

Power Assemblies Limited – Terms & Conditions of Trade

1. Definitions

- 1.1 **'Contract'** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.2 **'Company'** means Power Assemblies Limited, its successors and assigns.
- 1.3 **'Customer'** means the person/s, entities or any person acting on behalf of and with the authority of the Customer requesting the Company to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
- 6.5 (a) if there is more than one Customer, is a reference to each Customer jointly and severally; and
- (b) if the Customer is a partnership, it shall bind each partner jointly and severally; and
- (c) if the Customer is a part of a Trust, shall be bound in their capacity as a trustee; and
- (d) includes the Customer's executors, administrators, successors and permitted assigns.
- 1.4 **'Works'** means all Works (including consultation, manufacturing and/or installation services) or Materials supplied by the Company to the Customer at the Customer's request from time to time (where the context so permits the terms 'Works' or 'Materials' shall be interchangeable for the other).
- 1.5 **'Worksite'** means the address nominated by the Customer to which the Materials are to be supplied by the Company.
- 1.6 **'Intended Use'** means a product and the use thereof, for which the product is intended to be, or is reasonably likely to be, associated with the Works.
- 1.7 **'Non-Conforming Product'** means products that are regarded as Non-Conforming for an Intended Use if, when associated with a building:
- 6.6 (a) the product is not, or will not be, safe; or
- 6.7 (b) does not, or will not, comply with the relevant regulatory provisions; or
- (c) the product does not perform, or is not capable of performing, for the use to the standard it is represented to conform by or for a person in the chain of responsibility for the product.
- 1.8 **'Cookies'** means small files which are stored on a user's computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website, and can be accessed either by the web server or the client's computer. If the Customer does not wish to allow Cookies to operate in the background when using the Company's website, then the Customer shall have the right to enable/disable the Cookies first by selecting the option to enable/disable provided on the website, prior to making enquiries via the website.
- 1.9 **'Price'** means the Price payable (plus any Goods and Service Tax ("GST") where applicable) for the Works as agreed between the Company and the Customer in accordance with clause 6 below.

2. Acceptance

- 2.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of any Works.
- 2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- 2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.4 The Customer acknowledges that the supply of Works on credit shall not take effect until the Customer has completed a credit application with the Company and it has been approved with a credit limit established for the account.
- 2.5 In the event that the supply of Works requested exceeds the Customer's credit limit and/or the account exceeds the payment terms, the Company reserves the right to refuse delivery.
- 2.6 In the event that the Customer requests the Company to:
- (a) make an emergency Call-Out for critical equipment after hours or causes the Company to cancel or reschedule other work then the Customer reserves the right to charge a minimum Call-Out fee of one (1) hour labour cost plus a per kilometre travelled rate plus any Materials used to undertake the Works unless otherwise agreed between the Company and the Customer; and
- (b) provide the Works urgently, that may require the Company's staff to work outside normal business hours (including but not limited to working, through lunch breaks, weekends and/or Public Holidays) then the Customer reserves the right to charge the Customer additional labour costs (penalty rates will apply at time and a half normal rates), unless otherwise agreed between the Company and the Customer.
- 2.7 If the Company has been requested by the Customer to diagnose a fault that requires investigation, disassembly and/or testing, all costs involved will be charged to the Customer irrespective of whether or not the repair goes ahead.
- 2.8 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 226 of the Contract and Commercial Law Act 2017 or any other applicable provisions of that Act or any Regulations referred to in that Act.

3. Errors and Omissions

- 3.1 The Customer acknowledges and accepts that the Company shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- 8.4 (a) resulting from an inadvertent mistake made by the Company in the formation and/or administration of this Contract; and/or
- (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by the Company in respect of the Works.
- 3.2 In the event of such error and/or omission occurs in accordance with clause 3.1, and is not attributable to the negligence and/or willful misconduct of the Company, the Customer shall not be entitled to treat this Contract as repudiated nor render it invalid.

