

Terms and Conditions of Sale New Zealand

1. GENERAL

- a) In these Terms and Conditions, “Company” shall mean the Marathon entity specified in the Order, provider of Goods to the Customer and includes the Company’s successors and assigns.
- b) “Customer” shall mean the entity, partnership or individual requesting Goods from the Company and shall include the Customer’s successors and assigns.
- c) Where the Customer is applying to the Company for a Credit Trading Account the Customer is the individual/s, partnership or entity detailed in the Credit Application and in this case the Customer warrants that all information contained in any Credit Application to the Company is true and correct at the time of making the application for credit.
- d) These Terms and Conditions shall apply to the exclusion of all others (with the exception of clause 1(d) herein) including any Terms and Conditions of the Customer (whether on the Customer’s Order form or otherwise) or to be negotiated and agreed with the Customer.
- e) The Customer acknowledges that these Terms and Conditions constitute the agreement between the parties however the Company reserves the right to incorporate additional Terms and Conditions to be included in any quotation provided to the Customer in writing or otherwise. Such additional Terms and Conditions together with the Terms and Conditions herein will then constitute the agreement between the Company and the Customer.
- f) The Company reserves the right to review these Terms and Conditions at any time. If following any such review, there is to be any change to these Terms and Conditions then that change will take effect from the date on which the Company notifies the Customer of such change.
- g) Company Service is a type C inspection body for IANZ endorsed inspections services specified in AS/NZS 3800 covering the overhaul, repair and modification to electrical equipment used in explosive atmospheres. This requires adequate segregation of responsibilities and accountabilities in the provision of inspection services and/or documented procedures to ensure the level of independence required for type C inspection bodies as described in AS/NZS ISO/IEC 17020.

2. PRICES

Orders are accepted on the condition that the Goods and/or services will be invoiced at the price ruling at the date the Goods and/or services are dispatched. Unless specified to the contrary, prices quoted are exclusive of all GST, stamp duty and like levies or taxes. The Company may amend prices at any time without prior notice. All quotations provided by the Company are valid for a period of thirty (30) days.

3. PAYMENT

- a) The Customer (approved account holders only) shall make payment to the Company for all Goods supplied within the time period specified on the Credit Application or an invoice unless otherwise negotiated and agreed in writing with the Company prior to the supply of Goods.
- b) Non account holders will be required to pay prior to the supply of Goods.
- c) The Customer acknowledges that time is of the essence with regard to payment and any breach of any payment term/s will enable the Company to exercise all of its rights contained herein including (but without in any way limiting its rights) the right to cancel further credit and to take legal action for the recovery of all sums outstanding. Orders will not be processed for Customers whose accounts are in arrears. Cleared payment in full is required before the Customers initial Order will be processed and dispatched.
- d) A deposit as notified by the Company at the time of Order is placed shall be payable by the Customer prior to Orders being processed and such deposits are not refundable.

e) The Customer shall not be entitled to withhold payment of any sums after they become due by reason of any right of set off or counter claim which the Customer may have or alleged to have or for any other reason whatsoever.

f) In the event that payment remains outstanding beyond the Company's payment terms then the Customer agrees to pay an administration fee per month of either \$50.00 or 10% of the outstanding amount whichever is greater.

4. INTEREST

Should payment remain outstanding beyond the Company's payment terms as outlined in clause 3 above, the Customer agrees to pay interest on all amounts outstanding from the due date until the date of payment at a daily rate equal to 2% above the Company's then overdraft rate as varied from time to time.

5. COSTS

Should payment remain outstanding beyond the Company's payment terms as outlined in clause 3, the Customer agrees to pay all legal costs (on a solicitor/own client basis) and all Mercantile Agent's fees (including any commission payable on the payment of the debt) incurred by the Company as a result of non-payment of the debt.

6. DELIVERY

a) In the event that the Customer specifies a delivery date, the Company shall use its best endeavors to comply with the Customer's requests. In no circumstances will the Company be liable for any loss or damage of any kind whatsoever in the event that it is not able to comply with the Customer's request for delivery at a certain time. The Customer acknowledges and agrees that it will not make any claim against the Company for any loss or damage incurred as a result of late delivery.

b) Delivery of the Goods to a third party nominated by the Customer is deemed to be delivery to the Customer for the purposes of this agreement.

c) The Customer shall not be entitled to repudiate the agreement as a result of the failure of the Company to deliver the Goods and services.

