



## GENERAL TERMS AND CONDITIONS OF CONTRACT ACO DRAINAGE SYSTEMS LIMITED

IN THIS AGREEMENT THERE ARE CERTAIN CLAUSES OF SIMILAR FONT AND COLOUR TO THIS TEXT WHICH CONTAIN PROVISIONS THAT MAY HAVE THE EFFECT OF (I) LIMITING THE RISK OR LIABILITY OF ACO OR OF ANY OTHER PERSON AND/OR (II) MAY CONSTITUTE AN ASSUMPTION OF RISK OR LIABILITY BY YOU AND/OR (III) MAY IMPOSE AN OBLIGATION ON YOU TO INDEMNIFY ACO OR ANY OTHER PERSON FOR ANY CAUSE AND/OR (IV) MAY BE AN ACKNOWLEDGEMENT OF ANY FACT BY YOU. THESE PROVISIONS ARE VERY IMPORTANT AND YOU MUST ENSURE THAT YOU READ THEM CAREFULLY AND THAT YOU UNDERSTAND THEM CLEARLY.

### 1. GENERAL

- 1.1 All agreements are exclusively subject to ACO's terms and conditions of contract; ACO rejects any terms and conditions of the CUSTOMER to the contrary or deviating from ACO's terms and conditions unless it has expressly consented to their validity in writing.
- 1.2 It is the CUSTOMER'S responsibility to draw ACO's attention to the provisions of any relevant contract or specification by which the CUSTOMER is bound failing which ACO will accept no liability there from, and no acceptance shall be valid unless reduced to writing and signed.
- 1.3 The terms and conditions set out herein cancel all previous issued terms and conditions.
- 1.4 These terms and conditions, as re-issued or revised by ACO from time to time, apply to all orders placed with ACO and such orders are subject to acceptance by ACO and shall be deemed to be made subject to these terms and conditions.
- 1.5 No qualification or condition contained in any order form, acknowledgement of order or otherwise, shall form part of the contract of sale or override these terms and conditions unless expressly agreed to in writing by the Managing Director of ACO. No employee or agent of ACO shall have the authority or the ability to change these terms in any manner whatsoever, save the Managing Director of ACO.
- 1.6 ACO reserves the right to refuse an order and acceptance of all orders shall occur upon issue of ACO's order confirmation. Unless otherwise provided, ACO's order confirmation shall prevail concerning the scope of GOODS to be delivered and services to be provided.
- 1.7 The prices stated in ACO'S price lists shall be deemed to be customary in the location and reasonable.
- 1.8 Unless previously withdrawn, ACO'S quotation is open for acceptance for the period stated, or, if no period is stated, for 30 (Thirty) calendar days. All orders must be in writing or by email and are subject to ACO'S acceptance in writing.
- 1.9 The CUSTOMER must ensure that the terms of its order and any applicable INPUT MATERIAL are complete and accurate. Details and quantities listed in ACO'S quotation have been determined from ACO'S interpretation of INPUT MATERIAL. Should the design criteria change or other specifications required for any reason, ACO reserves the right to re-quote and to vary its prices.
- 1.10 ACO'S quotation does not include incidental charges that may occur in transit, these charges are inclusive of but not limited to customs examinations, storage, demurrage, port health stops, state VAT and police border stops. Charges incurred will be billed as per outlay.
- 1.11 The CUSTOMER may use the ACO name, logo, by-line and other brand related items in its advertising and marketing materials or similar but only in strict accordance with ACO's and/or the manufacturers guidelines. This usage is valid so long as ACO supplies the CUSTOMER. Should ACO cease to supply the CUSTOMER, this right ceases automatically, and the CUSTOMER must immediately cease and usage of the ACO name, logo, by-line and other brand related items in all of its advertising and marketing materials or similar.
- 1.12 The CUSTOMER will treat as confidential and will not use or disclose to any person any information relating to quantities, price, or availability of any GOODS provided by ACO to the CUSTOMER and these obligations shall survive any termination of the obligations

contained in these CONDITIONS or any other contractual arrangement entered into between the CUSTOMER and ACO.

