

YOKOGAWA NEW ZEALAND LIMITED

Terms and Conditions of Sale



1. General

- 1.1 These Conditions and the Proposal form part of the Contract for the supply of the Products and Services by the Company to the Customer, together with such other documents as are agreed to by the parties as forming part of the Contract. These Conditions shall prevail in the event of any inconsistency between these Conditions and any other Contract document.
- 1.2 The Company and the Customer acknowledge that any terms and conditions printed on or accompanying or referred to in any purchase order, order confirmation or other document issued by the Customer in relation to the Proposal or the Products or Services will be of no legal effect and will not form part of the Contract (even if the Company acknowledges, accepts or references that document).
- 1.3 The Customer acknowledges that it has reviewed the data sheets for the Products as provided to it or published by the Company (including on Company affiliated and third party suppliers' websites), and has satisfied itself that the Products are appropriate to the needs of the Customer. The Customer further acknowledges that the Customer shall be responsible for any errors, omissions and deficiencies in any information provided by the Customer to the Company in connection with the Products or Services.

2. Definitions and Interpretation

- 2.1 In these Conditions unless the context otherwise requires:
- “**Company**” means Yokogawa New Zealand Limited, company number 983890.
- “**Conditions**” means the terms and conditions set out in this document.
- “**Contract**” means the contract between the Company and the Customer of which these Conditions form a part and includes the Proposal.
- “**Customer**” means the purchaser of the Products and/or Services.
- “**Delivery Charge**” means the delivery charge for the Products where separately specified in the Contract.
- “**Delivery Date**” means the date specified in the Contract for delivery of the Products and/or completion of the Services.
- “**Delivery Point**” means the place where the Products shall be delivered to the Customer (or its nominee or carrier, as applicable) by or on behalf of the Company, as specified in the Contract.
- “**Effective Date**” means the time when the Contract comes into force.
- “**Force Majeure**” means an event or circumstance beyond the reasonable control of the party affected which occurs without the fault or negligence of that party, and includes: inevitable accident, storm, flood, fire, earthquake, explosion, hostility, terrorism, war (declared or undeclared), insurrection, breakdown, piracy, accident at sea or confiscation of property.
- “**Insolvency Event**” means any of the following events in

relation to a Party:

- (1) the Party informs creditors generally or passes a resolution to the effect that it is or is likely to become insolvent, or the Party is deemed or presumed to be insolvent under any law;
- (2) the Party commits an act of bankruptcy;
- (3) the Party enters, or attempts or proposes to enter a scheme of arrangement, or a compromise or other arrangement with creditors;
- (4) the Party has a liquidator, administrator or insolvency officer, or a receiver, receiver and manager or other controller appointed to it or over its property, or a secured creditor enters into possession of its property;
- (5) the Party has a winding up order made against it, is deregistered or dissolved.

“**Intellectual Property**” means the copyright subsisting in the Products and the output of the Services and any material supplied in relation thereto and all patents, patentable rights, trademarks and industrial designs (whether registered or not) and all confidential information and trade secrets concerning or relating to the Products and/or the Services.

“**Interest Rate**” means the rate of ten percent (10%) per annum, calculated daily.

“**Proposal**” means the documents and correspondence comprising the Company’s tender, submission, proposal, offer (including counter-offer) or quotation, as the case may be, to supply the Products and/or Services to the Customer, as at the Effective Date.

“**Price**” means the price to be paid by the Customer to the Company for the Products and Services as stated in and/or calculated in accordance with the Contract.

“**Products**” means the products (if any) specified in the Contract to be supplied to the Customer by the Company.

“**Sanctions Laws**” means applicable laws (including but not limited to legislation, regulation, specification, resolution, executive order or guidance note) imposing sanctions.

“**Sanctions List**” means any sanctions list maintained by New Zealand Foreign Affairs and Trade.

“**Sanctions Targets**” means an individual or entity that is, or has been, listed on a Sanctions List.

