

FASCEL MECHANICAL TERMS & CONDITIONS REF FASCEL 11/13 rev 2

- 1.0 Definitions**
The following definitions shall apply to this Sub-Contract
- 1.01** The "Authorised Person" means the person or persons identified by the Contractor as having the authority to issue an Instruction for additional and/or varied Works to the Sub-Contractor. No other person shall have any such authority implied or purported.
- 1.02** The term "Complete" or "Practically Complete" in respect of the Sub-Contract Works shall be as stated in the Head Contract and requires that the Sub-Contract Works must be complete in every facet including the correction of any defects and the issue of all necessary drawings and manuals and the execution of any collateral warranty required in full compliance with any requirement under the Head Contract and to the entire satisfaction of the Contractor. Where Phased, Sectional or Partial Completion (or similar) apply under the Head Contract then the same definitions, obligations and dates shall apply under the Sub-Contract as if they were incorporated herein.
- 1.03** The "Contractor" means Fasel Mechanical (Facel).
- 1.04** The term "Direction" shall mean a requirement made by the Contractor to the Sub-Contractor in connection with the performance of the Sub-Contract Works. A Direction shall not constitute a Variation.
- 1.05** The term "Employer" shall mean the contractor in writing by Facel under the Head Contract.
- 1.06** The "Head Contract" means the contract between Facel and its Employer.
- 1.07** The term "Instruction" shall mean any written instruction of Facel and/or a copy of any instruction, specification, schedule or drawing issued by the Employer and forwarded by Facel to the Sub-Contractor that varies the Works, including omissions thereto.
- 1.08** The term "Notice" shall mean any formal notification required by the Sub-Contract and/or the Head Contract. All Notices shall be issued by facsimile, first class post or recorded delivery to the registered office of the parties. Email shall not be used for the service of any Notice. The Contractor shall be in writing by Facel.
- 1.09** The term "Programme" shall mean any document that shows or describes the period and/or sequence and/or duration and/or start and completion dates for the Works.
- 1.10** The "Project" means all of the work to be undertaken by the Contractor under its contract with the Employer including the Sub-Contract Works.
- 1.11** The "Site" shall mean the location where the Works are to be performed by the Sub-Contractor as stated on the face of the Sub-Contract Order.
- 1.12** The "Sub-Contract" (SC) means the party named on the face of the Sub-Contract Order.
- 1.13** The "Sub-Contract Documents" (SCD) means the documents listed in and/or annexed to the Sub-Contract Order.
- 1.14** The "Sub-Contract Order" (SCO) means the order issued by Facel that lists the SCD and includes the agreed price for the Sub-Contract Works.
- 1.15** The "Sub-Contract Terms and Conditions" (T&C's) means the terms and conditions included within this document.
- 1.16** The "Sub-Contract Agreement" (SCA) means the entirety of the SCD, SCO and the T&C's.
- 1.17** The "Sub-Contract Agreement" (SCA) means the entirety of the SCD, SCO and the T&C's.
- 1.18** The "Valuation Dates" are the dates at which the SC submits to the Contractor its detailed and fully substantiated application for payment in accordance with the terms of the SCO.
- 1.19** The term "Variation" shall have the meaning ascribed to it in Clause 7.0 below.
- 1.20** The "Sub-Contract Works" shall mean the scope of work to be undertaken by the SC as described more fully in the SCO and SCA and/or as may be necessary for the complete and full performance of the Project and/or as may be Directed or Instructed by the Contractor.
- 2.0 Sub-Contractor's Performance**
The SC shall with due diligence and in a good and workmanlike manner regularly carry out and complete the Sub-Contract Works in accordance with the SCA and all the requirements of the Head Contract which the SC is deemed to be fully aware of. The SC shall commence, carry out and complete the Sub-Contract Works in a timely manner and/or in accordance with any requirement, sequence or duration included within the SCO or as otherwise Directed by Facel in order to ensure that Facel shall not be in breach of any obligations under the Head Contract. If Facel considers that the SC is not complying with this requirement and is not performing his Works regularly and/or diligently then Facel may at its sole discretion and without prejudice to any other rights and remedies, employ others to perform the SC's Works and/or augment or enhance the SC's work force on the Site at the cost of the SC and Facel shall be entitled to deduct the cost of same from any sums due to the SC and/or recover same as a debt from the SC. The SC shall provide all necessary method statements, health and safety procedures and policies and any necessary CDM documentation in order to comply with the requirements of the Head Contract.
