FOTHERGILL COATED FABRICS LIMITED

TERMS & CONDITIONS OF SALE
THESE CONDITIONS CONTAIN LIMITATIONS OF SELLER'S LIABILITY

1 **Interpretation**
In these Conditions:-

1.1 "**Buyer**" means the person who agrees to purchase the Seller's Products or acquire the Services from Seller subject to these Conditions;

1.2 "**these Conditions**" means the terms and conditions of business set out in this document;

1.3 "**the Contract**" means the agreement between Seller and Buyer for the sale and purchase of the Seller's Products or for the provision of the Services;

1.4 "**the Delivery Address**" means the address for delivery of the Products which shall be Buyer's principal place of business unless otherwise agreed between Buyer and Seller in Writing;

1.5 "**the Estimated Delivery Date**" means the date on which Seller estimates that the Products will be delivered;

1.6 **"Intellectual Property Rights"** means any and all intellectual property rights including, without limitation, patents, trade marks, rights in the nature of unfair competition, the right to sue for passing off, design rights, copyright, moral rights, rights in databases, domain names and all similar rights (whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world) together with any and all related goodwill and all extensions and renewals;

1.7 "**the Quotation**" means any quotation by Seller for the supply of the Seller's Products or the provision of the Services, which term includes any document issued by Seller indicating the terms on which the Seller's Products or the Services are to be supplied;

1.8 "**Seller**" means Fothergill Coated Fabrics Limited whose registered office is at Summit, Littleborough, Lancashire OL15 0LR.

1.9 "**the Seller's Products**" means the goods other than the Service Products (including any installment or part of them) which Seller is to supply to Buyer;

1.10 "**the Services**" means the services provided by Seller in manufacturing products from materials supplied by Buyer;

1.11 "**the Service Materials**" means any fabric, rubber and other materials supplied to Seller by Buyer in connection with the performance of the Services;

1.12 "**the Service Products**" means the goods (including any installment or part of them) resulting from the provision of the Services incorporating the Service Materials;

1.13 "**the Specification**" means any specification for the Products or the Services prepared or accepted by Seller for the purposes of the Contract including any variation of such specification which has been agreed in Writing between the parties;

1.14 "**the Products**" means the Seller's Products and the Service Products;

1.15 "**Writing**" means written communication or transmission by facsimile or email;

1.16 "**the Warranty**" means the warranty set out in clause 7.1 below; and

1.17 clause headings are for ease of reference and do not form part of or affect the interpretation of the Contract.

2 **Basis of sale**

2.1 These Conditions apply to all contracts for the sale of goods or the supply of manufacturing services entered into by Seller. By placing an offer or order with Seller, whether in respect of the Quotation or otherwise, Buyer offers to deal with Seller on these Conditions to the exclusion of all other terms, conditions, warranties or representations (other than those made fraudulently) with the exception of any terms specified in the Quotation or on Seller's acceptance of order form. The Quotation does not itself constitute an offer to supply the Products or perform the Services by Seller. The Contract is formed when Seller accepts Buyer's offer or order.

2.2 No variation to these Conditions shall be binding unless agreed in Writing and signed by authorised representatives on behalf of each of Buyer and Seller.

2.3 Seller's employees and agents are not authorised to make any representations concerning the Products or the Services unless confirmed by Seller in Writing. In entering into the Contract Buyer acknowledges that it does not rely on any such representations which are not so confirmed. Buyer irrevocably and unconditionally waives any right it may have to claim damages for and/or to rescind the Contract as a result of any misrepresentation (other than those made fraudulently) whether or not contained in the Contract.

2.4 Any typographical, clerical or other error or omission in the Specification, the Quotation or any price list, acceptance of offer, invoice or other document, literature or information issued by Seller shall be subject to correction without any liability on the part of Seller.

2.5 Any advice or recommendation given by Seller, its employees or agents to Buyer as to the storage, application or use of the Products which is not confirmed by Seller in writing is acted upon entirely at Buyer's own risk and Seller shall not be liable for any such advice or recommendation which is not so confirmed.

2.6 Buyer shall promptly supply all information and assistance reasonably requested by Seller in order to manufacture or supply the Products or perform the Services.

