

# GENERAL TERMS AND CONDITIONS – KERRY LINDSAY ENGINE RECONDITIONERS

## 1. CUSTOMER'S ACKNOWLEDGEMENTS

- 1.1. **A legally binding Contract is established between the two parties** (based on these terms and conditions contained herein) and **deemed accepted** by the Customer once the Customer placing an order for the supply of the Goods or Services or if the Customer accepts delivery of the Goods or Services from KLER. In such events, the Customer will immediately be bound, jointly and severally, by these terms and conditions.
- 1.2. **No amendment of this Contract will be of any force or effect, unless in writing signed by an authorised representative of each party.**
- 1.3. Upon signing this Contract both parties declare and confirm, they are lawfully entitled to enter this Contract (including where the Customer is to act in the capacity as a trustee of any trust ("**Trust**"). Furthermore, the Customer declares that they are not insolvent and accepts that this Contract creates an enforceable legal agreement on the Customer to meet his/her obligations and responsibilities under the Contract (including payment when requested).
- 1.4. If the Customer is primarily a Trust entity, the Customer declares that the provisions of the Trust does not imply to exclude or remove the right of indemnity of the Customer against the Trust. The Customer agrees to notify KLER forthwith, if there are any substantial changes to the Trust that could affect the business relationship and the Customer's obligations under the Contract which includes any variations or resettlements of trust assets or any changes of trustees, that may or could be the basis of any security under any contract with KLER.
- 1.5. The Customer acknowledges and accepts that unless any report, description, order, or deal is **stated** in writing, by **Kerry Lindsay Engine Reconditioning Specialists Limited** (*trading as*) **Kerry Lindsay Engine Reconditioners** or its duly official representative, KLER **shall not be bound** by any such unapproved statements.
- 1.6. Goods are always subject to availability, if any ordered Goods become unavailable, KLER agrees to notify the Customer and offer alternative Goods and will advise any changes in the quoted Price, prior to Delivery. Billing for changes in Goods supplied whether an increase/decrease will be done so, in accordance with clause 4, where required.
- 1.7. Where KLER has been provided with an email address from the Customer for e-communications, both parties agree to fully comply with all current requirements by law pertaining to electronic messaging (including but not limited to, Unsolicited Electronic Messages Act 2007).
- 1.8. Where it is agreed between both parties, electronic signatures, or e-signatures shall form part thereof, the acceptance to this Contract and to be deemed compliant, both parties acknowledge and agreed to adhere to all required provisions pertaining to such acceptance covered by the Contract and Commercial Law Act 2017.

## 2. ERROR AND OMISSIONS

- 2.1. KLER shall have no liability, unless attributed to negligence and/or willful misconduct by KLER, arising from any typographical, clerical, or other error, mistake or omission in any information, communication or other document or information issued by it.

## 3. PAYMENT TERMS

- 3.1. The Price will be as stated on the invoice supplied to the Customer or as stated in the quotation (inclusive of any variations (if known) prior to acceptance but the quoted Price shall only be binding for the period offered by KLER. **If no date is stated**, then the quote shall apply for a period of no less than **30 Days**).
- 3.2. **Estimates:** Notwithstanding clause 3.1, if KLER is requested to supply an estimate, the Price shall not be deemed binding upon KLER as the full and final Price for the job, as the full and final Price can only be validated once the Services are completed. In the interest of being fair and reasonable in respect of the pricing with the Customer, KLER agrees to keep the Customer informed, if KLER considers the final Price may exceed more than 10% of the original estimate, so the Customer can grant approval first before KLER continues further.
- 3.3. **Deposits due, are at the discretion of KLER and the deposit amount may vary due to the nature of the Services or Goods to be supplied. Any deposit required will be stated at the time of quoting and shall become immediately due and payable to KLER upon the Customer's acceptance.**
- 3.4. The Price will be payable by the Customer by the due date established by KLER, as follows:
  - (a) Prior to, or at the time of Delivery of the Services (complete with the supply of any Goods where applicable); or
  - (b) **Credit Approved Customer's:**
    - (i) As agreed by both parties, by the date as stated in KLER's schedule for payments; or
    - (ii) Upon the issue of a statement to the Customer's operating business address, **20 Calendar Days** following the end of every month; or
  - (c) In all other cases, unless stated otherwise, the date for payment is **7 Business Days** from the date of any invoice/s issued (by email or post) to the Customer by KLER.
- 3.5. Receipt for payment can be made by either cash and/or via direct bank transfer, these are acceptable payment methods. Outside of these options, KLER must be contacted first, before the supply of any Goods or commencement of any Services will occur.
- 3.6. For the avoidance of doubt, it is agreed by both parties that the Customer may not **set-off** against any monies due to KLER by the Customer, that the Customer considers KLER owes the Customer, **it must not be automatically deducted** from the Price, nor can

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any payment due be withheld by the Customer because part of any invoice is in dispute. Where the Customer believes that there has been a mistake made, and monies are due, KLER requests that the Customer contacts KLER within 7 Business Days of receipt of the invoice/statement, so that KLER may investigate any alleged error. If a mistake has occurred, the Customer's subsequent invoice/statement will be adjusted.