- 3.0 Head Contract Obligations**
The SC shall set itself out to the contrary in these T&C's, assume, observe, perform and be bound by all the obligations of Facel under the Head Contract as if the same had been repeated herein with such modifications as may be required to give effect thereto. Nothing contained in this requirement shall be construed as creating any contract between the SC and the Employer and the SC shall not without the written Direction of Facel liaise with, meet or communicate with in any way the Employer and/or any person, consultant or advocates representing the Employer. The SC hereby acknowledges that any breach by it of the SCA and/or the Head Contract may result in Facel becoming liable in damages (including but not limited to liquidated damages) under the Head Contract and in order to obtain the same, Facel will, at the risk of the SC, in so far as is in the opinion of Facel reasonably and lawfully possible to do so, obtain for the SC the like rights in relation thereto (and to the extent thereof, but no further) as Facel has under the Head Contract as if the same had been repeated herein with such modifications as may be required to give effect thereto. The said powers shall be exercisable by Facel in any case irrespective of whether the Employer has exercised like powers in relation thereto under the Head Contract. Where it is a requirement of the Sub-Contract that the SC shall enter into a form of Collateral Warranty, then the SC shall execute and return the Collateral Warranty within 7 days of any written request by VCL. Should the SC fail to execute the Collateral Warranty in accordance with VCL's written requests, then not withstanding any term of the SCA, it is hereby acknowledged and agreed that VCL shall have the power or attorney to execute the Collateral Warranty on behalf of the SC.
- 4.0 Powers of the Contractor**
Facel shall have the like powers in relation to the Head Contract as the Employer has in relation to the Project under the Head Contract and the SC shall have like obligations in connection with such powers and, provided that the SC complies with all the requirements that are necessary to enable Facel to obtain the same, Facel will, at the risk of the SC, in so far as is in the opinion of Facel reasonably and lawfully possible to do so, obtain for the SC the like rights in relation thereto (and to the extent thereof, but no further) as Facel has under the Head Contract as if the same had been repeated herein with such modifications as may be required to give effect thereto. The said powers shall be exercisable by Facel in any case irrespective of whether the Employer has exercised like powers in relation thereto under the Head Contract. Where it is a requirement of the Sub-Contract that the SC shall enter into a form of Collateral Warranty, then the SC shall execute and return the Collateral Warranty within 7 days of any written request by VCL. Should the SC fail to execute the Collateral Warranty in accordance with VCL's written requests, then not withstanding any term of the SCA, it is hereby acknowledged and agreed that VCL shall have the power or attorney to execute the Collateral Warranty on behalf of the SC.
- 5.0 Compliance with Head Contract**
Without prejudice to the generality of this Term, whenever Facel is required under the Head Contract to give any return, account, application, notice, programme, drawings, specification or any other information to the Employer or any other party named within the Head Contract then the SC shall in relation to the SCA give a similar return, account, application, notice, programme, drawings, specification or any other information in writing to Facel to enable Facel to comply with the terms of the Head Contract and shall do so in order to allow Facel to comply with any timescales contained within the Head Contract and any conditions precedent with regard to Facel's entitlement. If by reason of any breach by the SC of this provision Facel is prevented from recovering any sum that would otherwise have been due from the Employer and/or prevented from obtaining any extension of time resulting in the incurrance of damages by Facel but without prejudice to any other right or remedy that Facel may possess or have access to under the SC or at law, Facel may deduct any sum, damage or loss incurred by Facel from any sum due to the SC and/or may recover such sum, damage or loss as a debt from the SC.