“**Services**” means the services (if any) specified in the Contract to be provided to the Customer by the Company.

“**Software License Agreement**” means a software license agreement under which Yokogawa Japan, as licensor (whether alone or otherwise), licenses software to a licensee.

“**Yokogawa Japan**” means Yokogawa Electric Corporation, incorporated in Japan, and includes any related body corporate thereof.

“**Variation**” means a variation to the Products and/or Services.

- 2.2 In these Conditions, where the context permits:

- (1) the words “include”, “includes” and “including” are

not words of limitation;

- (2) a word denoting one gender includes the other genders;
 - (3) a word denoting the singular includes the plural and vice versa;
 - (4) the term 'related company' has the meaning given that term in the Companies Act 1993, provided that the term 'company' shall mean a body corporate wherever incorporated; and
 - (5) a word denoting a natural person includes reference to a corporation and other entities.
- 2.3 The headings in these Conditions are for convenience only and do not affect the interpretation of or form part of these Conditions.

3. Primary Obligations

- 3.1 The Company must supply the Products and Services in accordance with the specification in the Contract.
- 3.2 The Customer must pay the Company the Price in accordance with the Contract.

4. Price and Payment

- 4.1 The Customer shall pay the Price, and the Delivery Charge (if any), to the Company in accordance with the terms of payment set out in the Contract.
- 4.2 In respect of Products, the Company is entitled to submit to the Customer payment claims in the form of tax invoices upon and from achieving the milestones set out in the Contract, if any, and otherwise upon and from delivery in accordance with the Contract, such invoices to include the amount payable in respect of the Products delivered and the relevant Delivery Charge (if any).
- 4.3 In respect of Services, the Company is entitled to submit to the Customer payment claims in the form of tax invoices:
 - (1) for Services to be paid for by instalment, upon and from reaching each instalment milestone, for the instalment then payable; or
 - (2) in other cases:
 - (a) before completion, progressively upon and from the last day of each month, for the amount payable in respect of Services performed to the end of the month; and
 - (b) upon and from completion of the Services, for all Services performed and not paid for.
- 4.4 A tax invoice may include any other amounts then claimed as payable by the Customer under or in connection with the Contract.
- 4.5 Where the reason for the Customer withholding any amount claimed by the Company no longer exists that amount shall become immediately payable under the Contract.
- 4.6 Unless otherwise stated in the Contract, the Customer shall pay the amount due to the Company by no later than thirty (30) days from date of the relevant payment claim.
- 4.7 If the Customer fails to make any payment on the due date then, without prejudice to any other right or remedy available to the Company, the Company may:
 - (1) suspend or cancel any outstanding orders placed by the Customer; and
 - (2) charge the Customer interest (both before and after any judgement) on the amount overdue, at the

Interest Rate, calculated on a daily basis, from the date payment was due to the Company to the date of actual payment.

All costs incurred by the Company in enforcing payment must be borne by the Customer.

- 4.8 Unless otherwise stated, the Price does not include goods and services tax (GST). If GST is payable pursuant to the Goods and Services Tax Act 1985 (as amended) on a Taxable Supply (as defined by that Act), then despite anything to the contrary in the Contract, the Customer must pay to the Company at the same time that payment of the purchase price, service fee or other money or consideration is due from the Customer to the Company under the Contract for or on account of such Taxable Supply (or if no such payment is due, then on demand by the Company), an additional amount which is equal to the GST which is payable on such Taxable Supply.

