

CLOUDY BAY – GENERAL TERMS AND CONDITIONS OF PURCHASE (v1 JULY 2021)

All orders of Goods and/or Services placed by the Purchaser with the Supplier are subject to the following terms and conditions (**Terms**).

It is agreed that any terms or conditions of purchase contained in documents submitted by the Supplier are excluded unless the Purchaser agrees otherwise in writing.

Supplying Goods and/or Services to the Purchaser will constitute deemed acceptance by the Supplier of these Terms.

1. ORDERS AND CANCELLATIONS

1.1 Orders

- (a) Orders are to be made by the Purchaser in the form of a written purchase order signed by an Authorised Signatory of the Purchaser (**Purchase Order**).
- (b) A Purchase Order provided by the Purchaser to the Supplier will specify:
 - (1) where Goods are being ordered, the type, specifications, quantity, required delivery point(s) and required delivery date(s) for the Goods which are being ordered;
 - (2) where Services are being ordered, the type, scope and required delivery date(s) for the Services which are being ordered;
 - (3) the price payable by the Purchaser for the relevant Goods and/or Services including and excluding GST (as applicable) as agreed between the parties;
 - (4) where Goods are being ordered:
 - (A) any logistics or delivery costs; and
 - (B) any government charges or duties, including without limitation use or excises taxes or import taxes or other costs,which are payable by the Purchaser in connection with the delivery of the Goods as agreed between the parties.
- (c) Supplying any Goods and/or Services described in a Purchase Order issued by the Purchaser will constitute deemed acceptance of the Purchase Order (and these Terms) by the Supplier.
- (d) If the Supplier:
 - (1) does not accept a Purchase Order submitted by the Purchaser; or
 - (2) is not able to supply any of the Goods and/or Services that are ordered; or
 - (3) is not able to meet the Purchaser's required delivery date, the Supplier must notify the Purchaser within 10 Business Days of the Purchase Order being provided to the Supplier.
- (e) Upon receipt by the Purchaser of a notice under clause 1.1(d), the relevant Purchase Order will lapse and the parties may (but are not obliged to) negotiate a replacement Purchase Order.
- (f) Nothing in these Terms will:
 - (1) oblige the Purchaser to provide Purchase Orders to the Supplier (other than in circumstances where the Purchaser, in its absolute discretion, wishes to order Goods and/or Services from the Supplier);
 - (2) require the Purchaser to procure a minimum amount, or value, of Goods and/or Services from the Supplier; or
 - (3) restrict the Purchaser's ability, or right, to request the provision of Services or the supply of Goods from any other supplier.

1.2 Cancellations – Services

- (a) The Purchaser may cancel a Purchase Order provided to the Supplier for Services at any time upon providing a written notice of cancellation to the Supplier.
- (b) Upon cancellation under clause 1.2(a), the Supplier will promptly cease carrying out any Services (and where applicable, make the Site safe) and vacate the Site.
- (c) For any Purchase Orders which are cancelled, all costs (or work in progress) reasonably and necessarily incurred by the Supplier up to the date of cancellation will be payable by the Purchaser.
- (d) Upon cancellation, the Purchaser may engage alternate suppliers to supply the Services.

1.3 Cancellations – Goods

- (a) The Purchaser may, by written notice of cancellation to the Supplier, cancel a Purchase Order provided to the Supplier for Goods at any time before the relevant Goods have been delivered.
- (b) Upon cancellation under clause 1.3(a), the Purchaser will pay the Supplier any costs reasonably and necessarily incurred by the Supplier:
 - (1) prior to the date of the cancellation notice; or
 - (2) which the Supplier is legally bound to pay, in relation to the manufacture or supply of the Goods after deducting any amount which the Supplier receives for the sale of those Goods to any third party.
- (c) The Supplier must use its best endeavours to sell those Goods to a third party.
- (d) Upon cancellation, the Purchaser may engage alternate suppliers to supply the Goods.

2. PRICE AND INVOICING

2.1 Prices

- (a) The Supplier may only charge for Goods and/or Services at the prices detailed and itemised in the relevant Purchase Order.
- (b) Where Goods are supplied, the Supplier may also invoice the Purchaser for delivery costs and other charges (such as import or excise taxes) specified in the Purchase Order.
- (c) The Supplier may not invoice the Purchaser for any amounts which are not expressly specified in the Purchase Order.