4. Authorised Representatives

- 4.1 The Customer acknowledges that the Company shall (for the duration of the Works) liaise directly with one (1) authorised representative, and that once introduced as such to the Company, that person shall have the full authority of the Customer to order any Works, and/or to request any variation thereto on the Customer's behalf. The Customer accepts that they will be solely liable to the Company for all additional costs incurred by the Company (including the Company's profit margin) in providing any Works, or variation/s requested thereto by the Customer's duly authorised representative.

5. Change in Control

- 5.1 The Customer shall give the Company not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer and/or any other change in the Customer's details (including but not limited to, changes in the Customer's name, address, contact phone or fax number/s, change of trustees, or business practice). The Customer shall be liable for any loss incurred by the Company as a result of the Customer's failure to comply with this clause.

6. Price and Payment

- 6.1 At the Company's sole discretion the Price shall be either:
- 9.2 (a) as indicated by the Company to the Customer in respect of Works performed or Materials supplied; or
- (b) the Company's quoted Price (subject to clause 6.2) which shall be binding upon the Company provided that the Customer shall accept the Company's quotation in writing within thirty (30) days.
- 6.2 The Company reserves the right to change the Price:
- (a) if a variation to the Materials which are to be supplied is requested; or
- (b) if a variation to the Works originally scheduled (including any applicable plans or specifications) is requested; or
- (c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather, limitations to accessing the Worksite, obscured building/Worksite defects, incorrect measurements, and/or specifications provided by the Customer, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, lack of required utilities, remedial work required due to existing workmanship being of a poor quality or non-compliant to the building code, hard rock barriers below the surface, iron reinforcing rods in concrete or hidden pipes and wiring in walls, etc.) which are only discovered on commencement of the Works; or
- (d) in the event of increases to the Company in the cost of labour or materials which are beyond the Company's control.
- 6.3 Variations will be charged for on the basis of the Company's quotation, and will be detailed in writing, and shown as variations on the Company's invoice. The Customer shall be required to respond to any variation submitted by the Company within ten (10) working days. Failure to do so will entitle the Company to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.4 Time for payment for the Works being of the essence, the Price will be payable by the Customer on the date/s determined by the Company, which may be:

- (a) for certain approved Customers, due twenty (20) days following the end of the month in which a statement is posted to the Customer's address or address for payment; or
- (b) the date specified on any invoice or other form as being the date for payment; or
- (c) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by the Company.
- 6.5 At the agreement of both parties, payment of the Price may be subject to retention by the Customer of an amount (hereafter called the "Retention Money"), being a set amount or equal to a percentage of the Price. The Customer shall hold the Retention Money for the agreed period following completion of the Works during which time all Works are to be completed and/or all defects are to be remedied. Any Retention Money applicable to this Contract is to be dealt with in accordance with Subpart 2A - sections 18(a) to 18(i) of the Construction Contracts Amendment Act 2015 and as such no Retention Money shall be used other than to remedy defects in the performance of any invoice because part of that invoice is in dispute, unless the request for payment by the Company is a claim made under the Construction Contracts Act 2002. Nothing in this clause 6.8 prevents the Customer from the ability to dispute any invoice.
- 6.6 Payment may be made by cash, bank cheque, electronic/on-line banking, or by any other method as agreed to between the Customer and the Company.
- 6.7 The Company may in its discretion allocate any payment received from the Customer towards any invoice that the Company determines and may do so at the time of receipt or at any time afterwards. On any default by the Customer the Company may re-allocate any payments previously received and allocated. In the absence of any payment allocation by the Company, payment will be deemed to be allocated in such manner as preserves the maximum value of the Company's Purchase Money Security Interest (as defined in the PPISA) in the Materials.
- 6.8 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by the Company nor to withhold payment of any invoice because part of that invoice is in dispute, unless the request for payment by the Company is a claim made under the Construction Contracts Act 2002. Nothing in this clause 6.8 prevents the Customer from the ability to dispute any invoice.
- 6.9 Unless otherwise stated the Price does not include GST. In addition to the Price, the Customer must pay to the Company an amount equal to any GST the Company must pay for any supply by the Company under this or any other agreement for the sale of the Materials. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition, the Customer must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