7. CLAIMS

a) It is the responsibility of the Customer to check Goods to ensure that the Goods are complete and in good condition. The Customer will be deemed to have accepted the Goods as being in accordance with its Order and received in good condition and to their satisfaction unless it notifies the Company in writing of any claim within ten (10) days of receipt of the Goods.

b) The Company will not accept any return of Goods unless it has given prior written authorization for the return and unless the returned Goods are in their original condition and packaging. The Customer is responsible for payment of any freight or delivery costs to return any Goods to the Company unless the Company agrees to pay such costs on the basis that the Goods were delivered in a damaged condition.

8. JURISDICTION

The proper law of all contracts arising between the Company and the Customer is the Law of New Zealand and the parties agree to submit to the jurisdiction of the Courts of the place where Company is located.

9. WARRANTY AND LIMITATION OF LIABILITY

9.1 Nothing in these Terms and Conditions shall be read or applied so as to exclude, restrict or modify or have the effect of excluding, restricting or modifying any condition, warranty, guarantee, right or remedy implied by law (including the The Fair Trading Act 1986 and the Fair Trading Amendment Act 2013, The Commerce Act 1986 and The Credit Contracts and Consumer Finance Act 2003) which by law cannot be excluded, restricted or modified.

9.2 Scope of Warranty.

The Company provides the following limited warranties in relation to Goods and services provided under these Terms and Conditions:

- a) Products (other than software) will be delivered free from defects in material, workmanship and title and will conform with the Company’s specification set out in a written and signed agreement between the Customer and the Company, if applicable (Product Warranty);
- b) Repaired or replaced products or parts of products (other than software) will be delivered free from defects in material, workmanship and title (Parts Warranty);
- c) Software shall execute, at the time of delivery, in accordance with the specification set out in a written and signed agreement between the Customer (as licensee) and the Company (as licensor), if applicable, when properly installed in the products (Software Warranty); and
- d) services will be performed in a competent and diligent manner in accordance with any mutually agreed specification (Services Warranty).

9.3 Warranty Period.

Unless otherwise stated in the Quotation, the warranties set out in clause 9.2 expire as follows unless otherwise stated on the list below:

- a) In respect of products (other than software), twelve (12) months from invoice date;
- b) In respect of repaired or replaced products or parts of products (other than software), upon expiration of the warranty period applicable to the products originally supplied by the Company (if provided by way of repair or replacement under warranty). In the case of other repaired or replaced products or parts of products, twelve (12) months from the date of repair or manufacture of the products or parts of the products;
- c) In respect of services, ninety (90) days from the date of completion of the services; and
- d) In respect of software, six (6) months from the date of manufacture of the first product on which the software is loaded.
- e)

PRODUCT TYPE	WARRANTY PERIOD
All products, unless specified in the rows below	1 year from invoice date
Marathon Mining Specification Motors (PPA, TCM)	3 years from invoice date
Dow Corning, Insulation, Varnishes and Resin	12 months from invoice date or product expiration date whichever is sooner

9.4 Warranty Exclusions. The warranties set out above exclude:

- a) Replacement or repairs which are required as a result of abuse, neglect, negligence, misuse, misapplication, accident, damage by circumstances beyond the Company’s control, improper installation (if by any person other than the Company), improper operation (including, but not limited to, operation in excess of rated capacity or otherwise not in accordance with installation, maintenance or operating instructions or requirements), improper, inadequate or insufficient maintenance, improper storage, and/or any use other than normal use or service;
- b) Items subject to deterioration in normal service (such as lamps, bulbs, fuses, batteries);
- c) Goods, materials or parts supplied or manufactured by third parties unrelated to the Company. The Company will assign to the Customer the written warranty, if any, of the manufacturer, if assignment is reasonably practicable, however the Company does not adopt or guarantee or represent that the manufacturer will comply with any of the terms of the warranty of such manufacturer;
- d) Shipping expenses to and from the Company’s office, factory, warehouse, authorized service center or other destination designated by the Company for repair or replacement of defective products or any tax, duty, custom, inspection or testing fee, or any other related charges;

- e) Costs of removing defective Goods from, and/or disassembling, equipment in which Goods are assembled or reinstalling Goods and/or reassembling such equipment, or testing repaired or replaced Goods and / or the equipment;
- f) Field service travel and living costs and expenses;
- g) Goods maintained, serviced, repaired or altered by anyone other than the Company or the Company's authorized service agencies; or
- h) Failures of software to be interruption-free or error-free or to meet the Customer's or any other party's requirements; and problems caused by use of software in conjunction with third-party software, hardware or products.