### 2. DEFINITIONS & INTERPRETATION

- 2.1 Unless such meaning is inconsistent with the context, the following terms shall, throughout this AGREEMENT, have the meanings respectively ascribed to them, namely:
- 2.2 "ACO" – means ACO DRAINAGE SYSTEMS LIMITED registration number PVT-27UQXJ3 of 96 Riverside Drive, Allianz Plaza Building 2nd floor P.O BOX 14558-00800, Nairobi, Kenya.
- 2.3 "AGREEMENT" shall mean this AGREEMENT between ACO and the CUSTOMER, with the terms and conditions contained herein, the letter of approval issued to the CUSTOMER upon approval of the credit application as well as any annexures, if any attached hereto.
- 2.4 "CONTRACT PRICE" – means the price of the GOODS as set out in the invoice;
- 2.5 "CUSTOMER" – means the person or legal entity who contracts with ACO to purchase ACO'S GOODS and / or SERVICES;
- 2.6 "DESIGNATED PURPOSE" – means the purpose for which the GOODS are generally intended;
- 2.7 "FORCE MAJEURE EVENT" - Force Majeure Event means any circumstance not in a Party's reasonable control including, without limitation:
  - 2.7.1 acts of God, flood, drought, earthquake or other natural disaster;
  - 2.7.2 epidemic or pandemic and any action taken by a government and public authority in relation thereto;
  - 2.7.3 terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations;
  - 2.7.4 nuclear, chemical or biological contamination, or sonic boom;
  - 2.7.5 any law or any action taken by a government or public authority, including without limitation imposing an export or import restriction, quota or prohibition, or failing to grant a necessary licence or consent;
  - 2.7.6 collapse of buildings, fire, explosion or accident; and
  - 2.7.7 any labour or trade dispute, strikes, industrial action or lockouts.
- 2.8 "INPUT MATERIAL" – means any documents, plans or other materials or specifications and any data or other information provided by the CUSTOMER in whatever format relating to the GOODS.
- 2.9 "OUTPUT MATERIAL" - means any documents, plans or other materials or specifications and any data or other information provided by ACO in whatever format relating to the GOODS. In this AGREEMENT unless the context otherwise requires–
- 2.10 The singular shall import and include the plural and vice versa;
- 2.11 Words indicating natural persons shall import and include juristic persons;
- 2.12 Clause headings are for reference only and do not affect interpretation;
- 2.13 Where any number of days is prescribed in this AGREEMENT, they shall be calculated exclusive of the first day and inclusive of the last day unless the last day falls on a Saturday, Sunday or public holiday. In such day the last day shall be the next succeeding day which is not a Saturday, Sunday or public holiday;
- 2.14 The rule of construction that this AGREEMENT shall be interpreted against the party responsible for the drafting or preparation of this AGREEMENT shall not apply. The same applies to the schedules or annexures.

### 2.14.1 3. CONTRACT PRICE

- 3.1 Price lists issued by ACO from time to time, are for information purposes only and do not constitute offers for sale.
- 3.2 Due to variables such as quantity, size, packaging, marketing, etc., invoiced prices may differ marginally from advertised prices.
- 3.3 Save insofar as may be otherwise specifically agreed in writing to the contrary by ACO, orders are accepted only at prices and transport tariffs prevailing on the date of dispatch.
- 3.4 Unless otherwise agreed in writing, the CONTRACT PRICE shall exclude carriage from the warehouse.

