

CONDITIONS OF SALE OF GOODS AND/OR HIRE OF EQUIPMENT, SILO MORTAR

F. P. McCann Limited

1 Interpretation

1.1 In these Conditions:

"Customer" means a person to whom the Company supplies, or contracts for the supply of goods and/or hires or contracts for the hire of equipment;

"Equipment" means the silo together with any other device, pump, blower, tool and accessories which the Company is to hire to the Customer in accordance with these Conditions;

"Goods" means the goods which the Company is to supply in accordance with these Conditions and which may be more particularly described in the Company's written order acknowledgement;

"Company" means F.P. McCann Limited whose Head Office is situated at Knockloughrim Quarry, 3 Drumard Road, Magherafelt, BT45 8QA, Northern Ireland;

"Company's Insurances" means insurances effected and maintained by the Company in accordance with condition 12.1 hereof;

"Conditions" means the standard conditions of sale and/or hire set out in this document and (unless the context otherwise requires) includes any special terms and conditions agreed in writing between the parties;

"Contract" means any contract for sale of Goods and/or hire of Equipment by the Company;

"Hire Period" means the period for which the Customer is required to pay the Company for the hire of the Equipment, which shall commence when the Equipment is delivered to the Customer and shall terminate when the Equipment is returned to the Company;

"Hire Rate" is the Company's charging rate for each charging period (which, unless agreed otherwise in writing by the Company, will be one calendar week or part thereof) during the Hire Period.

1.2 The headings in these Conditions are for convenience only and shall not affect interpretation.

2 Orders

2.1 Orders accepted by the Company are accepted on these Conditions (as evidenced by any written order acknowledgement which might be provided by the Company) to the exclusion of all other conditions including any the Customer purports to apply to any purchase order, confirmation or order, specification, delivery note or other document or which might otherwise have been relied upon by the Customer whether in negotiation or at any stage in the dealings between the parties in respect of any Goods and/or Equipment. Any Contract (whether, for example, by an exchange of correspondence or over the telephone and which may be followed up by the Company's written order acknowledgement) shall be subject to these Conditions.

2.2 In the event of inconsistency between these Conditions and any other apparent Contract term, these Conditions shall apply except where a change to these Conditions is expressly agreed to in writing and signed by an authorised representative of the Company. Any representations about the Goods and/or Equipment shall have no effect unless expressly agreed in writing and signed by an authorised representative of the Company.

2.3 Each order placed by the Customer shall be deemed to be an offer by the Customer to purchase Goods and/or hire Equipment subject to these Conditions.

3 Specifications

3.1 The quantity, quality, description of and specification for the Goods and/or Equipment shall be those set out in the Customer's order (if accepted by the Company) provided always that the acceptance by the Company shall only be valid if an order acknowledgment is sent to the Customer.

3.2 The Company reserves the right to make any changes in specification of Goods and/or Equipment required to conform with any applicable safety or other statutory requirements or, where Goods and/or Equipment are to be supplied to the Company's specification, which do not materially affect their quality or performance.

3.3 No order which has been accepted by the Company may be cancelled by the Customer except with the agreement in writing of the Company and on terms that the Customer shall indemnify the Company in full against all losses (including loss of profit), costs (including cost of all labour and materials used), damages, charges and expenses incurred by the Company as a result of cancellation.

4 Prices

4.1 The price of Goods and Hire Rate of Equipment shall be the Company's quoted prices and rates or where no price or rate has been quoted (or a quoted price or rate is no longer valid), the Company's current price or rate at the date of dispatch of the order.

4.2 All prices and rates quoted are valid for 21 days only or until earlier acceptance by the Customer, after which time they may be altered by the Company without giving notice to the Customer.

4.3 If at any time after the acceptance of an order any duty or tax of any kind whatsoever shall be levied by the Government or other authority, or any duty or tax in existence at the date of acceptance of the order shall be increased and such duty or tax or increased duty or tax shall be payable by the Company, the amount of such duty or tax or the increase in duty or tax, as the case may be, shall be borne by the Customer and shall be repaid by the Customer to the Company as an increase in the price of Goods and/or Hire Rate.

