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| **Portable Sanitation Europe Limited Guidance Notes to assist in the use and incorporation of Terms and Conditions of Hire, Sale & Supply of Equipment and Services** |
| **IMPORTANT** |
| To ensure that the Terms and Conditions of Hire, Sale & Supply of Equipment and Services (“Conditions”) have legal effect please read and abide by the following notes.As these Guidance Notes do not deal in any detail with the content of the Conditions provided by PSE it is therefore your responsibility to ensure that you are familiar with the Conditions. Any queries relating to the actual Conditions should be directed to PSE.The PSE Conditions may be used for both hire and sale contracts for Equipment and/or ancillary services in England and Wales.If you sell to individuals or partnerships, the duration of the hire of Equipment must be limited to 3 months to avoid being regulated by the Consumer Credit Act. If it exceeds this you may not be able to enforce the contract. |
| **1** | **GENERAL** |
| 1.1 | It is imperative that your Conditions are incorporated into the contracts that you make for the hire and/or sale of your Equipment and/or Services, as failure to do so will result in your Conditions not forming part of the contract, meaning you will not be able to rely on them. |
| 1.2 | A contract can be made orally, electronically or in writing and will come into existence as soon as agreement is reached on the most important issues such as the identity of the Equipment and/or Services involved. While it is not even always necessary to agree the price (because courts may on occasion imply terms where necessary), it is nevertheless preferable to complete a written Contract Term Sheet for signature by both parties. A sample Contract Term Sheet is included in this pack. |
| **2** | **STATIONERY** |
| 2.1 | Prior to making a contract you should make every effort to draw your Conditions to the customer’s attention. |
| 2.2 | This may be done by printing your Conditions (or as a minimum referring to the fact they apply) on as many pre-contractual documents as possible. For example these might include quotation forms, order forms, order acknowledgement forms and/or hire forms. |
| 2.3 | A common approach to take is to print your Conditions on the reverse of a document. If you choose to take this approach you must clearly and prominently state on the front of the document that important terms of business which will affect the customer’s rights are set out on the reverse of the document. |
| 2.4 | As noted above, it is always preferable to obtain your customer’s signature agreeing that your Conditions apply as this can reduce the potential for future dispute as to whether your Conditions apply to the contract and/or were accepted by the customer. You may wish to use the following suggested wording:**[I confirm that I am authorised on behalf of the customer to enter into this contract.] [On behalf of the customer] I accept that the hire and/or sale of the Equipment is subject to the terms and conditions printed on the reverse of this form. I confirm that I have read and understood the terms and conditions.** |
| 2.5 | The words in brackets should be deleted where the contract is with an individual acting in his/her personal capacity. |
| **3** | **ORAL CONTRACTS** |
| 3.1 | Where a contract is made orally, e.g. by telephone or in person, staff should make it clear over the call that the contract is subject to your Conditions before the contract is concluded. Use of standard scripts can be used to ensure that staff adhere to this practice as well as requiring staff to confirm that they did indeed inform the customer that the contract would be subject to your Conditions. The place where orders are recorded should include a tick box that the call handler must tick too indicate that the Conditions were brought to the attention of the customer. |
| 3.2 | You should make every effort to supply your Conditions to the customer both before and at the time of the contract being formed. Your Conditions should also be available to customers on request. If you cannot supply your Conditions to the customer before the contract is formed, then they should be sent to the customer at the earliest opportunity and at the latest when the goods are delivered or the contract is performed. |
| 3.3 | In a hire outlet situation you may wish to consider displaying readable copies of your Conditions within the shop so that customers have the opportunity to study them before hiring goods. |
| **4** | **POSTAL, FAX AND WRITTEN CONTRACTS** |
| 4.1 | You must aim to win the so-called “battle of the forms” by ensuring that your Conditions appear on the last document to pass between you and your customer before the contract is concluded. In the “battle of the forms” it is said that “he who fires the last shot wins”, meaning that the terms of business contained in the last document passing between two parties before a contract is concluded will usually be those which apply to the contract. |
| 4.2 | It is easy to envisage a scenario where you send out a quotation with your Conditions and you receive a purchase order containing the purchaser’s terms and conditions. In order to win the “battle of the forms” in such a scenario you would need to either send back an order acceptance form containing your own Conditions, or find some other way of bringing it to the customer’s attention that you do not accept its terms and conditions and that the contract is to be subject to your Conditions. |
| 4.3 | You should ensure that any order placed by a customer by post or fax is acknowledged and accepted together with a reference to it being accepted on your Conditions. |
| 4.4 | As mentioned above, where acceptance is oral, standard scripts should be used to ensure that staff adhere to the standard acceptance procedure together with some note or evidence of this. Where acceptance is by fax or post, standard letters of acknowledgement can be used. A copy of your Conditions should also be sent with this response. |
| 4.5 | Rather than returning documents that originate from your customers, you should respond to any terms put forward by your customer with a document which contains or refers to your own Conditions. |
| 4.6 | This could be achieved by rubber stamping orders placed by customers with the phrase: “accepted on [**INSERT COMPANY NAME**]’s Conditions” and returning a copy to your customer. |
| **5** | **TIMING** |
| 5.1 | It will not be sufficient to incorporate your Conditions into the contract to merely refer to them after the contract has been formed, for example by attaching your Conditions to any invoices. This is because the “battle of the forms” must be won before the contract is formed. By the time an invoice is dispatched the contract will have been made. |
| 5.2 | Nonetheless, it is still common to see terms of business printed on invoices as this can, in very limited circumstances, assist in establishing a course of dealing on your terms of business. |
