

**KMK Compensators Limited Terms and Conditions of Business  
December 2014**

**The Customer's attention is particularly drawn to the provisions of clause 12.**

**1. INTERPRETATION**

1.1. Definitions. In these Conditions, the following definitions apply:

<b>"Charges"</b>	means the charges payable by the Customer for the Goods and Services, in accordance with clause 9.
<b>"Conditions"</b>	means these terms and conditions.
<b>"Contract"</b>	means the contract between the Supplier and the Customer for the supply of Goods and/or Services, comprising the Quotation and these Conditions.
<b>"Customer"</b>	means the person or firm who purchases the Goods and/or Services from the Supplier, as detailed in the Quotation.
<b>"Force Majeure Event"</b>	has the meaning given to it in clause 14.
<b>"Goods"</b>	means the fabric compensators, fabric expansion joints, fabric bellows, flexible bellows, expansion bellows, fire curtains, smoke curtains and any other goods detailed in the Quotation.
<b>"Specification"</b>	means any specification that is agreed in writing by the Customer and the Supplier.
<b>"Intellectual Property Rights"</b>	means patents, rights to inventions, copyright, trade marks, business names and domain names, goodwill and the right to sue for passing off, rights in designs, and all other intellectual property rights (registered or not), in any part of the world.
<b>"Quotation"</b>	means the quotation produced by the Supplier for the supply of Goods and/or Services.
<b>"Services"</b>	means the installation services, supplied by the Supplier to the Customer, as detailed in the Quotation.
<b>"Supplier"</b>	means KMK Compensators Limited registered in England and Wales with company number 03714968.

1.2. In these Conditions a reference to a statute or statutory provision is a reference to such statute or statutory provision as amended or re-enacted.

**2. CONTRACT FORMATION**

- 2.1. The Supplier will issue the Quotation to the Customer. The Quotation given by the Supplier shall not constitute an offer, and is only valid for a period of 30 days from its date of issue (or such other period as is specified in the Quotation). If the Customer wishes to proceed, it will place an order with the Supplier based on the Quotation. The order constitutes an offer by the Customer to purchase Goods/or Services, in accordance with these Conditions.
- 2.2. If the Supplier accepts the Customer's order it shall notify the Customer in writing, usually by email, at which point the Contract shall come into existence.
- 2.3. The Contract is the entire agreement between the parties. The Customer has not relied on any statement, promise, representation, assurance or warranty made or given by or on behalf of the Supplier which is not set out in the Contract.
- 2.4. Any samples, drawings, descriptive matter or advertising issued by the Supplier and any descriptions of the Goods or illustrations or descriptions of the Services contained in the Supplier's catalogues, brochures or website are issued or published for the sole purpose of giving an approximate idea of the Services and/or Goods described in them. They shall not form part of the Contract or have any contractual force.
- 2.5. These Conditions apply to the Contract to the exclusion of any other terms that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.
- 2.6. All of these Conditions shall apply to the supply of both Goods and Services except where application to one or the other is specified.

**3. GOODS**

- 3.1. The Goods shall be as described in the Quotation.
- 3.2. Where the Goods are to be manufactured in accordance with a Specification supplied by the Customer, the Customer shall indemnify the Supplier against all liabilities, costs, expenses, damages and losses suffered or incurred by the Supplier, in connection with any claim made by a third party that there has been an alleged or actual infringement of its intellectual property rights in connection with the Supplier's use of the Specification. This clause 3.2 shall survive termination of the Contract.
- 3.3. The Supplier reserves the right to amend the Specification if required by any applicable statutory or regulatory requirements.

**4. DELIVERY**

4.1. Where:

4.1.1. the Supplier agrees to deliver the Goods to the Customer, the Supplier shall deliver the Goods to the location set out in the Quotation (or such other location as the parties may agree) ("**Delivery Location**") at any time after the Supplier notifies the Customer that the Goods are ready.

4.1.2. the Customer agrees to collect the Goods from the Supplier, the Customer shall collect the Goods from the Supplier's premises (or such other location as the Supplier may notify to the Customer in advance) ("**Collection Location**") within three working days of the Supplier notifying the Customer that the Goods are ready.

4.2. Delivery of the Goods shall be completed on the Goods' arrival at the Delivery Location or the completion of loading of the Goods at the Collection Location, as applicable. Upon signing for the Goods, the Customer shall be deemed to have accepted them.

4.3. Any dates quoted for delivery/collection of the Goods are approximate only, and the time of delivery/collection is not of the essence. The Supplier shall not be liable for any delay in delivery/collection of the Goods that is caused by a Force Majeure Event or the Customer's failure to provide the Supplier with adequate delivery instructions or any other instructions that are relevant to the supply of the Goods.