Provision of the Works

- Subject to clause 7.2 it is the Company's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 7.2 The Works' commencement date will be put back and the completion date extended by whatever time is reasonable in the event that the Company claims an extension of time (by giving the Customer written notice) where completion is delayed by an event beyond the Company's control, including but not limited to any failure by the Customer to:
- (a) make a selection; or
- (b) have the Worksite ready for the Works; or
- (c) notify the Company that the Worksite is ready.
- 7.3 At the Company's sole discretion, the cost of delivery is either included in the Price or is in addition to the Price.
- 7.4 The Company may deliver the Works by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 7.5 Any time specified by the Company for delivery of the Works is an estimate only and the Company will not be liable for any loss or damage incurred by the Customer as a result of delivery being late. However, both parties agree that they shall make every endeavour to enable the Works to be supplied at the time and place as was arranged between both parties. In the event that the Company is unable to supply the Works as agreed solely due to any action or inaction of the Customer, then the Company shall be entitled to charge a reasonable fee for re-supplying the Works at a later time and date, and/or for storage of the Materials.

Worksite Access and Condition

- The Company is not responsible for the removal of rubbish from or clean-up of the building/construction Worksite/s. All rubbish generated by the Company will be placed in a designated area appointed by the Customer but the responsibility of removal of same is the Customer or the Customer's agent, unless otherwise agreed. It is the intention of the Company and agreed by the Customer that:
- (a) the Customer shall ensure that the Company has clear and free access to the Worksite at all times to enable them to undertake the Works (including carrying out Worksite inspections, gain signatures for required documents, and for the delivery and installation of the Materials). The Company shall not be liable for any loss or damage to the Worksite (including, without limitation, damage to pathways, driveways and concrete or paved or grassed areas) unless due to the negligence of the Company;
- (b) it is the Customer's responsibility to provide the Company, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities. The Customer agrees to be present at the Worksite when and as reasonably requested by the Company and its employees, contractors and/or agents.
- 7.6 **Worksite Inductions**
- (a) in the event the Customer requires an employee or sub-contractor of the Company to undertake a Worksite induction during working hours, the Customer will be liable to pay the hourly charges for that period, if any induction needs to be undertaken prior to the commencement date then the Customer shall be liable to pay the Company's standard (and/or overtime, if applicable) hourly labour rate; or
- (b) where the Company is in control of the Worksite, the Customer and/or the Customer's third-party contractors must initially carry out the Company's Health & Safety induction course before access to the Worksite will be granted. Inspection of the Worksite during the course of the Works will be by appointment only and unless otherwise agreed, in such an event the Customer and/or third party acting on behalf of the Customer must at all times be accompanied by the Company.

Risk

- If the Company retains ownership of the Materials under clause 12 then:
- (a) where the Company is supplying Materials only, all risk for the Materials shall immediately pass to the Customer on delivery and the Customer must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that either:
- (i) the Customer or the Customer's nominated carrier takes possession of the Materials at the Company's address; or
- (ii) the Materials are delivered by the Company or the Company's nominated carrier to the Customer's nominated delivery address (even if the Customer is not present at the address);
- (b) where the Company is to both supply and install Materials then the Company shall provide a contract work insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Customer.
- 7.7 Notwithstanding the provisions of clause 9.1 if the Customer specifically requests the Company to leave Materials outside the Company's premises for collection or to deliver the Materials to an unattended location then such materials shall always be left at sole risk of the Customer and it shall be the Customer's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Customer's expense.
- 7.8 The Company shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Customer. The Customer acknowledges and agrees that the event that any of the information provided by the Customer is inaccurate, the Company accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information. The Customer warrants that any structures to which the Materials are to be affixed are able to withstand the installation of the Materials and that any electrical connections (including, but not limited to, meter boxes, main switches, circuit breakers, and electrical cable) are of suitable capacity to handle the Materials once installed. If, for any reason (including but not limited to, the structure not being watertight, the discovery of asbestos, defective or unsafe wiring, or dangerous access etc.) the Company reasonably forms the opinion that the Customer's property is not safe for the installation of Materials to proceed then the Company shall be entitled to delay installation of the Materials (in accordance with clause 7.2) until the Company is satisfied that it is safe for the installation to proceed. The Company may in agreement with the Customer bring the property up to a standard suitable for installation to proceed but all such Works undertaken and any additional Materials supplied shall be treated as a variation and be charged for in addition to the Price.