5. Delivery and Installation

- 5.1 The Company shall endeavor to deliver the Products to the Delivery Point and perform the Services by the applicable Delivery Date. Other than for any liquidated damages provided in the Contract, the Company shall in no event be liable to the Customer for or in respect of delay in delivery of the Products or performance of the Services for any reason whatsoever.
- 5.2 The Customer must within five (5) business days from delivery give written notice to the Company of any shortages in or damage to the Products. In the event that the Customer:
 - (1) fails to give any such notice, then to the extent permitted by statute the Products shall be deemed to have been accepted by the Customer; or
 - (2) gives such notice, then the Company shall upon verification of the matters notified make up any shortages and rectify or replace any damaged Products as soon as it is reasonably able to do so.
- 5.3 If the Customer fails to accept delivery of any Products within ten (10) business days after the Company gives notice that they are ready for delivery, then, without prejudice to any other right or remedy available to the Company:
 - (1) the Company may store the Products until actual delivery and charge the Customer for the costs of and associated with storage, including without limitation insurance and handling charges;
 - (2) the Company shall be entitled to submit a payment claim for and be paid the amount which would have been claimable upon delivery, plus any storage and handling costs referred to in clause 5.3(1).
- 5.4 The Company will be entitled to a reasonable extension of time to deliver the Products and perform the Services where any of the following cause delay:
 - (1) an act or omission of the Customer or any contractor, consultant, representative or agent thereof;
 - (2) Variations;
 - (3) Force Majeure;
 - (4) industrial conditions not limited to the Company;
 - (5) inclement weather outside the range of normal weather conditions for the relevant time and place.

6. Risk and Property in Products

- 6.1 All Products shall be at the Customer's risk immediately upon delivery to the Delivery Point, or upon being placed into storage in accordance with clause 5.3, as applicable.
- 6.2 Notwithstanding the provisions of Clause 6.1, the Company and the Customer agree that title in Products shall not pass until the Customer has paid the Company the full Price for those Products.
- 6.3 Until title passes the Customer must:
- (1) refrain from encumbering the Products;
 - (2) not sell or otherwise dispose of the Products other than to a bona fide purchaser for full value in the ordinary course of the Customer's business; and
 - (3) maintain and allow the Company to inspect records of the Products, and of the persons to whom the Customer sells or otherwise disposes any of them and of payments made by such persons.
- 6.4 If an Insolvency Event occurs in relation to the Customer, or if the Products are 'at risk' (as that term is defined in the Personal Property Securities Act 1999 ("PPSA")) the Company is entitled, without prejudice to any of its other rights and remedies, to remove, uninstall and take possession of those Products and to enter any premises upon which they are stored, without notice, for this purpose (the Customer irrevocably authorises and indemnifies the Company and any of its agents for this purpose).
- 6.5 Unless the context requires otherwise, terms and expressions used in clauses 6.6 to 6.8 have the meanings given to them in, or by virtue of, the PPSA.
- 6.6 The Customer acknowledges that the Contract is a security agreement for the purposes of the PPSA. The Customer grants the Company a security interest in all Products. The security interest continues in the proceeds of any sale, disposition or insurance of or in respect of such Products.
- 6.7 The Customer must promptly do all things reasonably required by the Company to register the Company's security interest under the PPSA and to enforce and perfect the same, including obtaining consents, getting documents completed and signed, giving notices and supplying information, and to ensure that the security interest created under this Contract constitutes and remains a first ranking perfected security interest over the Products. The Customer shall notify the Company in writing of a change of its name at least 14 days prior to the date on which the change of name becomes effective.
- 6.8 In relation to such security interest and to the extent that the PPSA permits, the Customer waives its rights to receive a copy of any verification statement or financing change statement, any notice required under the PPSA, and its rights and any otherwise existing obligations of the Company under sections 114(1)(a), 116, 120(2), 121, 125, 126, 129, 131, 133, 134 and 148 of the PPSA.