4.4. If the Supplier fails to deliver the Goods or make the Goods available for collection, its liability shall be limited to the costs and expenses incurred by the Customer in obtaining replacement goods of similar description and quality in the cheapest market available, less the price of the Goods. The Supplier shall have no liability for any failure to deliver the Goods or make the Goods available for collection to the extent that such failure is caused by a Force Majeure Event, the Customer's failure to provide the Supplier with adequate delivery instructions for the Goods or any relevant instruction related to the supply of the Goods.

4.5. If the Customer fails to collect or take delivery of the Goods within five (5) working days of the Supplier notifying the Customer that the Goods are ready, then except where such failure or delay is caused by a Force Majeure Event or by the Supplier's failure to comply with its obligations under the Contract in respect of the Goods:

4.5.1. delivery/collection of the Goods shall be deemed to have been completed at 9.00 am on the fifth working day following the day on which the Supplier notified the Customer that the Goods were ready; and

4.5.2. the Supplier shall store the Goods until delivery/collection takes place, and charge the Customer for all related costs and expenses (including insurance).

4.6. The Supplier may deliver the Goods by instalments, which shall be invoiced and paid for separately. Each instalment shall constitute a separate contract. Any delay in delivery or defect in an instalment shall not entitle the Customer to cancel any other instalment.

**5. QUALITY OF GOODS**

5.1. The Supplier warrants and guarantees that on delivery/collection, and for a period of either: 18 months from the date of delivery/collection; or 12 months from the date the Services are supplied, whichever is earlier, ("**warranty period**") the Goods shall:

5.1.1. conform in all material respects with the Specification;

5.1.2. be free from material defects in design, material and workmanship.

5.2. Subject to clause 5.3, if:

5.2.1. the Customer gives notice in writing during the warranty period, within a reasonable time of discovery, that some or all of the Goods do not comply with the warranty set out in clause 5.1;

5.2.2. the Supplier is given a reasonable opportunity of examining such Goods; and

5.2.3. the Customer (if asked to do so by the Supplier) returns such Goods to the Supplier's place of business at the Customer's cost, the Supplier shall, at its option, repair or replace the defective Goods, or refund the price of the defective Goods in full.

5.3. The Supplier shall not be liable for the Goods' failure to comply with the warranty in clause 5.1 if:

5.3.1. the Customer makes any further use of such Goods after giving a notice in accordance with clause 5.2;

5.3.2. the defect arises because the Customer failed to follow the Supplier's general instructions as to the storage, installation, commissioning, use or maintenance of the Goods, and (where applicable) failed to follow the Supplier's General Storage, Handling, Installation, Operation and Maintenance Instructions, a copy of which is available on request and on the Supplier's website. For those Goods which have none of the above, where the Customer fails to follow good trade practice;

5.3.3. the defect arises as a result of the Supplier following any drawing, design or Specification supplied by the Customer;

5.3.4. the Customer alters or repairs such Goods without the written consent of the Supplier;

5.3.5. the defect arises as a result of fair wear and tear, wilful damage, negligence, or abnormal working conditions;

5.3.6. the Goods differ from the Specification as a result of changes made to ensure they comply with applicable statutory or regulatory standards.

5.4. Except as provided in this clause 5, the Supplier shall have no liability to the Customer in respect of the Goods' failure to comply with the warranty set out in clause 5.1.

5.5. The terms of these Conditions shall apply to any repaired or replacement Goods supplied by the Supplier under clause 5.2.

## 6. TITLE AND RISK

6.1. The risk in the Goods shall pass to the Customer on completion of delivery/ collection.

6.2. Title to the Goods shall not pass to the Customer until:

6.2.1. the Supplier receives payment in full (in cash or cleared funds) for the Goods and any other goods that the Supplier has supplied to the Customer in respect of which payment has become due, in which case title to the Goods shall pass at the time of payment of all such sums; and

6.2.2. the Customer resells the Goods, in which case title to the Goods shall pass to the Customer at the time specified and on the conditions stipulated in clause 6.4.

6.3. Until title to the Goods has passed to the Customer, the Customer shall:

6.3.1. store the Goods separately from all other goods held by the Customer so that they remain readily identifiable as the Supplier's property;

6.3.2. not remove, deface or obscure any identifying mark or packaging on or relating to the Goods;

6.3.3. maintain the Goods in satisfactory condition and keep them insured against all risks for their full price on the Supplier's behalf from the date of delivery;

6.3.4. notify the Supplier immediately if it becomes subject to any of the events listed in clause 13.2.2 to clause 13.2.6; and

6.3.5. give the Supplier such information relating to the Goods as the Supplier may require from time to time.