- 3.7. Apart from where KLER states otherwise, GST is **not included** in the Price, for all relevant Goods and Services supplied (including but not limited to, all stock, Services, costs, duties, fees, and freight charges) except where GST is **explicitly shown as included** in the Price.

## 4. VARIATIONS

- 4.1. KLER's Price may be subject to adjustment (upon written notice to the Customer):
- (a) If the Customer requests a variation to the Services (including the dimensions or design); or
  - (b) Any increases or decreases with the pricing of the Goods (including components, or Goods availability) or labour beyond KLER's reasonable control (such as; third-party suppliers' costs, fluctuations with the currency exchange rate or government/industry salary award rates etc.); and
  - (c) Any adjustment to the Price due to variation/s shall be allowed for at the time of the final invoicing or the next payment claim made by KLER; and
  - (d) **Storage:** - If the Customer's requests that the Goods or vehicle needs to be stored, as the Customer is unable to take delivery or collection of same, then KLER may (at its sole discretion) after 10 calendar days of such advice be entitled to charge a fee for storage, current rate being \$40.00 (incl GST) per day.
- 4.2. Any variations to the Customer's original quote will be described in full as a variation on the invoice. If KLER **does not** receive a response to any variation invoice presented to the Customer within 7 Business Days from the date of receipt of the invoice, KLER will assume that the variation invoice is accepted without dispute. Payment will be due as per the date stated on the said invoice.
- 4.3. The Customer acknowledges and agrees that KLER shall be entitled to:
- (a) Retain any components replaced during the provision of the Services; and
  - (b) The right to retain all proceeds obtained from the sale of such components to any auto recycler or salvage yard.

## 5. DELIVERY

- 5.1. If KLER is **only to supply Goods** (no installation) then Delivery ("**Delivery**") and/or ("**Return**") relating to any Goods are understood to have taken place when:
- (a) The Goods are picked-up at KLER's address by the Customer or the Customer's representative; or
  - (b) When a signed Delivery docket is obtained by KLER's designated courier at the Customer's given Delivery address; or
  - (c) KLER is in receipt of the signed Delivery docket if Goods are returned to KLER's address by the Customer.
- 5.2. Any Delivery costs associated with the supply of Goods or Services (if applicable) shall be covered as such in the quotation and will be stated on the invoice issued to the Customer by KLER. Additional travel charges will apply where the Services are to be provided outside of a 25km radius of KLER's base.
- 5.3. Delivery dates for the supply of the Goods and/or Services will only always be an estimate, as delays may occur beyond KLER's control i.e., Third Party KLERs, Force Majeure, etc (including Government imposed lockdowns effecting KLER's suppliers and employees, if a worksite is closed and all tradespeople are required to, self-isolate). **Where circumstances are beyond KLER's control, KLER does not accept any liability should any loss or damage be incurred by the Customer because of a late Delivery**, however, KLER will at every opportunity liaise with the Customer to ensure Delivery does take place, as soon as reasonably possible.
- 5.4. Notwithstanding clauses 5.2 and 5.3, KLER reserves the right to pass on a fair and reasonable charge to the Customer, if the Goods need to be stored or delivered again at a later stage, if the Customer is unable to take Delivery of the Goods as arranged.

## 6. RISK TO GOODS

- 6.1. All risk passes to the Customer on Delivery, regardless of whether KLER is directed by the Customer to leave the Goods outside of KLER's premises or at an unmanned site. It shall be the Customer's responsibility to adequately insure the Goods prior to dispatch.
- 6.2. KLER is entitled to receive all the insurance proceeds payable for the Goods should any Goods be damaged or destroyed after Delivery has happened if title to the Goods has not passed to the Customer. Although the preparation of these terms and conditions is done so by KLER, KLER shall still be entitled, without prejudice to any other of its rights or remedies under these terms and conditions to use this Contract (including invoices, consignment notes or delivery dockets) with the Customer, as prima facie evidence, if an insurance claim is made and thereby no further investigations ought not to be necessary.
- 6.3. **KLER will NOT accept responsibility for:**
- (a) Any defect, deterioration and/or damage to the Goods;
    - (i) Where Goods are installed by the Customer or any other third party engaged by the Customer which results in incorrect use, installation or assembly of the machined Goods; or
    - (ii) The Customer has chosen to store the Goods off site for a period that results in any form of deterioration due to the Customer's action or inaction to effect installation.