7. Warranties

- 7.1 The Company warrants that the Products shall, under proper use:
- (1) conform with the specification in the Contract; and
 - (2) be free from defects in materials and workmanship.
- In this clause 7.1, the expression "proper use" includes operation and maintenance in accordance with (i) any Company documentation, and (ii) operations and

- maintenance best practices. Notwithstanding the foregoing, the Company gives no warranty in relation to goods (including Products) not produced by the Company, but will, as far as is practical, pass on the benefit of any warranties it has from suppliers of these materials.
- 7.2 The Company warrants that the Services will be performed with due care and skill.
- 7.3 The Company's liability and the Customer's remedy under clause 7.1 is limited to the Company making good by, at the Company's option, the repair or replacement of the defective or non-conforming Products, PROVIDED THAT the Company will have no liability whatsoever for or in connection with any defect or non-conformity unless:
- (1) the Customer gives the Company prompt written notice of the defect or non-conformity together with all available information and a reasonable opportunity to investigate and rectify it; and
 - (2) such notice is given no later than the earlier to expire of twelve (12) months from first putting the relevant Products into use and eighteen (18) months from their dispatch from the Company's premises.
- 7.4 The Customer agrees that, in order to make a claim under the warranty provided in clause 7.1, it shall either:
- (1) return the defective or non-conforming Products to the Company; or
 - (2) pay to the Company all costs and expenses incurred by the Company in sending a representative to the site of repair, including without limitation travel, accommodation and sundry expenses.
- 7.5 The warranties in clause 7.1 do not extend to, and the Company is not liable for, any defect or non-conformity caused by repairs or modifications which have been made without the Company's approval, fair wear and tear, incorrect specification, configuration or application, plant or equipment outside the Company's scope of supply, accident, misuse, neglect or lack of proper care. Where and to the extent any defect or non-conformity is due to anything the Company is not responsible for then the Price will be adjusted to include any costs and expenses of the Company in making good the defect or non-conformity (including shipping, travel, accommodation and investigation).
- 7.6 The Company's liability in respect of Products which have been repaired or replaced under warranty will expire twenty-four (24) months after initial dispatch. Items replaced under warranty are the property of the Company.
- 7.7 The Company's liability and the Customer's remedy under clause 7.2 is limited to the Company, at the Company's option, re-performing the Services or paying the cost of re-performing the Services.
- 7.8 The Fair Trading Act 1986 ("FTA") and (to the extent the Customer is a 'consumer') the New Zealand Consumer Guarantees Act 1993 ("CGA") imply warranties, terms and conditions which are hereby excluded to the fullest extent permitted under that legislation. The parties acknowledge that all Products and Services are supplied in trade, and it is fair and reasonable for the parties to exclude the warranties, terms and conditions of the CGA and the FTA. To the extent the Customer is a 'consumer' (as defined in the CGA and FTA), the warranties, terms, and conditions implied by the CGA and FTA apply to these Conditions, and in the event the Company is in breach of

any such warranty, term or condition in relation to:

- (1) the Products, the liability of the Company shall be limited, at the Company's option, to the repair or replacement of the Products or the cost of repairing or replacing the Products; or
 - (2) the Services, the liability of the Company shall be limited, at the Company's option, to the reperformance of the Services or the cost of reperforming the Services.
- 7.9 The Company's liability to the Customer and the Customer's remedies in connection with:
- (1) any defect in the Products or any non-conformity of the Products with the Contract; or
 - (2) any lack of care and/or skill in performing the Services,
- are solely and exclusively as stated in this clause 7.
- 7.10 The warranties and remedies in this clause 7 are in place of and exclude to the fullest extent permitted by law all other warranties and conditions, whether oral, written, statutory, express or implied. IMPLIED WARRANTIES AND CONDITIONS OF FITNESS FOR PURPOSE AND MERCHANTABILITY ARE HEREBY EXCLUDED TO THE FULLEST EXTENT PERMITTED BY LAW.
- 8. Intellectual Property Rights**
- 8.1 The Company grants the Customer a perpetual, non-transferrable, non-exclusive licence to use the Products and the output of the Services including any software provided for the Products to own, operate and maintain the Products PROVIDED THAT the Customer's rights in respect of any third party componentry or software are governed by any conditions of the third party. Software provided for the Products must not be transferred onto any device other than the device used to operate or which is operated by the Products or to a secure back-up system.
- 8.2 The Customer must not copy, replicate, reverse engineer, manufacture, or sublicense the manufacture or use of the whole or any part of the Products including the software provided therewith.
- 8.3 As between the Company and the Customer, the Company is the owner of all intellectual property rights in the Products and the output of the Services, including copyright, patentable rights and trademarks in any designs, drawings, specifications, materials, inventions, devices, methods of working and procedures.
- 8.4 The Company warrants that when used for their specified purpose the Products will not infringe any third party's intellectual property rights in the country of destination of the Products (as specified in the Contract or, if none is specified, in New Zealand) PROVIDED THAT the Company is not liable for any infringement that is wholly or partly due to use of the Products in a manner or in association or combination with any apparatus or device other than as specified by the Company or to any alteration made to the Products by the Customer or others and PROVIDED FURTHER THAT the Company shall have no liability for any such infringement unless the Customer gives the Company prompt written notice of any claim for infringement and permits the Company (at the Company's expense) to conduct on the Customer's behalf and in the name of the Customer the defence of such claim and of any litigation in respect thereof.
- 8.5 Notwithstanding clauses 8.1 to 8.4, inclusive, where and to the extent stated in the Proposal, the terms of the relevant Software License Agreement (a copy of which is available upon request) shall apply in relation to such part (or all) of the Products to which such Software License Agreement relates in lieu of clauses 8.1 to 8.4, and the Customer shall be bound by the terms and conditions thereof as licensee.
- 8.6 The Customer acknowledges that the Company:
- (1) is a designated subsidiary of Yokogawa Japan for the purposes of any Software License Agreement that refers to Yokogawa Japan's designated subsidiaries;
 - (2) is entitled to rely on and enforce as agent the rights of Yokogawa Japan under any Software License Agreement under which the Company is not (whether alone or otherwise) the licensor.
- 9. Confidentiality**
- 9.1 The Customer acknowledges that information concerning the Products, the Services and the Intellectual Property disclosed to it by the Company is proprietary, confidential and a trade secret of the Company. The Customer shall not and shall not permit any of its officers, employees, agents, contractors or related companies to use or to disclose to any person such information without prior written consent of the Company. This clause shall not apply to any information which is generally available to the public (other than as a result of the wrongful disclosure by the Customer) or where the information is required to be disclosed by any law.
- 10. Variations, Cancellations & Restocking**
- 10.1 No Variation shall be made without the prior written approval of the Company.
- 10.2 Variations will be priced using the following order of precedence:
- (1) prior agreement;
 - (2) to the extent they reasonably apply, rates or prices in the Contract (N.B. unit prices for Products are not "take out" prices);
 - (3) to the extent they may reasonably apply, rates or prices in a Company price list or schedule of rates (copies of which may be inspected at the office of the Company and shall be issued to the Customer on request);
 - (4) reasonable rates and prices as determined by the Company.
- The Price shall be adjusted to include, or be reduced by (as applicable), the price of the Variation so determined.
- 10.3 In relation to Products held by the Company in stock in New Zealand or Australia, if the Company accepts a Variation reducing the quantity of such Products then a cancellation fee of 30% of the value of the cancelled Products will be payable by the Customer. In relation to the Products which are not held by the Company in stock in New Zealand or Australia, then at the Company's absolute discretion, the cancellation fee payable by the Customer will be up to 100% of the value of the cancelled Products. Nothing in this clause shall be interpreted as giving the Customer the right to cancel the Contract or the supply of any Products or Services without the prior approval of the Company.

10.4 If, in order to perform its obligations under the Contract, the Company is reasonably required to supply any goods or materials or perform any work or services which, in circumstances which, in view of any condition, assumption, allowance, limit, exclusion or qualification stated in the Contract, or any information provided by the Customer, the Company would not reasonably be expected to have allowed for, the supply of those goods or materials and the performance of that work or those services shall be deemed to be a Variation.

10.5 A change to a drawing or document to comply with a direction, meet a requirement or obtain the satisfaction or approval of the Customer shall be considered a Variation except to the extent such change is required for the Products to comply with the Contract.

