

## Section 3: Terms and Conditions

These terms and conditions apply (unless otherwise previously agreed in writing) to the supply of Goods by HIMAC Attachments to a Customer from time to time. Any supply of Goods by HIMAC Attachments to the Customer made after the date of acceptance of these terms is a supply pursuant to the Agreement as defined and any such supply does not give rise to a new or separate agreement.

### 1. DEFINITIONS AND INTERPRETATION

#### 1.1. In this Agreement:

**Agreement** means the agreement between the Customer and HIMAC Attachments comprising the following documents:

- (a) the Order, accepted by HIMAC Attachments;
- (b) these Terms and Conditions of Sale; and
- (c) any other document which is incorporated by reference in the Quotation or these terms and conditions of sale.

**Australian Consumer Law** has the meaning given to it in the *Competition and Consumer Act 2010 (Cth)*.

**Business Day** means any day other than a Saturday, Sunday or public holiday in the whole State of Western Australia.

**Customer** means the party to whom a Quotation is provided by HIMAC Attachments or by whom an Order is placed is placed with HIMAC Attachments for Goods.

**Delivery Time** means the date and time that the Goods are:

- (a) delivered by, or on behalf of, HIMAC Attachments to the Site or any other delivery location nominated by the Customer and agreed to by HIMAC Attachments; or
- (b) collected by, or on behalf of, the Customer or notified as being ready for collection from HIMAC Attachments' premises or any other location at which the Goods are situated; or
- (c) due to be delivered by HIMAC Attachments, but delivery is delayed at the request of the Customer or due to circumstances beyond the reasonable control of HIMAC Attachments.

**Force Majeure Event** means any event outside the reasonable control of HIMAC Attachments including acts of God, war, riots, strikes, lock outs, trade disputes, break downs, mechanical failures, interruptions of transport, Government action or any other cause whatsoever, whether or not of a like nature to those specified above.

**Goods** mean any product, item, equipment or materials sold or to be sold by to the Customer and includes any services provided by HIMAC Attachments to Customer.

**GST** means the tax imposed by *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.

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**HIMAC Attachments** means Himac Group Pty Ltd ATF The Tindal Family Trust trading as HIMAC Attachments ABN 43 593 715 741.

**Invoice** means the written invoice issued by HIMAC Attachments to the Customer upon acceptance of an Order setting out the Price and any delivery charges.

**Order** means a written order to purchase Goods placed by the Customer with HIMAC Attachments in such form as required by HIMAC Attachments.

**PPSA** means the *Personal Property Securities Act 2009 (Cth)*.

**Price** means the Price of Goods determined under clause 3.

**Quotation** means a written quotation issued by HIMAC Attachments for the sale of Goods to the Customer.

**Site** means the location where the Goods are to be delivered, as stated in the Quotation or otherwise nominated by the Customer and agreed to by HIMAC Attachments.

**Standard Specifications** means HIMAC Attachments' standard specification for the Goods current at the time Goods are delivered to the Customer. Copies of the Standard Specifications are available upon request from HIMAC Attachments.

#### 1.2. In this Agreement:

- (a) any reference to a party includes its successors and permitted assigns;
- (b) headings are for convenience only and have no legal effect;
- (c) the singular includes the plural and vice versa;
- (d) "including" and similar words do not imply any limitation;
- (e) a reference to \$ is to the Australian dollar;
- (f) a reference to legislation or a legislative provision includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them; and
- (g) if the performance of an obligation under this Agreement falls due on a weekend or public holiday day it must be performed on the next Business Day.

### 2. QUOTATIONS AND ORDERS

- 2.1. Quotations are valid for a period of 30 days from date of issue and may be amended or withdrawn at any time by HIMAC Attachments before an Order is placed by the Customer.
- 2.2. An order given to HIMAC Attachments is binding on HIMAC Attachments and the Customer, if:
  - (a) a written acceptance is signed for or on behalf of HIMAC Attachments; or
  - (b) the Goods are supplied by HIMAC Attachments in accordance with the Order.
- 2.3. Once accepted by HIMAC Attachments an Order constitutes a contract between HIMAC Attachments and the Customer on the terms and conditions contained in this Agreement and the terms of the Agreement will override any conditions contained in the Customer's Order.
- 2.4. Once accepted by HIMAC Attachments, orders cannot be cancelled by the Customer under any circumstances without HIMAC Attachments' prior written consent which it may refuse in its absolute discretion (which consent may include a requirement that the Customer indemnify HIMAC Attachments against any loss or expense suffered by it as a result of the cancelled Order).