- 3.5 **ACO** shall retain the title to and copyrights in all offer documents; these may not be made available to third parties without **ACO'S** express written consent.
- 3.6 The **CONTRACT PRICE** shall specifically exclude Value Added Tax (VAT) and any other taxes that may be levied in respect of the **GOODS**. **ACO** reserves its rights to effect price increases from time to time without notification to the **CUSTOMER**. The onus shall be on the **CUSTOMER** to remain informed of the prices of **ACO**. No **ACO** employee, official, agent or nominee shall have the authority to effect or authorise any discounting of the **CONTRACT PRICE** of the **GOODS** save the Managing Director of **ACO**.
- 3.7 The **CONTRACT PRICE** is strictly net and not subject to any discounts unless otherwise agreed in writing and signed by the managing director of **ACO**.
- 3.8 Notwithstanding the stated price on the **INVOICE**, the **CONTRACT PRICE** shall, at all material times, be subject to any increase of duties, levies, taxes, transport, storage, cost of foreign currency and packing costs and **ACO** shall endeavour, where reasonably possible, to inform the **CUSTOMER** in advance of any anticipated increases of the aforesaid. **ACO** reserves its right to charge such revised prices for **GOODS** affected by the increase and pending delivery.
- 3.9 **ACO** reserves its right to add a reasonable charge for storage on any items which have not been collected or could not be delivered within 14 (fourteen) days of the date on which they were available for delivery or collection, as the case may be, and in the event that this is as a result of the **CUSTOMER'S** conduct.
- 3.10 If any discount is agreed to as required in clause 3.7 above, it shall only be allowed if payment is received by **ACO** on or before the due date and shall apply to the actual price of the **GOODS** themselves.
- 3.11 The **CUSTOMER** shall be liable for extra charges required as a result of its instructions, lack of instructions, and the inaccuracy of any **INPUT MATERIAL** or any other cause attributable to the **CUSTOMER**.
- 4. TERMS OF PAYMENT**
- 4.1 Should the **CUSTOMER** require credit facilities from **ACO**, an application shall be completed by the **CUSTOMER** in writing. The acceptance of the credit application shall be subject to the approval of **ACO**.
- 4.2 The approval from **ACO**, if granted, shall be recorded therein and communicated to the **CUSTOMER** in writing, should the credit application be refused the **CUSTOMER** shall have the option to purchase the **GOODS** on terms as stipulated by **ACO**, and should the **CUSTOMER** accept such terms, such agreement will continue to be subject to these terms and conditions.
- 4.3 **ACO** reserves the right to extend credit facilities to **CUSTOMERS** from time to time without any obligation to do so notwithstanding having extended such facilities in the past to the **CUSTOMER**, and may require any security it deems necessary prior to the granting or reinstatement of any credit facilities.
- 4.4 **ACO** reserves its right to, any time and after having provided the **CUSTOMER** with reasonable notice, and reasonable notices shall be deemed to be 30 (thirty) days, advise that credit facilities to a **CUSTOMER** by **ACO** will be terminated, and **ACO** will be under no obligation whatsoever to provide any reasons for such termination.
- 4.5 It is specifically agreed and recorded that at all material times, it shall be the sole prerogative of **ACO** to decide to which **CUSTOMERS** it would be willing to extend credit facilities, it specifically being understood by the **CUSTOMER** that any differentiation shall not be deemed to be discriminatory, but shall be deemed to form part of **ACO'S** internal credit risk limitation policy.
- 4.6 **ACO** shall be entitled to refuse sale of the **GOODS** to any **CUSTOMER** in the event of overdue amounts owing by the **CUSTOMER** to **ACO** or in the event that a **CUSTOMER** is not able to obtain/provide satisfactory guarantees/suretyships. It is specifically recorded and agreed that any late payments by a **CUSTOMER** shall constitute an automatic breach of the **AGREEMENT** entered into between **ACO** and the **CUSTOMER** and provided to the **CUSTOMER** by **ACO** and accordingly, **ACO** reserves the right at any time to refuse any further sale of **GOODS** to the **CUSTOMER** on any basis until all outstanding amounts including any accrued interest on such outstanding amounts have been settled in full by such **CUSTOMER**.
- 4.7 IT IS SPECIFICALLY RECORDED AND AGREED THAT THE **CUSTOMER** WAIVES ALL CLAIMS AGAINST **ACO** FOR ANY DAMAGES OR LOSSES THAT IT MAY SUFFER AS A RESULT OF THE REFUSAL OF **ACO** TO SELL OR DELIVER **GOODS** TO THE **CUSTOMER** IN THE EVENT OF OVERDUE AMOUNTS, OR IN CONNECTION WITH ANY OTHER DISPUTE WHATSOEVER ARISING OUT OF PAYMENT FOR **GOODS**.
- 4.8 Where no credit has been granted, payment for **GOODS** shall be made free on board.
- 4.9 Payment for **GOODS** to be delivered outside the Republic of Kenya shall be made by letter of guarantee issued by a Kenyan bank, payable upon presentation of transport documents or upon notification to the **CUSTOMER** that the **GOODS** are ready for transportation.
- 4.10 The **CUSTOMER** shall make all payments due under the contract without any deduction whether by way of set-off, counterclaim, discount, abatement, or otherwise.
- 4.11 No order for **GOODS** which has been accepted by **ACO** may be cancelled by the **CUSTOMER** except with the **AGREEMENT** in writing of **ACO** and on terms that the **CUSTOMER** shall indemnify **ACO** in full against all loss (including loss of profit), costs (including the cost of all labour and materials used), damages, charges and expenses incurred by **ACO** as a result of cancellation.
- 5. DELIVERY**
- 5.1 Time of delivery shall not be of the essence in this **AGREEMENT**.
- 5.2 WHILST EVERY EFFORT WILL BE MADE TO DISPATCH AND DELIVER THE **GOODS** WITHIN THE TIME QUOTED, **ACO** DOES NOT GUARANTEE DISPATCH AND/OR DELIVERY ON ANY SPECIFIC DATE AND SHALL NOT BE LIABLE FOR ANY DAMAGES INCLUDING CONSEQUENTIAL DAMAGES THAT MAY BE SUFFERED BY THE **CUSTOMER** AS A RESULT OF ANY DELAYS IN THE DELIVERY OF THE **GOODS** THAT MAY OCCUR
- 5.3 **ACO** may deliver the **GOODS** to the **CUSTOMER'S** premises or may agree to deliver the **GOODS** directly to the site of any third party.
- 5.4 Upon **ACO** notifying the **CUSTOMER** that the **GOODS** are ready for collection or tendering delivery of the **GOODS** the **CUSTOMER** shall agree to accept delivery of the **GOODS** forthwith. If **ACO** has agreed to deliver the **GOODS** and the **CUSTOMER** fails to give proper delivery instructions or to accept delivery as aforesaid, it shall be liable for all costs incurred by **ACO** as a result of such failure (including without limitation storage and insurance costs) which shall become immediately due and payable on demand, but such liability shall not affect its obligation to purchase the **GOODS** or the right of **ACO** to damages for breach of such obligation.
- 5.5 Where the **GOODS** are to be delivered in instalments, each delivery shall be deemed to constitute a separate contract and failure by **ACO** to deliver any one or more of the instalments in accordance with these terms and conditions or any claim by the **CUSTOMER** in respect of any one or more instalments shall not entitle the **CUSTOMER** to treat the **AGREEMENT** as a whole as repudiated.
- 5.6 THE **CUSTOMER** MUST SATISFY ITSELF UPON DELIVERY THAT THE DESCRIPTION OF THE **GOODS** SHOWN ON THE DELIVERY NOTE ARE IN FACT THE **GOODS** ORDERED. IF THE **CUSTOMER** ACCEPTS THE **GOODS** DELIVERED WHETHER OR NOT THEY ARE THE **GOODS** ORDERED, THE **CUSTOMER** SHALL SUBJECT TO CLAUSE 6 BE LIABLE TO PAY FOR THEM AND WILL HAVE NO CLAIM AGAINST **ACO**.
- 5.7 The day on and the time at which the delivery is to be made and at the rate required are to be mutually agreed upon in advance. Should adverse weather or other site problems necessitate a change in the agreed program, **ACO** shall advise the **CUSTOMER** thereof as soon as reasonably possible. The **CUSTOMER** shall be liable for the cost of any **GOODS** already dispatched prior to notification.
- 5.8 The **CUSTOMER** shall not be entitled to cancel or repudiate any order or refuse delivery by reason of such delay.
- 5.9 **ACO** reserves the right to refuse an order after, seven (7) days of being lodged, where costs have escalated due to any contingencies or circumstances not within **ACO'S** control or where the **CUSTOMER'S** account is overdue for payment or **ACO** considers the **CUSTOMER'S** credit to be unsatisfactory.

