

TERMS AND CONDITIONS OF SALES 02/2006

1. INTERPRETATION

1.1 The definitions and rules of interpretation in this condition apply in these conditions.

Customer: the person, firm or company who purchases the Machinery from Wirtgen.

Wirtgen: Wirtgen Limited a company incorporated and registered in England and Wales with company number 03026300 whose registered office is Reinhard House, Paving Way, Whisby Road, Lincoln, England, LN6 3QW.

Contract: any contract between Wirtgen and the Customer for the sale and purchase of the Machinery, incorporating these conditions.

Delivery Point: the place where delivery of the Machinery is to take place under condition 4.

Machinery: any Machinery agreed in the Contract to be supplied to the Customer by Wirtgen (including any part or parts of them).

1.2 A reference to a particular law is a reference to it as it is in force for the time being taking account of any amendment, extension, application or re-enactment and includes any subordinate legislation for the time being in force made under it.

1.3 Words in the singular include the plural and in the plural include the singular.

1.4 A reference to one gender includes a reference to the other gender.

1.5 Condition headings do not affect the interpretation of these conditions.

2. APPLICATION OF TERMS

2.1 Subject to any variation under condition 2.3 the Contract shall be on these conditions to the exclusion of all other terms and conditions (including any terms or conditions which the Customer purports to apply under any purchase order, confirmation of order, specification or other document).

2.2 No terms or conditions endorsed on, delivered with or contained in the Customer's purchase order, confirmation of order, specification or other document shall form part of the Contract simply as a result of such document being referred to in the Contract.

2.3 These conditions apply to all Wirtgen's sales and any variation to these conditions and any representations about the Machinery shall have no effect unless expressly agreed in writing by Wirtgen. The Customer acknowledges that it has not relied on any statement, promise or representation made or given by or on behalf of Wirtgen which is not set out in the Contract. Nothing in this condition shall exclude or limit Wirtgen's liability for fraudulent misrepresentation.

2.4 Each order or acceptance of a quotation for Machinery by the Customer from Wirtgen shall be deemed to be an offer by the Customer to buy Machinery subject to these conditions.

2.5 No order placed by the Customer shall be deemed to be accepted by Wirtgen until a written acknowledgement of order is issued by Wirtgen or (if earlier) Wirtgen delivers the Machinery to the Customer.

2.6 The Customer shall ensure that the terms of its order and any applicable specification are complete and accurate.

2.7 Any quotation is given on the basis that no Contract shall come into existence until Wirtgen despatches an acknowledgement of order to the Customer. Any quotation is valid for a period of 30 days only from its date, provided that Wirtgen has not previously withdrawn it.

3. DESCRIPTION

3.1 The quantity and description of the Machinery shall be as set out in Wirtgen's quotation or acknowledgement of order.

3.2 All samples, drawings, descriptive matter, specifications, weight, dimension, performance capability and advertising issued by Wirtgen and any descriptions or illustrations contained in Wirtgen's catalogues or brochures are issued or published for the sole purpose of giving an approximate idea of the Machinery described in them. They shall not form part of the Contract and this is not a sale by sample.

3.3 Where any designs or specifications have been supplied by the Customer for manufacture by Wirtgen or to the order of the Customer then the Customer warrants that the use of those designs or specifications for the manufacture, processing, assembly or supply of the Machinery shall not infringe the rights of any third party and the Customer shall indemnify Wirtgen against all losses, damages, costs and expenses (including legal expenses) awarded against or incurred by Wirtgen in connection with any claim for infringement of the rights of any third party (including any settlement made by Wirtgen) which result from Wirtgen's use of the designs or specifications supplied by the Customer.

4. DELIVERY

4.1 Unless otherwise agreed in writing by Wirtgen, delivery of the Machinery shall take place at Wirtgen's place of business.

4.2 The Customer shall take delivery of the Machinery within 3 days of Wirtgen giving it notice that the Machinery is ready for delivery.

4.3 Any dates specified by Wirtgen for delivery of the Machinery are intended to be an estimate and time for delivery shall not be made of the essence by notice. If no dates are so specified, delivery shall be within a reasonable time.

4.4 Subject to the other provisions of these conditions Wirtgen shall not be liable for any direct, indirect or consequential loss (all three of which terms include, without limitation, pure economic loss, loss of profits, loss of business, depletion of goodwill and similar loss), costs, damages, charges or expenses caused directly or indirectly by any delay in the delivery of the Machinery (even if caused by Wirtgen's negligence), nor shall any delay entitle the Customer to terminate or rescind the Contract unless such delay exceeds 180 days.