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- (b) **Temporary repairs** performed by KLER:
  - (i) KLER offers **NO guarantee** against the reoccurrence of the initial fault, or any further damage caused; and
  - (ii) The Customer will be advised immediately of the fault, with an estimate for the full repair required; and
  - (iii) KLER only accepts responsibility for the Goods that it replaces, **NO liability is accepted** in respect of any previous parts or services supplied by any other third party that subsequently fail after KLER has conducted its temporary repair as requested and it is later discovered that the previous parts or services were the actual source of the failure; nor
  - (iv) Will KLER accept any form of liability for any damages caused due to the replacement of additional parts (including but not limited to, radiators, thermostats, water pump, diesel fuel injectors or any other associated parts) by another third party after KLER completed its Services, unless it is found to be a fault attributed to KLER's prior Services.
- (c) Any item/s supplied by the Customer for reconditioning is at all times stored and repaired at the Customer's **sole risk** and it is the **Customer's responsibility** to ensure their item/s (including any vehicle, if supplied with the engine) are adequately insured, against accident, damage, theft, fire (including any other standard risk covered by such insurance), whilst the item/s are stored at KLER's premises and any valuables or other items in a vehicle should be removed, prior to any Services commencing; and
- (d) Any loss of or damage to the Customer's vehicle, its accessories or contents while being repaired or operated in connection with the authorised Services, unless caused by the negligence of KLER, or KLER's employees.

### 7. DEFECTIVE GOODS/SERVICES & RETURNS

- 7.1. The Customer agrees to examine the Goods (Services on completion) on Delivery and shall satisfy itself that they conform with the quotation, description, purchase order or any other document applicable to this Contract, that the Goods are of merchantable quality, fit for purpose and in a useable condition.
- 7.2. If the Customer discovers a defect in the quality, or a shortage in the quantity of the Goods, or a failure to comply with KLER's quote and these terms and conditions, they must immediately notify KLER of that defect. **If no notice** is received by KLER within 5 Business Days from the time of Delivery, then the Goods and Services shall be assumed to be accepted and clear from any defect or fault.
- 7.3. The Consumer Guarantees Act 1993, the Fair Trading Act 1986 and other statutes may imply warranties or conditions or impose obligations upon KLER which cannot by law (or which can only to a limited extent by law) be excluded or modified. In respect of any such implied warranties, conditions or terms imposed on KLER, KLER's liability shall, where it is allowed, be excluded or if not able to be excluded only apply to the minimum extent required by the relevant statute. For avoidance of doubt, where the Customer acquires, or holds themselves out as acquiring, the Goods and/or Services for business purposes, the Consumer Guarantees Act 1993 does not apply and as defined in clause 10.
- 7.4. Subject to clause 7.3 and to the extent permitted by law, KLER's liability in any case of any defect or fault, or otherwise under this Contract, shall be limited to:
  - (a) The value of the total amount invoiced to the Customer; or
  - (b) KLER repairing or replacing the Goods in relation to the defective or faulty Goods and/or Services of which such liability arises. KLER shall have no liability or responsibility for any indirect or consequential injury, loss, damage, or expense whatsoever and howsoever.
- 7.5. **Conditions apply to all Goods for return, such as:**
  - (a) The Customer carried out KLER's requests detailed in clauses 7.1 & 7.2;
  - (b) KLER has **confirmed in writing**, that the returned Goods are accepted; and
  - (c) The cost of returned Goods shall be borne by the Customer and within 5 Business Days of the Delivery date as stated in clause 7.1, or any other date as agreed with KLER; and
  - (d) Returned Goods are still in good condition (as reasonably possible) together with all the original wrapping, catalogues, and maintenance instructions together with a copy of original invoice.
- 7.6. Non-defective Goods that KLER has agreed to accept under clause 7.5(b) will be subject to a processing fee of twenty percent (20%) of the value of the Goods received back in stock, plus any freight.
- 7.7. Custom made Goods created with the Customer's designs, plans or dimensions or any Goods that are not deemed stock standard items by KLER will not under any circumstances be eligible for a credit or refund nor for such Goods to be given back to KLER, unless the Customer is entitled to reject under clause 7.3.