6.4. Subject to clause 6.5, the Customer may resell or use the Goods in the ordinary course of its business (but not otherwise) before the Supplier receives payment for the Goods. However, if the Customer resells the Goods before that time:

6.4.1. it does so as principal and not as the Supplier's agent;

6.4.2. title to the Goods shall pass from the Supplier to the Customer immediately before the time at which resale by the Customer occurs; and

6.4.3. the proceeds of any sale of the Goods shall be held on trust for the benefit of the Supplier.

6.5. If before title to the Goods passes to the Customer the Customer becomes subject to any of the events listed in clause 13.2.2 to clause 13.2.6, then, without limiting any other right or remedy the Supplier may have:

6.5.1. the Customer's right to resell Goods or use them in the ordinary course of its business ceases immediately; and

6.5.2. the Supplier may at any time:

6.5.2.1. require the Customer to deliver up all Goods in its possession which have not been resold, or irrevocably incorporated into another product; and

6.5.2.2. if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Goods are stored in order to recover them.

## 7. SUPPLY OF SERVICES

7.1. The Supplier shall provide the Services to the Customer in accordance with the Quotation.

7.2. The Supplier shall use all reasonable endeavours to meet any performance dates for the Services specified in the Quotation, but any such dates shall be estimates only and time shall not be of the essence for the performance of the Services.

7.3. The Supplier shall have the right to make any changes to the Services which are necessary to comply with any applicable law or safety requirement, or which do not materially affect the nature or quality of the Services.

7.4. The Supplier warrants to the Customer that the Services will be provided using reasonable care and skill.

7.5. The Supplier reserves the right not to provide the Services where it considers that weather conditions render the provision of Services unsafe. An alternative performance date and time shall be agreed in writing between the parties.

## 8. CUSTOMER'S OBLIGATIONS

8.1. The Customer shall:

8.1.1. ensure that the terms of the Customer's order and the Specification are complete and accurate;

8.1.2. co-operate with the Supplier in all matters relating to the Services;

8.1.3. provide the Supplier, its employees, agents, consultants and subcontractors, with access to the Customer's premises and other facilities as reasonably required by the Supplier to provide the Services;

8.1.4. provide the Supplier with such information and materials as the Supplier may reasonably require to supply the Services, and ensure that such information is accurate in all material respects;

8.1.5. prepare the Customer's premises for the supply of the Services;

8.1.6. obtain and maintain all necessary licences, permissions and consents which may be required for the Services before the date on which the Services are to start;

8.1.7. keep and maintain all materials, equipment, documents and other property of the Supplier ("**Supplier Materials**") at the Customer's

premises in safe custody at its own risk, until returned to the Supplier, and not dispose of or use the Supplier Materials other than in accordance with the Supplier's written instructions or authorisation. The Supplier Materials are the exclusive property of the Supplier.

8.2. If the Supplier's performance of any of its obligations in respect of the Services is prevented or delayed by any act or omission by the Customer or failure by the Customer to perform any relevant obligation ("**Customer Default**"):

8.2.1. the Supplier may (without limiting its other rights or remedies) suspend provision of the Services until the Customer remedies the Customer Default, and rely on the Customer Default to relieve it from the performance of any of its obligations to the extent the Customer Default prevents or delays the Supplier's performance of any of its obligations;

8.2.2. the Supplier shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from the Supplier's failure or delay to perform any of its obligations as set out in this clause 8.2; and

8.2.3. the Customer shall reimburse the Supplier on written demand for any costs or losses sustained or incurred by the Supplier arising directly or indirectly from the Customer Default.

## 9. CHARGES AND PAYMENT

9.1. The price for Goods and Services shall be the price set out in the Quotation. The price of the Goods is exclusive of all costs and charges of packaging, insurance, transport of the Goods which, shall be added to the price, where applicable.

9.2. The Supplier shall be entitled to charge the Customer for any expenses reasonably incurred by or on behalf of the Supplier in connection with the Services.

9.3. The Supplier reserves the right to increase the price of the Goods, by giving notice to the Customer at any time before delivery, to reflect any increase in the cost of the Goods to the Supplier that is due to:

9.3.1. any factor beyond the control of the Supplier (including foreign exchange fluctuations, increases in taxes and duties, and increases in labour, materials and other manufacturing costs);

9.3.2. any request by the Customer to change the delivery date(s), quantities or types of Goods ordered, or the Specification; or

9.3.3. any delay caused by any instructions of the Customer in respect of the Goods or failure of the Customer to give the Supplier adequate or accurate information or instructions in respect of the Goods.