### **3. PRICE**

- 3.1. The Price for Goods is either;
  - (a) the price indicated in HIMAC Attachments' Quotation (or any subsequent Quotation if varied); or
  - (b) the price listed in any HIMAC Attachments price list current at the date an Order is placed.
- 3.2. Prices do not include applicable taxes or statutory charges (such as GST) or delivery charges. Delivery charges will be specified in Quotations and Invoices and charged in addition to the Price.

### **4. PAYMENT**

- 4.1. HIMAC Attachments, at its discretion, may require payment of a deposit for Goods on placing of an Order. HIMAC Attachments may also require that the Goods be paid for in instalments by the Customer.
- 4.2. Unless the Customer has a credit account in the Customer's name with HIMAC Attachments, the total amount of an invoice (less any deposit paid) and the delivery charges are payable by the Customer prior to or on delivery of the Goods.
- 4.3. If the Customer has an approved credit account, an invoice (less any deposit paid) and the delivery charges are payable by the Customer within 30 days after delivery of the Goods.
- 4.4. Payment must be made by cash, bank cheque, credit card (which may include provider surcharge), direct credit into HIMAC Attachments' bank account or by any other method agreed between the Customer and HIMAC Attachments. Receipt of any form of payment other than cash will not constitute payment until that form of payment has been honoured, cleared or recognised.
- 4.5. Subject to clause 7, payment will constitute acceptance by the Customer of all Goods.
- 4.6. All amounts payable by the Customer under this Agreement must be paid without set-off or counter claim of any kind.

### **5. GST**

- 5.1. If GST is imposed on any taxable supply under this Agreement then the recipient of that taxable supply must pay the supplier an additional amount equal to the GST payable on the taxable supply at the same time as payment for the taxable supply is due.

### **6. DELIVERY**

- 6.1. HIMAC Attachments will (unless otherwise agreed with the Customer) organise for delivery of the Goods to the Site by a carrier appointed by HIMAC Attachments. Delivery and freight costs will be specified in the Quotation and are payable by the Customer at the same time an invoice or application for payment is payable.
- 6.2. An estimated timeframe for delivery will be stated in the Quotation. HIMAC Attachments will use reasonable endeavours to meet the delivery timeframe but accepts no responsibility for costs or charges resulting from a delay in delivery due to factors outside its reasonable control. The Customer is not relieved of any obligation to accept or pay for Goods by reason of any delay in delivery. HIMAC Attachments may change the estimated delivery time by written notice to the

Customer. HIMAC Attachments reserves the right to deliver the Goods in instalments.

- 6.3. The Customer acknowledges that Goods do not need to be signed for when delivered and may be unloaded and left on any part of the Site that HIMAC Attachments or its carrier considers reasonable in the circumstances.

### **7. DEFECTS AND RETURNS**

- 7.1. The Customer must inspect the Goods on delivery and notify HIMAC Attachments in writing within 7 days of delivery of any alleged defect, damage or failure of the Goods. If no notice is given within 7 days of delivery, the Customer will be deemed to have accepted the Goods.
- 7.2. If a notice of defect or damage is given the Customer must allow HIMAC Attachments access to inspect the Goods and determine whether or not that notice is valid. If HIMAC Attachments accepts that Goods are defective or damaged the parties acknowledge that the Customer has remedies available to it as a consumer under the Australian Consumer Law.
- 7.3. HIMAC Attachments will not be liable for any defects, damage or failure of Goods which have not been stored or used in a proper manner.
- 7.4. HIMAC Attachments may, at its sole discretion, accept the return of non-defective Goods for credit subject to a handling fee of 15% of the value of the returned Goods or \$35 (which ever is the higher amount) plus freight costs.
- 7.5. Goods will not be accepted for return in any circumstances (including any custom made, proceed or acquired Goods) other than those specified in this clause 7 or required by law.

### **8. RISK**

- 8.1. Risk in the Goods passes to the Customer at the Delivery Time.
- 8.2. The Customer must, from the date risk in the Goods passes to it, insure the Goods against all reasonably insurable risks for their full replacement value and, if required by HIMAC Attachments, store the Goods separately from any other goods and in a way that enables the Goods to be clearly identifiable as the property of HIMAC Attachments.

