

Terms of Business for Sponge Holdings Pty Ltd



Interpretation

1. In these conditions:

- (1) "The Sponge" means "Sponge Holdings Pty Ltd (ABN: 21 159 360 086) trading as "The Sponge" of Suite 1, 164D Burwood Road, Concord, NSW 2137 which is the seller of the goods.
- (2) "Buyer" means the purchaser of the goods specified in the attached Schedule.
- (3) "Goods" means the products and, if any, services specified in the attached Schedule.
- (4) "Production costs" means disbursements incurred by The Sponge as the buyer's agent and paid to others on the buyer's behalf.
- (5) Nothing in these 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 Trade Practices Act 1974) and which by law cannot be excluded, restricted or modified.

General

2. a. These conditions (which shall only be waived in writing signed by The Sponge) shall prevail over all conditions of the buyer's order to the extent of any inconsistency.
- b. Headings to clauses are included for the sake of convenience only and shall not affect the interpretation of the clauses to which they relate.

Terms of sale

3. The goods and all other products sold by The Sponge are sold on these terms and conditions.

Prices

4. Unless otherwise stated all prices quoted by The Sponge are gross, inclusive of Goods and Services Tax (GST).

The Sponge's Fees

5. The Sponge will charge you for its fees at the hourly rate of \$192.50 standard, or \$308.00 senior for each of its employees involved in the production of the goods and the supplying of the services referred to in the Schedule. This rate will be proportionally charged for shorter periods involving less than an hour on the basis that each 30 minute period, or part thereof, will be charged at the rate of \$96.25 or \$154.00 per such 30 minute period.

Estimate of Costs

6. The estimate contained in the Schedule is purely an estimate on the information available to The Sponge to date. It is an estimate and only subject to change with written consent of the Buyer.

Specifications, etc

7. a. All specifications and particulars of dimensions submitted by or to The Sponge are approximate only and any deviation from any of these things does not vitiate any contract with The Sponge or form grounds for any claim against The Sponge.
- b. The descriptions, illustrations and performances contained in catalogues, price lists and other advertising matter do not form part of the contract of sale of the goods or of the description applied to the goods.

Performance

8. Any performance figures given by The Sponge are estimates only. The Sponge is under no liability for damages for failure of the goods to attain such figures unless specifically guaranteed in writing. Any such written guarantees are subject to the recognised tolerances applicable to such figures.

Right of refusal of order

9. a. The Sponge reserves the right to refuse any order based on any estimate within 7 days after the receipt of the order and this right of refusal is at the Sponge's sole discretion.
- b. Nothing in this clause creates any obligation upon the Sponge to provide any goods to the Buyer should the Buyer fail to pay all moneys required to be paid in advance for the goods, including any deposit, pursuant to these terms.

Delivery

10. a. The delivery times made known to the buyer are estimates only and The Sponge shall not be liable for late delivery or non-delivery.
- b. The Sponge shall not be liable for any loss, damage or delay occasioned to the buyer arising from late or non-delivery of the goods.

Qualified exclusion

11. The law implies terms, conditions and warranties ("prescribed terms") into contracts for the supply of goods and services and prohibits the exclusion, restriction or modification of certain terms, conditions and warranties. Some prescribed terms permit a supplier to limit its liability for a breach of the prescribed terms. Except as provided by prescribed terms:

- a. the liability of The Sponge in respect of a breach of a prescribed term relating to the goods or any part of the goods is limited at the option of The Sponge to the replacement or repair of the goods or part thereof or payment of the cost of repairing or replacing the goods or any part of the goods;
- b. in these conditions the buyer does not have under any circumstances any cause of action against or right to claim or recover from The Sponge for, or in respect of, any loss or damage of any kind whatsoever, caused directly or indirectly by:
 - i. any defect in material or workmanship of, or any other defect whatsoever in, or unsuitability for, any purpose of the goods or any part of the goods; or
 - ii. by default or negligence on the part of The Sponge or of any employee, contractor or agent of The Sponge or of any person for whom The Sponge has legal responsibility relating to the supply of, or otherwise concerning the goods or any part of the goods.

Exclusion of negligence...

12. The Sponge is not liable to the buyer in contract or in tort arising out of, or in connection with, or relating to:
 - a. the performance of the goods or any breach of these conditions; or
 - b. any fact, matter or thing relating to the goods; or
 - c. any error (whether negligent or in breach of contract or not) in information supplied to the buyer or a user before or after the date of the buyer's or user's use of the goods.

Exclusion of representations and arrangements

13. These terms and conditions supersede and exclude all prior and other discussions, representations (contractual or otherwise) and arrangements relating to the supply of the goods or any part of the goods including, but without limiting the generality of the foregoing, those relating to the performance of the goods or any part of the goods or the results that ought to be expected from using the goods.

Limitation to price of products

14. The total liability of The Sponge for loss or damage of every kind:
 - a. whether arising pursuant to this agreement; or
 - b. out of or in relation to the goods, their sale, delivery or the way they behave, in tort or contract or in any other cause of action; or

- c. in any other way whatsoever,

is limited to the amount paid by the buyer to The Sponge under this agreement at the date when such liability arises.