| **6** | **CREDIT ACCOUNTS** |
| 6.1 | You may wish to consider sending a form to all new customers asking them to set up a credit account. This would be particularly useful for business customers who provide repeat business. |
| 6.2 | This form would seek details of the customer, such as its full name and in the case of a company its registered number and registered office, details of trade referees and other relevant information. Having this information can be very useful when pursuing customers for late payment. |
| 6.3 | This form would be accompanied by your Conditions and would set out that your customer accepts that your Conditions will apply in all contracts between you and the customer to the exclusion of all other terms of business. The customer’s signature of the form would operate to both open an account with you and accept your Conditions. |
| **7** | **CONSUMERS AND BUSINESSES** |
| 7.1 | These Conditions will cover both business and consumer contracts. However, it is important to note that in relation to these Conditions, a number of the exclusions and/or limitations as well as other terms may not be enforceable against consumers. |
| 7.2 | The Conditions include asterisks (\*) to highlight that some provisions may not be applicable to consumers, in an aim to comply with relevant consumer regulations. However, there may still be exclusions and/or limitations that may not be enforceable. This will vary from case to case. |
| 7.3 | Even in a business context, exclusions and/or limitations may not be enforceable if they are not reasonable. |
| **8** | **JURISDICTION** |
| 8.1 | Condition 17.7 states that the governing law that will apply to a Contract made under these Conditions will be the law of the country where you are located. This is to ensure that the governing law will always be that of where the relevant PSE member is situated. |
| 8.2 | Specific advice on the amendments that have been made has not been sought from lawyers based in any other jurisdiction other than that of England and Wales. If you are based outside England and Wales you may wish to obtain local legal advice on the amendments that have been made as there is inevitably a risk that the Conditions may not fully comply with Scottish or Northern Irish law. You should be aware that consumers in other jurisdictions may have rights under applicable consumer legislation and we would recommend that you seek legal advice in this respect. PSE has legal advisor contacts in other jurisdictions and may be able to give some assistance by arrangement. |
| **9** | **MEMBER SPECIFIC CONDITIONS** |
| 9.1 | Please note that some sections of the Conditions are in square brackets and highlighted yellow. This signifies that these sections may be altered by you so as to ensure that the Conditions suit your individual business as much as possible. Below is advice on how you should approach such sections in the Conditions. |
| 9.2 | **“We, Us, Our or Ours” - Condition 1.1:**Insert the name of the relevant PSE member. |
| 9.3 | **Validity of Quotations - Condition 2.1:** Decide how long you want any quotation given by you to be valid for. |
| 9.4 | **Acceptance of Orders - Condition 2.3:** You may wish to include the additional wording “in Writing” to ensure that there is certainty over when the Contract iscreated. However, some PSE members may feel that agreeing every Contract in writing would be too much of an administrative burden. |
| 9.5 | **Events Management Company - Condition 3.3:** The wording in square brackets and highlighted in yellow should only be included in these Conditions by members who are not events management companies. |
| 9.6 | **Minimum Hire Period - Condition 4.3:** Decide how long you wish your standard minimum Hire Period to be. |
| 9.7 | **Cancellation - Condition 6:** You may change the time periods for when certain cancellation fees arise and the actual percentage of the Charges making up those cancellation fees to suit your commercial circumstances. |
| 9.8 | **Ownership of Waste - Condition 10.4:** Where a member and the activity it carries out falls within the "own account" definition of European Regulation 1702/2009 (on page 131 of the FTA 2012 Yearbook), the wording in condition 10.4 may be used to demonstrate that there is no question about the ownership of the waste and that it passes to the member upon collection. The result of this is that the member would therefore only require a Restricted Operator Licence, thus making operating costs much cheaper. There are a number of requirements that a member must satisfy to fall within the “own account” definition for a Restricted Operator Licence to be sufficient. Please seek advice from the FTA as to whether you can operate under a Restricted Operator Licence. If so, it is advisable to include condition 10.4. |
| 9.9 | **Limitation of Liability (1) - Condition 15.3:** The amount of £1,000,000 is included in this condition as it is expected that your insurance should cover this liability cap, however please do confirm this. If your insurance does not cover this cap, then the figure should be altered to a suitable amount that you are covered for. Note that if you choose a cap that is much lower than your maximum insurance cover and this clause is challenged, the courts may find that it is unfair and therefore void. This would mean that you would be fully liable for any property damage. |
| 9.10 | **Limitation of Liability (2) - Condition 15.6:** You may decide how the overall cap on your liability is calculated as it is up to you how much you limit your liability by, provided this is reasonable under legislation such as UCTA. Often total liability is limited to the higher of a percentage of the Contract price (e.g. the “5 times the amount of the Charges” provision) or a specified figure (e.g. the £1,000 provision). It is important to note that limiting your liability too much could lead to the Conditions being challenged by a customer and declared unfair by a court and therefore unenforceable. It is therefore important for you to decide on a reasonable figure to limit your liability to. As the current wording states that you will accept any additional liability beyond these figures that is covered by insurance this is compliant with UCTA (provided that the stated insurance does exist). |
| 9.11 | **Waiting Charges - Schedule 2, Paragraph 3:** Decide how long you will allow for waste removal services. |
| 9.12 | **Prices - Schedule 2, Paragraph 4:** This paragraph contains various statements regarding how you will charge for the tanker services set out in Schedule 2. These will need to be adapted to suit your commercial circumstances. |
| These Guidance Notes only offer a brief explanation of some of the procedures that you may wish to adopt in order to ensure that your Conditions have been validly incorporated. If you have further queries please contact PSE.Portable Sanitation Europe, November 2015 |