3 **Sale and purchase**

3.1 Buyer agrees to purchase the Seller's Products or acquire the Services (as the case may be) from Seller and Seller agrees to sell the Seller's Products or provide the Services (as the case may be) to Buyer.

3.2 Buyer shall not be entitled to cancel in whole or in part any order which Seller has accepted, whether orally or in writing.

3.3 Buyer shall accept manufacturing tolerances customary in the trade and weights or quantities varying by not more than 5% from the weight or quantity specified in the Contract and shall pay pro-rata for the actual weight or quantity delivered. The weight or quantity stated on Seller's despatch note shall be conclusive evidence of the amount delivered except in cases of manifest error.

3.4 If the Products are to be manufactured or any process is to be applied to them by Seller in accordance with any specifications submitted by Buyer or if the Products are to be marked with any trade mark at the request of Buyer or made using the Service Materials, Buyer shall indemnify Seller against all loss, damages, costs and expenses awarded against or incurred by Seller in connection with or paid or agreed to be paid by Seller in settlement of any claim for infringement of any Intellectual Property Rights or misuse of any confidential information of any other person or any other liability whatsoever which results from Seller's use of Buyer's specifications or the marking of the Products or use of the Service Materials or from the sale or supply of such Products by Seller pursuant to the provisions of sub-clauses 4.7 or 9.5 below.

3.5 Seller reserves the right to make any changes in the specification of the Products which are required to conform with any applicable safety or other requirements or which do not materially affect the quality or performance of the Products.

4 **Delivery**

4.1 Seller shall use its reasonable efforts to deliver the Products to Buyer at the Delivery Address on or around the Estimated Delivery Date, but time of delivery shall not be of the essence.

4.2 Seller shall be entitled to deliver the Products in installments in which case each instalment shall be treated as an entirely separate contract and any default or breach by Seller in respect of any such instalment shall not entitle Buyer to cancel any other instalment or terminate the Contract or treat the Contract as a whole as repudiated.

4.3 If the Products are damaged on delivery or less than the correct amount of the Products is delivered, then unless Buyer notifies Seller and the carrier (otherwise than by a note on the delivery note) within three days of delivery no claim against Seller may be made in respect of damage to or short delivery of such Products.

4.4 If the Products have not been delivered despite receipt by Buyer of the invoice from Seller relating to them, then unless Buyer notifies Seller within seven days after the date of such invoice no claim against Seller may be made in respect of non-delivery of those Products.

4.5 Buyer shall be deemed to accept the Products on delivery notwithstanding any late delivery by Seller.

4.6 Seller shall be entitled to require immediate payment of the price of the Seller's Products or the Services (as the case may be) or provision of security reasonably acceptable to Seller in the event that the provisions of sub-clauses 4.7 or 11.1 below apply. Failure by Buyer to comply with such requirement shall be considered to be an irremediable breach of Buyer's obligations under the Contract.

4.7 If Buyer fails to take delivery of the Products or fails to give Seller adequate delivery instructions before the Estimated Delivery Date, then, without prejudice to any other right or remedy available to Seller, Seller may:-

4.7.1 issue its invoice in respect of the Seller's Products or the Services (as the case may be) as if the relevant Products had been delivered on the Estimated Delivery Date; and/or

4.7.2 store the Products until actual delivery is made and charge Buyer for the costs (including insurance, handling and transport) of storage; and/or

4.7.3 sell or supply the Products (whether or not such Products were manufactured or marked by Seller pursuant to the provisions of sub-clause 3.4 above) to a third party in any country at the best price readily obtainable and (after deducting all storage and selling expenses) reimburse or credit Buyer with any balance over the amounts due to Seller under the Contract or otherwise; and/or

4.7.4 suspend other deliveries of the Products or performance of the Services

5 **Transit**

5.1 Seller reserves the right to choose the form of transport for the Products and the composition of each load.

5.2 For the purpose of this clause 5, the Products shall be considered to have been delivered as soon as they are ready to be unloaded at the Delivery Address which shall be considered to be the case when all ropes, chains, sheets, restraining bars and other means of fastening to or on the vehicle have been removed.

5.3 Unloading of the Products from the delivery vehicle shall be the entire responsibility of Buyer and on their arrival at the Delivery Address Buyer shall provide unloading facilities and shall unload them promptly. Seller shall be entitled to recover from Buyer all and any costs and expenses incurred as a result of Buyer's failure to do so.