9.4. [The Supplier shall invoice the Customer for the Goods and/or Services on or at any time after the Goods are ready for delivery/collection and/or completion of the Services.

9.5. The Customer shall pay each invoice submitted by the Supplier in full and cleared funds within 30 days of the date of the invoice (or such other period as is specified in the Quotation) to the bank account specified by the Supplier. Time for payment shall be of the essence of the Contract.

9.6. All amounts payable by the Customer under the Contract are exclusive of amounts in respect of value added tax chargeable from time to time ("**VAT**") which, where applicable, shall be added to the price.

9.7. If the Customer fails to make any payment due to the Supplier under the Contract by the due date for payment, then the Customer shall pay interest on the overdue amount at the rate of 4% per annum above Lloyds Bank Plc's base rate from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment.

9.8. The Customer shall pay all amounts due under the Contract in full without any set-off, counterclaim, deduction or withholding except as required by law. The Supplier may, without limiting its other rights or remedies, set off any amount owing to it by the Customer against any amount payable by the Supplier to the Customer.

## 10. INTELLECTUAL PROPERTY RIGHTS

10.1. All Intellectual Property Rights in or arising out of or in connection with the Services shall be owned by the Supplier.

10.2. The Customer acknowledges that, in respect of any third party Intellectual Property Rights in the Services, the Customer's use of any such Intellectual Property Rights is conditional on the Supplier obtaining a written licence from the relevant licensor on such terms as will entitle the Supplier to license such rights to the Customer.

## 11. CONFIDENTIALITY

A party ("**receiving party**") shall keep in strict confidence all technical or commercial know-how, information, specifications, inventions or processes which are of a confidential nature and have been disclosed to the receiving party by the other party ("**disclosing party**"), its employees, agents or subcontractors, and any other confidential information concerning the disclosing party's business, its products and services which the receiving party may obtain. The receiving party shall only disclose such confidential information to those of its employees, agents and subcontractors who need to know it for the purpose of discharging the receiving party's obligations under the Contract, and shall ensure that such employees, agents and subcontractors comply with the obligations set out in this clause. The receiving party may disclose such of the disclosing party's confidential information as is required to be disclosed by law, any governmental or regulatory authority or by a court of competent jurisdiction. This clause 11 shall survive termination of the Contract.

## **12. LIMITATION OF LIABILITY: THE CUSTOMER'S ATTENTION IS PARTICULARLY DRAWN TO THIS CLAUSE**

- 12.1. Nothing in these Conditions shall limit or exclude the Supplier's liability for:
- 12.1.1. death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors;
  - 12.1.2. fraud or fraudulent misrepresentation.
- 12.2. Subject to clause 12.1:
- 12.2.1. the Supplier shall under no circumstances whatever be liable to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, for any loss of profit, or any indirect or consequential loss arising under or in connection with the Contract ; and
  - 12.2.2. the Supplier's total liability to the Customer in respect of all other losses arising under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed the total charges payable by the Customer under the Contract.
- 12.3. The terms implied by sections 3 to 5 of the Supply of Goods and Services Act 1982 are, to the fullest extent permitted by law, excluded from the Contract.
- 12.4. This clause 12 shall survive termination of the Contract.