4.5 If for any reason the Customer fails to accept delivery of any of the Machinery when they are ready for delivery, or Wirtgen is unable to deliver the Machinery on time because the Customer has not provided appropriate instructions, documents, licences or authorisations:

(a) risk in the Machinery shall pass to the Customer (including for loss or damage caused by Wirtgen's negligence);

(b) the Machinery shall be deemed to have been delivered; and

(c) Wirtgen may store the Machinery until delivery, whereupon the Customer shall be liable for all related costs and expenses (including, without limitation, storage and insurance).

4.6 The Customer shall provide at the Delivery Point and at its expense adequate and appropriate equipment and manual labour for loading the Machinery.

4.7 Wirtgen may deliver the Machinery by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the provisions of the Contract.

4.8 Each instalment shall be a separate Contract and no cancellation or termination of any one Contract relating to an instalment shall entitle the Customer to repudiate or cancel any other Contract or instalment.

5. NON-DELIVERY

5.1 The quantity of any consignment of Machinery as recorded by Wirtgen upon despatch from Wirtgen's place of business shall be conclusive evidence of the quantity received by the Customer on delivery unless the Customer can provide conclusive evidence proving the contrary.

5.2 Wirtgen shall not be liable for any non-delivery of Machinery (even if caused by Wirtgen's negligence) unless the Customer gives written notice to Wirtgen of the non-delivery within 7 days of the date when the Machinery would in the ordinary course of events have been received.

5.3 Any liability of Wirtgen for non-delivery of the Machinery shall be limited to replacing the Machinery within a reasonable time or issuing a credit note at the pro rata Contract rate against any invoice raised for such Machinery.

6. Risk/TITLE

- 6.1 The Machinery is at the risk of the Customer from the time of delivery.
- 6.2 Ownership of the Machinery shall not pass to the Customer until Wirtgen has received in full (in cash or cleared funds) all sums due to it in respect of:
- (a) the Machinery; and
 - (b) all other sums which are or which become due to Wirtgen from the Customer on any account.
- 6.3 Until ownership of the Machinery has passed to the Customer, the Customer shall:
- (a) hold the Machinery on a fiduciary basis as Wirtgen's bailee;
 - (b) store the Machinery (at no cost to Wirtgen) separately from all other Machinery of the Customer or any third party in such a way that they remain readily identifiable as Wirtgen's property;
 - (c) not destroy, deface or obscure any identifying mark or packaging on or relating to the Machinery; and
 - (d) maintain the Machinery in satisfactory condition and keep them insured on Wirtgen's behalf for their full price against all risks to the reasonable satisfaction of Wirtgen. On request the Customer shall produce the policy of insurance to Wirtgen.
- 6.4 The Customer may resell the Machinery before ownership has passed to it solely on the following conditions:
- (a) any sale shall be effected in the ordinary course of the Customer's business at full market value and the Customer shall hold such part of the proceeds of sale as represent the amount owed by the Customer to Wirtgen on behalf of Wirtgen and the Customer shall account to Wirtgen accordingly; and
 - (b) any such sale shall be a sale of Wirtgen's property on the Customer's own behalf and the Customer shall deal as principal when making such a sale.
- 6.5 The Customer's right to possession of the Machinery shall terminate immediately if:
- (a) the Customer has a bankruptcy order made against him or makes an arrangement or composition with his creditors, or otherwise takes the benefit of any statutory provision 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 of its undertaking or any part thereof, or documents are filed with the court for the appointment of an administrator of the Customer or notice of intention to appoint an administrator is given by the Customer or its directors or by a qualifying floating charge holder (as defined in paragraph 14 of Schedule B1 to the Insolvency Act 1986), 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
 - (b) the Customer suffers or allows any execution, whether legal or equitable, to be levied on his/its property or obtained against him/it, or fails to observe or perform any of his/its obligations under the Contract or any other contract between Wirtgen and the Customer, or is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986 or the Customer ceases to trade; or
 - (c) the Customer encumbers or in any way charges any of the Machinery.
- 6.6 Wirtgen shall be entitled to recover payment for the Machinery notwithstanding that ownership of any of the Machinery has not passed from Wirtgen.
- 6.7 The Customer grants Wirtgen, its agents and employees an irrevocable licence at any time to enter any premises where the Machinery are or may be stored in order to inspect them, or, where the Customer's right to possession has terminated, to recover them.