### 8. WARRANTIES

- 8.1. To the extent permitted by statute, **no warranty** is given by KLER as to the quality or suitability of the Goods for any purpose and any implied warranty is **expressly excluded**. KLER shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any party thereof however arising.
- 8.2. **Only new Goods are used during the provision of the Services.** KLER will not use any secondhand items when reconditioning a Customer's engine regardless, even if such items are offered by the Customer. If the Customer insists that their parts are used in

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the reconditioning of their engine, the Customer accepts and agrees, this action shall result in any warranty that KLER may have otherwise offered, becoming invalid and unenforceable.

- 8.3. KLER will **not be liable** if any defect or damage claimed is caused by:
- (a) The Goods **not** being properly maintained and/or serviced (**all diesel engines must have new or reconditioned injectors fitted**), because the Customer has failed to follow KLER's recommendations or guidelines supplied, relating to the Goods; or
  - (b) The Goods **being used** in any way other than what the Goods were designed and manufactured for, as was stated in this Contract; or
  - (c) Failure by the Customer or the Customer's employee or contractor to **cease using the Goods** after a defect becomes apparent; or
  - (d) Fair wear and tear, any accident or act of God; and
  - (e) Any warranty offered shall become **void and unenforceable** against KLER, if the Customer chooses to engage a third party to repair or rectify any alleged defect without KLER's consent but should consent be granted, any work to be carried out must be done so by an authorised repairer approved by KLER. Consent by KLER will not be unreasonable withheld, and the Customer accepts and agrees where this sub-clause applies that KLER will **not be responsible to pay any damages** to the Customer where delays occur in rectifying the workmanship and/or in appraising the Customer's claim, through a third-party.
- 8.4. Only a **manufacturer's warranty** will apply (if any), where KLER **has not** actually manufactured the Goods. KLER will **not be liable** in any way or be required to meet any obligation given under a manufacturer's warranty. In the event of a claim, the Customer must deal directly with the manufacturer.
- 8.5. Notwithstanding clause 8.4, the Customer accepts that if a manufacturer's defective item is identified that needs to be replaced or repaired, it shall be the **Customer's responsibility to meet any costs associated with the dismantle or reassemble** of the Goods incurred by KLER (**time and labour**) in rectifying the issue on the Customer's behalf. KLER's liability shall be limited in all instances (whether it's a manufacturer's warranty claim or a general warranty claim) to the repair or replacement only of the defective part/component pertaining to the Goods or Services.

## 9. TITLE

- 9.1. Title in the Goods and/or Services pass to the Customer when payment for those Goods and/or Services (together with any additional interest or charges as set out in these terms of trade) have been made in full by way of cleared funds and the Customer's obligations have been fulfilled.
- 9.2. Until such time as title passes to the Customer:
- (a) All Goods are held on trust by the Customer in their capacity as "bailee" for KLER and upon request the Customer is required to return all uninstalled Goods to KLER where payment has not been affected;
  - (b) The Customer agrees and gives permission to KLER to access any property considered to be housing the Goods and take back possession of them, without KLER being liable for any loss or damage caused to the Customer;
  - (c) If any Goods are lost, damaged, or destroyed, the Customer acknowledges and agrees to indemnify KLER by way of the proceeds of any insurance claim as per clause 6.2;
  - (d) If possession of the Goods passes to another by way of sale or the Customer does anything to the Goods which changes its form, then the Customer as per clause 9.2(a) must hold such funds from this transaction on trust for KLER, and make payment immediately upon demand
  - (e) At no time shall the Customer be entitled to use the Goods as a form of security (including but not limited to, executing a charge or lien over the Goods when ownership of the Goods as not taken place).