- 5.10 Should the dispatch of the **GOODS** be delayed for reasons due to the **CUSTOMER'S** fault, the **CUSTOMER** shall be charged the expenses arising from such delay.
- 5.11 Should delivery be delayed due to a Force Majeure Event, the delivery period shall be reasonably extended. **ACO** shall notify the **CUSTOMER** in due time about the commencement and the end of such circumstances.
- 5.12 Should **ACO** be prevented from the performance of any of its obligations as a result of a Force Majeure Event, **ACO** shall be entitled at its option to cancel this **AGREEMENT** or to suspend performance of its obligations thereunder and shall not be liable whatsoever for any loss or damage consequential or otherwise resulting from such inability to perform its obligations, cancellation or suspension.
- 5.13 Unless otherwise agreed in writing, delivery and passing of the risk of the **GOODS** to the **CUSTOMER** shall be deemed to have taken place when the **GOODS** have left the premises of **ACO**. This shall also apply to partial deliveries or if **ACO** has agreed to provide other services, e.g. payment of the transportation costs, delivery of the **GOODS**.
- 5.14 Should dispatch be delayed or not be effected at all due to circumstances for which **ACO** is not responsible, risk shall pass to the **CUSTOMER** on the date on which the **CUSTOMER** receives advice of dispatch. **ACO** undertakes to take out any insurance the **CUSTOMER** may request against advance payment and at the **CUSTOMER'S** expense.
- 5.15 Partial deliveries shall be permissible to the extent acceptable to the **CUSTOMER**.
- 5.16 In the event of a shortage of raw materials or component parts specified in the contract for use in the production of **GOODS**, **ACO** shall be entitled to substitute such other materials as it shall consider reasonably fit for such purpose.
- 5.17 All quotations are made subject to availability of the **GOODS** or materials at the time of receipt of the **CUSTOMER'S** order.
- 6. RETURN OF GOODS**
- 6.1 THE PRECONDITION FOR THE WARRANTY RIGHTS (CLAIMS BASED ON DEFECTS) OF THE **CUSTOMER** IN TERMS OF THE **AGREEMENT** IS THAT THE **CUSTOMER** INSPECTS THE **GOODS** UPON RECEIPT WITHOUT UNDUE DELAY AND GIVES WRITTEN NOTICE OF ANY VISIBLE DEFECTS AFTER THE INSPECTION, SPECIFYING THE DEFECT. THIS SHALL ALSO APPLY TO WRONG DELIVERIES OR ITEMS IN INSUFFICIENT QUANTITIES BEING DELIVERED. NOTIFICATION MUST BE GIVEN IN WRITING TO **ACO** WITHIN A PERIOD OF 3 (THREE) BUSINESS DAYS OF DELIVERY.
- 6.2 A PRECONDITION FOR THE WARRANTY RIGHTS (CLAIMS BASED ON DEFECTS) OF THE **CUSTOMER** IN TERMS OF THE **AGREEMENT** IS THAT THE **CUSTOMER** NOTIFIES **ACO** IN WRITING WITHIN 3 (THREE) DAYS OF THE DISCOVERY OF ANY LATENT (HIDDEN) DEFECTS OF THE **GOODS**.
- 6.3 A PRECONDITION FOR THE WARRANTY RIGHTS (CLAIMS BASED ON DEFECTS) OF THE **CUSTOMER** IN TERMS OF THE **AGREEMENT** IS THAT THE **CUSTOMER** PROMPTLY RETURN THE DEFECTIVE **GOODS** TO **ACO** IN THE CASE OF A DEFECT.
- 6.4 In the event that the **CUSTOMER** complies with clauses 6.1, 6.2 and 6.3, and **ACO** is satisfied that the **GOODS** are defective or do not conform to the specification or other description of the **GOODS** on the invoice, then **ACO** will, at **ACO'S** election either replace such quantity of **GOODS** with an equal quantity of **GOODS** or refund the applicable portion of the purchase price to the **CUSTOMER** against return of the defective portion of the **GOODS** by the **CUSTOMER** at their cost.
- 6.5 Except insofar as any statute provides to the contrary the undertakings contained in the preceding paragraphs of this clause are given *in lieu* of and to the exclusion of all conditions, warranties and representations whether express or implied by statute or otherwise as to the quality of the **GOODS** or their fitness for any particular purpose or otherwise and **ACO** shall have no liability in respect of the **GOODS** save as provided in clause 6.4.
- 6.6 **ACO** shall not be liable for any loss or damage sustained by the **CUSTOMER** by reason of any Force Majeure Event.