10.6 The Customer may not request a Variation that omits any part of the Products or Services for which a substitute is to be supplied by others. The Company may, at its expense, make such minor Variations as it deems necessary, in its sole discretion, to conform the Products or Services to applicable specifications, standards and codes and/or to pass tests and/or satisfy performance criteria.

11. Force Majeure

11.1 The obligations of a party under the Contract, other than the obligation to pay money, shall be suspended during the time and to the extent that the party is prevented from or delayed in complying with the obligations by Force Majeure, and the parties shall not be liable for any failure to fulfil their obligations caused by Force Majeure.

12. Limitation of Liability

12.1 Notwithstanding any other provision of the Contract, the liability of the Company to the Customer, whether arising under or in connection with the Contract or the performance or non-performance thereof or anything incidental thereto, and whether by way of indemnity, by statute (to the extent that it is possible to exclude such liability), in tort (for negligence or otherwise), or on any other basis in law or equity is hereby limited and excluded as follows:

- (1) the Company shall have no liability whatsoever to the Customer for or in respect of loss of use, production, power, data, income, profit, revenue, investment return, business, contract, goodwill, anticipated saving or for any delay (other than liquidated damages provided for in the Contract), financing costs or increase in operating costs or for any pure economic loss or for any special, indirect or consequential loss or damage;
- (2) the total aggregate liability of the Company to the Customer is limited to the amount of the Price;
- (3) if, notwithstanding clause 5.1, the Company is liable to the Customer in respect of delay in delivery of the Products or performance of the Services, such liability, other than for liquidated damages, is limited in aggregate to \$1.00.

12.2 The foregoing limitation and exclusion of liability does not apply to any liability of the Company arising from:

- (1) death or bodily injury;
- (2) criminal acts, fraud or malicious damage;
- (3) breach of a third party's intellectual property rights.

13. Sanctions

13.1 The Customer warrants that none of the Consultant, its Personnel, controllers, direct or indirect owners, or subsidiaries of or entities controlled by the Customer (together the Relevant Parties for the purposes of this clause 13):

- (1) have engaged in any business in a country or territory that is the subject of any sanctions regime under any Sanctions Laws;
- (2) have been investigated or convicted for breach of a Sanctions Law; or
- (3) are Sanctions Targets.

13.2 The Customer must ensure that it, its Personnel and all other Relevant Parties complies with Sanctions Laws and maintain appropriate policies and procedures to ensure such compliance.

13.3

13.4 The Customer will, in writing, promptly notify Company, with all available details, if at any time any Relevant party breaches this clause 13 or would be in breach of this clause if it were a party to this Agreement.

14. Notices

14.1 A notice or other communication required or permitted to be given by one party to another shall be in writing and either delivered personally, sent by post (postage prepaid) to the other party's address set out in the Proposal or forwarded by email to the other party's email address (if any) set out in the Proposal as the email address for notices under the Contract.

14.2 A notice or other communication is deemed given if:

- (1) personally delivered, upon delivery;
- (2) mailed, on the expiration of two (2) business days after posting; or
- (3) sent by email, at close of business on the day of receipt of the email, and if not received during business hours, at close of business on the next business day.

15. Severance

15.1 If any provision of the Contract is or becomes invalid, illegal or unenforceable such provision shall be deemed to be severed from the Contract but all the remaining provisions shall not be affected as far as possible.

16. Governing Law

16.1 The Contract shall be governed by the laws of New Zealand, and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

17. No waiver

17.1 Failure by the Company to insist upon strict performance of any of the terms and conditions hereof, or failure or delay in exercising any rights or remedies provided herein or by law, or to properly notify the Customer in the event of breach, or the acceptance of or payment for any products hereunder, or review of design, shall not release the Customer from any of the warranties or obligations, and shall not be deemed a waiver of any right of the Company.

18. Time of the Essence

18.1 Time will be of the essence in the performance by the Customer of its obligations under the Contract.