## 10. COMPLIANCE WITH LAWS

- 10.1. If the Customer is acquiring Goods or Services for the **purposes of a trade or business**, the Customer acknowledges that the provisions of section 43 of the Consumer Guarantees Act 1993 ("**CGA**") and section 5D of the Fair Trading Act 1986 ("**FTA**") do not apply to the supply of Goods or Services by KLER to the Customer, nor will the provisions of the FTA apply to either parties conduct or representations if unintentional: section 9 (**misleading conduct**), section 12A (**unsubstantiated representations**) or section 13 (**false or misleading representations**).
- 10.2. If the Customer is acquiring Goods or Services in the capacity as a "**consumer**" as defined in the Consumer Guarantees Act 1993 and the Customer is **not in trade**, nothing in the Contract will exclude or limit the Customer's rights or remedies under the Act.
- 10.3. Furthermore, both KLER and the Customer agreed to comply with all governing laws (including the provisions of all statutes, regulations, and bylaws of Government, local and other public authorities) of New Zealand applicable to the Goods and Services and agree that nothing in this Contract is intended to have the effect of contracting out of any applicable provisions of the Fair Trading Act 1986 and the Health and Safety at Work Act 2015 ("the HSW Act"), including any substitute to those Acts or re-enactment thereof, except to the extent permitted by those Acts where applicable.
- 10.4. Where any Goods are subject to any form of certification during the provision of the Services, this shall be done so by a certified party, being either KLER or an engaged third-party independent contractor certified in their field of expertise and all certification documentation relevant to the Goods supplied will be provided with the Goods at the time of delivery to the Customer and/or pick-up. The Customer agrees to indemnify KLER against any costs incurred in respect of any certification required by law.

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- 10.5. If the Customer is ever in breach of clause 10, then the Customer accepts and agrees to indemnify KLER against all claims, liability, losses, or costs imposed or incurred by KLER, because of such a breach.
- 11. DEFAULT**
- 11.1. In any event, KLER reserves the right to charge the Customer interest in respect of the late payment of any sums due under this Contract, which will be calculated and cumulated monthly, at the rate of five percent (5%) per year above the official cash rate as set from time to time by the Reserve Bank of New Zealand, from the due date until receipt of payment, and also prior, to any judgement being awarded by a court of law.
- 11.2. For the sake of clarity, KLER has the right to suspend or bring the whole Contract to an end, or parts thereof, or any other contract or contracts with the Customer, in addition to its other remedies, upon the happening of any of the following events of default:
- (a) Where monies owed by the Customer to KLER remain outstanding; or
  - (b) If the Customer breaches, or fails to comply or repudiates, any obligation under this Contract or any other subsequent contract with KLER; or
  - (c) The Customer intimating that they will not pay any sum by the due date; or
  - (d) Any Goods seized by any other creditor of the Customer or any other creditor intimates that it intends to seize the Goods; or
  - (e) Any Goods in the possession of the Customer are materially damaged while any sum due from the Customer to KLER remains unpaid; or
  - (f) The Customer dies, becomes insolvent or subject to bankruptcy laws, calls a meeting of creditors, or if a company – enters into an arrangement with creditors or makes an assignment/compromise for the benefit of its creditors, or receivers, managers, liquidations (provisional or otherwise), administrators or any similar party is appointed in respect of the Customer (or any asset of the Customer), has any winding up petition presented against, or ceases to carry on business; or
  - (g) If the Customer ceases or threatens to cease carrying on business; or
  - (h) if the ownership or effective control of the Customer is transferred, or the nature of the Customer's business is materially altered.
- 11.3. Whether this Contract is ended by mutual agreement or due to any breach by the Customer, all monies owed by the Customer (including any interest or costs due) to KLER shall become immediately due and payable. Without limiting the effect of this clause 11.3 it shall survive the end of this Contract, and any other terms and conditions which by their nature are intended to survive.
- 11.4. Where any event of default occurs, KLER may appoint a receiver in respect of all Goods (including their proceeds) supplied to the Customer and any such receiver may take possession of the Goods and sell them and otherwise exercise all rights and powers conferred on a receiver by law.
- 11.5. Notwithstanding clause 11.1, it is further agreed that if the Customer owes KLER any money, the Customer agrees to reimburse KLER all costs and expenses suffered by KLER in their attempt to recover all overdue monies owed to KLER, (which may include charges incurred by KLER from their banking institute for dishonours or chargebacks, legal costs on a solicitor and own basis, inhouse admin fees or any fees charged during the debt recovery process, if a debt is passed to a recognised Debt Collection Recovery Agency).
- 12. CANCELLATION**
- 12.1. **By KLER:**
- (a) At any time before the Services are carried out upon provided the Customer 7 Business Days' notice in writing; and
  - (b) KLER agrees to refund the Customer any funds paid by the Customer in respect of the Goods or Services, less any amounts owing to KLER for any Goods purchased on the Customer's behalf where credits or refunds cannot be obtained from KLER's third- party suppliers; and
  - (c) KLER will **not be liable** to the Customer for any loss or damage the Customer suffers because KLER has relied on its rights covered in this clause.
- 12.2. **By the Customer:**
- (a) Prior to Delivery of the Goods and/or Services, by giving no less than 7 Business Days written notice, the Customer remains liable for any costs incurred by KLER (including, but not limited to, loss of profit) up to the time of cancellation; or
  - (b) Where the Customer cancels an order that has commenced:
    - (i) The initial notification may be by telephone but must be confirmed in writing or email within 7 Business Days; and
    - (ii) The Customer shall be invoiced for all work completed up until the date of cancellation. Any deposit paid prior to the commencement of the Services will be forfeited in lieu of monies due, however, the Customer remains liable for any monies due over and above any deposit paid; or
    - (iii) At KLER's discretion, where failure of clause 12.2(b)(i) occurs, the Customer may be required to pay the full quoted Price.
  - (c) Cancellation is **not accepted** by KLER if the new Goods have been used, if the Customer later changes their mind, unless the cancellation is subject to the Consumer Guarantees Act 1993.