4.4 The price of Goods and Hire Rate are exclusive of any applicable insurance, customs and Value Added Tax and other duties which the Customer shall be additionally liable to pay to the Company.

5 Terms of Payment

5.1 Unless otherwise agreed, accounts are strictly nett and payment in full must be made within 30 days from the date of invoice notwithstanding that where delivery is on a consignment basis full delivery may not have taken place and property in the Goods has not passed to the Customer. Settlement discount, where agreed by the Company, may be deducted only where the account is paid within 30 days of the date of invoice irrespective of whether the total order has been executed or not. Accounts are due and should be paid to F.P. McCann Ltd, Knockloughrim Quarry, 3 Drumard Road, Magherafelt, BT45 8QA, Northern Ireland.

5.2 If the Customer fails to make a payment on a due date then without prejudice to any other right or remedy available to the Company, the Company shall be entitled to:

- (a) cancel the Contract or suspend any further deliveries to the Customer;
- (b) appropriate any payment made by the Customer to such of the Goods for goods supplied under any other contract between the Customer and the Company as the Company may think fit (notwithstanding any purported appropriation by the Customer);
- (c) charge interest on overdue accounts at the rate of 3% above the Bank of England Base Rate for sales in Pounds Sterling or 3% above the Euro Repo Rate for sales in Euros;
- (d) enter the Customer's premises or site and uplift and remove the Equipment; and
- (e) use any legal means deemed appropriate to recover any amounts owing by the Customer and then recoup the costs associated therewith from the Customer.

5.3 The Customer shall make all payments to the Company without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise.

6 Delivery

6.1 Any time named by the Company for delivery shall mean the time of delivery at the Company's works and time required for transit is additional. When goods and/or equipment are offered for delivery to site the Company's obligation is to deliver to the nearest hard road to site, it is the Customer's responsibility to off-load without any undue delay to the Company's delivery vehicle.