6 **Prices and payment**

6.1 The price of the Seller's Products or provision of the Services shall be the price set out and shall be paid in the currency specified in the Quotation or, if not so specified, in Seller's acceptance of order.

6.2 Seller reserves the right, by giving notice to Buyer at any time before delivery, to increase the price of the Seller's Products or the Services to reflect any increase in the cost to Seller which is due to any factor beyond its control after the date of the Contract, any change in delivery dates or quantities of the Products or in the Specification which is requested by Buyer or any delay caused by any instructions of Buyer or failure of Buyer to give Seller adequate information or instructions.

6.3 The price is exclusive of any applicable duties and value added tax, which Buyer shall be additionally liable to pay to Seller.

6.4 Seller shall be entitled to invoice Buyer for all amounts due under the Contract on or at any time after delivery of the Products unless the Products are to be collected by Buyer or Buyer wrongly fails to take delivery of them, in which case Seller shall be entitled to invoice Buyer at any time after Seller has notified Buyer that the Products are ready for collection or (as the case may be) Seller has tendered delivery of the Products.

6.5 Buyer shall make payment to Seller in respect of all invoices in full and without any deduction or set off (whether in relation to such invoice or otherwise) within 30 days after the date of invoice unless other payment terms have been agreed. Time of payment shall be of the essence.

6.6 All payments made by Buyer to Seller whether pursuant to the Contract or otherwise shall be applied to invoices issued by Seller and to Products, Services or other goods listed in such invoices in the sequence determined in its discretion by Seller.

6.7 If full payment of any amount payable to it under the Contract is not received by Seller by the due date then, without prejudice to its rights, Seller shall be entitled to:

6.7.1 sue for the entire amount due; and/or

6.7.2 charge interest (both before and after any judgment) at the rate of 4% over the base rate from time to time of Barclays Bank PLC on the outstanding balance; and/or

6.7.3 recover from Buyer any reasonable expenses and any legal costs incurred by Seller in taking steps, including court action, to enforce Buyer's obligations under the Contract for the payment of any amounts Buyer owes Seller; and/or

6.7.4 require the immediate return to Seller of all goods agreed to be sold by Seller to Buyer in which the property has not passed to Buyer in accordance with the provisions of clause 9 below and Buyer hereby agrees to reimburse to Seller upon demand Seller's costs or expenses in recovering such goods; and/or

6.7.5 suspend further deliveries of the Products and any other goods which Seller has agreed to supply to Buyer and further performance of the Services and any other services which Seller has agreed to supply to Buyer; and/or

6.7.6 reimbursement of any currency losses suffered by Seller resulting from late payment where the price of the Seller's Products or the Services is not payable in sterling.

7 **Warranty and liability**

7.1 Seller warrants that the Products and any replacements for the Products supplied under this warranty will in all material respects and subject to Seller's manufacturing tolerances:

7.1.1 correspond with the Specification;

7.1.2 except to the extent that there is a conflict with the Specification, conform to any applicable data sheets issued by Seller;

7.1.3 where so specified in the Quotation or the Specification, be manufactured in accordance with specified MoD or CAA approval quality assurance procedures; and

7.1.4 where there is no Specification and there are no applicable data sheets, be made with sound materials and workmanship to normal standards accepted in Seller's industry.

7.2 Seller shall have no liability under the Warranty in respect of any defects in the Products or non-compliance with the Warranty arising from:

7.2.1 Buyer's failure to follow any instructions given by Seller relating to the Products;

7.2.2 any drawing, design, specifications or information supplied by Buyer;

7.2.3 fair wear and tear or damage to the Products; or

7.2.4 any defect in the Service Materials and Seller shall be under no obligation to examine the Service Materials for defects prior to processing or incorporation into the Service Products.

7.3 The Warranty shall not apply to any Products which are sold as seconds, remainder stock, samples, obsolete or sub standard.

7.4 No claim may be made under the Warranty unless the claim is made in Writing within 30 days after Buyer became or ought reasonably to have become aware of the circumstances giving rise to the claim and in any event before the earlier of:

7.4.1 6 months from the date of despatch of the Products by Seller; and

7.4.2 30 days after the Products have been used or put into process by Buyer.

