

TERMS AND CONDITIONS OF TRADE FOR ABOVE-BOARD BUILDING CONTRACTORS LIMITED

These terms and conditions are made pursuant to the Construction Contracts Act 2002 (“the Act”) and any amendments made to the Act and therefore all provisions under the Act and subsequent amendments shall apply.

1. GENERAL

- 1.1 In these terms and conditions the “Company” means Above-Board Building Contractors Limited.
- 1.2 Any goods or services (the “Work” or “any Work”) supplied by the Company to the Customer will be supplied in these terms and conditions. If the Customer orders Work, the Customer will be deemed to have accepted these terms and conditions. The only circumstance where any variation on these terms will apply is where the Company has expressly agreed in writing to that variation.
- 1.3 Where requested, estimates will be provided before work in commenced. Estimates may be revised as the specifications of a project evolve or when there are changes to a project’s initially defined content and scope.

2. PRICE

- 2.1 Work will be invoiced at the price set by the Company **plus GST** on the date the Work is provided and in the case of goods the date of dispatch by the Company unless otherwise expressly agreed in writing by the Company.
- 2.2 The Customer acknowledges that the Company may alter prices without notice and that the purchase price of Work may be different from the price quoted or the price current when Work was ordered.
- 2.3 Charges for items and expenses such as photocopying, facsimiles, toll calls, couriers, travel, materials and postage (“Disbursements”) are not included in the price quoted for work but are payable by the Customer when invoiced for same.
- 2.4 If a project is terminated before completion, the Company will be compensated for all work done and Disbursements incurred up to the date of termination.
- 2.5 Changes to the brief that require extra work to that specified in the original cost estimates may result in additional charges. Where possible, these terms will be negotiated and agreed before further work is put in hand, otherwise they will be charged on the basis of our normal rates.

3. PAYMENT

- 3.1 The invoiced price of Work is due and payable seven days following issue of an invoice.
- 3.2 Notwithstanding clause 3.1, the Company reserves the right to alter the payment terms including the requirement for payment for any Work in cash before the Work is undertaken. The terms will be stated on the front of the invoice.
- 3.3 The Company reserves the right to request a proportion of its estimate to be paid upfront prior to commencing any of the Work detailed in any estimate.
- 3.4 The Customer may not deduct or withhold any amount (whether by way of set-off counterclaim or otherwise) from any money owing to the Company.

- 3.5 If full payment for any Work is not made to the Company by the due date for that payment, then the Customer shall be in default and the Customer shall at the Company's discretion (and without affecting any other right the Company may have), pay default interest on any amount outstanding to the Company in accordance with the following:
- (a) the default interest rate shall be 5 per cent per month; and
 - (b) default interest shall accrue on a daily basis from the date when payment is due until the date when payment is actually made; and
 - (c) the Customer shall be liable to pay all expenses and costs (including legal costs as between solicitor and client) in relation to the Company obtaining or attempting to obtain a remedy for the failure to pay.
- 3.6 All payments pursuant to 3.5((a)-(c) inclusive) shall be upon demand. The charging of default interest shall in no way imply the granting or an extension of credit by the Company to the Customer.
- 3.7 The Company reserves the right to discontinue any Work in hand for the client in the event of non-payment of accounts at the correct time.
4. **RISK**
- 4.1 All risk in the Work supplied by the Company shall pass to the Customer on delivery.
5. **SECURITY FOR PAYMENT**
- 5.1 In consideration of the Company providing or agreeing to provide Work to the Customer or to others at the request of the Customer, the Customer by accepting delivery of the Work that includes goods grants to the Company under the Personal Property Securities Act 1999 ("Act"):
- (a) a Purchase Money Security Interest ("PMSI") in the goods; and,
 - (b) agrees that any of the goods or proceeds of the goods coming into existence after the date of delivery will come into existence subject to the PMSI granted herein without the need for any further action by any part;
 - (c) acknowledges that it has received valuable consideration from the Company and agrees that it is sufficient;
 - (d) agrees that the PMSI has attached to the goods and that the attachment of the PMSI has in no way deferred or postponed from the date of recorded herein;
 - (e) agrees that the Company may register a financing statement at the cost of the Customer;
 - (f) to the extent that Part 9 of the PPSA applies, the Customer agrees that the provisions of sections 114(1)(a), 120, 122, 133 and 134 of the PPSA which are for the Customers benefit, or place any obligations on the Company in the Customer's favour, will not apply; and where the Company has rights in addition to those in Part 9 of the PPSA, those rights will continue to apply;
 - (g) To the extent that Part 9 of the PPSA applies, without limiting anything in the previous paragraph, the Customer hereby waives its rights under sections 116, 120(2), 121, 125, 126,127, 129 and 131 of the PPSA, and its rights to receive a copy of a verification statement under section 148 of the PPSA in respect of any financing statement or financing change statement registered by the Company.