- 6.7 To enable **ACO** to perform all rework and replace all parts **ACO** deems necessary, the **CUSTOMER**, upon consultation with **ACO**, shall allow enough time and afford sufficient opportunity to **ACO** to remedy the defects. SHOULD THE **CUSTOMER** FAIL TO DO SO AND INSTEAD ELECTS TO REMEDY THE DEFECTS ITSELF OR BY THIRD PARTIES, **ACO** SHALL BE RELEASED FROM ANY LIABILITY OR CONSEQUENCES ARISING THERE FROM. Only in urgent cases involving endangering of the operational safety and/or to prevent unreasonably serious damage - in which case the **CUSTOMER** shall notify **ACO** immediately - shall the **CUSTOMER** be entitled to either remedy the defect itself or have such defect remedied by third parties and to demand compensation from **ACO** for the expenses incurred.
- 6.8 SHOULD THERE BE AN ALLEGATION THAT ANY **GOODS** ARE UNSAFE, INSUFFICIENT AND/OR DEFECTIVE; **ACO** SHALL NOT BE LIABLE FOR ANY HARM CAUSED WHERE SUCH ALLEGED UNSAFE CHARACTERISTIC, FAILURE, DEFECT OR HAZARD DID NOT EXIST IN THE **GOODS** AT THE TIME AT WHICH THEY WERE DELIVERED TO THE **CUSTOMER** BY **ACO**. THEREFORE IF NO SUCH NOTIFICATION IS RECEIVED IN TERMS OF CLAUSE 6.1 ABOVE, IT WILL BE REGARDED AS *PRIMA FACIE* PROOF THAT NO DEFECTS WERE PRESENT AT THE TIME OF DELIVERY AND THAT THE **GOODS** WERE DELIVERED IN ACCORDANCE WITH THIS **AGREEMENT**.
- 6.9 The **CUSTOMER** may not however return to **ACO** any **GOODS** for any reason whatsoever unless:-
- 6.9.1 the **PARTIES** have agreed in writing to such return and to the conditions of such return;
- 6.9.2 the **GOODS** are being returned in accordance with the provisions of clauses 6.1 and 6.3 above;
- 6.9.3 the **GOODS** were intended to satisfy a particular purpose communicated to **ACO** prior to the **PURCHASE** thereof and have been found not to satisfy the purpose for which they were intended, within 10 (ten) business days of delivery and **ACO** has been notified of this within that time period;
- 6.9.4 the **CUSTOMER** was not permitted to inspect the **GOODS** upon delivery thereof.
- 7. REPRESENTATION AND WARRANTIES**
- 7.1 For a period of 12 (Twelve) months from the date of the **CUSTOMER'S** receipt of the **GOODS** sold hereunder, the **ACO** warrants that the **GOODS** supplied in terms of the **AGREEMENT** shall be of **ACO'S** standard quality and are reasonably suitable for the purposes for which they are generally intended. In the event that defects are discovered in the **GOODS** supplied that were present at the time of **DELIVERY**, **ACO** shall within its own discretion either remedy the defect or supply defect free replacement **GOODS** as per clause 5.4
- 7.2 Any representations or warranties made or given by **ACO**, or anyone on **ACO'S** behalf, prior to **ACO'S** acceptance of an order and not contained in **ACO'S** written quotation or in these terms and conditions are hereby expressly excluded.
- 7.3 All **GOODS** sold by **ACO** shall not be sold as fit for any specific purpose unless so agreed to in writing.
- 7.4 The **CUSTOMER** bears the burden of proof that such defects in clause 7.1 were in fact present at the time of **DELIVERY**. In this regard the notification in clause 5.41 shall be *prima facie* proof as to whether the **GOODS** were defective at the time of **DELIVERY**.
- 7.5 Should defects be found without notification in terms of clause 6.1, the **CUSTOMER** shall bear the burden of proof to show that the defects were caused as a result of use for the **DESIGNATED PURPOSE** and that the **GOODS** were used according to the instructions by a technically qualified person and that any prescribed maintenance work and tests have been carried out by a qualified person.
- 7.6 **ACO** makes no other warranty of any kind, express or implied, including without limitation, any warranty of merchantability, or non-infringement. **ACO** specifically makes no warranties as to any services or as to compliance with laws, regulations, standards and/or conventions including any related to the environment or to the packaging, labelling and/or transport of hazardous **GOODS**. No warranty shall apply to shipping damage, damage caused by improper installation, **GOODS** that have been modified or altered in any way, damage caused by corrosion, abrasion, or severe temperatures, or