7.5 In the event of any valid claim under the Warranty or otherwise under the Contract being made by Buyer, Seller shall be entitled (but not obliged) in full satisfaction of its liabilities to provide replacements for the Products in question. If it does not do so, Seller's liability for breach of its obligations in respect of any such Seller's Product shall not exceed the price paid for that Product and in respect of any Service Product shall not exceed the amount paid by Buyer for the Services in respect of such Service Product (or a rateable proportion of the total amount paid if such amount is not specified in the Contract) plus the costs of replacing the Service Materials comprised in such Service Products. Buyer shall preserve any Products which do not comply with the Warranty for inspection by Seller and shall return them to Seller at Seller's cost if Seller so requests.

7.6 Seller excludes all warranties, conditions, guarantees and representations (except those made fraudulently) as to quality or fitness for a particular purpose of or otherwise relating to the Products or provision of the Services whether express or implied, oral or in writing, except those expressly stated in the Contract. It is Buyer's responsibility to check that the Products are suitable for the purpose intended.

7.7 Notwithstanding any other provisions of the Contract, Seller does not seek to exclude its liability for any death or personal injury to the extent that it results from negligence or any other liability which it cannot exclude or limit as a matter of law.

7.8 Seller shall be liable to Buyer for any direct physical damage to Buyer's property other than death or personal injury to the extent that it results from the negligence of Seller or its employees in connection with the Contract up to a maximum of £1,000,000 in respect of any one event or series of events.

7.9 Except pursuant to sub-clauses 7.7 and 7.8 above and clause 8 below, Seller shall not in any event be liable for any indirect, special or consequential damages, howsoever arising or for loss of anticipated profits in connection with or arising out of the furnishing, functioning or use of the Products or the provision of the Services or any item or advice or service provided or otherwise in connection with the Contract and shall not be liable for any other damages except as provided in the Contract.

7.10 Except pursuant to sub-clause 7.7 above and clause 8 below, no action, regardless of form, arising out of the transactions under the Contract may be brought by Buyer more than two years after the cause of action has accrued.

8 **Third party rights**

8.1 All Intellectual Property Rights in or relating to the Products and the Services shall belong to Seller (even if developed solely for the purpose of supplying the Products or the Services to Buyer) except where such rights are identified in advance in any pre-contractual specifications submitted by Buyer.

8.2 Buyer shall promptly notify Seller of any claim that any of the Products constitute an infringement of any Intellectual Property Rights or a misuse of any confidential information belonging to any third party ("a Claim") and shall take no steps and make no admissions in relation to a Claim until Seller has had a reasonable opportunity to decide whether it wishes to conduct the defence of such Claim.

8.3 Seller shall be entitled at its own expense to conduct the defence of any Claim made against Buyer in which case:-

8.3.1 Seller shall have the sole control of the defence of such Claim and all negotiations for settlement or compromise;

8.3.2 Buyer shall allow its name to be used in proceedings if necessary and provide all reasonable assistance to Seller; and

8.3.3 Seller shall be entitled to any costs awarded in favour of Buyer.

8.4 Seller shall pay all damages and costs awarded against Buyer in a final non-appealable decision by a court or tribunal of competent jurisdiction (except to the extent that Buyer is entitled to recover such sums under any policy of insurance) directly resulting from a Claim **PROVIDED THAT**:-

8.4.1 Buyer has complied with the provisions of this clause 8; and

8.4.2 Buyer shall take all steps reasonably possible to mitigate or reduce any damages and costs which may be awarded against it as a result of such Claim.

8.5 If a Claim is successful or Seller considers that it is likely to be successful, Seller may, at its option or as part of a settlement or compromise, procure for Buyer the right to continue using the Products which are the subject of such Claim, modify them so that they are non-infringing or terminate the Contract in so far as it applies to those Products, in which latter case Seller shall refund to Buyer the price paid for such Products or (in the case of Seller's Products) the price paid by the Buyer for the Services in respect of such Service Products (or a rateable proportion of the total amount paid if such amount is not specified in the Contract) plus the cost of replacing the Service Materials comprised in such Service Products less in each case depreciation on a straight line basis over the life of the Products as determined by Seller.