2.2 Invoices and payment terms

- (a) Invoices may be issued by the Supplier:
 - (1) in relation to Goods supplied, on or within 20 Business Days after, the date on which the Purchaser takes possession of the Goods; and
 - (2) in relation to Services supplied, on or about the final Business Day of each calendar month.
- (b) All invoices must:
 - (1) be valid tax invoices for the purposes of section 24 of the GST Act; and
 - (2) fully itemise all Goods and/or Services and other amounts which are included in the invoice (including, where Services are provided, the number of hours worked in the relevant period).
- (c) Other than to the extent an invoice is disputed by the Purchaser in good faith, the Purchaser must pay all invoices issued by the Supplier 30 days following the calendar month in which the invoice is issued.

2.3 GST

- (a) Unless otherwise stated, the consideration expressed to be payable by the Purchaser for, or in connection with, any supply made by the Supplier under these Terms which is subject to GST, does not include any GST.
- (b) The Purchaser must pay to the Supplier an additional amount on account of GST (the **GST Amount**) equal to the consideration payable by the recipient to the Supplier for the supply multiplied by the prevailing GST rate.
- (c) The GST Amount is payable no later than the time the consideration to which the GST Amount relates is payable by the Purchaser under these Terms, provided the Supplier has issued a tax invoice to the recipient in accordance with clause 2.2.

3. PROVISION OF SERVICES

3.1 Performance / completion

- (a) The Supplier must perform and complete any Services by the delivery date(s) specified in the relevant Purchase Order (or such later date agreed by the Purchaser in writing).
- (b) The Purchaser agrees to provide access to the Site (and any information required to undertake the Services) as reasonably necessary to enable the Supplier to deliver the required Services.
- (c) The Supplier is responsible for all acts and omissions of any employee, officer, agent, representative, contractor or subcontractor of the Supplier ("**Personnel**") as if they were the acts or omissions of the Supplier.

- (d) The Supplier must ensure that all Personnel strictly comply with the Terms and with all of the Purchaser's policies, procedures and directions in relation to these Terms.

3.2 Variation of Services

- (a) The Purchaser may by written notice to the Supplier request that the Supplier varies the Services.
- (b) If the Purchaser requests a variation to the Services:
 - (1) the Purchaser will provide the Supplier with a written notice detailing the required variation;
 - (2) the Supplier will, as soon as reasonably possible, review and evaluate the estimated cost of the proposed variation and provide the Purchaser with particulars of its updated costs; and
 - (3) if the Purchaser wishes to proceed with the variation, the parties will agree to a further Purchase Order describing the updated particulars of the Services to be provided.

3.3 Work health and safety

In supplying any Services on Site, the Supplier must and must ensure that all of its Personnel:

- (a) comply with the *Health and Safety at Work Act 2015 (HSWA)*, including any regulations, codes and guidance made under the HSWA (by WorkSafe or otherwise) and any 'safe work instrument' (**WHS Laws**) and, upon reasonable request by the Purchaser, demonstrate compliance with the WHS Laws including the provision of evidence to demonstrate compliance with the WHS Laws;
- (b) complete any work, health and safety (**WHS**) inductions or similar WHS training as required by the Purchaser upon accessing the Site and comply with any directions of the Purchaser in relation to work health and safety matters on the Site;
- (c) provide all such information and assistance as the Purchaser may reasonably require in connection with any WHS investigation relating to the Services; and
- (d) provide the Purchaser with a copy of any notification (or the details thereof if not in writing) required to be given by the Purchaser under the WHS Laws to any Authority in relation to the death, serious injury or injury of any person or in respect of a dangerous incident arising pursuant to or in relation to the provision of the Services, promptly after the giving of such notification.

4. DELIVERY, TITLE AND RISK

4.1 Delivery

- (a) The Supplier must deliver the Goods to the delivery point specified in the Purchase Order by the delivery date specified in the Purchase Order.
- (b) The Goods must be accompanied by:
 - (1) a delivery docket containing reasonable particulars in relation to the Goods;
 - (2) all relevant manufacturer's or supplier's instructions concerning the use of the Goods; and
 - (iii) all relevant manufacturer's or supplier's warranties in respect of the Goods.