Indemnity

15. a. The buyer indemnifies The Sponge on a continuing basis and on a full indemnity basis from and against any liability, loss, expense or demand for or arising from any false, misleading, deceptive or misdescriptive representation or statement made by the buyer in respect of the goods to any person.

- b. The buyer further warrants that all intellectual property in material supplied to The Sponge by the buyer is owned by or licensed to the buyer and that the buyer is fully entitled to use that intellectual property and to permit The Sponge to use that intellectual property pursuant to and as provided for in this agreement.

- c. The buyer further indemnifies The Sponge in respect of any claim or demand made or action commenced by any person or entity against The Sponge in relation to the intellectual property referred to in clause 12.b.

Acknowledgements and warranties of the Buyer

16. The buyer hereby acknowledges, warrants and agrees that the buyer may be required to acknowledge a proof or proofs of the goods and that such acknowledgement is to be relied upon by The Sponge to the extent that all information contained in the goods is accurate and in accordance with and pursuant to the buyer's instructions to The Sponge and the buyer, by so acknowledging that proof, thereby releases and indemnifies The Sponge from and for all liability associated with any matter that may be subsequently alleged to be an error of The Sponge or done by The Sponge in a manner that was not in accordance with and pursuant to the buyer's instructions.

No waiver

17. a. The failure of any party to enforce the provisions of this agreement or to exercise any rights expressed in this agreement is not to be a waiver of such provisions or rights and does not affect the enforcement of this agreement.

- b. No waiver under Clause 17.a. operates as an estoppel against the party who seeks to rely on Clause 17.a.

- c. The exercise by any party of any of its rights expressed in this agreement does not preclude or prejudice such party from exercising the same or any other rights it may have irrespective of any previous action taken by that party.

Force majeure

18. If by reason of any fact, circumstance, matter or thing beyond the reasonable control of The Sponge or the buyer either is unable to perform in whole or in part any obligation under this agreement that party is relieved of that obligation under this agreement to the extent and for the period that it is so unable to perform and is not liable to the other party to this agreement in respect of such inability.

Payment

19. a. The buyer is required to pay The Sponge for the goods at the rate as specified in Clause 5 above.
- b. All Production costs are required to be paid by the buyer prior to The Sponge commencing any work in relation to the goods as and when specified in the Schedule.
- c. Should it be specified in the Schedule that the buyer is required to pay a deposit then that deposit is required to be paid to The Sponge as and when specified in the Schedule and prior to The Sponge commencing any work in relation to the goods. The deposit shall then be credited against accounts rendered by the Sponge as and when rendered.
- d. Time in relation to the payment of all moneys is of the essence.
- e. Interest is payable by the buyer to The Sponge on any moneys not paid by the times when due pursuant to the Schedule to this agreement at the agreed rate of 10 percent per annum.

Intellectual Property

20. The Sponge at all times retains all intellectual property in any way related to any templates and designs and images provided by or modified by The Sponge notwithstanding whether or not the buyer has purchased, or agreed to purchase images as part of the goods.

Disposal of goods

21. The Sponge will retain any goods of the buyer or produced for the buyer for no more than 24 months after the date of the final invoice rendered by The Sponge pursuant to this agreement and the buyer hereby authorises and directs The Sponge to destroy and/or dispose of those goods after the expiration of that 24 month period.

Buyer's property

22. Any property of the buyer under The Sponge's possession, custody or control is completely at the buyer's risk as regards loss or damage caused to the property or by it.

Goods sold

23. All goods to be supplied by The Sponge to the buyer are as described in the attached Schedule and on any purchase order agreed to by The Sponge in writing and the buyer and the description on such purchase order modified as so agreed prevails over all other descriptions including any specification or enquiry of the buyer.

Cancellation

24. No order may be cancelled except with consent in writing and on terms which will indemnify The Sponge against all losses.

Place of contract

25. This agreement will be governed by and construed pursuant to the laws of New South Wales and the parties agree to submit to the jurisdiction of the Courts of New South Wales in connection with any dispute relating to this agreement.

Severability

26. a. The parties agree that a construction of this agreement that results in all provisions being enforceable is to be preferred to a construction that does not so result.
- b. If, despite the application of Clause 26, a provision of this agreement is illegal or unenforceable:
 - i. if the provision would not be illegal or unenforceable if a word or words were omitted, that word or those words are severed; and
 - ii. in any other case, the whole provision is severed, and the remainder of this agreement continues in force.

Commencement Date of Agreement

27. This agreement is deemed to commence on the date specified in the Schedule.

Rights to Survive Termination

28. Termination of this agreement will not release either party from any liability or right of action which at the time of expiry or termination has already accrued to either party or which may thereafter accrue in respect of any act or omission prior to such expiry or termination. Such rights may include, but not be limited to, the recovery of any money due and the rights associated with the indemnities given in this agreement continuing.