- In the event that the electrical wiring is required to be re-positioned at the request of any third party contracted by the Customer then the Customer agrees to notify the Company immediately upon any proposed changes. The Customer agrees to indemnify the Company against any additional costs incurred with such a relocation of electrical wiring. All such variances shall be invoiced in accordance with clause 6.2.
- 7.9 Where the Company gives advice or recommendations to the Customer, or the Customer's agent, regarding the suitability of the Worksite for the installation of the Materials or similar works and such advice or recommendations are not acted upon then the Company shall require the Customer or their agent to authorise commencement of the Works in writing. The Company shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Works.
- 7.10 The Customer acknowledges and accepts that:
- (a) where the Company has performed temporary repairs that:
- (i) the Company offers no guarantee against the reoccurrence of the initial fault, or any further damage caused; and
- (ii) the Company will immediately advise the Customer of the fault and shall provide the Customer with an estimate for the full repair required; and
- (b) the Company is only responsible for components that are replaced by the Company and does not at any stage accept any liability in respect of previous goods and/or services supplied by any other third party that subsequently fail and found to be the source of the failure; and
- (c) the Company shall not be responsible or liable for any defect in other appliances or power points as a coincidence of the Company installing the Materials; and
- (d) any defects in the Materials or appearing in the Works after completion due to the Customer or any third party using any items that overloads the structure or system to which the Company's Materials are installed or connected to, or by workmanship not performed by the Company, shall not be covered by any applicable warranty pertaining to the Materials; and
- (e) it is the Customer's responsibility to insure any equipment partly or completely installed on the Worksite, against theft or damage; and
- (f) the Company shall not be liable for any loss or damage caused in accessing the work area beyond reasonable control of the Company (including, without limitation, to ceiling tiles and panels, face brickwork and rendered masonry services) which the Company may have to break into or disturb in performance of the Works; unless due to the negligence of the Company; and
- (g) under no circumstances, will the Company handle removal of asbestos product. In the event asbestos (or other hazardous material) is discovered on the Worksite:
- (i) the Company shall suspend the Works; and
- (ii) the Customer shall be fully responsible for the resolution of any resulting problems; and
- (iii) any additional cost incurred by the Company shall be added to the Price under clause 6.2; and
- (h) Materials supplied may:
- (i) exhibit variations in shade, colour, texture, surface and finish, and may fade or change colour over time. The Company will make every effort to match batches of product supplied in order to minimise such variations but shall not be liable in any way whatsoever where such variations occur; and
- (ii) expand, contract or distort as a result of exposure to heat, cold, weather; and
- (iii) mark or stain if exposed to certain substances; and
- (iv) be damaged or disfigured by impact or scratching.
- 7.11 Where the Company requires that Materials, tools etc. required for the Works be stored at the Worksite, the Customer shall supply the Company a safe area for storage and shall take all reasonable efforts to protect all items from destruction, theft or damage. In the event that any of the stored items are destroyed, stolen or damaged, then the cost of repair or replacement shall be the Customer's responsibility.