9.5 Remedies. If, prior to expiration of the warranty periods set out in clause 9.3, there is a breach by the Company of any warranty under clause 9.2, the Customer's exclusive remedy shall be limited to, in the Company's discretion:

- a) In the case of Goods (including products, replacement parts and software), repair or replacement of the Goods, or refund of the invoiced price of the Goods; or
- b) in the case of services, either the re-supply of the services, or the cost of having the services supplied again by the Company.

9.6 Warranty Conditions - Non-Consumer. This clause 9.6 applies if the Customer is not a "Consumer" as defined under the Australian Consumer Law. If the Customer is a Consumer, the warranty conditions in clause 9.7 will apply:

- a) All claims for breach of Product Warranty or Parts Warranty must be notified to the Company within a reasonable period of time, but in no event more than thirty (30) days, after the defect giving rise to the claim was discovered or by reasonable care should have been discovered, and all subsequent claims received by the Company will be deemed waived;
- b) All claims for breach of Software Warranty must be accompanied by a complete written description of the claimed non-conformance of the software, and submitted to the Company prior to the expiry of the software warranty period.
- c) All claims for breach of Service Warranty must be accompanied by a complete written description of the claimed non-conformance of the services and submitted to the Company prior to the expiry of the service warranty period.
- d) The Customer will be responsible for all expenses associated with a warranty claim in accordance with this clause 9 other than the costs of making the repair, replacement, rectification or refund for the Goods or services, including the costs of returning any defective Goods to the Company. Any repair or replacement to Goods offered by the Company under warranty will be provided FCA factory, warehouse or other facility that the Company designates at its discretion as point of shipment from time to time (Incoterms® 2020).
- e) To the extent permitted by law, the Company will not be liable to the Customer for any loss (whether direct or indirect, special or consequential), damage or injury resulting from any breach of warranty or any defective material, faulty workmanship or otherwise arising out of these Terms and Conditions. In no event shall the Company's liability for defective or nonconforming Goods or services (including products, parts or software) exceed the purchase price paid by the Customer for such Goods or services.

9.7 Warranty Conditions - Consumer. This clause 9.7 applies if the Customer is a "Consumer" as defined under the Australian Consumer Law.

- a) To claim under warranty, the Customer must submit a online Warranty form to the Company within the relevant Goods or services warranty period as set out in clause 9.3 specifying the nature of the defect, breach or non-conformance, the form can be accessed at company website.
- b) The Customer will be responsible for all expenses associated with a warranty claim in accordance with this clause 9 other than the costs of making the repair, replacement, rectification or refund for the Goods or services, including the costs of returning any defective Goods to the Company. Any repair or replacement to Goods offered by the Company under warranty will be provided FCA factory, warehouse or other facility that the Company designates at its sole and absolute discretion as point of shipment from time to time (Incoterms® 2020).

c) The benefits to the Customer of these warranties are in addition to any other rights and remedies the Customer may have under the New Zealand Consumer Law.

d) Company's Goods come with guarantees that cannot be excluded under the New Zealand Consumer Law. The Customer is entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. The Customer is also entitled to have the Goods repaired or replaced if Goods fail to be of acceptable quality and the failure does not amount to a major failure.

9.8 Warranty Conditions - Consumer and non-Consumer.

a) Any warranty provided under or in connection with these Terms and Conditions relates only to Goods or services provided by the Company to the Customer. Any claim in relation to such Goods or services must be made by the Customer only, and not by any person who acquires the Goods or services from the Customer (Transferee).

b) All other terms, conditions, warranties and guarantees implied or imposed by statute, common law or otherwise in relation to the Goods or services (including without limiting the foregoing any implied or imposed warranty or guarantee that the Goods are suitable or fit for any particular use or purpose or that the Goods will comply with a sample) are hereby excluded, except for any warranties or guarantees which may not be excluded according to the applicable laws or regulations of a country which has proper jurisdiction.

c) The Company does not warrant the accuracy, sufficiency or completeness of any information provided to the Customer. Except where the Customer and Company agree in a written and signed agreement upon the specifications applicable to the products, software, and/or services, any description of the products, software and/or services (whether in writing or made orally by the Customer or Customer's agents), specifications, samples, models, bulletins, drawings, diagrams, engineering sheets or similar materials used in connection with the Customer's Order are for the sole purpose of identifying the Goods or services and shall not be construed as an express or implied warranty. No employee, representative or agent of the Company (other than an Officer of the Company) is authorized to alter or modify any provision of this clause 9 or to make any guarantee, warranty or representation, whether express or implied, orally or in writing, which is contrary to the foregoing.