- 6.2 Delivery ex-stock is intended to convey that the goods are in stock at date of quotation, and such delivery is offered subject to the goods being available on receipt of the order. Where a period is named for delivery and such period is not extended by mutual consent in writing, the Customer shall take delivery within that period.
- 6.3 The Customer's signature on any delivery note, or other documentation presented for signature in connection with a delivery, shall be evidence of the receipt by the Customer of the delivery and that the amount of Goods and/or Equipment specified on the delivery note have been delivered and the Goods and/or Equipment are in good condition and undamaged by transit.
- 6.4 If the Company delivers to the Customer a quantity of Goods (where such Goods constitute materials delivered in bulk) of up to 10% more or less than the quantity ordered, the Customer shall not be entitled to object to or reject the Goods or any of them by reason of the surplus or shortfall and shall pay for such Goods at the pro rata Contract rate.
- 6.5 All illustrations, drawings and other information issued by the Company in catalogues, price lists, advertisements, or any other publications, must be regarded as approximate representations only, except where otherwise specified. Weights, dimensions, measurements, capacities and all other particulars of the Goods and/or Equipment are stated by the Company in good faith as being approximately correct and are given as accurately as circumstances permit but are not taken as conclusive. Defects in quality or dimensions in any delivery shall not be a ground for cancellation of the remainder of the order.
- 6.6 Time for delivery shall not be of the essence unless previously agreed by the Company in writing.
- 7 Notification of rejection, partial loss, damage etc.**
- 7.1 The Company must be notified in writing of any claim to reject the Goods and/or Equipment within three days of such goods and/or equipment being delivered if such claim is to be considered.
- 7.2 The Company (and where appropriate the carrier) must be notified in writing of a claim for damage to or partial loss of the Goods and/or Equipment within three days of delivery.
- 7.3 Goods and/or Equipment supplied by the Company will only be replaced if the Company is satisfied that they were defective in material or workmanship upon delivery.
- 8 Return of Goods**
- 8.1 Goods shall not be returned to the Company's works unless an arrangement has been made with the Company to that effect and receipt by the Company at its works or sales office or returned goods shall not be deemed to be evidence of any agreement to cancel an order nor an admission of any defect in such goods. Goods will only be exchanged or credited (where agreed by the Company) subject to a handling charge, if in good, clean and saleable condition, and returned to the Company carriage paid giving date of invoice or purchase. A further charge will be made for cleaning where necessary. Specially-made goods cannot be credited in any circumstances.
- 9 Passing of Property**
- 9.1 Ownership of the Goods shall not pass to the Customer until the Company has received in full (in cash or cleared funds) all sums due it in respect of the Goods and all other sums which are or which become due to the Company from the Customer on any account.
- 9.2 Until ownership of the Goods has passed to the Customer, the Customer must:
- hold the Goods on a fiduciary basis as the Company's bailee;
 - store the Goods (at no cost to the Company) separately from all other goods of the Customer or any third party in such a way that they remain readily identifiable as the Company's property;
 - not destroy, deface or obscure any identifying mark or packaging on or relating to the Goods;
 - maintain the Goods in satisfactory condition insured on the Company's behalf for their full price against all risks to the reasonable satisfaction of the Company. On request the Customer shall produce the policy of insurance to the Company; and