Title

- The Company and the Customer agree that ownership of the Materials shall not pass until:
- (a) the Customer has paid the Company all amounts owing to the Company; and
- (b) the Customer has met all of its other obligations to the Company.
- 7.12 Receipt by the Company of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised. It is further agreed that:
- (a) until ownership of the Materials passes to the Customer in accordance with clause 12.1 that the Customer is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to the Company on request;

Power Assemblies Limited – Terms & Conditions of Trade

- (b) the Customer holds the benefit of the Customer's insurance of the Materials on trust for the Company and must pay to the Company the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed;
- (c) the production of these terms and conditions by the Company shall be sufficient evidence of the Company's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with the Company to make further enquiries;
- (d) the Customer must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Customer sells, disposes or parts with possession of the Materials then the Customer must hold the proceeds of any such act on trust for the Company and must pay or deliver the proceeds to the Company on demand;
- (e) the Customer should not convert or process the Materials or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of the Company and must sell, dispose of or return the resulting product to the Company as it so directs;
- (f) unless the Materials have become fixtures the Customer irrevocably authorises the Company to enter any premises where the Company believes the Materials are kept and recover possession of the Materials;
- (g) the Company may recover possession of any Materials in transit whether or not delivery has occurred;
- (h) the Customer shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of the Company; and
- (i) the Company may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Customer.
- 13. Personal Property Securities Act 1999 ("PPSA")**
- 13.1 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that:
- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
- (b) a security interest is taken in all Materials that have previously been supplied and that will be supplied in the future by the Company to the Customer and the proceeds from such Materials.
- 13.2 The Customer undertakes to:
- (a) sign and further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Company may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
- (b) indemnify, and upon demand reimburse, the Company for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Materials charged thereby;
- (c) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials or the proceeds of such Materials in favour of a third party without the prior written consent of the Company; and
- (d) immediately advise the Company of any material change in its business practices of selling Materials which would result in a change in the nature of proceeds derived from such sales.
- 13.3 The Company and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 13.4 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA.
- 13.5 Unless otherwise agreed to in writing by the Company, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 13.6 The Customer shall unconditionally ratify any actions taken by the Company under clauses 13.1 to 13.5.
- 13.7 Subject to any express provisions to the contrary (including those contained in this clause 13), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 14. Security and Charge**
- 14.1 In consideration of the Company agreeing to supply the Works, the Customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Customer either now or in the future, and the Customer grants a security interest in all of its present and after-acquired property, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money). The terms of the charge and security interest are the terms of Memorandum 2018/4344 registered pursuant to s. 209 of the Land Transfer Act 2017.
- 14.2 The Customer indemnifies the Company from and against all the Company's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Company's rights under this clause.
- 14.3 The Customer irrevocably appoints the Company and each director of the Company as the Customer's true and lawful attorney(s) to perform all necessary acts to give effect to the provisions of this clause 14 including, but not limited to, signing any document on the Customer's behalf.
- 15. Defects and Returns**
- 15.1 The Customer shall inspect the Materials on delivery and shall within seven (7) days of delivery (time being of the essence) notify the Company of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford the Company an opportunity to inspect the Materials within a reasonable time following delivery if the Customer believes the Materials are defective in any way. If the Customer shall fail to comply with these provisions the Materials shall be presumed to be free from any defect or damage. For defective Materials, which the Company has agreed in writing that the Customer is entitled to reject, the Company's liability is limited to either (at the Company's discretion) replacing the Materials or repairing the Materials.
- 15.2 Returns will only be accepted provided that:
- (a) the Customer has complied with the provisions of clause 15.1; and
- (b) the Company has agreed in writing to accept the return of the Materials; and
- (c) the Materials are returned at the Customer's cost within fourteen (14) days of the delivery date; and
- (d) the Company will not be liable for Materials which have not been installed, stored or used in a proper manner; and