### **9. RETENTION OF TITLE**

- 9.1. Ownership, title and property in the Goods and in the proceeds of sale of those Goods remains with HIMAC Attachments until payment in full for the Goods and all sums due and owing by the Customer to HIMAC Attachments on any account has been made. Until the date of payment:
  - (a) the Customer has the right to sell the Goods in the ordinary course of business;
  - (b) until the Goods have been sold by the Customer in the ordinary course of the Customer's business, the Customer holds the Goods as bailee for HIMAC Attachments;
  - (c) the Goods are always at the risk of the Customer.
- 9.2. The Customer is deemed to be in default immediately upon the happening of any of the following events:
  - (a) if any payment to HIMAC Attachments is not made promptly before the due date for payment;

- (b) if the Customer ceases to carry on business or stops or suspends payment or states its intention of so doing or is unable to pay its debts as they fall due or if any cheque or bill of exchange drawn by the Customer payable to HIMAC Attachments is dishonoured;
- 9.3. In the event of a default by the Customer, then without prejudice to any other rights which HIMAC Attachments may have at law or under this agreement:
- (a) HIMAC Attachments or its agents may without notice to the Customer enter the Customer's premises or any premises under the control of the Customer for the purposes of recovering the Goods.
  - (b) HIMAC Attachments may recover and resell the Goods;
  - (c) if the Goods cannot be distinguished from similar Goods which the Customer has or claims to have paid for in full, HIMAC Attachments may in its absolute discretion seize all goods matching the description of the Goods and hold same for a reasonable period so that the respective claims of HIMAC Attachments and the Customer may be ascertained. HIMAC Attachments must promptly return to the Customer any goods the property of the Customer and HIMAC Attachments is in no way liable or responsible for any loss or damage to the Goods or for any loss, damage or destruction to the Customer's business howsoever arising from the seizure of the Goods.
  - (d) In the event that the Customer uses the Goods in some manufacturing or construction process of its own or some third party, then the Customer must hold such part of the proceeds of sale of such manufacturing or construction process as relates to the Goods in trust for HIMAC Attachments. Such part will be an amount equal in dollar terms to the amount owing by the Customer to the HIMAC Attachments at the time of the receipt of such proceeds. The Customer will pay HIMAC Attachments such funds held in trust upon the demand of HIMAC Attachments.
- 9.4. Separately, Customer hereby charges all its right, title and interest to and in the proceeds of sale of the Collateral as original collateral, or any of it, in favour of the HIMAC Attachments

## **10. PERSONAL PROPERTY SECURITIES ACT 2009 ("PPSA")**

- 10.1. Capitalised terms used in this clause but not defined in clause 1 the meanings given to them in the PPSA.
- 10.2. The Customer acknowledges and agrees that;
- (a) this Agreement constitutes a Security Agreement in respect of the Goods;
  - (b) the Goods are Collateral for the purpose of the PPSA;
  - (c) HIMAC Attachments holds (as Secured Party) a Security Interest over all of the present and after acquired Goods supplied by HIMAC Attachments to the Customer and any Proceeds of the sale of those Goods;
  - (d) that any purchase by the Customer on credit terms from HIMAC Attachments or retention of

title under clause 9 will constitute a Purchase Money Security Interest;

- (e) the Purchase Money Security Interest granted will continue to apply to any Goods coming into existence or proceeds of sale of Goods coming into existence;
  - (f) HIMAC Attachments will continue to hold a Security Interest in the Goods in accordance with, and subject to, the PPSA, notwithstanding that the Goods may be processed, co-mingled or become an accession with other goods.
  - (g) any HIMAC Attachments' Security Interest will be a continuing and subsisting interest in the Collateral with priority to the fullest extent permitted by law over all registered or unregistered Security Interests;
  - (h) until title in the Goods passes to the Customer, it will keep all Goods supplied by HIMAC Attachments free of any charge, lien or Security Interest and not otherwise deal with the Goods in a way that will or may prejudice any rights of HIMAC Attachments under this Agreement or the PPSA; and
  - (i) in addition to any other rights under this Agreement or otherwise arising, HIMAC Attachments may exercise any and all remedies afforded to it as a Secured Party under Chapter 4 of the PPSA, including entry into any building or premises owned, occupied or used by the Customer to search for and seize, dispose of or retain those Goods over which HIMAC Attachments holds a Security Interest.
- 10.3. The Customer undertakes to:
- (a) sign any further documents and provide such information which HIMAC Attachments may reasonably require to register, amend or update a Financing Statement or a Financing Change Statement in relation to a Security Interest on the Personal Securities Register;
  - (b) indemnify, and on demand reimburse, HIMAC Attachments for all expense incurred in registering a Finance Statement or Financing Change Statement on the Personal Property Securities Register or releasing any Security Interests;
  - (c) not register or permit to be registered a Financing Change Statement in the Collateral without the prior written consent of HIMAC Attachments; and
  - (d) provide HIMAC Attachments not less than 7 days prior written notice of any proposed change in the Customer's name, address, contact numbers, business practice or other change in the Customer's details registered on the Personal Property Securities Register to enable HIMAC Attachments to register a Financing Change Statement if required.
- 10.4. HIMAC Attachments and the Customer agree that sections 96, 125 and 132(3)(d) and 132(4) of the PPSA do not apply to the Security Agreement created under this Agreement.
- 10.5. The Customer waives its rights:
- (a) to receive notices under sections 95, 118 121(4), 130, 132(3)(d) and 132(4) of the PPSA; and