8.6 In no event shall Seller have any liability under this clause 8 with respect to any Claim falling within the scope of sub-clause 3.4 above or resulting from the use of the Products otherwise than for their natural purpose or the purpose for which Seller knew it supplied them to Buyer if use for such purposes would not have given rise to a successful Claim or for their use in combination with any other product or equipment not supplied by Seller if use without such combination would not have given rise to a successful Claim.

8.7 This clause 8 states the entire obligation and liability of Seller with respect to infringement of Intellectual Property Rights and misuse of confidential information. Seller's liability under this clause shall not in any event exceed the amount paid to Seller under the Contract.

9 **Risk and title**

9.1 Risk of loss of or damage to the Products shall pass to Buyer on delivery of the Products or, if Buyer refuses to accept delivery or fails to give adequate delivery instructions before the Estimated Delivery Date, on such refusal or the Estimated Delivery Date as appropriate. Buyer shall insure the Products from that time until ownership of and title to them passes to Buyer.

9.2 Notwithstanding delivery and the passing of risk in the Seller's Products to Buyer, or any other provisions of the Contract, ownership of and title to the Seller's Products shall not pass to Buyer and shall be retained by Seller until Seller has received in cash or cleared funds payment in full of the price of the Seller's Products and of the price of any other goods supplied to Buyer by Seller at any time whether or not the price has become due.

9.3 If any of the Seller's Products owned by Seller is incorporated into other goods and is not identifiable in and separable from the resulting composite or mixed goods, title to the resulting composite or mixed goods shall vest in Seller and shall be retained by Seller for so long as and on the same terms as those on which it would have retained title to the Seller's Products in question.

9.4 Until ownership of and title to all goods owned by Seller passes to Buyer, Buyer shall hold the goods in Buyer's possession or control as Seller's fiduciary agent and bailee and shall keep them separate from those of Buyer and third parties and properly stored, protected and insured and identified as Seller's property. Buyer shall be entitled to resell or use such goods in the ordinary course of its business as principal.

9.5 For the avoidance of doubt, the Seller's Products, all other goods supplied to Buyer by Seller and all goods into which the Products or such other goods have been incorporated which are in Buyer's possession shall be presumed to belong to Seller unless Buyer can prove otherwise.

9.6 Until ownership of and title to any goods owned by Seller passes to Buyer (and providing the goods are still in existence and have not been resold), Seller shall be entitled at any time to require Buyer to deliver up such goods to Seller and, if Buyer fails to do so forthwith, to enter upon any premises of Buyer or any third party where such goods are stored and repossess them. Buyer shall procure that any third party which holds such goods shall permit Seller to take possession of them and shall indemnify Seller against any liability which it may incur to such third party in connection with taking or attempting to take possession of them. Seller shall be entitled to use or dispose of such goods as it wishes. Unless Seller expressly elects otherwise any contract between it and Buyer for the supply of the Seller's Products shall remain in existence notwithstanding any exercise by Seller of any of its rights under this clause 9.

9.7 Buyer shall not be entitled to pledge or in any way charge by way of security for any indebtedness any goods which remain the property of Seller, but if Buyer does so, all monies owing by Buyer to Seller shall (without prejudice to any other right or remedy of Seller) forthwith become due and payable.

10 **Service Materials, Service Products and Lien**

10.1 Risk of loss of or damage to the Service Materials shall pass to Seller on delivery provided that Seller's aggregate liability to Buyer in respect of any loss of or damage to the Service Materials shall not exceed the cost of replacing them.

10.2 Ownership of and title to any Service Materials and the Service Products shall at all times remain with Buyer but Seller shall be entitled to a lien over all Service Materials, Service Products and other goods belonging to Buyer in Seller's possession for the unpaid price of the Services and the unpaid price of any other goods and services supplied to Buyer by Seller under any other contract.