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## 13. PRIVACY POLICY

- 13.1. In accordance with the Privacy Act 2020 and full disclosure, KLER has advised the Customer that Personal Information will be collected, handled, used, and stored about the Customer during the business relationship and thereby, the Customer grants consent to KLER to proceed with any inquiries with any third party necessary for the following purposes:
- (a) Assessing the Customer's credit risk (if any);
  - (b) Administering the Customer orders;
  - (c) Receiving information from one or more credit reference agencies, relating the credit record and repayment history of the Customer;
  - (d) Disclosing credit-related information to, and using the credit Services of, one or more credit reference agencies, on a continuing basis at any time and entirely at its discretion concerning the Customer's credit worthiness.
- 13.2. For the avoidance of doubt, all authorities given above are continuing authorities, to apply throughout the duration of the term of KLER and Customer's trading relationship.
- 13.3. The Customer, if an individual, has a right of access to Personal Information about the Customer held by KLER and may request correction of the information.
- 13.4. KLER agrees to destroy Personal Information upon the Customer's request in writing (or email) or if the Personal Information is no longer required unless it is required to fulfill the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- 13.5. If any Customer believes their privacy has been breached in any way, then a privacy complaint can be made to KLER's Privacy Officer via **email** at: info@kler.co.nz or **post** to: The Privacy Officer, Kerry Lindsay Engine Reconditioning Specialists Limited (*trading as*) Kerry Lindsay Engine Reconditioners, 455 Jackson Street Petone, LOWER HUTT 5012. KLER will respond to that complaint within 7 days of its receipt, should more time be needed to investigate the complaint then KLER will undertake to decide on a resolution as to the complaint within 20 days of the original date of receipt. If the Customer is not satisfied with the resolution provided by KLER, the Customer can make a complaint to the Privacy Commissioner at [www.privacy.org.nz](http://www.privacy.org.nz).
- 13.6. For the purposes of this clause 13, Personal Information has the meaning given to it in the Privacy Act 2020.

## 14. NOTICES

- 14.1. If either party gives or is required to give notice to the other party under this Contract, it must be:
- (a) In writing;
  - (b) Be given directly to the other party concerned;
  - (c) Directed to the recipient's address for service of notice, specified in the quotation or, proposal (Contract details) or as advised from time to time; or
  - (d) Sent by pre-paid post; or
  - (e) Email address that was given to KLER by the other party for the purposes of service.
- 14.2. **Notice is taken as received when:**
- (a) A notice given in accordance with clause 14.1 is taken to be received; or
  - (b) If given to the concerned party on delivery; or
  - (c) If sent by prepaid post, 5 Business Days after the date of posting for local or regional mail and 10 Business Days after the date of posting for international mail; or
  - (d) If sent by courier mail, immediately upon signed receipt thereof; or
  - (e) If sent by email, at the time denoted in an automated receipt notification received by the sender (in the absence of manifest error or tampering) or, if that function is not enabled, upon acknowledgement of receipt by the other party by return email or otherwise).

## 15. DISPUTE RESOLUTION

- 15.1. If either party has any dispute or disagreement in connection with, or arising out of, this Contract that party must give the other party written notice, clearly identifying, and providing full details of the dispute. Both parties if unable to do so themselves, will appoint one representative to act on their behalf to try to settle the dispute (each party shall bear their own costs associated with any mediation method chosen). Failure to settle the dispute by the representatives and/or by mediation within 10 Business Day (or whatsoever timeframe allowed) after service of the written notice shall allow either party to issue a further notice (subject to clause 14.1) to the other party stating that the dispute is now to be referred to a sole arbitration and the provisions of the Arbitration Act shall apply.
- 15.2. Nothing shall restrict either party's freedom to commence legal proceedings to preserve any legal right or remedy or protect and proprietary or trade secret right.
- 15.3. Furthermore, the Customer agrees not to contract any third party to replace KLER as their provider of the Services to be supplied under this Contract until the dispute resolution process in clause 15.1 has been completed, and then only if arbitration has found against KLER in its determination, and KLER is unable or unwilling to resolve, rectify or correct the issues that have led the arbitrator to find against KLER.