- (b) as a Grantor and / or a Debtor under sections 142 and 143 of the PPSA; and
  - (c) to receive a Verification Statement in accordance with section 157 of the PPSA.
- 10.6. The Customer must unconditionally ratify any actions taken by HIMAC Attachments under this clause 10.
- 10.7. The Customer appoints and authorises HIMAC Attachments to be its attorney to sign in the Customer's name all documents which HIMAC Attachments reasonably considers necessary to protect, preserve and enforce its rights and powers under this Agreement and the PPSA.

## 11. DEFAULT AND TERMINATION

- 11.1. In relation to any Invoice that has not been paid by the due date:
- (a) default interest will accrue daily at the rate of 2% per calendar month; and
  - (b) the Customer agrees to indemnify HIMAC Attachments from and against all costs and disbursements incurred by HIMAC Attachments in pursuing the debt (including legal costs on a solicitor and own client basis and collection agency costs).
- 11.2. In the event that the Customer's payment is dishonoured for any reason the Customer will be liable for any dishonour fees incurred by HIMAC Attachments.
- 11.3. If the Customer:
- (a) is in default of any payment obligation;
  - (b) fails to remedy a breach of any non-payment related obligation within 14 days of having been given a written notice to remedy the breach by HIMAC Attachments;
  - (c) becomes unable to pay its debts and when they fall due; or
  - (d) commits an act of bankruptcy or, being a company, enters into liquidation or provisional liquidation whether compulsory or voluntary or compounds with its creditors generally or has a receiver or receiver manager or administrator appointed over all or part of its assets or passes a resolution for winding-up or a petition is presented for its winding-up; then HIMAC Attachments may, without prejudice to any other rights or remedies available to it under this Agreement or otherwise, by notice in writing to the Customer:
    - (e) suspend further supply of the Goods and require payment in advance for any future supply;
    - (f) recover possession of any Goods for which payment has not been made;
    - (g) terminate all or any Orders which have been accepted by HIMAC Attachments;
    - (h) claim immediate payment of all moneys due by the Customer in respect of all Goods which will then be immediately due and payable notwithstanding the due date or dates for payment; and/or
    - (i) continue to enforce its rights against and recover from the Customer such payments and any other amounts owing as and when they fall due.

## 12. WARRANTIES AND LIMITATION OF LIABILITY

- 12.1. HIMAC Attachments warrants that the Goods When delivered to the Customer will comply with any

description for the Goods contained in the Quotation and with the Standard Specification (if any) for the Goods.

- 12.2. Unless expressly provided in the Quotation or any other written document of HIMAC Attachments', HIMAC Attachments gives no representations or warranties for the Goods.
- 12.3. The Customer warrants that in placing its Order it has:
- (a) satisfied itself as to the description and condition of the Goods and their fitness for the purpose for which the Customer will use them; and
  - (b) not relied on any statement, representation, warranty, guarantee, condition, advice, recommendation, information, assistance or service provided or given by HIMAC Attachments or anyone on HIMAC Attachments' behalf in respect of the Goods, other than those expressly contained in this Agreement, the Quotation or any other document that HIMAC Attachments has provided to the Customer.
- 12.4. Where the customer buys Goods as a consumer, this Agreement is subject to the Australian Consumer Law which governs the rights of consumers and nothing in this Agreement affects the Customer's statutory rights.
- 12.5. HIMAC Attachments' liability to the Customer is limited, to the extent permissible by law, and at HIMAC Attachments' option:
- (a) in relation to the Goods;
    - i. the replacement of the products or the supply of equivalent products
    - ii. the repair of the products
    - iii. the payment of the cost of replacing the products or of acquiring equivalent products; or
    - iv. The payment of the cost of having the products repaired
  - (b) Where the Goods are services:
    - i. the supply of service again; or
    - ii. the payment of the cost of having the services supplied again.
- 12.6. To the extent permitted at law, all other warranties whether implied or otherwise, not set out in these Terms are excluded and HIMAC Attachments is not liable in contract, tort (including, without limitation, negligence or breach of statutory duty) or otherwise to compensate Customer for:
- (a) any increased costs or expenses;
  - (b) any loss of profit, revenue, business, contracts or anticipated savings;
  - (c) any loss or expense resulting from a claim by a third party; or
  - (d) any special, indirect or consequential loss or damage of any nature whatsoever caused by HIMAC Attachments' failure to complete or delay in completing the order to deliver the Goods.