4.2 Hazardous materials

- (a) The Supplier must transport and store all hazardous and dangerous Goods in accordance with applicable law (including, without limitation, the *Hazardous Substances and New Organisms Act 1996* and its regulations) and must provide the Purchaser with a materials safety data sheet (**MSDS**) for all chemicals, chemical substances and other hazardous goods on delivery of such Goods.
- (b) No hazardous Goods may be delivered until the relevant MSDS has been provided to the Purchaser.

4.3 Retention of title

Title to the Goods will pass to the Purchaser when the Supplier has been paid in full for the Goods, however it is agreed that the Purchaser may on-sell, lease or bail the Goods to third parties in the ordinary course of its business before full title passes to the Purchaser.

4.4 Risk

Despite clause 4.3, risk in Goods supplied will pass to the Purchaser when the Goods are delivered to the Purchaser and safely unloaded (in accordance with all reasonable directions provided by the Purchaser) at the delivery point specified in the relevant Purchase Order.

4.5 Rejection

- (a) The Purchaser may, within 14 days of taking delivery of the Goods, reject the Goods if it reasonably determines that:

- (1) the Goods delivered do not match the description of such Goods in the relevant Purchase Order;
- (2) the Goods supplied do not comply with the relevant Purchase Order or these Terms;
- (3) the Supplier has breached any term of the Purchase Order or these Terms; or
- (4) the Goods delivered are in excess of the quantities stated in the relevant Purchase Order.

- (b) The Purchaser may, at the Supplier's cost, sell or dispose of the rejected Goods if the Supplier does not repossess the Goods within 30 days of being notified of the rejection.

4.6 PPSA

- (a) The Supplier may make a registration on the PPSR in relation to any retention of title security interest created by clause 4.3. In relation to any such registration, the Supplier must:
 - (1) immediately provide to the Purchaser a verification statement in relation to any such registration when the registration is made; and
 - (2) discharge and remove such registration from the PPSR within 10 Business Days of a written request from the Purchaser if:
 - (A) all Goods supplied by the Supplier to the Purchaser have been paid for in full by the Purchaser; and
 - (B) the Purchaser has no current Purchase Orders or Purchase Orders in place with the Supplier for Goods.
- (b) The Supplier must indemnify the Purchaser for all costs, expenses and Losses (including legal fees) incurred by the Purchaser as a result of a failure to comply with clause 4.6(a)(2).
- (c) Terms used in this clause 4 have the same meaning as defined in the PPSA unless expressly provided otherwise.

5. WARRANTIES

5.1 General warranties – Goods

- (a) Where Goods are supplied by the Supplier, it warrants that:
 - (1) it has the right to sell and transfer unencumbered title to the Goods to the Purchaser;
 - (2) the Goods will be new, unused, free from defects (including any latent defect) and of merchantable quality when delivered to the Purchaser and will be fit for the purpose for which the Goods would ordinarily be used;
 - (3) ownership, possession, use or resale of the Goods by the Purchaser will not infringe any IP Rights of any third party;
 - (4) the Goods comply in all respects with all applicable laws and it holds all Authorisations required by applicable law to supply the Goods; and
 - (5) the Goods will conform strictly to the description, specifications, standards, quality and quantity set out in the relevant Purchase Order and model number and the sample (if any) provided by the Supplier.
- (b) The Supplier acknowledges that the Purchaser has relied upon such warranties in ordering the Goods from the Supplier.
- (c) The Supplier must, immediately upon request, provide the Purchaser with evidence of any Authorisations it holds or is required to hold as per clause 5.1(a)(3).

5.2 Replacement warranty – Goods

- (a) If, during the 12-month period from the date of delivery (**Warranty Period**) the Purchaser becomes aware or discovers that the Goods:
 - (1) are defective; or
 - (2) are faulty,the Supplier will repair or replace the Goods free of charge.
- (b) To make a warranty claim under clause 5.2(a), the Purchaser must provide a notice to the Supplier within one month of becoming aware of the relevant circumstances giving rise to the claim.
- (c) Clause 5.2(a) does not apply to the extent that the Goods have become defective as a result of the Purchaser's failure to take reasonable care in relation to its use or storage of the Goods.
- (d) Clause 5.2 operates without limiting any of the Purchaser's rights under applicable law, including without limitation, the NZ Consumer Law.