- 5.2 The Company will retain title until such time as the Customer has paid all amounts owed to the Company in respect of the goods and including any default interest and other costs payable pursuant to clause 3.5.
- 5.3 The Customer agrees to treat the PMSI in the Goods as a continuing and subsisting security regardless whether the goods have become fixtures at any time before payment has been made for them.
- 5.4 The Customer will keep the goods insured and in good repair and free of any liens or encumbrances.
- 5.5 If the Customer fails to make payment or is in default, as that term is defined in the Act, then the Company or its agents may enter the Customer's address and remove the goods without notice or judicial process and the Customer waives any right that may arise as a result of this removal.

6. SECURITY FOR PAYMENT – MEMORANDUM OF MORTGAGE

- 6.1 If the owner fails to pay any money payable to the Company on the due date for payment, then on demand the Customer will straight away from the Company with an executed and registrable memorandum of mortgage over the Land (for the purposes of securing all money owing from time to time by the Customer to the Company). That mortgage will be in the form of the All obligations form produced by the Auckland District Law Society and approved by the Registrar General of Land under number 2011/2200 together with Memorandum number 2011/4300. The Customer also undertakes to complete any Authority and Instruction ("A&I") form that is necessary to register that mortgage and to instruct their solicitor (or other relevant agent) to take whatever step is necessary to register that mortgage.
- 6.2 The Customer also acknowledges that the Company is entitled to register a caveat or similar charge against the title to the Land in circumstances where the Company is entitled to demand a registrable memorandum of mortgage.
- 6.3 The Company must notify the Customer in writing and give the Customer five working days to remedy the default before demanding a registerable memorandum of mortgage over the Land or registering a caveat over the Land.
- 6.4 The Customer appoints the Company to be the Customer's attorney for the purposes of giving and executing in favour of the Company a registrable memorandum of mortgage over the Land (i.e for the purposes of clause 6.1). The Customer acknowledges that the appointment of the Company as the Customer's attorney is made for valuable consideration (i.e the Company entering into the Building Contract) and is irrevocable.
- 6.5 The Customer must ensure that any existing mortgagee is aware of and does not oppose the Company's rights under clauses 6.1 to 6.4.

7. COSTS OF RECOVERY OF ANY AMOUNT DUE AND PAYABLE

- 7.1 The Company is entitled to recover from the Customer, on an indemnity basis, all costs and expenses (including legal costs on a client/solicitor basis) incurred in connection with the recovery of any amount due and payable by the Customer including, without limitation, all costs and expenses incurred:
- (a) repossession and/or selling any goods or materials;
 - (b) registering any memorandum of mortgage or caveat; or
 - (c) in relation to any court proceedings.