- 6.0 Conflicts & Ambiguities**
In the event of a conflict, inconsistency or ambiguity in or between these Terms and Conditions and any other terms or documents comprising the SCA then the Contractor shall have the exclusive authority to decide which term or terms shall prevail. Any Direction issued by the Contractor to correct any conflict, inconsistency or ambiguity shall not constitute a Variation unless it is Instructed as a Variation by Facel. It is agreed by the parties that all general terms and conditions or qualifications contained within any quotation from the SC and/or submitted by the SC are hereby excluded from the SCA. The principle of Contra Proferentem shall not apply under the SCA.
- 7.0 Variations**
The Authorised Person may on behalf of Facel Instruct any Variation to add to, omit from or change any part of the Sub-Contract Works. When so instructed to do so by Facel, the SC will before proceeding with the Variation first provide Facel with a written quotation for the Variation in such detail as Facel may require. Facel shall be under no obligation at any time to accept any quotation. Where Facel does not instruct that a quotation be provided by the SC then the SC shall proceed with the Variation forthwith without any agreement to price, and the value of the Variation shall be determined by Facel in accordance with the provisions of the Head Contract for Variations, compensation events or changes however they may be described. Any rates or prices included within the SCA (where relevant) will be used to value the Variation and/or where there are no such rates or prices and the rates and prices that are fair and reasonable will be used. Daywork or time and materials sheets shall not be used to value Variations unless first instructed in writing by Facel and the submission of such returns must be fully compliant with Clause 5.0 above. Where the Head Contract requires any Variation/change/compensation event or the like to be submitted in a particular format, timescale and/or detail, then the SC shall provide any variation/change/compensation event or the like in the format required by the Head Contract and in a timescale to enable Facel to comply in accordance with Clause 5.0 above. In the alternative if Facel so directs, the SC will provide a full breakdown for any genuine Variation performed by Facel Construction including measurements, marked up drawings, quotations, invoices, time sheets, labour notes, labour rates and labour prices. Where there is no agreement between the parties the rates and prices will be subject to the addition of overhead and profit reasonable in all the circumstances, but in any case no greater than the SC can demonstrate using an average of the SC's last 5 years audited accounts.
- 8.0 Directions & Instructions**
The SC shall immediately comply with any and all Directions and Instructions issued by Facel. The format of any Direction or Instruction may include email, correspondence served by post or facsimile but not meetings of minutes, the issue of drawings (unless otherwise instructed by Facel) or verbal communications. If the SC purports to issue a written confirmation of a verbal instruction it shall be of no effect unless countersigned by the Authorised Person. For the avoidance of doubt Requests for Information (RFI), Technical Queries (TQ) and Drawing Revision's shall not constitute an Instruction or a Variation unless otherwise stated in writing by Facel.
- 9.0 Protection**
The SC shall protect and maintain the Sub-Contract Works in good order and workmanlike condition until Complete or Practically Complete in accordance with Clause 1.02 above. It shall be a condition precedent to the release of the retention under the SCA that the Contractor shall have confirmed in writing to the SC that the SC Works are Complete or Practically Complete. The SC shall be liable for and shall immediately make good at his own expense any defects in the Sub-Contract Works arising prior to Completion and/or after Completion. In the event that the SC fails to remedy any defect notified to him by Facel and/or fails to take steps to remedy the defects within 3 days of any Direction to do so by Facel, then Facel may at its own discretion employ others to remedy the defect on behalf of the SC and may recover any costs, losses or damages incurred in so doing from the SC as a debt.
- 10.0 Injury**
The SC shall:
10.1 Be liable for and shall indemnify Facel against any expense, liability, loss, claim or proceedings, whether arising under statute or a common law, in respect of any personal injury to or the death of any person, or in respect of any loss of or damage to any property including the Sub-Contract Works, arising in the course of or caused by the carrying out of the Sub-Contract Works, to the extent that the same is due to any negligence, breach of statutory duty, omission or default of the SC and/or his servants or agents.