5.3 General warranties – Services

- (a) Where Services are supplied by the Supplier, it warrants that:

- (1) the Services will be provided to the standard of a suitably qualified, experienced and competent contractor and in accordance with Best Industry Practice;
 - (2) the Services will conform strictly with all specifications and standards set out in the relevant Purchase Order and all reasonable directions provided by the Purchaser;
 - (3) it has not relied on and will not rely on any information, data, representation, statement or document given by the Supplier in relation to the Services;
 - (4) it has satisfied itself as to the adequacy and suitability of the Site for providing the relevant Services; and
 - (5) the Services will be provided in accordance with all applicable laws and it holds all Authorisations required by applicable law to provide the Services.
- (b) The Supplier acknowledges that the Purchaser has relied upon such warranties in ordering the Services from the Supplier.
- (c) The Supplier must, immediately upon request, provide the Purchaser with evidence of any Authorisations it holds or is required to hold as per clause 5.3(a)(5).

6. INTELLECTUAL PROPERTY

6.1 Background IP Materials

Each party acknowledges that it does not have (and does not obtain) any IP Rights in, or any licence to use, the other party's Background IP Materials other than as expressly provided for in clause 6.2.

6.2 Supplier Background IP Materials

The Supplier grants to the Purchaser a non-exclusive, royalty free, perpetual, irrevocable, worldwide licence (including the right to sub-licence) to (itself or using third party contractors) use, reproduce, modify, adapt and further develop all IP Rights, its Background IP Materials to the extent necessary or desirable to enable the Purchaser (itself or using third party contractors) to fully enjoy, exploit and further develop the Contract IP Materials.

6.3 Contract IP Materials

- (a) Upon creation, all Contract IP Materials created by the Supplier in the course of providing the Services (for example, any reports or studies which are provided as part of the Services) will vest in the Purchaser free of all encumbrances and the Supplier hereby unconditionally assigns to the Purchaser:
- (1) all IP Rights (other than copyright) in the Contract IP Materials, without the need for further assurance; and
 - (2) all copyright in the Contract IP Materials, as an assignment of future property under section 116 of the *Copyright Act 1994* and in equity.
- (b) The Supplier, if and whenever required by the Purchaser to do so, will at its own expense, execute all instruments and do all things necessary in order to implement the assignment referred to in clause 6.3(a) above.
- (c) The Purchaser grants to Supplier a non-exclusive, revocable, royalty free, non-transferable licence to use any Contract IP Materials for the purposes of providing the Services.

6.4 Infringement claim

The Supplier indemnifies and holds harmless the Purchaser against any Loss or claim (including any third party claim) arising from any infringement or alleged infringement of IP Rights owned by any third party in respect of any of the Supplier's Background IP Materials and/or the Contract IP Materials.

7. LIMITATION OF LIABILITY

7.1 Limitation of liability

- (a) The Supplier's liability in respect of any Loss relating to or arising with respect to Goods and/or the Services is, to the extent permitted by law, limited to any of the following, as determined by the Purchaser in its absolute discretion:
- (1) the repair or replacement of the Goods; or
 - (2) the payment of the cost of repairing or replacing the Goods or of acquiring equivalent Goods; or
 - (3) the payment of the cost of, or, re-performing the Services.
- (b) [Except to the extent of direct damage or Loss to the Supplier caused by a breach of these Terms by the Purchaser and to the extent permitted by law, the Purchaser has no liability (whether in contract, tort or equity, including negligence) to the Supplier or any other person in relation to these Terms.]

7.2 Subcontracting

- (a) The Supplier may not subcontract the provision of any Services under these Terms without the Purchaser's prior written consent.
- (b) Where the Supplier subcontracts any of the Services, or orders Goods it supplies to the Purchaser from a third party, the Supplier acknowledges and agrees that the Supplier is solely responsible to the Purchaser for any claims for Loss incurred by the Purchaser in connection with the relevant Goods and/or Services.