- hold the proceeds of the insurance referred to in this condition on trust for the Company and not mix them with any other money, nor pay the proceeds into an overdrawn bank account.
- 9.3 The Customer may resell the Goods before ownership has passed to it solely on the conditions that any sale shall be effected in the ordinary course of the Customer's business at full market value and any such sale shall be a sale of the Company's property on the Customer's own behalf and the Customer shall deal as principal when making such a sale.
- 9.4 The Customer's right to possession of the Goods shall terminate immediately if:
- the Customer has a bankruptcy order made against it or makes an arrangement or composition with its creditors, or otherwise takes the benefit of any Act for the time being in force for the relief of insolvent debtors, or (being a body corporate) convenes a meeting of creditors (whether formal or informal), or enters into liquidation (whether voluntary or compulsory) except a solvent voluntary liquidation for the purpose only of reconstruction or amalgamation, or has a receiver and/or manager, administrator or administrative receiver appointed (either in court or otherwise) of its undertaking or any part thereof, or a resolution is passed or a petition presented to any court for the winding up of the Customer or for the granting of an administration order in respect of the Customer, or any proceedings are commenced relating to the insolvency or possible insolvency of the Customer; or
 - the Customer suffers or allows any execution, whether legal or equitable, to be levied on its property or obtained against the Customer suffers or allows any execution, whether legal or equitable, to be levied on its property or obtained against it, or fails to observe/perform any of its obligations under the Contract or any other contract between the Company and the Customer, or is unable to pay its debts as defined by the Insolvency (Northern Ireland) Order 1989 (or any equivalent legislation applicable to the Customer)
- and the Customer grants the Company, its agents and employees an irrevocable licence at any time to enter any premises where Goods are or may be stored in order to inspect them, or, where the Customer's right to possession has terminated, to recover them.
- 9.5 Ownership of the Equipment shall remain with the Company at all times and shall not pass to the Customer.
- 10 Installation, Operation, Maintenance, Inspection, Safekeeping & Return of Equipment**
- 10.1 Subject to these Conditions, responsibility for the safe and proper erection, installation, care, storage, operation, maintenance, inspection and safekeeping of the Equipment shall pass to the Customer at the date and time of delivery of the Equipment and remain with the Customer until return of the Equipment to the Company.
- 10.2 The Customer is responsible for safe and proper siting, erection and installation of the Equipment including, but not limited to, assessment of the ground conditions and design and installation of adequate foundations, accesses and working areas. Any advice or guidance offered by the Company will not in any way diminish the Customer's responsibility under this condition.
- 10.3 The Customer shall fully indemnify the Company in respect of any and all claims arising from or in connection with the use of the Equipment during the Hire Period.
- 10.4 The Customer shall at its own expense put in place insurance, with the Company's interest registered, against the risk of loss, theft, damage or destruction of the Equipment, however caused, to a value of not less than the full replacement value advised by the Company in its order acknowledgement (or where none is stated, £50,000). The Customer shall provide evidence to the Company that such insurance is in place when requested by the Company.
- 10.5 The Customer shall not use the Equipment for storage and/or mixing of materials (save for water used by the Customer for mixing of mortar) other than goods supplied by the Company.
- 10.6 The Customer shall not without the prior written consent of the Company remove the Equipment or any part thereof from the site or premises to which it is delivered by the Company.