10.2 Without prejudice to his obligations to indemnify Facel under Clause 10.1, the SC shall maintain such insurance's as are necessary to cover his liability under the SCA including any requirement for professional indemnity insurance. The insurance in respect of claims for personal injury to or the death of any person employed by the SC in the course of such employment shall comply with the Employers Liability (Compulsory Insurance) Act 1969 or any amendment or re-enactment thereof. For all other claims to which Clause 10.1 relates, the Insurance cover shall be at a level not less than any amount stated in the Head Contract.
10.3 The SC shall produce for inspection on any written demand made by Facel at any time all of the policies of insurance required under Clause 10.2 and the premium receipts thereof. In the event of any failure of the SC to comply with the provisions of this Clause, then Facel may by written notice to the SC insure the Sub-Contract Works itself and may deduct the cost of any premiums so incurred from any monies due to the SC and/or may recover same as a debt.
- 11.0 Payment**
The following payment provisions shall be read in conjunction with the details in the SCO and shall take precedence over the terms of the Head Contract:
11.1 It is a Condition Precedent to any payment becoming due from Facel to the SC that the SC shall have signed and returned a dated copy of the SCA to Facel and/or shall have produced evidence of any insurance required by the SCA and/or shall have executed and returned any collateral warranty and/or performance bond required by the SCA to Facel.
11.2 Subject to Clause 11.1 above Facel shall pay to the SC, at intervals stated in the SCO, the total value of the Sub-Contract Works properly executed by the SC up to the Valuation Date stated less:-
11.2.1 any amounts previously paid; and;
11.2.2 the Retention Percentage stated in the SCO, and;
11.2.3 any amounts deducted under the terms of the SCA.
11.3 The first payment shall become due 7 days following the first valuation date after the commencement of the Sub-Contract Works on Site in accordance with the Valuation Dates set out in the SCO. Thereafter further interim payments shall become due at intervals of one month calculated from the date when the first payment became due, provided that no payment shall become due under this Clause unless the SC has submitted to Facel a proper and detailed application for payment by the Valuation Date. The final date for payment for the first, any interim and any final payments shall be not later than 30 days after the date when they became properly due. Not later than 5 days after the date, on which any interim payment becomes due, the Contractor shall give written notice to the SC specifying:
11.3.1 the amount of the interim payment which is proposed to be made in respect of the Sub-Contract Works and the basis on which such amount was calculated; and;
11.3.2 any other amount to be added to or deducted from the SC.
11.4 Not later than 1 day before the final date for payment for any sum properly due to the SC, Facel may give written notice to the SC of the intention to pay less. The issue of such a notice is without prejudice to Facel's right to abatement and/or any cross set off against any other sum due to the SC under any other contract with Facel.
11.5 Without prejudice to the above, Facel may possess or have access to the SC's employment under the SCA and/or any cross set off against any other sum due to the SC under any other contract with Facel.
11.6 In the event that the party obliged to make payments to Facel under the Head Contract and/or any other party liable to make payment for the Project under the Head Contract becomes insolvent or enters into administration or a creditors voluntary arrangement as generally defined in Sections 113(2)-113(5) of the Housing Grants Construction and Regeneration Act 1996 or any re-enactment thereof, then Facel shall only be obliged to pay to the SC such amounts in respect of the Sub-Contract Works which have been received by Facel.
11.7 The first release of retention will become due in accordance with Clause 9.0 above.
11.8 The issue of retention will become due upon the written notification by Facel to the SC that all the SC's defects have been rectified and/or 24 months following the notification of Completion or Practical Completion under Clause 9 above, whichever is the sooner.
11.9 In the event that Facel suspends performance under the Head Contract for non-payment of sums that are due to Facel then Facel requires that the SC also suspends its own performance under the SCA for the same period that Facel suspends its performance. The SC acknowledges and agrees that any lawful suspension by Facel shall not entitle the SC to any time and/or financial compensation greater than that which Facel is itself entitled under the terms of the Head Contract and only to the extent that Facel is entitled to secure any such relief on behalf of the SC in accordance with Clause 4.0 above.
12.0 VAT
The SCS is exclusive of VAT. If the SC is registered within the requirements of VAT legislation, he shall immediately after signing the SCA give to Facel evidence of registration and/or shall produce such evidence on any written demand of Facel. If the SC ceases to be a registered person as aforesaid, he shall immediately notify Facel in writing.