7.3 Exceptions

The limitation of liability in clause 7.1(a) does not apply in respect of claims for Losses:

- (a) relating to personal injury or death (suffered by any person including any third party) which is caused or contributed to by the Supplier Group;
- (b) in respect of which the Supplier Group holds, or is required to hold under clause 8 of these Terms, insurances covering amounts which are in excess of such limitation of liability;
- (c) to the extent caused or contributed to by any wilful default of these Terms by the Supplier Group or any intentional or recklessly indifferent act or omission of the Supplier Group;
- (d) under the indemnities provided by the Supplier in clauses 4.6(b) (PPSA) and 6.4 (Infringement claims); and
- (e) in respect of any breach by the Supplier of clause 9 (Confidentiality).

8. INSURANCES

- (a) The Supplier will ensure that the Goods are fully insured by the Supplier (including whilst the Goods are in transit) until such time as they are delivered to, and safely unloaded at, the delivery point specified in the Purchase Order.
- (b) The Supplier must also maintain all insurances required by law (including workers compensation insurance), employer's liability insurance and a general, product and professional indemnity liability insurance policy which covers up to NZ\$20,000,000 per claim (and is unlimited in aggregate), plus any other insurances reasonably required by the Purchaser given the nature of the Goods or Services being provided.
- (c) The Supplier will provide the Purchaser with a certificate of insurance evidencing its holding of the above insurance policies promptly upon request.

9. CONFIDENTIALITY

- (a) The Supplier must hold all Confidential Information of the Purchaser in strict confidence and must not disclose such information to any person except:
- (1) to members of the Supplier Group who reasonably need to receive such information on the basis that the Supplier must ensure such persons keep the relevant information confidential;
 - (2) with the Purchaser's prior written consent; or
 - (3) as required by law (provided the Purchaser is first given the ability to object to such information being disclosed with the relevant entity or body).
- (b) Upon written request by the Purchaser, the Supplier must destroy or delete all Confidential Information of the Purchaser (and must direct all members of the Supplier Group to do the same) other than to the extent:
- (1) the Supplier Group is required to retain such information in accordance with applicable law;
 - (2) the information is contained in board papers of the Supplier Group; or
 - (3) the information is stored in computer back-up servers or cloud-based servers and it is not reasonably possible to readily delete such information,
- in which case, it must keep such information confidential (and must ensure that any members of the Supplier Group who hold such information keep it confidential) indefinitely.
- (c) Damages may not be a suitable remedy for a breach of this clause 9 and the parties agree the Supplier is entitled to obtain injunctive relief or specific performance (as appropriate) in connection with such breach.

10. GENERAL

10.1 Notices

- (a) Notice may be given to a party under these Terms personally, by leaving it at the party's address, by sending it by pre-paid mail to the party's address or by sending it by e-mail to the party's e-mail address.
- (b) Notice is deemed to be received by a person when left at the party's address, if sent by pre-paid mail, on the 7th Business Day after posting or if sent by e-mail:
 - (1) at the time shown in the delivery confirmation report generated by the sender's e-mail system; or
 - (2) 12 hours after the e-mail is sent, unless the sender receives a return e-mail notification that the e-mail was not delivered, undeliverable or similar.

10.2 Severance

If any provision of these Terms is void, voidable or unenforceable, the provision will be read down, limited or, if necessary, excluded to the extent necessary to make it not void, voidable or unenforceable, and all other Terms will remain in full force and effect.

10.3 Governing law

These Terms are governed by the laws of New Zealand. The parties irrevocably submit to the exclusive jurisdiction of the courts of New Zealand.

10.4 Relationship

The relationship of the Supplier to the Purchaser is that of independent contractors and neither party is an agent, employee, partner or joint venturer of the other party.

10.5 Assignment

The Supplier may not transfer, assign or otherwise dispose of any of its rights under these Terms without the prior written consent of the Purchaser.

10.6 Survival

The parties agree that clauses 6 (intellectual property), 7 (limitation of liability) and 9 (confidentiality) and the indemnities contained in these Terms survive termination of these Terms and/or the cancellation of any Purchase Order.

10.7 Unfair contracts

If an agreement between the parties incorporating these Terms is a 'consumer contract' and a term of that contract would, but for this clause, be an 'unfair contract term' (as defined in section 2(1) of the *Fair Trading Act 1986*), the Purchaser may only apply or rely upon that term to the extent that doing so is reasonably necessary to protect its legitimate interests.