- 10.7 The Customer shall not without the prior written consent of the Company, move the Equipment or any part thereof within the site to which it is delivered, other than by use of the Company's special lifting equipment. The Company will levy the applicable charge for any such move carried out using its special lifting equipment.
- 10.8 The Customer shall not sub-let the Equipment or any part of it without the prior written consent of the Company.
- 10.9 The Customer is responsible for keeping itself acquainted with the state and condition of the Equipment and shall use it in accordance with the Company's instructions.
- 10.10 The Customer is responsible for the conduct and costs of all inspection, testing, examination and checks in relation to the Equipment required by all legislation, best practice and/or operating instructions, except where and to the extent that the Company has undertaken to provide them in its order acknowledgement.
- 10.11 The Customer shall allow the Company, its employees and/or agents access for the purpose of inspecting, altering and/or repairing the Equipment at all reasonable times. The Customer will be responsible for the implementation and cost of any rectification measures identified by the Company during any such inspection.
- 10.12 The Customer shall not without the prior written consent of the Company make any additions, adjustments, alterations, improvements or repairs to the Equipment or any part thereof.
- 10.13 Any breakdown, defect, loss or damage to the Equipment occurring whilst under the Customer's control shall be notified immediately to the Company. No loss or damage to the Equipment or any part thereof shall affect or impair the obligations of the Customer under the Contract which shall continue in full force and be permitted by law. No loss or damage which prevents the operation of the Equipment will affect calculation of the Hire Period.
- 10.14 All alterations, repairs or replacements to the Equipment shall be carried out by the Company and the Customer shall upon demand reimburse the Company the cost thereof.
- 10.15 In the event of breakdown, defect, loss or damage preventing continued operation of the Equipment or part thereof, the Company shall be entitled, at its sole discretion, to supply substitute equipment of a similar type and condition.
- 10.16 In the event that repairs cannot be carried out economically and substitute equipment is not available with a reasonable timeframe, then the Company shall each be entitled to terminate the hire of the Equipment by issue of written notice to the Customer.
- 10.17 The Customer shall notify the Company not less than one week in advance of the date for return of the Equipment.
- 10.18 The Customer is responsible for returning the Equipment at the end of the Hire Period in the same condition as that in which it was delivered. The Customer shall reimburse the Company for all costs associated with emptying and disposal of the contents, if any, of the Equipment prior to collection.
- 10.19 The Customer shall indemnify the Company for any loss or damage to the Equipment prior to its return to the Company, however caused.
- 11 Limitation of Liability**
- 11.1 The following provisions set out the entire financial liability of the Company (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer in respect of both any breach of these Conditions and any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract.
- 11.2 The Company warrants to the Customer, subject to condition 11.3 below:
- (a) that the Goods comply with the specification applicable to the Goods published by the Company (if any);
 - (b) that the Goods will be of satisfactory quality (within the meaning of the Sale of Goods Act 1979);
 - (c) that the Goods will be fit for any purpose held out for such Goods by the Company (if any); and
 - (d) that the Goods will comply with all applicable statutory regulations of application to the Goods as at the date of the Contract.
- 11.3 Save as set out in condition 11.2 and implied by section 12 of the Sale of Goods Act 1979, and subject to condition 11.4 below, all other warranties, conditions and terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.
- 11.4 Nothing in these conditions excludes or limits the liability of the Company
- (a) for death or personal injury caused by the Company's negligence; or
 - (b) under section 2(3), Consumer Protection Act 1987; or
 - (c) for any matter which it would be illegal for the Company to exclude or attempt to exclude its liability; or
 - (d) for fraud or fraudulent misrepresentation
- 11.5 Subject to condition 11.3 and condition 11.4
- (a) the Company's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with any actual or alleged defect in the Goods shall be limited to the direct cost of replacement of such of the Goods as are defective (but for the avoidance of doubt the direct cost shall not include removal, recovery or extraction of the defective Goods or the relaying of the replacement Goods); and
 - (b) the Company's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Contract shall be limited to the following:
 - a. where the aggregate price paid by the Customer for the Goods is £100,000 or less, the aggregate price paid for the Goods by the Customer; or
 - b. where the aggregate price paid by the Customer for the Goods exceeds £100,000, the greater of: (i) £100,000 and (ii) 10% of the aggregate price paid by the Customer for the Goods; and
 - c. in either case, the actual proceeds received by the Company under its relevant insurance policy or policies effected and maintained in accordance with condition 12.1 in respect of the liability in question; and
 - (c) the Company shall not accept any liability whatsoever in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the provision by the Company of technical assistance in relation to the installation, use or performance of the Goods and/or Equipment; and
 - (d) the Company shall not be liable to the Customer for any pure economic loss, loss of profit, loss of business, depletion of goodwill or otherwise, in each case whether direct, indirect or consequential, or any claims for consequential compensation whatsoever (howsoever caused) which arise out of or in connection with the Contract
- 11.6 The Company shall not be liable for any breach by it of these Conditions (which breach will be subject to the limitation of liability provisions in these Conditions) unless the Customer notifies the Company within 7 days of the date on which it became aware, or ought upon diligent enquiry to have become aware, of such breach and unless after receiving such notice the Company is given a reasonable opportunity of remedying the alleged breach.
- 11.7 The Company shall not be liable to the Customer for any loss (including loss of profit), costs, damages, charges or expenses caused directly or indirectly by any delay in the delivery of the Goods and/or unavailability, including as a result of breakdown, of the Equipment (even if caused by the Company's negligence), nor will the Company be deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform any of the Company's obligations in relation to the Goods and/or Equipment, if the delay or failure was due to any cause beyond the Company's reasonable control.
- 11.8 Without prejudice to the generality of the foregoing, the following shall be regarded as causes beyond the Company's reasonable control:
- (a) act of God, explosion, flood, tempest, fire or accident;
 - (b) war or threat of war, sabotage, insurrection, civil disturbance or requisition;