- (e) the Materials are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
- 15.3 The Company may (in its discretion) accept the return of Materials for credit but this may incur a handling fee of five percent (5%) of the value of the returned Materials plus any freight.
- 15.4 Subject to clause 15.1, non-stockist items or Materials made to the Customer's specifications are under no circumstances acceptable for credit or return.
- 16. Warranties**
- 16.1 Subject to the conditions of warranty set out in clause 16.2 the Company warrants that if any defect in any Materials manufactured or Works provided by the Company becomes apparent and is reported to the Company within three (3) months of the date of delivery (time being of the essence) then the Company will either (at the Company's sole discretion) replace or remedy the defect.
- 16.2 The conditions applicable to the warranty given by clause 16.1 are:
- (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
- (i) failure on the part of the Customer to properly maintain any Materials or serviced item; or
- (ii) failure on the part of the Customer to follow any instructions or guidelines provided by the Company;
- (iii) any use of any Materials or serviced item otherwise than for any application specified on a quote or order form; or
- (iv) the continued use of any Materials or serviced item after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
- (v) fair wear and tear, any accident or act of God.
- (b) the warranty shall cease and the Company shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Company's consent.
- (c) in respect of all claims the Company shall not be liable to compensate the Customer for any delay in either replacing or remedying the workmanship or in properly assessing the Customer's claim.
- 16.3 For Materials not manufactured by the Company, the warranty shall be the current warranty provided by the manufacturer of the Materials. The Company shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Materials.
- To the extent permitted by statute, no warranty is given by the Company as to the quality or suitability of the Materials for any purpose and any implied warranty, is expressly excluded. The Company shall not be responsible for any loss or damage to the Materials, or caused by the Materials, or any part thereof however arising.
- The conditions applicable to the warranty given on Materials supplied by the Company are contained on the "Warranty Documentation" that will be supplied with the Materials.
- In the case of second hand Materials, the Customer acknowledges that full opportunity to inspect the same has been provided and accepts the same with all faults and that no warranty is given by the Company as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Company shall not be responsible for any loss or damage to the Materials, or caused by the Materials, or any part thereof however arising.
- 17. Consumer Guarantees Act 1993**
- 17.1 If the Customer is acquiring Materials for the purposes of a trade or business, the Customer acknowledges that the provisions of the Consumer Guarantees Act 1993 ("CGA") do not apply to the supply of Materials by the Company to the Customer.
- 18. Intellectual Property**
- 18.1 Where the Company has designed, drawn, written plans or a schedule of Works, or created any products for the Customer, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in the Company, and shall only be used by the Customer at the Company's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of the Company.
- 18.2 The Company warrants that all designs, specifications or instructions given to the Customer will not cause the Company to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify the Company against any action taken by a third party against the Company in respect of any such infringement.
- 19. Default and Consequences of Default**
- 19.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at the Company's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 19.2 If the Customer owes the Company any money the Customer shall indemnify the Company from and against all costs and disbursements incurred by the Company in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Company's collection agency costs, and bank dishonour fees).
- 19.3 Further to any other rights or remedies the Company may have under this Contract, if a Customer has made payment to the Company, and the transaction is subsequently reversed, the Customer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Company under this clause 19, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Customer's obligations under this Contract.
- 19.4 Without prejudice to the Company's other remedies at law the Company shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to the Company shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to the Company becomes overdue, or in the Company's opinion the Customer will be unable to make a payment when it falls due;
- (b) the Customer has exceeded any applicable credit limit provided by the Company;
- (c) the Customer becomes insolvent or bankrupt, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.
- 20. Cancellation**
- 20.1 Without prejudice to any other rights or remedies the Company may have, if at any time the Customer is in breach of any obligation (including those relating to payment and/or failure to remedy any breach in respect of this Contract within ten (10) working days of receipt by the Customer of such notice(s)) then the Company may suspend or terminate the supply of the Works. The Company will not be liable to the Customer for any loss or damage the Customer suffers because the Company has exercised its rights under this clause.