- 6.8 Where Wirtgen is unable to determine whether any Machinery are the Machinery in respect of which the Customer's right to possession has terminated, the Customer shall be deemed to have sold all Machinery of the kind sold by Wirtgen to the Customer in the order in which they were invoiced to the Customer.
- 6.9 On termination of the Contract, howsoever caused, Wirtgen's (but not the Customer's) rights contained in this condition 6 shall remain in effect.
- 7. PRICE**
- 7.1 The price for the Machinery shall be the price set out in purchase order or confirmation of order.
- 7.2 The price for the Machinery shall be exclusive of any value added tax and all costs or charges in relation to packaging, loading, unloading, carriage and insurance, all of which amounts the Customer shall pay in addition when it is due to pay for the Machinery.
- 8. PAYMENT**
- 8.1 Subject to condition 8.4, payment of the price for the Machinery is due in pounds sterling in cleared funds on the date which the Machinery is delivered or deemed to be delivered. Payments of the price for any spare parts is due in pounds sterling 30 days following the date which the spare parts are delivered or deemed to be delivered.
- 8.2 Time for payment shall be of the essence.
- 8.3 No payment shall be deemed to have been received until Wirtgen has received cleared funds.
- 8.4 All payments payable to Wirtgen under the Contract shall become due immediately on its termination despite any other provision.
- 8.5 The Customer shall make all payments due under the Contract in full without any deduction whether by way of set-off, counterclaim, discount, abatement or otherwise unless the Customer has a valid court order requiring an amount equal to such deduction to be paid by Wirtgen to the Customer.
- 8.6 If the Customer fails to pay Wirtgen any sum due pursuant to the Contract, the Customer shall be liable to pay interest to Wirtgen on such sum from the due date for payment at the annual rate of 4% above the base lending rate from time to time of HSBC Bank Plc, accruing on a daily basis until payment is made, whether before or after any judgment.
- 9. QUALITY**
- 9.1 Where Wirtgen is not the manufacturer of the Machinery, Wirtgen shall endeavour to transfer to the Customer the benefit of any warranty or guarantee given to Wirtgen.
- 9.2 Wirtgen warrants that, unless otherwise agreed in writing by Wirtgen, (subject to the other provisions of these conditions) upon delivery, and for a period of 6 months from the date of delivery, the Machinery shall be of satisfactory quality within the meaning of the Sale of Goods Act 1979.
- 9.3 Wirtgen shall not be liable for a breach of the warranty in condition 9.2 unless:
- (a) the Customer gives written notice of the defect to Wirtgen, and, if the defect is as a result of damage in transit to the carrier, within 7 days of the time when the Customer discovers or ought to have discovered the defect; and
 - (b) Wirtgen is given a reasonable opportunity after receiving the notice of examining such Machinery and the Customer (if asked to do so by Wirtgen) returns such Machinery to Wirtgen's place of business at Wirtgen's cost for the examination to take place there.
- 9.4 Wirtgen shall not be liable for a breach of the warranty in condition 9.2 if:
- (a) the Customer makes any further use of such Machinery after giving such notice; or
 - (b) the defect arises because the Customer failed to follow Wirtgen's oral or written instructions as to the storage, installation, commissioning, use or maintenance of the Machinery or (if there are none) good trade practice; or
 - (c) the Customer alters or repairs such Machinery without the written consent of Wirtgen; or

- (d) the defect arises where the Machinery has been supplied by Wirtgen on any designs or specifications that have been supplied by the Customer for manufacture by Wirtgen or to the order of the Customer and the defect arises due to such design or specification; or
- (e) the defect arises from fair wear and tear or consumable or wearing parts including but not limited to scrapers, tyres, padfoot segments, roller drums, sprinkler nozzles, edge press and cutting equipment, chipperspreaders, conveyor bearings, augers, drive sprockets for conveyor or auger, chains, track pads, rollers, tampers, screed plates, conveyor belts, pressure bars, heating rods, milling drum bearings, cutting tools, toolholders, milling drums, distribution augers and concrete equipment (engines and engine components are as per the engine manufacturer terms, available from Wirtgen on request); or

9.5 The warranty granted under condition 9.2 and any extended warranty period agreed by Wirtgen in writing shall be subject to the Customers use of genuine Wirtgen spare parts.

