

Terms & Conditions of Business

DEFINITIONS

1. In these Terms and Conditions of Business the following terms shall have the following meanings:-

"Company" means Provender Nurseries Limited.

"Contract" means any contract for the sale of Goods and/or services by the Company to the Customer.

"Customer" means the person, firm or company from whom orders for Goods are received by the Company.

"Goods" means any goods forming the subject of this contract including parts and components of or materials incorporated in them.

QUOTATIONS

2. Quotations by the Company unless otherwise stated in them shall be valid for 30 days and shall in any event be subject to availability of the Goods referred to in them.

EXISTENCE OF CONTRACT

3.1 No Contract shall come into existence until the Customer's order (however given) is accepted by the Company's written Order Acknowledgment.

3.2 The Customer shall be responsible for ensuring the accuracy of its orders and for checking that the Company's Order Acknowledgement is accurate.

3.3 These Conditions shall be incorporated in the Contract to the exclusion of all other terms or conditions.

3.4 The Company's employees and agents are not authorised to make any representations concerning the Goods unless confirmed by the Company in writing. In entering into the Contract the Customer acknowledges that it does not rely on any such representations which are not so confirmed.

3.5 Clerical errors by the Company may be corrected at any time without any liability on the part of the Company.

3.6 No variation or amendment of the Contract shall be valid unless in writing and signed by or on behalf of both parties.

3.7 The Company is contracted to the Customer as Principal and will not accept any instructions whatsoever from any Agent of the Customer (including but not limited to Architects, Specifiers and Landscapers) unless such instructions are confirmed in writing by the Customer.

3.8 Any valid instructions given to the Company by an Agent of the Customer shall bind the Customer in so far as it affects or alters in any way the Contract in particular but not limited to where the Company is put to additional cost.

3.9 The Company shall not be liable for any consequence, howsoever arising, which as a result of it accepting a valid instruction from the Customer's Agent has any adverse consequence upon the materiality of the Contract.

3.10 In the event of any dispute arising in dealings with the Customer's Agents the Company's liability shall be limited to the Customer as Principal.

PRICES

4.1 The price of the Goods shall be that stated in the Company's quotation or (where no quotation has been given or is no longer valid) the price listed in the Company's published list price, less the customers trade discount current at the date on which the Company's Order Confirmation is issued.

4.2 The prices for the Goods are ex-nursery and exclude packing, insurance, carriage, VAT and other taxes or duties for which the Customer shall be additionally liable.

4.3 Where the Company is requested to delay or withhold delivery beyond the agreed delivery date by the Customer for any reason the Company may in its absolute discretion charge for any costs arising therefrom including but not limited to additional husbandry.

PAYMENT

5.1 The Company shall be entitled to require payment for the goods in full upon acceptance of the Customer's order.

5.2 The Company may at its sole discretion provide the Customer with credit terms, this will require completion of a credit account application form.

5.3 If in the opinion of the Company the credit-worthiness of the Customer has deteriorated at any time the Company may require full or partial payment of :-

5.3.1 the price of Goods which are the subject of an order which has already been accepted by the Company prior to delivery of the same; and

5.3.2 the price of Goods which are the subject of an order which has not yet been accepted by the Company as a condition of the Company's acceptance of the same.

5.4 The Company may in its sole discretion, invoice the Customer for the price of the Goods on receipt of the Customer's order or at any time prior to or after delivery of the Goods.

5.5 If the Company has allowed the Customer credit terms whether in accordance with this clause 5 or otherwise all invoices are payable without set-off or deduction in the quoted currency within 30 days of the date thereof.

5.6 If the Customer fails to pay any invoice by the due date the Customer shall not be allowed any discount given in that invoice and shall:-

5.6.1 pay interest on any overdue amount from the date of which payment was due to that on which it is made (whether before or after judgment) on a daily basis at a rate of 4% p. a. over the base rate from time to time quoted by the Barclays Bank.

5.6.2 reimburse to the Company all costs and expenses (including but not limited to legal costs) incurred in the collection of any overdue amount; and

5.6.3 cancel the Contract or suspend any further deliveries to the Customer or both.

TITLE

6.1 For the purpose of section 12 of the Sale of Goods Act 1979 the Company shall transfer only such title or rights in respect of the Goods as the Company has and if the Goods are purchased from a third party shall transfer only such title or rights as that party had and has transferred to the Company.

6.2 Notwithstanding the earlier passing of risk, title in the Goods shall remain with the Company and shall not pass to the Customer until the Customer has paid the price of the Goods in full and no other sums whatsoever are due from the Customer to the Company.

6.3 Until title passes the Customer shall hold the Goods as bailee for the Company and shall (at no cost to the Company) store or mark them so that they can at all times be identified as the property of the Company.

6.4 The Company may at any time before title passes and without any liability to the Customer:-

6.4.1 repossess and remove and use or sell all or any of the Goods and by doing so terminate the Customer's right to use, sell or otherwise deal in them; and

6.4.2 (for that purpose or determining what if any goods are held by the Customer and inspecting them) enter any premises of or occupied by the Customer.

