shall be to the Customer's account.
- 20.11 The Customer may not assign any of their rights or obligations under these terms without Express' prior written consent.
- 20.12 Express reserves the right to review any of these terms at any time and from time to time. If, following any such review, there is any change to these terms that change will take effect from the date on which Express gives notice to the Customer of such change.
- 20.13 Express and the Customer will not, at any time, directly or indirectly, disclose or permit to be disclosed to any person, use for itself, or use to the detriment of the other party, any confidential information disclosed by Express to the Customer or vice versa unless as is reasonably required for the implementation of these terms.