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## 16. ASSIGNMENT

- 16.1. Neither party shall assign, sub-license or otherwise transfer this Contract or any part of it to any other person, without not firstly obtaining written consent (hardcopy or email) of the other party. Such consents **shall not be unreasonably withheld or delayed**.
- 16.2. Unless specifically stated otherwise, in any consent to an assignment (as covered in clause 16.1), no **assignment shall release or discharge the assignor** from any liability or obligation under this Contract.
- 16.3. Furthermore, it is agreed between the parties that the Customer **cannot give any instructions or redirect the performance of the Services** of any of KLER's subcontractors or third-party suppliers that are engaged to carry out any part of the Services, without firstly obtaining **written consent from KLER**.

## 17. FORCE MAJEURE

- 17.1. Both parties are freed from any liability or obligations, if a Force Majeure event occurs:
  - (a) The obligations of a party under this Contract will be suspended to the extent that it is wholly or partially precluded from complying with its obligations under this Contract by Force Majeure; and
  - (b) A party affected by Force Majeure must notify the other party as soon as practicable of the Force Majeure and the extent to which that party is unable to comply with its obligations; and
  - (c) If a failure or delay in performance exceeds 60 Business Days, either party may immediately terminate this Contract by written notice to the other party.
- 17.2. Nothing in clause 17.1 shall excuse payment of any amount owing due or which becomes due under the terms of this Contract.

## 18. RIGHT TO EXECUTE A LIEN

- 18.1. Without prejudice to any other remedies available to KLER, it does not prevent KLER, where the Customer has left any item/s with KLER for repair, modification, exchange or for KLER to perform any other Services in relation to items supplied by the Customer and KLER has not received or been tendered the whole of the Price, or the payment has been dishonoured, to execute:
  - (a) A right to a lien in respect of the item/s while KLER is in possession of the Customer's item/s; and
  - (b) Upon serving the Customer with a notice (section 342 of the Contract and Commercial Law Act 2017) to remedy within 10 days; and
  - (c) Failure to comply with 18.1(b), KLER shall then have a right to sell the item/s in accordance with the provisions of section 341 of the Contract and Commercial Law Act 2017 (2017 No 5) by auction or private treaty.
- 18.2. The proceeds of a sale the item/s under this clause 18 will be applied in the following order:
  - (a) In payment of the expenses of the advertising and sale; and
  - (b) In payment of the amount due under the lien; and
  - (c) The surplus (if any) will, as soon as practicable after the completion of the sale, be paid to the Customer, the person entitled to it; or
  - (d) If any monies remain owing to KLER after such disposal, KLER may at its discretion continue to pursue recovery of such monies from the Customer.
- 18.3. The lien of KLER shall continue despite the commencement of proceedings, or judgement for the Price having been obtained.

## 19. MISCELLANEOUS

- 19.1. If any term or obligation of this Contract is at any time held by any jurisdiction to be negated, invalid or unenforceable, then it shall be treated as changed or reduced, only to the extent minimally necessary to bring it within the laws of that jurisdiction and to prevent it from being void and it shall be binding in that changed or reduced form. Subject to that, each provision shall be interpreted as severable and shall not in any way affect any other of these terms and conditions.
- 19.2. The legality, construction and performance of this Contract shall be governed by the laws of New Zealand. The Customer agrees that any dispute arising from the Contract between the two parties that cannot reasonably be resolved by mediation shall then be litigated only, by the jurisdiction of the Wellington Courts of New Zealand.
- 19.3. KLER WILL **NOT BE LIABLE** FOR ANY LOSS CAUSED BY A FAILURE BY THE CUSTOMER TO COMPLY WITH THE CUSTOMER'S OBLIGATIONS UNDER THIS CONTRACT. FURTHER, KLER'S TOTAL LIABILITY WILL NOT, UNDER ANY CIRCUMSTANCES, EXCEED THE PRICE OF THE GOODS OR SERVICES SUPPLIED OR PERFORMED, PURSUANT TO THIS CONTRACT.
- 19.4. KLER reserves the right from time to time to amend their terms and conditions, but for disclosure purposes any amendments shall always be provided in writing to the Customer and/or notified by email that the updated terms and conditions are posted and ready for viewing on KLER's website. The amended terms and conditions take effect for any new contracts from when the Customer accepts the updated terms and conditions and/or from when the Customer asks KLER to deliver/supply additional Goods and/or Services.