- GOODS** that have been subjected to improper maintenance, abuse, misuse, abnormal usage, or accident.
- 7.7 THE **CUSTOMER** WARRANTS THAT IT SHALL FULLY COMPLY WITH ALL LABEL DIRECTIONS FOR THE HANDLING, STORAGE, POSSESSION OR USE OF THE **GOODS** SOLD HEREUNDER AND THE **CUSTOMER** AGREES THAT IT SHALL INDEMNIFY AND HOLD **ACO** HARMLESS FROM ALL CLAIMS (INCLUDING, WITHOUT LIMITATION, ADVOCATES' FEES) OF PERSONAL INJURY OR PROPERTY DAMAGE RESULTING FROM ANY NEGLIGENCE, RECKLESSNESS OR WILFUL MISCONDUCT ON THE PART OF THE **CUSTOMER** OR FROM ANY FAILURE OF THE **CUSTOMER** TO COMPLY WITH THE TERMS OF THIS WARRANTY.
- 7.8 Specifications, illustrations and the like remain the property of **ACO** and may only be used for the purpose specified in the **AGREEMENT** and must be returned upon the request of **ACO**.
- 7.9 NO LIABILITY FOR DAMAGES WILL BE ATTRIBUTED TO **ACO** RESULTING FROM UNSUITABLE OR IMPROPER USE, IMPROPER ASSEMBLY AND IMPROPER COMMISSIONING OR HANDLING BY THE **CUSTOMER** OR BY THIRD PARTIES, NORMAL WEAR AND TEAR OR PREMATURE EROSION DUE TO THE NATURE OF THE MATERIAL OR THE KIND OF ITS USE, IMPROPER OR NEGLIGENT HANDLING OR STORAGE, IMPROPER MAINTENANCE, DEFECTIVE CONSTRUCTION WORKS, UNSUITABLE BUILDING GROUND, CHEMICAL, ELECTRO-CHEMICAL OR ELECTRICAL INFLUENCES UNLESS **ACO** IS RESPONSIBLE FOR SUCH INFLUENCES.
- 8. RESERVATION OF OWNERSHIP**
- 8.1 **ACO** reserves the right of ownership, copyright and exploitation rights for all estimates, and other documents and information in physical and non-physical form, in particular in digital form, provided to the **CUSTOMER**. Documents of a confidential nature must not be made available to third parties without **ACO'S** prior written consent. Should the **CUSTOMER** not place an order with **ACO** or cancel the **AGREEMENT**, the **CUSTOMER** shall return the documents immediately upon **ACO'S** request. Information provided in non-physical form – in particular digital form - shall be deleted by the **CUSTOMER** and their deletion shall be confirmed in writing to **ACO**.
- 8.2 **ACO** shall retain title to the **GOODS** (**GOODS** supplied under reservation of ownership) until full payment of all amounts owed for whatever legal reason including future amounts owed or contingent amounts owed, also from contracts concluded at the same time or at a later point of time. This shall also apply in case payments are made for specifically denominated amounts owed.
- 8.3 In the event that the **CUSTOMER** acts contrary to the terms of the **CONTRACT** in any way or defaults in payment **ACO** may elect without detracting from other remedies which may be available to it, to continue with the **AGREEMENT** or to cancel it and cancel the sale of any further **GOODS** to the **CUSTOMER** and to rely on the provisions of this clause 8 to repossess those **GOODS** sold and delivered by **ACO** to the **CUSTOMER** or to claim specific performance of all the **CUSTOMER'S** obligations whether or not such obligations would otherwise have fallen due for performance, in either event, without prejudice to **ACO'S** rights to claim damages.
- 8.4 In the event that the **CUSTOMER** acts contrary to the terms of the **CONTRACT** in any way or defaults in payment, the **CUSTOMER** shall deliver the **GOODS** to **ACO** upon receipt of notice by the **CUSTOMER** from **ACO**, without undue delay.
- 8.5 The **CUSTOMER** herewith assigns the amounts owed to it from the resale of the **GOODS** subject to reservation of ownership of **ACO**. Such amounts owed shall serve **ACO** as a security to the same extent as the **GOODS** under reservation of ownership. If the **CUSTOMER** sells the **GOODS** subject to reservation of ownership together with the **GOODS** not sold to it by **ACO**, the **CUSTOMER** shall assign the amounts owed to it from the resale, to **ACO** only in such amounts as corresponds to the resale value of the **GOODS** delivered by **ACO**.
- 8.6 The **CUSTOMER** shall be entitled to collect the amounts due to it from the resale of the **GOODS** until revoked by **ACO**. **ACO** may revoke such entitlement at any time. The **CUSTOMER** shall not assign the amounts owed to it – this shall also apply to the sale of accounts receivable to factoring banks - without **ACO'S** prior written permission. Upon **ACO'S** request, the **CUSTOMER** shall be obliged to notify its own customers of such assignment, unless **ACO** itself decided to do so, and to provide the information and documents required for collection by **ACO**.
- 8.7 In case of payment by cheque, the ownership of the cheque shall pass to **ACO** as soon as the **CUSTOMER** acquires ownership of the cheque. In case of payment by bill of exchange, the **CUSTOMER** shall assign its rights arising therefrom in advance to **ACO**. The handing over of such documents shall be replaced by the **CUSTOMER'S** keeping them in safe custody for **ACO** or, in case the **CUSTOMER** does not obtain immediate possession of such documents, by the **CUSTOMER'S** hereby assigning its claim for return against third parties in advance to **ACO**. The **CUSTOMER** shall hand over such documents bearing the **CUSTOMER'S** endorsement immediately to **ACO**.
- 9. SPECIFICATIONS**
- 9.1 All descriptive and shipping specifications, estimates, drawings and particulars of weights and dimensions supplied by **ACO** are approximate only and the descriptions and illustrations contained in its catalogues, price lists and other marketing materials are intended merely to present a general idea of the **GOODS** described therein, unless otherwise stated. **ACO** reserves its right to change its marketing materials from time to time without notice to the **CUSTOMER**.
- 9.2 **ACO** may correct any typographical or other errors or omissions in any marketing materials, quotation, written acknowledgement of the **CUSTOMER'S** order, or other document relating to the provision of the **GOODS** without any liability to the **CUSTOMER**.
- 9.3 Any advice or recommendation given by **ACO** or its employees or agents to the **CUSTOMER** or its employees or agents as to the storage, application or use of the **GOODS** which is not confirmed in writing by **ACO** is followed or acted upon entirely at the **CUSTOMER'S** own risk, and accordingly **ACO** shall not be liable for any such advice or recommendation which is not so confirmed.
- 10. BREACH**
- 10.1 In the event that:
- 10.1.1 the **CUSTOMER** breaches any condition contained in these conditions and failing to pay any amount due and payable on due date, and having failed to rectify such breach or outstanding payment within 10 (Ten) days of having been requested to do so in writing by **ACO**;
- 10.1.2 the **CUSTOMER** suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due or admits inability to pay its debts;
- 10.1.3 the **CUSTOMER** begins negotiations with all or any class of its creditors with a view to rescheduling any of its debts, or makes a proposal for or enters into any compromise or arrangement with any of its creditors;
- 10.1.4 a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of the **CUSTOMER**;
- 10.1.5 an application is made to court, or an order is made, for the appointment of an administrator or if a notice of intention to appoint an administrator is given or if an administrator is appointed over the **CUSTOMER**;
- 10.1.6 the holder of a qualifying floating charge over the assets of the **CUSTOMER** has become entitled to appoint or has appointed an administrative receiver;
- 10.1.7 a person becomes entitled to appoint a receiver over all or any of the assets of the **CUSTOMER** or a receiver is appointed over all or any of the assets of the **CUSTOMER**;
- 10.1.8 a creditor or encumbrancer of the **CUSTOMER** attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of its assets and such attachment or process is not discharged within fourteen (14) days;
- 10.1.9 any event occurs, or proceeding is taken, with respect to the **CUSTOMER** in any jurisdiction to which it is subject that has an