- (c) acts, restrictions, bye-laws, prohibitions or measures of any kind on the party of government, parliamentary or local authority;
 - (d) import or export regulations or embargoes;
 - (e) strikes, lock-outs or other industrial actions or trade disputes (whether involving employees of the Company or a third party);
 - (f) difficulties in obtaining raw material, labour, fuel, part of machinery; and
 - (g) power failure or breakdown of machinery.
- 11.9 The Company shall be under no liability in respect of any defect in Goods arising from any drawing, design or specification supplied by the Customer or resulting from the installation of the Goods.
- 11.10 The Company shall not be responsible for any direct loss or damage and any indirect or consequential loss or damage (including any loss of income, loss of profits or loss of interest or opportunity) arising from any breach by the Customer of these Conditions and the Customer will fully and effectively indemnify the Company on demand against any such loss that it suffers whether directly or as a result of a claim against it by any third party.
- 12 Insurance**
- 12.1 The Company shall effect and maintain, with insurers who are of good financial standing and who are appropriately regulated, Employer's Liability insurance and Public Liability insurance as required by law in respect of its obligations and liabilities under this Contract for an amount of not less than £10m per any one occurrence.
- 12.2 Subject to condition 11, the Customer shall have no recourse or claim against the Company in the event that:
- (a) the proceeds from the Company's Insurances are insufficient to indemnify the Customer in respect of its losses, costs, damages and/or expenses suffered as a consequence of the occurrence of a given risk;
 - (b) the relevant insurer or underwriter refuses or delays payment of any insurance proceeds;
 - (c) proceeds under the Company's Insurances become irrecoverable in whole or in part; or
 - (d) insurance proceeds (in whole or in part) are not received by the Company for any other reason,
- save where any of the events set out in this condition 12.2 occur as a direct result of a default of the Company or any negligent act or omission on the part of the Company (including any failure on the part of the Company to have the Required Insurances in place).
- 12.3 Should one or more of the circumstances set out in condition 12.2(a) to 12.2(d) arise, the Company agrees to communicate with the relevant insurer of the Company's Insurance(s) and to the extent practicable, to negotiate with that insurer in good faith in an effort to recover the proceeds, in whole or in part, under the Company's Insurances for the benefit of the Customer.
- 12.4 The Company agrees to keep the Customer fully informed of all communications and negotiations with any insurer should any of the circumstances in condition 12.2(a) to 12.2(d) arise, and to provide written copies of any relevant correspondence between the Company and any insurer if so requested by the Customer.
- 13 Insolvency of Customer**
- 13.1 Without prejudice to common law and statutory rights relating to stoppage in transit, and rights in respect of any antecedent breaches, if the Customer fails or is unable to comply with, or perform any of the terms of the Contract, or commits any act of bankruptcy, or shall suffer any execution or distress to be levied on its goods or being a company shall enter into liquidation whether compulsory or voluntary (save for the purposes of reconstruction or amalgamation) or shall have a Receiver appointed, then the Company shall have the right forthwith to determine the Contract.
- 14 Assignment**
- 14.1 The Customer shall not be entitled to assign the Contract or any part of it without the Company's prior written consent.
- 14.2 The Company may assign the Contract or any part of it to any person, firm or company.
- 15 Notice**
- 15.1 Any notice required or permitted to be given by either party to the other under these Conditions shall be in writing addressed to that other party at its principal place of business or such other address as may at the relevant time have been notified pursuant to this provision to the party giving the notice.
- 16 Waiver**
- 16.1 Failure or delay by the Company in enforcing or partially enforcing any provision of the Contract will not be construed as a waiver of any of its rights under the Contract. Any waiver by the Company of any breach of, or any default under, any provision of the Contract by the Customer will not be deemed a waiver of any subsequent breach or default and will in no way affect the other terms of the Contract.
- 17 Third Party Rights**
- 17.1 Neither the Company nor the Customer intend that any term of this Contract will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person that is not a party to it.
- 18 Severance**
- 18.1 If any provision or part-provision of these Conditions 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. Any modification to or deletion of a provision or part-provision under this condition 18.1 shall not affect the validity and enforceability of the rest of the Conditions.
- 18.2 If any provision or part-provision of these Conditions is invalid, illegal or unenforceable, the Company and the Customer shall negotiate in good faith to amend such provision so that, as amended, it is legal, valid and enforceable and, to the greatest extent possible, achieves the intended commercial result of the original position.
- 19 Dispute Resolution**
- 19.1 Any dispute or difference arising out of or in connection with a contract for the supply of goods and/or hire of equipment by the Company, whether on a supply-only basis or not, may be referred to adjudication as a construction contract in accordance with the provisions of the Construction Contracts (Northern Ireland) Order 1997.
- 19.2 If any difference or dispute arising out of or in connection with a contract for the supply of goods and/or hire of equipment by the Company cannot be finally resolved under the adjudication procedure referred to in condition 19.1, it shall be referred for final settlement by a single arbitrator sitting in Northern Ireland under the Rules of the Chartered Institute of Arbitrators. Such arbitrator shall be appointed (in default of agreement) by the President for the time being of the Chartered Institute of Arbitrators, and such reference shall be deemed a submission to Arbitration in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof for the time being in force.
- 20 Applicable Law and Jurisdiction**
- 20.1 These Conditions shall be governed by and construed in accordance with the law of Northern Ireland and the Northern Ireland Courts shall have exclusive jurisdiction over all differences and disputes which shall arise between the Company and the Customer.
- 21 Entire Agreement**
- 21.1 These Conditions together with the Company's order acknowledgement (where such order acknowledgement exists) contain the entire agreement between the parties in respect of the Goods and/or Equipment and supersede any previous agreements, arrangements, undertakings or proposals, written or oral between the parties. In agreeing to these Conditions, the customer confirms that he has not relied on any representation other than those expressly stated and agrees that he shall have no remedy in respect of any misrepresentation that has not been made expressly in these Conditions or on the Company's order acknowledgement.