8. WARRANTIES

- 8.1 The Company warrants the Work in respect of defects for a period of twelve months from the date of invoice; fair wear and tear and damage beyond the Company's control excepted but such warranty shall not apply:
- (a) to defects which would be apparent on completion of the work unless a written claim is received by the Company within seven (7) days;
 - (b) to Work which has been repaired by any person not authorised by the Company to do such repairs;
 - (c) to any Work which has been incorrectly maintained, handled or stored;
 - (d) to any Work which has been modified in any way;
 - (e) to any Work, parts or components not supplied by the Company.
- 8.2 Except for the warranty in the clause 8.1, all warranties, descriptions, representations or conditions whether implied by the Contract and Commercial Law Act 2017 or otherwise is expressly excluded to the fullest extent permitted by law.
- 8.3 Under section 41(2) and 43A Consumer Guarantees Act 1991 and any subsequent amendments made to the Consumer Guarantees Act 1991, as appropriate, the Company and the Customer contract out of that Act.
- 8.4 In any event, the total liability of the Company whether in tort (including negligence), contract or otherwise for any loss, damage or injury arising directly or indirectly from any defect in or non-compliance of the Work or any other breach of the Company's obligations shall in any case be limited at the Company's option, except where statute expressly requires otherwise, to either the repair or replacement of the Work, or refund of the purchase price (provided that if the Company is no longer manufacturing the identical product at the time of the claim, it may replace the product with the closest equivalent then being manufactured).
- 8.5 While the Company will make every effort to ensure the accuracy of any advice, recommendation, information, assistance or service provided by the Company in relation to the Work.
- 8.6 The Company does not accept any liability or responsibility in respect thereof.
- 8.7 The Customer will familiarise itself with the current literature produced by the Company.
- 8.8 The Company will have no liability either in contract or in tort for any loss suffered by the Customer or any third party claiming through the Customer for which the Company has not accepted in writing for such loss.
- 8.9 The Company makes no representations or warranties in respect of the Work supplied by it to the Customer unless such representation or warranty is made by the Company in writing to the Customer.

9. OTHER RIGHTS OF COMPANY

- 9.1 In the event that:
- (a) any amount payable by the Customer to the Company is overdue, or the Customer fails to meet any other obligation to the Company (whether in relation to the sale of goods or otherwise), or the Company's opinion the Customer is likely to be unable to meet its payment or other obligation to the Company; or

- (b) the Customer becomes insolvent, has a receiver appointed in respect of all or some of its assets, makes or is likely to make an arrangement with its creditors or has a liquidator (provisional or otherwise) appointed or is placed under statutory or official management; or
- (c) the ownership or effective control of the Customer is transferred or the nature of the Customer's business is materially altered;

the Company shall be entitled to cancel all or any part of the contract or contract with the Customer which remains unperformed, in addition to and without prejudice to its other remedies ; and

All amounts outstanding under any contract with the Company shall whether or not due for payment, immediately become due and payable; and

The Company shall be entitled to reclaim any goods in the Customer's possession or control and to dispose of them to its own benefit and for that purpose the Company shall be entitled, without notice to enter directly or by its agents on any premises where it believes goods which has supplied may be stored, without in any way being liable to any person.

10. **PRIVACY ACT 1993**

10.1 The Customer and any guarantor acknowledge that the Company may:

- (a) Collect from and disclose to the Customer, any guarantor, or any appropriate third party any personal information concerning the Customer or a guarantor as the Company may consider appropriately required;
 - (i) For the purpose of processing the Customer's order; or
 - (ii) For any other purpose in trade with the Customer or any guarantor under the circumstances at the time of that collection or disclosure.
- (b) Use and retain any personal information which related to the Customer or any guarantor as may be required by the Company in the ordinary course of its business;
- (c) Seek information from third parties (including without limitation a credit check) to enable the Company to assess the Customer's creditworthiness and business practices. This is a continuing authorisation which will apply through the course of the trading relationship between parties.

11. **SEVERANCE**

11.1 If any clause or part of a clause of these terms and conditions is held to be invalid or unenforceable for whatever reason to the extent not inconsistent with the aforementioned invalid clause, the remaining provisions shall remain in full force and effect.

12. **FORCE MAJEURE and DELAY**

12.1 The Company shall not be liable for any delay in performing its obligations under this agreement to the Customer caused in whole or in part by force majeure which shall include (but not limited to) an act of God, natural disasters, strikes, lockouts, fire war suit, civil commotion, inability to obtain products or supplies including the imposition of any export or import bans or any other cause beyond the reasonable control of the Company.