11 **Termination**

11.1 Seller shall be entitled to terminate the Contract forthwith by notice in Writing to Buyer if:-

11.1.1 Buyer commits an irremediable breach of the Contract, persistently repeats a remediable breach or commits any remediable breach and fails to remedy it within 30 days of receipt of notice of the breach requiring remedy of the same; or

11.1.2 Buyer makes any voluntary arrangement with its creditors or (being an individual or firm) becomes bankrupt or (being a company) becomes subject to an administration order or goes into liquidation (otherwise than for the purposes of solvent amalgamation or reconstruction); or

11.1.3 an encumbrancer takes possession, or a receiver is appointed, of any of the property or assets of Buyer; or

11.1.4 Buyer ceases to carry on business; or

11.1.5 where Buyer is resident in a jurisdiction other than England and Wales, an event similar to any of those specified in sub-clauses 11.1.2 and 11.1.3 occurs to or in relation to Buyer; or

11.1.6 Seller reasonably apprehends that any of the events specified in sub-clauses 11.1.2 to 11.1.5 inclusive is about to occur in relation to Buyer and notifies Buyer accordingly.

11.2 In the event of termination by Seller pursuant to sub-clause 11.1 above then, without prejudice to any other right or remedy available to Seller, Seller shall be entitled to cancel the Contract or suspend any further deliveries under it without any liability to Buyer and, if the Products have already been delivered but not paid for, the price of the Seller's Products or the Price of the Services as appropriate shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.

12 **Laws, Regulations and Licences**

12.1 Buyer shall comply with all laws and regulations relating to the ownership and use of the Products including health and safety requirements, export control legislation and US re-export control legislation and shall indemnify Seller against any loss suffered or expense incurred by Seller as a result of Buyer failing to do so.

12.2 Seller does not warrant that any necessary export licences for Buyer's intended destination for the Products will be available and it is Buyer's responsibility to obtain any necessary licences unless Seller agrees to do so in the Quotation or on its order acceptance form. Buyer shall supply any information or assistance requested by Seller in connection with its application for any necessary licences.

12.3 Buyer shall ensure that all appropriate safety information (whether or not supplied by Seller) is distributed and drawn to the attention of its customers and all others (including its employers) who require it for the safe handling or use of the Products.

13 **General**

13.1 The remedies available to Seller under the Contract shall be without prejudice to any other rights, either at common law or under statute, which it may have against Buyer.

13.2 The failure or delay of Seller to enforce or to exercise, at any time or for any period of time, any term of or any right, power or privilege arising pursuant to the Contract does not constitute and shall not be construed as a waiver of such term or right and shall in no way affect Seller's right later to enforce or exercise it nor shall any single or partial exercise of any remedy, right, power or privilege preclude any further exercise of the same or the exercise of any other remedy, right, power or privilege.

13.3 The invalidity or unenforceability of any term of, or any right arising pursuant to the Contract shall not in any way affect the remaining terms or rights which shall be construed as if such invalid or unenforceable term or right did not exist.

13.4 Any notice or communication in Writing required or permitted to be served on or given to either party under the Contract shall be sent to the other party at its address which it has last notified to the sending party prior to the date of the notice and shall be deemed to have been served or given when actually received or, if sent by mail to such address and returned marked "gone away" or "not known" or to the like effect, on return of such mail.

13.5 The Contract is personal to Buyer and Buyer may not assign, transfer, sub-contract or otherwise part with the Contract or any right or obligation under it without the prior written consent of Seller.

13.6 Seller shall not be liable to Buyer if its performance of its obligations under the Contract (including refusal of any export or other licence which Seller is obliged to obtain under the Contract) is prevented or hindered due to any circumstances outside its control provided that each party shall use its reasonable endeavours to remove or avoid the effects of such cause(s) of non-performance and shall continue performance of its obligations under the Contract as soon as reasonably possible whenever such cause(s) cease(s) to have effect.

13.7 No agent of Seller has any authority to accept any order or make any contract binding on Seller.

13.8 The Contract contains all the terms agreed by the parties relating to the subject matter of the Contract and supersedes any prior agreements, understandings or arrangements between them, whether oral or in writing, and no representation (unless made fraudulently), undertaking or promise shall be taken to have been given or been implied from anything said or written in negotiations between the parties prior to the Contract except as set out in the Contract.

13.9 In the event of any conflict between the provisions of the Contract and of any other document referred to in it, the provisions of the Contract shall prevail.

13.10 The construction, validity and performance of the Contract is governed by the law of England and the parties accept the jurisdiction of the English Courts. The Buyer shall have the right to commence proceedings solely in the English Courts but Seller shall have the right to commence proceedings either in the English Courts or in the courts of the country in which the Products are delivered or of the country in which Buyer is resident or which otherwise have jurisdiction.

Updated 1st July 2019