9.9 Limitation of Liability

a) The Company, under any circumstances, shall be liable for any contingent, indirect, consequential or special losses (including but not limited to loss of profit or income, loss of business opportunity, loss of use of the products, software or related equipment or systems, cost of capital, cost of substitute products, business interruption, increased expense of operation or any financing and holding costs), damages or injuries arising directly or indirectly from these Terms and Conditions or any performance or failure to perform, whether in contract, tort, negligence, strict liability or otherwise, including (but not limited to) the Company's negligence, default or misconduct even if informed of the possibility of such damages.

b) If the Customer is not a Consumer (as defined under the New Zealand Consumer Law), to the extent permitted by law:

- i. The Customer's only remedy for breach of warranty is set out in clause 9.5 above; and
- ii. The Company's liability to the Customer for any claim other than a breach of warranty claim, whether in contract, tort (including negligence), statute, indemnity or otherwise for any loss or damage arising out of, or in connection with, these Terms and Conditions, or from the design, manufacture, sale, delivery, resale, repair, replacement, installation, technical direction of installation, inspection, operation or use of any Goods or services provided under these Terms and Conditions, shall be limited to five percent (5%) of the purchase price of the Goods or services or part thereof giving rise to the claim.

c) If the Customer is a Consumer (as defined under the New Zealand Consumer Law), to the extent permitted by law:

- i. The Company's liability for the failure to comply with a guarantee required under the the New Zealand Consumer Law is limited as follows:

A. If the failure cannot be remedied or is a major failure as defined in the New Zealand Consumer Law (Major Failure), the Company's liability is as stated in the New Zealand Consumer Law in respect of that failure;

B. If such failure is not a Major Failure, then in the Company's absolute discretion:

(1) If the failure is in respect of services, the Company's liability is limited to the supply of those services again or the payment of the cost of having those services resupplied;

(2) If the failure is in respect of Goods (including software), the Company's liability is limited to replacement of the Goods, the supply of equivalent Goods, the repair of the Goods or the cost of replacing the Goods or having them repaired.

ii. The Company's liability for any other claim whether in contract, tort (including negligence), statute, indemnity or otherwise for any loss or damage arising out of, or in connection with, the Terms and Conditions, or from the design, manufacture, sale, delivery, resale, repair, replacement, installation, technical direction of installation, inspection, operation or use of any Goods or services provided under these Terms and Conditions, is limited to five percent (5%) of the purchase price of the Goods or services or part thereof giving rise to the claim.

d) Notwithstanding any other provision of these Terms and Conditions, to the extent permitted by applicable law, the limitations and exclusions stated in these Terms and Conditions, including this clause 9, will apply regardless of whether liability arises from breach of contract, tort (including but not limited to our negligence, default or misconduct or the negligence, default or misconduct of our employees, representatives or agents), by operation of law, or otherwise.

e) To the extent permitted by law, all causes of action against the Company, arising out of or in connection with the supply of the Goods (including software) or services shall expire unless made and presented to the Company in writing by the Customer before expiration of the relevant warranty period for those Goods or services set out in clause 9.3.

10. INTELLECTUAL PROPERTY

a) The Company shall retain the copyright in all drawings of any products produced for the Customer unless otherwise agreed in writing.

b) If the Customer provides the Company with any specifications, designs or drawings for the production or manufacture of any item or items then the Customer hereby warrants that the use of these designs, drawing or specifications will not infringe any third party's rights and the Customer hereby indemnifies the Company against any claims, demands, suits or actions in relation thereto.

11. RIGHTS OF THE COMPANY TO DISPOSE OF GOODS AND SERVICES

In the event that the Company retains or regains possession of the Goods Ordered by the Customer and the Customer has not paid for the Goods within the Company's terms of trade then the Company may dispose of the Goods and may claim from the Customer any loss the Company has suffered in relation to same.

12. CHANGE OF OWNERSHIP

The Customer agrees to notify the Company in writing of any change of ownership of the Customer within seven (7) days from the date of such change (including but not limited to changes to registered office, business address, Company office holders) and indemnifies the Company against any loss or damage incurred by it as a result of the Customer's failure to notify the Company of any change.

13. CANCELLATION

Orders placed with the Company cannot be cancelled without the written approval of the Company. In the event that the Company accepts the cancellation of any Order placed with it, it shall be entitled to charge a reasonable fee for any work done on behalf of the Customer to the date of the cancellation including a fee for the processing and acceptance of the Customer's Order, request for cancellation and any restocking fee charged by a supplier.