6.5 The Company may maintain an action for the price of any Goods notwithstanding that title in them has not passed to the Customer.

DELIVERY AND RISK

7.1 Delivery of the Goods shall be made when the Company makes the Goods available to the Customer or its agent or carrier at the Company's premises or other agreed delivery point.

7.2 Risk in the Goods passes on delivery.

7.3 The Company may at its absolute discretion deliver the Goods by instalments in any sequence, unless otherwise agreed in writing.

7.4 Where the Goods are delivered by instalments, no default or failure by the Company in respect of any one or more instalments shall vitiate the Contract in respect of the Goods previously delivered or as yet undelivered.

7.5 Any dates advised by the Company for the delivery of the Goods are approximate only and the time for delivery shall not be of the essence of the Contract. The Customer shall have no right to damages or to cancel the order for failure for any cause to meet any delivery date or time stated.

7.6 Where delivery takes place other than at the Company's premises the Customer shall be responsible for providing unobstructed access to a clear and safe site for the purpose of offloading and it shall be the responsibility of the Customer to ensure at its own cost that appropriate equipment is available for off-loading purposes and that such equipment and its operator comply with all relevant legislative requirements, failing which:-

7.6.1 the Company shall be under no obligation to attempt to off-load the Goods; and

7.6.2 the Customer shall be liable for all additional costs arising therefrom including but not limited to transport, storage and husbandry.

7.7 The Company may in its absolute discretion charge the Customer for standing time where offloading is delayed for any reason.

7.8 If the Customer fails to take delivery of the Goods or any part of them on the due date or to provide any instructions or documents required to enable the Goods to be delivered on the due date, the Company may:-

7.8.1 store or arrange for the storage of the Goods; and

7.8.2 charge the Customer all reasonable costs and expenses arising from its failure, including but not limited to storage, insurance and husbandry.

7.9 Where the Company delivers Goods to the Customer in returnable containers the containers must be empty when made available for collection. The Company has an absolute discretion to either not collect containers which contain rubbish or waste material, including packaging and pots, or to collect and charge the Customer for disposal of the contents, at a minimum rate of £20.00 per container.

7.10 All products supplied by the Company are believed to be true to name. In the event of any error by the Company over plant names, the liability of the Company to pay any charges or compensate for such an error will not exceed the invoice price of the product in question. No claim for loss of profit or other expenses incurred in excess of the invoice value of the plants will be considered.

WARRANTY & LIMITATION OF LIABILITY

8.1 The Company warrants that the Goods shall conform to any specification agreed by the Company in writing and that (subject to clauses 4.3 and 7.10) they will comply with their description and be of satisfactory quality.

8.2 Any claim that the Goods have not been delivered or have been delivered dead or damaged or (subject to clause 4.3) are not of the correct quantity or (subject to clause 7.10) do not comply with their description shall be notified verbally by the Customer to the Company within 2 Working Days of the date of delivery and confirmed in writing within 7 days thereafter.

8.3 The written confirmation referred to in clause 8.2 must contain full details of the claim including but not limited to the type and species of the products concerned.

8.4 The Company shall be afforded reasonable opportunity and facilities to investigate any claims made under this clause 8 and uplift the goods if deemed unacceptable.

8.5 Unless agreed otherwise in writing the Company shall under no circumstances have any liability of whatever kind:-

8.5.1 for any defects resulting from weather, accident, failure to tend, improper use by the Customer or use by the Customer except in accordance with the instructions or advice of the Company;

8.5.2 for the suitability of any Goods for any particular purpose or use under specific conditions whether or not the purpose or conditions were known or communicated to the Company;

8.5.3 for any descriptions, illustrations, specifications, drawings and particulars of weights and dimensions contained in the Company's catalogues, price lists, web site or elsewhere;

8.5.4 for any substitution of any type or species or product, if the substitution does not materially effect the characteristics of the Goods, and the substituted Goods are of a quality equal or superior to those being substituted; or

8.5.5 if the Customer does not comply with the procedures set out in clauses 8.2 to 8.4;

8.5.6 if the total price of the Goods has not been paid.

8.6 Where the Company is liable under this clause 8 it shall, at its sole option, replace with the Goods with similar goods or reimburse the Customer the price paid for the Goods. The delivery of any replacement Goods shall be made in accordance with clause 7.

8.7 During periods of inclement weather including storm, freezing temperatures or excessive heat, the Company may in its absolute discretion, without bringing itself into breach of contract for failure to perform, withhold or delay indefinitely the delivery of any Goods ordered by the Customer.

8.8 Where in the exercise of its discretion under clause 8.7 the Company incurs additional costs for storage and husbandry or both the Company may so charge the Customer.

8.9 Notwithstanding the Company's due diligence the Company does not warrant that the Goods are free from infection, infestation or disease or that they are not of a type known to be poisonous or of a type having injurious, hazardous or irritating properties save as may be specified in the Customer's order or the Company's sales materials.

8.10 Subject as expressly provided in these Conditions all warranties, conditions or other terms implied by statute or common law are excluded to the fullest extent permitted by law.