13.0 Final Payment
The final payment shall become due 30 days after the issue of a notification of the final payment by Facel and shall be calculated in accordance with the terms of the Head Contract. The final date for payment of the final payment shall be 30 days following the due date. The SC shall issue all necessary details, accounts, returns, records and documents necessary to compute the Final Payment within 20 working days of the Completion of the Sub-Contract Works. If the SC fails to issue all necessary details, accounts, returns, records and documents necessary for the computation of the final payment, then Facel may at its sole discretion determine the amount of the final payment due to the SC after taking into account any property instructed variations and any deductions and may thereafter notify the SC in writing of the amount of the final payment. The amount of the final payment once notified in writing by Facel shall be binding and conclusive on the SC unless dissented from by the SC within 7 days of the issue date of the notification by Facel by the commencement of dispute resolution procedures. Not later than 1 day before the final date for payment for any sum properly due to the SC against the Final Payment, Facel may give written notice to the SC of the intention to pay less. The issue of such a notice is without prejudice to Facel's right to abatement and/or any cross set off against any other sum due to the SC under any other contract with Facel.
14.0 Attendance
Facel shall provide free of charge to the SC any items of attendance stated in the SCO. Subject thereto, the SC shall, at his own cost, provide all services and facilities necessary for the execution of the Sub-Contract Works and shall at all times satisfy himself as to the safety of any items of attendance provided by Facel.
15.0 House Keeping
The SC shall at all times keep access to the Sub-Contract Works clear and shall carry away all rubbish resulting from the execution of the Sub-Contract Works. On Completion the SC shall remove from the site all his plant and tools, and shall leave clean and tidy all areas made available to him for the purpose of executing the Sub-Contract Works.
16.0 Training
Facel shall be entitled to require the SC to provide on-site training for persons employed by the SC and/or shall require the SC personnel to attend any site induction procedure, tool box talk or other safety initiative that may be applicable to the Site and the SC shall be deemed to have made due allowance for same which shall not be treated as a Variation.
17.0 Termination
Without prejudice to any other rights or remedies which Facel may possess or have access to the SC's employment under the SCA shall automatically be determined if:
17.1 Facel's employment under the Head Contract is determined; and/or;
17.2 The SC breaches the SCA in breach of Clause 22.0 below.
17.3 Facel may also forthwith terminate by written notice the employment of the SC under the SCA if:
17.3.1 the SC fails to comply with any of the obligations under the SCA, the Head Contract or under statute, and/or;
17.3.2 the SC fails to maintain reasonable progress of the Sub-Contract Works following a notice from Facel to remedy the breach, and/or;
17.3.3 the SC fails to comply with any Direction or Instruction of Facel, and/or;
17.3.4 Facel for convenience decides to terminate the SCA.
17.4 Upon termination of the SC's employment no further payments shall become due from Facel to the SC until Facel has completed all of its obligations under the Head Contract including the completion of the Sub-Contract Works, the Project, the rectification of defects and the release of the final retention under the Head Contract and Facel has been released from any statutory liabilities for latent defects in the Sub-Contract Works that may have arisen or may subsequently arise resultant from the actions of the SC in performing the Sub-Contract Works prior to termination. Any payment that may thereafter become due to the SC will be calculated in accordance with Clause 13 above after the deduction of any damages, costs and contra charges that Facel may incur in completing or arranging for others to complete the Sub-Contract Works. At that time, any over payment made to the SC shall be recoverable from the SC by Facel as a debt.
17.5 Within 2 weeks of termination the SC shall provide to Facel all records, accounts, information, schedules and documentation to enable Facel to ascertain the value of the Sub-Contract Works properly completed and any material supplied by the SC in connection with the Works up to the date of Termination. Facel shall be entitled to make use of all materials delivered to Site by the SC up to the date of Termination.