12.2 Any time or date given by the Company for delivery or uplifting of Work is intended only as an estimate and the Company shall not be liable for the consequences of delay however arising and the Customer acknowledges that the Company will not accept any liability for any claims or losses arising from its failure to meet the delivery date (if any).

13. NOTICES

- 13.1 Every notice to be given under the terms of this Agreement shall be in writing, addressed to the person to whom it affects, dated, and signed by the author.

14. DISPUTE RESOLUTION

- 14.1 In case of any dispute between the Company and the Customer, the party raising the dispute shall give the other party written notice specifying particulars of the dispute. The Company and the Customer shall then, within five (5) Working Days or such other time period as agreed upon, use their best efforts to resolve any dispute through good faith negotiations.
- 14.2 If negotiations do not resolve the dispute, then either party will be able to refer the dispute to mediation by a mediator agreed between the parties or appointed by the President of New Zealand Law Society. If the dispute is not resolved through mediation, then either party will be able to refer the dispute to adjudication under the Construction Contracts Act 2002 and any subsequent amendments made to the Construction Contracts Act 2002. Each party will be required to continue to perform its obligations under the contract as far as practicable given the nature of the dispute.
- 14.3 For the avoidance of doubt, nothing in this clause shall prevent any party to this Agreement from seeking urgent interlocutory relief from any court of competent jurisdiction.
- 14.4 Clauses 14.1 to 15.2 shall survive the termination of this Agreement.

15. AGENCY

- 15.1 The Customer authorises the Company to contract either as principal or agent for the provision of goods or services that are the subject matter of this contract.
- 15.2 Where the Company enters into a contract of the type referred to in clause 13.1 it shall be read with and form part of this agreement and the Customer agrees to pay any amounts due under that contract.

16. MISCELLANEOUS

- 16.1 If at any time the Company does not enforce any of these terms and conditions or grants the Customer time or other indulgence, the Company shall not be construed as having waived that term or condition or its rights to later enforce that or any other term or condition.
- 16.2 The Customer acknowledges that the Company may receive commission or referral fees from contractors or agents relating to the Work and the customer releases the Company from any duty to disclose the same.
- 16.3 The Customer agrees to comply with all healthy and safety directions from the Company and further agrees to be responsible for ensuring any hazards at the property, not in the control of the Company, are controlled or eliminated.

ACCEPTANCE

_____ (Name of the Customer) hereby accepts and agrees to the above terms and conditions of trade in respect of all Work carried out by Above Board Building Contractors Limited now or at any time in the future.

Where the customer is a limited liability company in consideration of the Company supplying the Work, the directors or principal shareholders of the Company named below unconditionally and irrevocably guarantee the due and punctual payment to the Company of all monies which are now owing by the customer to the Company or which may from time to time be owing by the Customer to the Company and the due observance and performance by the Customer under these terms and conditions or any other agreement between the Company and the Customer and further as a separate obligation agrees on demand to hold harmless and indemnify the Company from all damages, costs, losses and legal fees incurred by the Contractor in connection with the supply of the Work, the recovery of monies owing by the Customer to the Company and monies paid by the Company with the Customer's consent in settlement of a dispute that arises with a third party over the supply of the Work.

Date ____/____/____

Signed for and on behalf of the above named customer

Name of the person signing

Signature of Guarantor

Name of Guarantor

Signature of Guarantor

Name of Guarantor

FIRST SCHEDULE

**SCOPE OF WORKS BEING UNDERTAKEN BY ABOVE BOARD BUILDING
CONTRACTORS LIMITED**

SECOND SCHEDULE
VARIATION TO CONTRACT

Date of Variation: _____ / _____ / _____

Variation number: _____

The parties agree to vary the Contract dated _____ / _____ / _____ as follows:

The parties agree to an increase / reduction of \$ _____ (excluding GST)

The price for carrying out the variation set out above should be inclusive of all The Company's costs, margins, overheads, and profit.