- effect equivalent or similar to any of the events mentioned in Clause 10.1.3 to Clause 10.1.9 inclusive;
- 10.1.10 the CUSTOMER ceases, or threatens to cease, to carry on all or substantially the whole of its business;
- 10.1.11 the CUSTOMER dies or ceases to exist;
- then, and in that event, ACO shall, without retracting from other remedies which may be available to it, be entitled to terminate this AGREEMENT and cancel the sale of any GOODS to the CUSTOMER without notice to the CUSTOMER and to rely on the provisions of this clause to repossess those GOODS sold and delivered by ACO to the CUSTOMER or to claim specific performance of all the CUSTOMER'S obligations whether or not such obligations would otherwise have fallen due for performance, in either event, without prejudice to ACO'S rights to claim damages.
- 10.2 The CUSTOMER shall use its best efforts to notify ACO immediately in case of any of clauses 10.1.1 to 10.1.11 occurring and shall provide ACO with all information and documents required for ACO'S assertion of its rights. The CUSTOMER shall be liable to ACO for the judicial and extra-judicial costs of any necessary action pursuant to third-party action against execution.
- 11. REMEDIES**
- 11.1 The CUSTOMER'S exclusive remedy for shortage in the GOODS delivered, damaged or defective GOODS (whether or not occurring as a result of ACO'S alleged negligence) or any other cause of action arising out of the contract, including breach of warranty, is expressly limited to replacement of non-conforming GOODS or payment of an amount not to exceed the purchase price of the GOODS for which damages are claimed, at ACO'S option. The CUSTOMER shall have no right to setoff, to withhold payment or to make a reduction in price. The CUSTOMER'S remedy of replacement or refund is available only if non-conformance was not caused by the CUSTOMER or by accident, fire or other hazard.
- 12. INDEMNITY**
- 12.1 The CUSTOMER agrees to indemnify, hold harmless and defend ACO and its directors, officers, employee's and agents, and the directors, officers, employees and agents of any ACO's parent, subsidiary or related company (the "ACO's Indemnitees") from and against any and all claims, suits, losses, damages, costs, fees and expenses arising out of the death or injury to person or damage to property resulting from the sale, marketing or use of the GOODS by the CUSTOMER, except that such claims, suits, losses, damages, costs, fees or expenses arise or result from any negligent or wrongful act or omission of ACO.
- 13. LIMITATION OF LIABILITY**
- 13.1 IN NO EVENT SHALL ACO, ITS DIRECTORS, OFFICERS, EMPLOYEES OR AGENTS BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT OR SPECIAL DAMAGES, INCLUDING PUNITIVE DAMAGES OR ADVOCATES' FEES, WHETHER FORESEEABLE OR UNFORESEEABLE. BASED ON CLAIMS OF THE CUSTOMER OR ITS CLIENTS OR THE CUSTOMER'S (INCLUDING, BUT NOT LIMITED TO, CLAIMS FOR LOSS OF BUSINESS, GOODWILL, PROFITS, LOSS OF MONEY OR USE OF GOODS OR IMPAIRMENT OF OTHER ASSETS), ARISING OUT OF BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, BREACH OF CONTRACT, MISREPRESENTATION, NEGLIGENCE, TORT OR OTHERWISE IN CONNECTION WITH OR ARISING OUT OF THE CONTRACT, EXCEPT IN THE CASE OF PERSONAL INJURY OR PROPERTY DAMAGE WHERE AND ONLY TO THE EXTENT THAT APPLICABLE LAW REQUIRES SUCH LIABILITY. TO THE EXTENT THE CUSTOMER INCORPORATES OR CAUSES OTHERS TO INCORPORATE THE GOODS IN ITS OWN GOODS OR THE GOODS OF ANY THIRD PARTY, ACO SHALL NOT BE LIABLE FOR THIRD PARTY CLAIMS FOR INFRINGEMENT OF LETTERS PATENT, REGISTERED DESIGN, TRADEMARK OR COPYRIGHT RESULTING FROM SUCH INCORPORATION AND BASED UPON THE USE OF THE GOODS OR THE MANUFACTURE, USE, SALE OR OFFER FOR SALE OF ANY GOODS CONTAINING SUCH GOODS, EXCEPT AS SUCH LIABILITY FOR THIRD PARTY CLAIMS FOR INFRINGEMENT IS EXPRESSLY REQUIRED BY APPLICABLE LAW AND NOT WAIVABLE BY THE CUSTOMER. THE CUSTOMER ASSUMES RESPONSIBILITY FOR ALL PERSONAL INJURY AND PROPERTY DAMAGE RESULTING FROM HANDLING, POSSESSION, USE, RESALE OR DISPOSAL OF THE GOODS.
- 13.2 ANY ACTION BY THE CUSTOMER FOR BREACH OF THE CONTRACT BY ACO OR ANY OTHER CAUSES OF ACTION OF THE CUSTOMER EXPRESSLY ALLOWED UNDER THE CONTRACT MUST BE COMMENCED WITHIN ONE YEAR AFTER THE CAUSE OF ACTION HAS ACCRUED.
- 13.3 THE CUSTOMER INDEMNIFIES AND HOLDS HARMLESS AND DEFENDS ACO IN THE EVENT THAT THE GOODS ARE NOT ERECTED AND DISMANTLED IN A PROPER MANNER AND NOT BY THOSE PERSONS HAVING THE APPROPRIATE QUALIFICATIONS AND EXPERIENCE TO ERECT AND DISMANTLE THE GOODS AND IN ACCORDANCE WITH ANY INSTRUCTIONS GIVEN OUT BY ACO.
- 14. SURETY**
- 14.1 THE PERSON WHO SIGNS THIS AGREEMENT ("THE SIGNATORY") SHALL BE JOINTLY AND SEVERALLY LIABLE WITH THE CUSTOMER, FOR THE DUE PAYMENT OVER EVERY SUM OF MONEY WHICH THE CUSTOMER OWES TO ACO IN RESPECT OF THIS AGREEMENT.
- 15. CERTIFICATE OF INDEBTEDNESS**
- 15.1 A certificate under the hand of the Financial Controller of ACO as to the existence and the amount of the CUSTOMER'S indebtedness to ACO, as well as the amount of interest accrued thereon, and as to any other fact, matter or thing relating to the CUSTOMER'S indebtedness to ACO, shall be accepted as sufficient (*prima facie*) proof of the contents and correctness thereof and of the amount of the CUSTOMER'S indebtedness for the purpose of summary judgment or any other proceedings against the CUSTOMER in any competent Court. Furthermore, it shall not be necessary to prove the appointment of the person signing such a certificate and it shall be deemed to be sufficient particularity for the purpose of any action or any other proceeding instituted by ACO against the CUSTOMER.
- 16. JURISDICTION & LEGAL ACTION**
- 16.1 Any dispute, controversy or claim arising out of or relating to this Agreement or a termination hereof, or the interpretation, breach or validity hereof, shall be resolved through courts of competent jurisdiction in Kenya.
- 16.2 This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of the Republic of Kenya.
- 16.3 In the event of ACO instructing advocates in regard to any breach of the CUSTOMER, of the conditions of this AGREEMENT, then the CUSTOMER shall be liable to pay in full all the costs including any costs incidental to such action instituted against the CUSTOMER.
- 17. NOTICE AND DOMICILIA**
- 17.1 Any notices to be given to the parties in terms of this AGREEMENT shall be in writing and delivered by hand during ordinary business hours, posted by pre-paid registered post or by e-mail to the addresses mentioned hereunder.
- 17.2 ACO: 96 Riverside Drive, Allianz Plaza Building 2nd floor P.O BOX 14558-00800, Nairobi, Kenya, info@aco.co.ke.]
- 17.3 The CUSTOMER: The address as given by the CUSTOMER in writing to ACO, or such other address within the Republic of Kenya as either party may choose by written notice to the other.
- 17.4 Any notice shall be deemed to have been received:
- 17.4.1 on signature of a delivery receipt or at the time the notice is left at the proper address;
- 17.4.2 if sent by pre-paid first-class post or courier service, at the time recorded by the delivery service; or
- 17.4.3 if sent by fax or email, at 9.00 am on the next business day after transmission.
- 17.5 This clause does not apply to the service of any proceedings or other documents in any legal action or other method of dispute resolution which shall be governed by the applicable rules.