## 13. INDEMNITY

- 13.1. The Customer agrees to indemnify and keep indemnified HIMAC Attachments against all costs, claims, demands, expenses and liabilities of whatsoever nature (including claims of death, personal injury, damage to property and consequential loss (including loss of profit)), suffered or incurred by, or made against HIMAC Attachments as a result of a breach of this Agreement by the Customer, the

Customer's use of the Goods, or any other conduct of the Customer, except where those costs, claims, demands, expenses or liabilities are directly and solely attributable to the gross negligence or wilful default of HIMAC Attachments or any of its duly authorised employees or agents.

#### **14. FORCE MAJEURE**

- 14.1. HIMAC Attachments will not be liable for the consequences of any failure or delay in performing any of its obligations under this Agreement to the extent that such failure or delay is due directly or indirectly to any Force Majeure Event.
- 14.2. If a Force Majeure Event arises, HIMAC Attachments will notify the Customer in writing of the Force Majeure Event and the likely impact it will have on HIMAC Attachments' performance under this Agreement. If the Force Majeure Event affects the capacity of HIMAC Attachments to complete its material obligations under this Agreement in a timely manner, HIMAC Attachments may by notice to the Customer terminate this Agreement without any liability whatsoever on its part arising from that termination.

#### **15. CONFIDENTIALITY**

- 15.1. The Customer shall treat as confidential all information, data, drawings, specifications, samples and documentation supplied by HIMAC Attachments under or in connection with this Agreement, and will not disclose them to any third party without the prior written consent of HIMAC Attachments.

#### **16. DISPUTE RESOLUTION**

- 16.1. If there is a dispute in relation to any aspect of the supply of the Goods either party may notify the other in writing of the dispute.
- 16.2. Following any such notification, there will be a period of 30 days during which both parties must participate in good faith in any negotiations or discussions regarding the dispute which HIMAC Attachments requests the Customer to participate in.
- 16.3. If the dispute has not been resolved by the end of the 30 day period, HIMAC Attachments may require that the dispute be submitted to mediation in accordance with, and subject to, the Institute of Arbitrators and Mediators Australia and its applicable rules.
- 16.4. Subject to clause 16.5 neither party is permitted to commence any court proceedings or other similar actions relating to a dispute unless it has complied with the procedure set out in this clause.
- 16.5. This clause does not prevent a party from exercising any rights it has under the Construction Act or from commencing legal proceedings for urgent interlocutory relief.

#### **17. GENERAL PROVISIONS**

- 17.1. The Customer must not assign or otherwise deal with any of its rights or obligations under this Agreement without the prior written consent of HIMAC Attachments.
- 17.2. HIMAC Attachments may assign or deal with any of its rights or obligations under this Agreement at any time and without any requirement to notify the Customer. HIMAC Attachments reserves the right to subcontract the performance of any of its obligations under this Agreement to any other person it so determines.

- 17.3. HIMAC Attachments may vary this Agreement from time to time and any variation takes effect in relation to subsequent Orders place after the Customer has received written notice of the variation from HIMAC Attachments.
- 17.4. No failure to exercise or delay in exercising any right under this Agreement constitutes a waiver and any right may be exercised in the future. A waiver of any right under this Agreement must be in writing and is only effective to the extent set out in that written waiver.
- 17.5. If any provision of this Agreement is void, unenforceable or illegal and would not be so if words were omitted, then those words are to be severed and if this cannot be done, the relevant sub-clause is to be severed from this Agreement and if this cannot be done, then the entire relevant clause is to be severed from this Agreement, in each case, without affecting the validity or enforceability of the remaining provisions.
- 17.6. This Agreement (including the Quotation, Order and Invoice) constitutes the entire Agreement between the parties in respect of the sale of Goods and supersedes all previous communications, representations understandings or agreements.
- 17.7. This Agreement is governed by the laws in force in the State of Western Australia and the parties submit to the non-exclusive jurisdiction of the courts of State of Western Australia.
- 17.8. Any notice to be given to a party must be in writing.
- 17.9. Clauses 5, 7, 9, 10, 12, 13, 15 and 16 survive termination or completion of this Agreement.
- 17.10. Any intellectual property rights in the Goods and any instructions relating to them remain with HIMAC Attachments and do not pass to the Customer. HIMAC Attachments grants to the Customer a non-exclusive, royalty free license to use HIMAC Attachments' intellectual property to the extent such materials form part of, or are integral to, the Goods.