The parties agree to an extension / reduction of time of _____ Working Days.

SIGNED by The Company: _____

SIGNED by the CUSTOMER(S): _____

Variations are not binding unless signed by both parties.
Please sign **TWO** copies of the Variation.

THIRD SCHEDULE

PAYMENT CLAIM

PAYMENT CLAIM		This is a Payment Claim under the Construction Contracts Act 2002. Please read the Important Notice attached.				
DATE:						
FROM Above Board Building Contractors Limited (PAYEE)						
Address:						
TO CUSTOMER (PAYER)						
Address:						
Project description						
Payment claims #						
Claim period:		From:	To:			
Last day to submit Payment Schedule:						
Due date for payment:						
Item	Description	Total amount for Item as per Quote		% claimed	Total	
TOTAL BASE CONTRACT (excluding GST)						
Var #	Description	Var. submitted	Var. approved	Var. amount	%claimed	Total
TOTAL VARIATIONS (excluding GST)						
TAX INVOICE		Total Base Contract				
GST No.		Total Variation				
Examined by:		Total amount claimed (excluding GST)				
		GST				
		TOTAL (including GST)				

Important Notice

You have been served with a Payment Claim under section 20 of the Construction Contracts Act 2002 (the **Act**). Under the Act, the person who has served the Payment Claim is called the **payee**.

If you do not respond to the Payment Claim promptly, you may lose your right to object to the Payment Claim.

You may choose to respond to the Payment Claim in either of the following two ways:

1. You may pay the payee the amount claimed in the Payment Claim in full on or before the due date;
2. If you object to the Payment Claim, you may provide a written Payment Schedule to the payee, which must identify the Payment Claim to which it relates and indicate what you are prepared to pay (which can be nothing). The amount you so indicate is called the **scheduled amount**. If the scheduled amount is less than the claimed amount, the Payment Schedule must indicate:
 - a. How you calculated the scheduled amount; and
 - b. Your reason or reasons for the difference between the scheduled amount and the claimed amount; and
 - c. **In a case where the difference is because you are withholding payment on any basis, your reason or reasons for withholding payment.**

You must provide the Payment Schedule to the payee within the time required by the construction contract or, if the construction contract does not set out a time for responding to the payment claim, then within 20 working days after the payment claim is served on you. If you provide a Payment Schedule in this way, then you must pay the scheduled amount in full on or before the due date for the progress payment to which the Payment Claim relates.

Consequences of not responding to Payment Claim

If you do not respond to the Payment Claim by paying the claimed amount in full or providing a Payment Schedule that set out the amount you are prepared to pay, then you will become liable to pay the claimed amount and the Payee may recover from you, as a debt due, in the appropriate court, the unpaid portion of the claim amount and the actual and reasonable costs of recovery awarded against you by the court.

Consequences of indication that you will pay nothing or less than the claimed amount

If you do respond to the Payment Claim by providing a Payment Schedule but indicate in the schedule that you are prepared to pay nothing or an amount less than the claimed amount, the Payee may take issue with you doing so. The Payee may bring court proceedings against you and refer the matter as a dispute for adjudication under the Act.

Consequences of not paying schedule amount in manner indicated by Payment Schedule

If you do respond to the Payment Claim by providing a Payment Schedule but do not pay the scheduled amount on or before the due date for the progress payment to which the Payment Claim relates, the Payee may recover from you, as a debt due, in the appropriate court, the unpaid portion of the scheduled amount and the actual and reasonable costs of recovery awarded against you by the court.

Advice to residential occupier

Important: if you do not understand this information or if you want advise about how best to respond to the Payment Claim, you should consider getting legal advice immediately.

The **Due Date** for a payment is the date agreed for payment of the progress payment between you and the Payee as parties to the construction contract. The due date should be set out in the Payment Claim.

Working Day does not include Saturdays, Sundays, any day during 24 December to 5 January inclusive, national holidays, or the anniversary or the relevant province. If the last day for making a payment or providing a payment schedule falls on a day that is not a working day, you may do not on the next working day after that day.