**18. NON VARIATION & SEVERABILITY**

- 18.1 This **AGREEMENT** constitutes the entire **AGREEMENT** between the parties and no representation by either of the parties or their agents, whether made prior or subsequent to the signing of this **AGREEMENT**, shall be binding on either of the parties unless done in writing and signed by both parties hereto.
- 18.2 If any of the provisions of this **AGREEMENT** are held to be invalid, the validity of the remainder of this **AGREEMENT** shall not be affected and the rights and obligations of the parties shall be construed and enforced as if this **AGREEMENT** did not contain the invalid term and to that end the provisions of this **AGREEMENT** and the application thereof are hereby declared to be severable.
- 18.3 No variation, alteration or consensual cancellation of this **AGREEMENT**, or any of the terms thereof, shall be of any force or effect, unless done in writing and signed by the parties hereto.
- 18.4 No waiver or abandonment by either party of any of its rights in terms of this **AGREEMENT** shall be binding on that party, unless such waiver or abandonment is in writing and signed by the waiving party.
- 18.5 No indulgence, extension of time, relaxation or latitude which any party may show, grant or allow to another shall constitute a waiver by a party of any such party's rights and such party shall not hereby be prejudiced or estopped from exercising any of its rights against any party which may have arisen in the past or which might arise in the future. Unless the context indicates otherwise, the rights and obligations of any party arising from this **AGREEMENT** shall devolve upon and bind its successors-in-title.
- 18.6 The parties agree that they will do all things and sign all documents necessary to give effect to the terms of this **AGREEMENT** and to all transactions deriving there from.

SIGNED AT \_\_\_\_\_ BY THE **CUSTOMER** ON THIS

\_\_\_\_ DAY OF \_\_\_\_\_ 20\_\_.

THE **CUSTOMER** CONFIRMS THAT HE/SHE/IT HAS READ AND UNDERSTANDS THE CONTENTS OF THIS DOCUMENT AND UNDERSTANDS THAT HE/SHE/IT IS BOUND BY THESE TERMS AND CONDITIONS.

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Designation: \_\_\_\_\_