17.6 The SC may terminate the SCA if Facel fails to make payment of any sum that has been notified as due to the SC by Facel within 90 days after the final date for payment, provided that the SC has first given 28 days written notice to Facel of his intention to terminate the Contract by the service of a notice in writing by recorded delivery to the registered office of Facel.
18.0 Design
Any design produced by the SC in connection with the performance of its obligations under the SCA and the Head Contract shall be carried out using the skill, care and diligence of an experienced construction professional and shall in all respects be compliant with all current legislation and the requirements set out within the Head Contract. Anything necessary for the completion of the Works and/or operation of the Sub-Contract Works whether or not shown or described in any drawings, specifications or other documents provided to the SC by Facel is deemed to be included in the SC's design development obligations and the SCS and there shall be no adjustment to the SCS in respect of anything necessary for the complete, satisfactory and punctual performance of the Sub-Contract Works unless instructed in writing by Facel. The SC shall maintain Professional Indemnity Insurance in the sum of £5,000,000 in respect of each and every claim made unless stated to the contrary in the SCO. The SC shall maintain such insurance for a period of 12 years following the completion of the Project under the SCA and shall be bound to provide and shall produce documentary evidence that such insurance is in place. In the event that the SC fails to provide such evidence when requested then Facel may take out his own insurance in respect of the Sub-Contract Works and shall be entitled to recover the cost of all premiums and any administration costs from the SC as a debt. The SC indemnifies Facel in respect of any claims for business interruption, loss of earnings, loss of profit, temporary accommodation or any other consequential loss arising as a result of the designs performed by the SC whether directly or indirectly incurred by Facel.
19.0 Materials
All materials supplied and installed by the SC in connection with the performance of his Works shall be fit for their intended purpose and in full compliance with any requirements set out in the SCA and/or the Head Contract.
20.0 Disputes
The Dispute Resolution Procedures shall be exclusively as follows:
20.1 If any dispute of difference arises between the parties concerning the SCA, then such dispute or difference may be referred to Adjudication at any time. The procedures for Adjudication shall be those contained within the Head Contract.
20.2 Either party shall have the option to refer any dispute to Arbitration in accordance with the 1996 Arbitration Act as may be amended or replaced and current at the time of the agreement. The appointment of any Arbitrator shall be mutually agreed between the parties or, failing agreement within 7 days, shall be a person appointed by the President for the time being of the Chartered Institute of Arbitrators.
21.0 The Law
The Law applicable to the SCA shall be the Law of England.
22.0 Bribery & Corruption
The SC shall not do anything to damage the reputation of Facel and in particular shall not offer any kind of inducement of any nature whatsoever to any member of staff of Facel and/or any third party connected with the SC (including any representative of the Employer) with an intention to obtain an reward or commercial advantage under this or any other contract. The SC warrants that he has in place adequate procedures to ensure that his business dealings and transactions do not infringe the Bribery Act 2012 or any re-enactment thereof. The SC indemnifies Facel for any failure to maintain such policies and procedures.
23.0 Entire Agreement
The SCA including the Head Contract comprises the entire agreement between the parties and supersedes any and all prior agreements, negotiations, letters of intent, understandings and undertakings.
24.0 Third Party Provisions
No provision of the SCA shall or is intended to confer on any third party any benefit or right enforceable at the option of that third party or any liability on that third party.
25.0 Assignment
The SC may not assign the SCA at any time without the written agreement of Facel. Facel may assign the SCA at any time by written notice to the SC.
26.0 Notices
The address for the service of any Notice required under the terms of the SCA including any Notice or return required by Clause 5.0 above shall be sent to the address of the parties contained within the SCO.

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27.0 Provisional Sums

Unless otherwise stated in the SCO all Provisional Sums included within the SCA are deemed to make full allowance for any preliminaries, overheads, profit and time for the completion of the Sub-Contract Works and no extension of time will be granted to the Sub-Contractor for the performance of any Work resultant from the Direction or Instruction of Fascel to expend a Provisional Sum. The valuation rules in respect of any Provisional Sum shall be as stated in Clause 7.0 above and the total amount of the Provisional Sum shall not be exceeded in computing any amount due.

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