10.8 Electronic communications

The Supplier acknowledges and agrees that, for the purposes of the *Contract and Commercial Law Act 2017*, and the *Unsolicited Electronic Messages Act 2007*, the Purchaser is permitted to communicate with the Supplier electronically (including, without limitation, making disclosures to the Supplier and sending notices, certificates, letters, statements, and other communications to the Supplier electronically) in all matters where the Purchaser is permitted to do so by law.

10.9 Privity

The covenants of the Supplier under these Terms are given for the benefit of, and are enforceable in terms of the *Contract and Commercial Law Act 2017* by, the Purchaser, its related companies (as that term is defined in section 2(3) of the *Companies Act 1993*), directors, employees, officers, advisers and agents.

11. DEFINITIONS

In these Terms:

Authorisation means any approval, authorisation, code of conduct, government policy, consent, exemption, filing, licence, notarisation, permit, registration, waiver and conditions attaching to any of them (as applicable) by any Authority.

Authorised Signatory means:

- (a) any director or secretary of a party; and
- (b) any employee of a party with the word 'chief' or 'manager' included in its position description; and
- (c) any authorised signatory of a party (first party) notified to the other party by an Authorised Signatory of the first party.

Authority means any government or governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, agency or entity in any part of the world.

Background IP Materials means all IP Materials owned or licensed by a party before the commencement of the Services.

Best Industry Practice means practices followed when services are undertaken in a sound, professional and workmanlike manner, with due care, skill and diligence to the standard expected of a competent and skilled contractor performing services similar in nature to the Services.

Business Day means any day other than a Saturday, Sunday or public holiday in Auckland and Marlborough, New Zealand.

Confidential Information means any information (in any format, including hard copy, electronic or otherwise) that is acquired by one party from the other party in connection with these Terms or any Purchase Order except information which is in the public domain (other than as a result of a breach of this agreement).

Contract IP Materials means all IP Materials created or produced by, or on behalf of, the Supplier as part of, or in the course of performing the Services.

Goods means any goods, products, materials or services supplied by the Supplier in accordance with these Terms as described in any related Purchase Order.

GST means the goods and services tax imposed under the GST Act.

GST Act means the *Goods and Services Tax Act 1985*

IP Rights means any and all current and future intellectual and industrial property rights and interests, including any:

- (a) patents, trademarks, service marks, rights in designs, trade names, copyrights, utility models, eligible layout rights and topography rights, inventions, discoveries, trade secrets, know how, software and improvements;
- (b) applications for, or right to apply for, registration of any of them;
- (c) rights under licences and consents in relation to any of them; and
- (d) other forms of protection of a similar nature or having equivalent or similar effect to any of them,

in New Zealand and the world, whether registered or unregistered, for the duration of the rights and interests.

IP Materials means material in whatever form, including documents, specifications, designs, plans, reports, studies, products, equipment, information, data, concepts, inventions, processes, formulae, know-how, graphic layouts, images and software.

Loss means any loss, claim, action, damage, liability, cost, charge, expense, penalty, compensation, fines, outgoing or payment (including all legal and other expenses) whether direct, indirect or consequential, present or future, fixed or unascertained, actual or contingent, under statute, in tort for negligence, by contract or otherwise.

NZ Consumer Law means the *Commerce Act 1986*, the *Fair Trading Act 1986* and the *Consumer Guarantees Act 1993*.

PPSA means the *Personal Property Securities Act 1999*.

PPSR means the Personal Property Securities Register established pursuant to the PPSA.

Purchase Order has the meaning given to that term in clause 1.1(a).

Purchaser means the entity which is listed as purchaser in the relevant Purchase Order which incorporates these Terms.

Services means any services provided by the Supplier to the Purchaser under or pursuant to these Terms as described in any related Purchase Order.

Site means any premises of the Purchaser on which any Services are required to be performed.

Supplier means the entity which is listed as supplier in the relevant Purchase Order which incorporates these Terms.

Supplier Group means any of the Supplier, its employees and officers and the Supplier's contractors (or sub-contractors) and their employees and officers.