14. LIEN

The Customer hereby acknowledges that the Company has a lien over all Goods and/or services in its possession belonging to the Customer to secure payment of any or all amounts outstanding from time to time.

15. RETENTION OF TITLE AND PURCHASE MONEY SECURITY INTEREST

a) The following expressions have the meanings described:

“PPSA” means the Personal Property Securities Act 1999

“Purchase Money Security Interest” has the meaning in the PPSA

“Goods” mean all Goods supplied by the Company to the Customer (and where the context so permits includes any supply of services herein after defined.)

“Services” means any Goods or services carried out in connection with the supply of the Goods.

b) It is agreed by the Company and the Customer that property in the Goods shall not pass until:

i. the Customer has paid all amounts owing for all Goods, and

ii. the Customer has met all other obligations by the Customer to the Company in respect of all contracts between the Company and the Customer.

c) By taking delivery of the Goods, the Customer grants to the Company a Purchase Money Security Interest in the Goods or in the event of the sale of the Goods the proceeds of the sale (“the proceeds”);

d) Until the Company has been paid in full for all the Goods the Customer must:

i. not dispose of the Goods to a third party except by sale to bona fide Customers for market value in the ordinary course of business;

ii. not charge the Goods or grant any security over or interest in the Goods or the proceeds;

iii. keep any proceeds separate from other moneys of the Customer;

iv. not deal with the proceeds in any way which may be averse to the interests of the Company.

e) The following are events of default:

i. the appointment of a liquidator, controller or administrator to the Customer;

ii. the commission of an act of bankruptcy by the Customer;

iii. a judgement being entered against the Customer and remaining unsatisfied for more than 14 days; and

iv. any breach of the Customers obligations under these Terms and Conditions.

f) In the event of default, the Company may:

i. require the Customer to deliver the Goods to the Company;

ii. if the Customer fails to return the Goods to the Company, then the Company within 48 hours of demand thereof, then the Company’s agent may enter upon or into land and premises owned, occupied or used by the Customer, or any other premises where the Goods are situated, as the invitee of the Customer and take possession of the Goods, without being responsible for any damage thereby caused and the Customer hereby agrees to indemnify the Company in relation thereto.

iii. the Company may take any lawful steps to require payment of all monies due to it by the Customer including but not limited to the issue of legal proceedings to recover such monies notwithstanding that the ownership of the Goods may not have passed to the Customer.

16. WAIVER

a) Pursuant to s115 of the PPSA, the Customer hereby waives the Company’s obligations to comply with all or any of the Sections referred to in Section 115(1) of the PPSA.

b) The Customer hereby waives it’s right to a verification statement under s 157 of the PPSA.

17. CHARGE

The Customer hereby charges all its property whatsoever whether currently owned by the Customer or acquired in the future with its indebtedness to the Company.

18. CONSENT TO CREDIT CHECK - PRIVACY ACT

- a) The Customer acknowledges and authorizes the Company pursuant to the provisions of the Privacy Act to:
- i. seek from or give to a Credit Reporting Agency personal information about the Customer at any time after accepting these conditions;
 - ii. contact any trade references or other credit providers and acquire from them or give to them personal information in relation to the Customer and its credit worthiness.

19. SUB-CONTRACTING

The Customer hereby authorizes the Company to sub-contract all or any part of the works that the Company has been contracted to carry out. The Company in doing so may be required to agree to the sub-contractors Terms and Conditions of trade and the carrying out of the work by the sub-contractor will deem the Customer also bound by those Terms and Conditions. The sub-contractor in agreeing to carry out the work on behalf of the Company shall also be deemed to have the benefit of these Terms and Conditions.

20. FORCE MAJEURE

The Parties shall not be held liable for the non-fulfillment of their obligations when motivated by Unforeseeable Circumstances or Force Majeure, being considered as Fortuitous Events of nature, and as reasons for Force Majeure those arising from acts performed by third parties and independent of the will of the Parties, among others: war, serious political commotions, sabotage, strikes or "lock out", acts of political authorities, epidemics, interruption in the supply of electricity, water and fuel, and floods.

In the event of an event of Unforeseeable Circumstances or Force Majeure, the affected Party shall promptly send to the other Party a notification communicating: (i) the occurrence of the fact, providing proof of what happened; (ii) the measures that are being taken to mitigate the effects and (iii) the forecast for the regularization of the situation.

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