## **13. TERMINATION**

- 13.1. Without limiting its other rights or remedies either party may terminate the Contract by giving the other party not less than ten (10) working days written notice.
- 13.2. Without limiting its other rights or remedies, each party may terminate the Contract with immediate effect by giving written notice to the other party if:
- 13.2.1. the other party commits a material breach of its obligations under this Contract and (if such breach is remediable) fails to remedy that breach within 10 days after receipt of notice in writing to do so;
  - 13.2.2. the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its debts as they fall due; the other party commences negotiations with all or any class of its creditors with a view to rescheduling any of its debts; 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 other party (being a company); the other party (being an individual) is the subject of a bankruptcy petition or order; a creditor or encumbrancer of the other party attaches or takes possession of, the whole or any part of its assets and such attachment or process is not discharged within 14 days; an application is made to court, or an order is made, for the appointment of an administrator over the other party (being a company); the holder of a qualifying charge over the assets of the other party (being a company) has become entitled to appoint or has appointed an administrative receiver; a person becomes entitled to appoint a receiver over the assets of the other party or a receiver is appointed over the assets of the other party;
  - 13.2.3. any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in clause 13.2.2;
  - 13.2.4. the other party suspends, threatens to suspend, ceases or threatens to cease to carry on, all or substantially the whole of its business;
  - 13.2.5. the other party's financial position deteriorates to such an extent that in the Supplier's opinion the Customer's capability to adequately fulfil its obligations under the Contract has been placed in jeopardy; or
  - 13.2.6. the other party (being an individual) dies or, by reason of illness or incapacity (whether mental or physical), is incapable of managing his own affairs or becomes a patient under any mental health legislation.
- 13.3. Without limiting its other rights or remedies, the Supplier may terminate the Contract with immediate effect by giving written notice to the Customer if the Customer fails to pay any amount due under this Contract on the due date for payment.
- 13.4. Without limiting its other rights or remedies, the Supplier may suspend the supply of Services and/or all further deliveries of Goods under the Contract or any other contract between the Customer and the Supplier if the Customer fails to pay any amount due under this Contract on the due date for payment, the Customer becomes subject to any of the events listed in clause 13.2.2 to clause 13.2.6, or the Supplier reasonably believes that the Customer is about to become subject to any of them.
- 13.5. On termination of the Contract for any reason:
- 13.5.1. the Customer shall immediately pay to the Supplier all of the Supplier's outstanding unpaid invoices and interest. Further, where Services have been supplied but not yet invoiced, the Supplier shall submit an invoice, which shall be payable by the Customer immediately on receipt;
  - 13.5.2. the Customer shall return all of the Supplier Materials and any Goods which have not been fully paid for. If the Customer fails to do so, then the Supplier may enter the Customer's premises and take possession of them. Until they have been returned, the Customer shall be solely responsible for their safe keeping and will not use them for any purpose not connected with this Contract;
  - 13.5.3. the accrued rights and remedies of the parties as at termination shall not be affected; and
  - 13.5.4. clauses which expressly or by implication have effect after termination shall continue in full force and effect.

## **14. FORCE MAJEURE**

- 14.1. For the purposes of this Contract, "**Force Majeure Event**" means an event beyond the reasonable control of the Supplier including but not limited to strikes or industrial disputes, failure of a utility service or transport network, act of God, war, riot, malicious damage, compliance with any law or governmental order, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or subcontractors.
- 14.2. The Supplier shall not be liable to the Customer as a result of any delay or failure to perform its obligations under this Contract as a result of a Force Majeure Event.
- 14.3. If the Force Majeure Event prevents the Supplier from providing any of the Services and/or Goods for more than four weeks, the Supplier shall, without limiting its other rights or remedies, have the right to terminate this Contract immediately by giving written notice to the Customer.

## **15. GENERAL**

- 15.1. Assignment and other dealings.
- 15.1.1. The Supplier may at any time assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract to any third party.
  - 15.1.2. The Customer shall not, without the prior written consent of the Supplier, assign, transfer, charge, subcontract, or deal in any other manner with all or any of its rights or obligations under the Contract.
- 15.2. Notices.
- 15.2.1. Any notice or other communication given to a party under or in connection with this Contract shall be in writing, addressed to that party at its registered office (if it is a company) or its principal place of business (in any other case) or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally or sent by prepaid first-class post or other next working day delivery service, or by commercial courier, fax.
  - 15.2.2. A notice or other communication shall be deemed to have been received: if delivered personally, when left at the address referred to in clause 15.2.1; if sent by pre-paid first class post or other next working day delivery service, at 9.00 am on the second working day after posting; if delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed; or, if sent by fax, one working day after transmission.
  - 15.2.3. The provisions of this clause shall not apply to the service of any proceedings or other documents in any legal action
- 15.3. Severance. If any provision or part-provision of the Contract is or becomes invalid, illegal or unenforceable, it shall be deemed modified to the minimum extent necessary to make it valid, legal and enforceable. If such modification is not possible, the relevant provision or part-provision shall be deemed deleted.
- 15.4. Waiver. No failure or delay by a party in exercising any right or remedy under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor prevent or restrict its further exercise of that or any other right or remedy.
- 15.5. No partnership or agency. Nothing in the Contract is intended to, or shall be deemed to, establish any partnership or joint venture between any of the parties.
- 15.6. Third parties. A person who is not a party to the Contract shall not have any rights to enforce its terms.
- 15.7. Variation. Except as set out in these Conditions, no variation of the Contract, shall be effective unless it is agreed in writing and signed by the Supplier.
- 15.8. Governing law. This agreement and any dispute or claim arising out of or in connection with it (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales, and the parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Contract or its subject matter or formation (including non-contractual disputes or claims).

End