9.6 Subject to condition 9.3 and condition 9.4, if any of the Machinery do not conform with the warranty in condition 9.2 Wirtgen shall at its option repair or replace such Machinery (or the defective part) or refund the price of such Machinery at the pro rata Contract rate provided that, if Wirtgen so requests, the Customer shall, at Wirtgen's expense, return the Machinery or the part of such Machinery which is defective to Wirtgen.

9.7 If Wirtgen complies with condition 9.6 it shall have no further liability for a breach of the warranty in condition 9.2 in respect of such Machinery.

9.8 Any Machinery replaced shall belong to Wirtgen and any repaired or replacement Machinery shall be guaranteed on these terms for the unexpired portion of the 6-month period.

10. LIMITATION OF LIABILITY

10.1 Subject to condition 4, condition 5 and condition 9, the following provisions set out the entire financial liability of Wirtgen (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Customer in respect of:

- (a) any breach of these conditions;
- (b) any use made or resale by the Customer of any of the Machinery, or of any product incorporating any of the Machinery; and
- (c) any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract.

10.2 All warranties, conditions and other terms implied by statute or common law (save for the conditions implied by section 12 of the Sale of Goods Act 1979) are, to the fullest extent permitted by law, excluded from the Contract.

10.3 Nothing in these conditions excludes or limits the liability of Wirtgen:

- (a) for death or personal injury caused by Wirtgen's negligence; or
- (b) under section 2(3), Consumer Protection Act 1987; or
- (c) for any matter which it would be illegal for Wirtgen to exclude or attempt to exclude its liability; or
- (d) for fraud or fraudulent misrepresentation.

10.4 Subject to condition 10.2 and condition 10.3:

- (a) Wirtgen'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 Contract price; and
- (b) Wirtgen 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. ASSIGNMENT

11.1 Wirtgen may assign the Contract or any part of it to any person, firm or company.

11.2 The Customer shall not be entitled to assign the Contract or any part of it without the prior written consent of Wirtgen.

12. FORCE MAJEURE

Wirtgen reserves the right to defer the date of delivery or to cancel the Contract or reduce the volume of the Machinery ordered by the Customer (without liability to the Customer) if it is prevented from or delayed in the carrying on of its business due to circumstances beyond the reasonable control of Wirtgen including, without limitation, acts of God, governmental actions, war or national emergency, acts of terrorism, protests, riot, civil commotion, fire, explosion, flood, epidemic, lock-outs, strikes or other labour disputes (whether or not relating to either party's workforce), or restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable materials, provided that, if the event in question continues for a continuous period in excess of 90 days, the Customer shall be entitled to give notice in writing to Wirtgen to terminate the Contract.

13. GENERAL

13.1 Each right or remedy of Wirtgen under the Contract is without prejudice to any other right or remedy of Wirtgen whether under the Contract or not.

13.2 If any provision of the Contract is found by any court, tribunal or administrative body of competent jurisdiction to be wholly or partly illegal, invalid, void, voidable, unenforceable or unreasonable it shall to the extent of such illegality, invalidity, voidness, voidability, unenforceability or unreasonableness be deemed severable and the remaining provisions of the Contract and the remainder of such provision shall continue in full force and effect.

13.3 Failure or delay by Wirtgen in enforcing or partially enforcing any provision of the Contract shall not be construed as a waiver of any of its rights under the Contract.

13.4 Any waiver by Wirtgen of any breach of, or any default under, any provision of the Contract by the Customer shall not be deemed a waiver of any subsequent breach or default and shall in no way affect the other terms of the Contract.

13.5 The parties to the Contract do not intend that any term of the Contract shall be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person that is not a party to it.

13.6 The formation, existence, construction, performance, validity and all aspects of the Contract shall be governed by English law and the parties submit to the exclusive jurisdiction of the English courts.

14. COMMUNICATIONS

14.1 All communications between the parties about the Contract shall be in writing and delivered by hand or sent by pre-paid first class post or sent by fax:

- (a) (in case of communications to Wirtgen) to its registered office or such changed address as shall be notified to the Customer by Wirtgen; or
- (b) (in the case of the communications to the Customer) to the registered office of the addressee (if it is a company) or (in any other case) to any address of the Customer set out in any document which forms part of the Contract or such other address as shall be notified to Wirtgen by the Customer.

14.2 Communications shall be deemed to have been received:

- (a) if sent by pre-paid first class post, two days (excluding Saturdays, Sundays and bank and public holidays) after posting (exclusive of the day of posting); or
- (b) if delivered by hand, on the day of delivery; or
- (c) if sent by fax on a working day prior to 4.00 pm, at the time of transmission and otherwise on the next working day.