# GENERAL TERMS AND CONDITIONS – KERRY LINDSAY ENGINE RECONDITIONERS

## 20. DEFINITIONS AND INTERPRETATION

20.1. In this Contract, unless the context otherwise requires capitalised terms have the meaning set out below:

- (a) **“Business Days”** means a day on which banks are open for business in New Zealand other than a Saturday, Sunday, or public holiday.
- (b) **“Confidential Information”** means any information:
  - (i) Relating to this Contract;
  - (ii) Relating to a quotation, order or proposal or its contents;
  - (iii) Relating to a Customer of KLER
  - (iv) Disclosed by either party to the other party on the express basis that such information is confidential; or
  - (v) Which might reasonably be expected by either party to be confidential in nature.Provided that, where information relates exclusively to one party, nothing in this Contract will require that party to maintain confidentiality in respect of that information.
- (c) **“Contract”** means this Contract, inclusive of its terms and conditions contained herein, its schedules and annexures or any quotation, proposal, invoice, or document that forms part thereof and/or is deemed to be supplementary to this Contract.
- (d) **“Customer”** means the person/s, entities (including but not limited to, partnerships and/or a trust and where applicable shall include the Customer’s executors, administrators, successors and permitted assigns) or any person with written consent given by the Customer to act on the Customer’s behalf to request KLER to provide Good and Services as specified in any quotation, purchase order or other documentation.
- (e) **“Force Majeure”** means an event outside the reasonable control of either party, including an act of God, earthquake, adverse weather conditions, flood, storm, fire, explosion, war, rebellion, terrorism, strike, lock-out, industrial action national or global epidemics or pandemic and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government quarantine restrictions for Goods or individuals.
- (f) **“Goods”** means Goods, parts and/or equipment of any kind that KLER provides to the Customer as specified in any Contract, quotation, proposal, order, or any other documentation.
- (g) **“GST”** means Goods and Services Tax, as defined within the Goods and Services Tax Act 1985.
- (h) **“Intellectual Property”** means and includes (whether invisible, electronic or any other form) all brands, and symbols, names and images used in commerce, goodwill, logos, formulae, techniques, know-how, specifications, designs, drawings, copyright, manufacturing processes, patents, and trademarks (if any) whether registered or not, software (and source and object code), business strategies and contracts, confidential business information including market and marketing strategies.
- (i) **“KLER”** means **Kerry Lindsay Engine Reconditioning Specialists Limited** (*trading as*) **Kerry Lindsay Engine Reconditioners**, their successors, and assigns.
- (j) **“Personal Information”** means information about an identifiable individual by ways of their name, address, D.O.B., occupation, driver’s license details, electronic contact type details, such as, email, IP Address, social media such as: Facebook, or Twitter, or next of kin and any other contact information (if applicable) and were deemed relevant shall include any previous credit applications or credit reporting status. By the nature of such information, it shall always be considered, Confidential Information.
- (k) **“PPSA”** means Personal Property Securities Act 1999.
- (l) **“Price”** means the Price due under this Contract for the supply of Goods and/or Services as detailed in any quote or proposal or invoice and duly accepted by the Customer and (if applicable) shall include any GST payable.
- (m) **“Services”** means all Services (including any documentation, advice, consultancy, or recommendations and where these terms and conditions give allowance to, the terms ‘Goods’ or ‘Services’ may be identified and substitutable for the other) supplied by KLER to the Customer, and are as described on the invoices, quotation, authorisation form or any other forms as provided by KLER to the Customer.

20.2. In this Contract, unless the context requires otherwise:

- (a) **Headings:** Headings to clauses are for convenience only and shall not affect their interpretation;
- (b) **Joint obligations:** If there is more than one person or party to this Contract herein, this Contract shall bind all persons and parties jointly and severally.
- (c) **Parts of Contract:** References to this Contract shall including its clauses, cross references, schedules, appendices, or any other document relevant to the Contract;
- (d) **Plurals:** Words importing the singular shall include the plural and vice versa and words importing the masculine, feminine and neuter shall include all three;
- (e) **Price:** A reference to dollars or \$ is to an amount in New Zealand currency;
- (f) **Statutory Requirements:** A reference to any Act or Regulation shall include subsequent Acts or Regulations in amendment of, or substitution for, the same.

20.3. **Neutral Interpretation** - nothing in this Contract is to be interpreted against a party solely on the ground that that party put forward this Contract or a relevant part of it.