8.11 The Company shall not be liable to the Customer for loss of profit, loss of contracts, consequential, special or indirect loss or damage whether arising from negligence, breach of contract or otherwise even if the Company has been advised of the possibility of such loss or damage.

8.12 Except in respect of death or personal injury resulting from the Company's negligence, fraud or fraudulent misrepresentation and for any matter which it would be illegal for the Company to exclude or attempt to exclude its liability (for which no limit applies) the Company's total liability for all damages, losses and causes of action (whether in contract, tort (including but not limited to negligence) or otherwise) shall not exceed the price of the Goods.

SPECIAL GOODS

9.1 If the Goods (plants) are grown or manufactured in accordance with any design or specification provided or made by the Customer the Customer shall indemnify the Company in full on demand for all claims, expenses and liabilities of any nature in connection with them, including but not limited to any claim, whether actual or alleged, that the design or specification infringes the rights of any third party or falls within the ambit of the Plant Varieties and Seeds Act 1964 as may be amended from time to time.

9.2 Except for any which is expressly agreed to be included in the goods all tools, patterns, materials, drawings, specifications and other data provided by the Company shall remain its property and all technical information, patentable or unpatentable, copyright and registered designs arising from the execution of any orders shall become the property of the Company.

CANCELLATION

10.1 Orders for Goods which have to be grown or acquired especially for the Customer, or which are put aside especially for the Customer, may only be cancelled with the Company's agreement in writing and on terms that the Customer indemnifies the Company in full against all loss (including but not limited to loss of profit) costs, damages and expenses incurred by the Company as a result of cancellation.

10.2 Orders for stock items may be cancelled by written notice at any time before the Goods are allocated to the Contract but if a cancellation notice is received after the Goods have been allocated to the Contract then a charge of 50% of order value will payable by the Customer.]

FORCE MAJEURE & STOCK SEASONAL GOODS

The Company shall not be liable for any act or omission arising which shall render performance of the contract impossible or shall in any way have the effect of frustrating the common cause where such an act or omission is beyond the control of either the Company or the Customer or was not reasonably foreseeable by either one or both of them. Such act or omission shall have the effect of automatically terminating the Contract, save where the Customer has ordered Stock Seasonal Goods in which case the following shall apply:-

11.1 Unless expressly otherwise agreed in writing by both the Company and the Customer, Season Stock Goods shall be accepted by the Company as being expressly required for delivery during the relevant season.

11.2 Where for any reason whatsoever the Stock Seasonal Goods are not delivered during the relevant season, the Customer accepts delivery at its own risk and the Company shall not be liable for any defect, deterioration or other material difference in the state or appearance of the Stock Seasonal Goods.

11.3 All Stock Seasonal Goods ordered by the Customer shall be invoiced and paid for in accordance with clause 5.

INSOLVENCY OF CUSTOMER

12.1 This clause applies if:-

12.1.1 the Customer makes any voluntary arrangement with its creditors or (being an individual firm) becomes bankrupt or (being a company) goes into administration or liquidation (otherwise than for the purpose of an amalgamation or restructuring); or,

12.1.2 an encumbrancer takes possession or a receiver is appointed of any of the property or assets of the Customer; or

12.1.3 the Customer ceases or threatens to cease to carry on business.

12.2 Where this clause applies then without prejudice to any right or remedy available to the Company, the Company shall be entitled to cancel the Contract or suspend any further deliveries of Goods or both without any liability to the Customer. If Goods have been delivered but not paid for the price shall become due immediately and payable not withstanding any previous agreement or arrangement to the contrary.

LAW AND JURISDICTION

13. These Conditions shall be interpreted in accordance with the laws of England and Wales and any dispute hereunder shall be subject to the exclusive jurisdiction of the Courts of England and Wales.

NOTICES

14.1 Any notice given under this Contract shall be in writing and may be served personally, by registered or recorded delivery mail or by telex or fax transmission.

14.2 A notice shall be deemed to have been served:-

14.2.1 if it was served in person, at the time of service;

14.2.2 if it was served by post, the day after posting; and

14.2.3 if it was served by facsimile or electronic transmission, at the time of transmission.

GENERAL

15.1 If any provision of these Conditions is declared by any judicial or any other competent authority to be void, voidable, illegal or otherwise unenforceable or indications to that effect are received by either party from any competent authority then that provision shall be limited or eliminated to the minimum extent necessary so these Conditions shall otherwise remain in full force and effect and enforceable.

15.2 These Conditions together with the Customer's order and the Company's Order Confirmation contain the entire agreement between the parties.

15.3 No waiver by the Company of any breach of these Conditions by the Customer shall be considered as a waiver of any subsequent breach of the same or any other provisions.

15.4 Any Contract incorporating these Conditions is personal to the Customer and the Customer may not without the prior written consent of the Company assign its rights or obligations under any Contract.

15.5 Except in so far as these Conditions expressly provide that a third party may in its own right enforce a provision of these Conditions a person who is not a party to the Contract has no right under the Contracts (Rights of Third Parties) Act 1999 (the "Act") to rely on or enforce any provision of the Contract but this does not affect the right or remedy of a third party which exists or is available apart from the Act.