- 20.2 The Company may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are commenced by giving written notice to the Customer. On giving such notice the Company shall repay to the Customer any sums paid in respect of the Price, less any amounts owing by the Customer to the Company for Works already performed. The Company shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 20.3 In the event that the Customer cancels the delivery of Works the Customer shall be liable for any and all loss incurred (whether direct or indirect) by the Company as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 20.4 Cancellation of orders for products made to the Customer's specifications, or for non-stockist items, will definitely not be accepted once production has commenced, or an order has been placed.
- Privacy Policy**
- All emails, documents, images or other recorded information held or used by the Company is "Personal Information" as defined and referred to in clause 21.3 and therefore considered confidential. The Company acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 2020 ("the Act") including Part II of the OECD Guidelines and as set out in the Act. The Company acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Customer's Personal Information, held by the Company that may result in serious harm to the Customer, the Company will notify the Customer in accordance with the Act. Any release of such Personal Information must be in accordance with the Act and must be approved by the Customer by written consent, unless subject to an operation of law.
- Notwithstanding clause 21.1, privacy limitations will extend to the Company in respect of Cookies where the Customer utilises the Company's website to make enquiries. The Company agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Customer's:
- (a) IP address, browser, email client type and other similar details;
- (b) tracking website usage and traffic; and
- (c) reports are available to the Company when the Company sends an email to the Customer, so the Company may collect and review that information ("collectively Personal Information")
- If the Customer consents to the Company's use of Cookies on the Company's website and later wishes to withdraw that consent, the Customer may manage and control the Company's privacy controls via the Customer's web browser, including revoking Cookies by deleting them from the browser history when exiting the site. The Customer authorises the Company or the Company's agent to:
- (a) access, collect, retain and use any information about the Customer;
- (i) (including, name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history or any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Customer's creditworthiness; or
- (ii) for the purpose of marketing products and services to the Customer.
- (b) disclose information about the Customer, whether collected by the Company from the Customer directly or obtained by the Company from any other source, to any other credit provider or credit reference agency for the purpose of providing or obtaining a credit reference, debt collection or notifying a default by the Customer.
- Where the Customer is an individual the authorities under clause 21.3 are authorities or consents for the purposes of the Privacy Act 2020.
- The Customer shall have the right to request (by e-mail) from the Company, a copy of the Personal Information about the Customer retained by the Company and the right to request that the Company correct any incorrect Personal Information. The Company will destroy Personal Information upon the Customer's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- The Customer can make a privacy complaint by contacting the Company via e-mail. The Company will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within twenty (20) days of receipt of the complaint. In the event that the Customer is not satisfied with the resolution provided, the Customer can make a complaint to the Privacy Commissioner at <http://www.privacy.org.nz>.
- 22. Suspension of Works**
- Where the Contract is subject to section 24A of the Construction Contracts Act 2002, the Customer hereby expressly acknowledges that:
- (a) the Company has the right to suspend work within five (5) working days of written notice of its intent to do so if a payment claim is served on the Customer, and:
- (i) the payment is not paid in full by the due date for payment in accordance with clause 6.4 and/or any subsequent amendments or new legislation and no payment schedule has been given by the Customer; or
- (ii) a scheduled amount stated in a payment schedule issued by the Customer in relation to the payment claim is not paid in full by the due date for its payment; or
- (iii) the Customer has not complied with an adjudicator's notice that the Customer must pay an amount to the Company by a particular date; and
- (iv) the Company has given written notice to the Customer of its intention to suspend the carrying out of construction work under the construction Contract.
- (b) if the Company suspends work, it:
- (i) is not in breach of Contract; and
- (ii) is not liable for any loss or damage whatsoever suffered, or alleged to be suffered, by the Customer or by any person claiming through the Customer; and
- (iii) is entitled to an extension of time to complete the Contract; and
- (iv) keeps its rights under the Contract including the right to terminate the Contract, and may at any time lift the suspension, even if the amount has not been paid or an adjudicator's determination has not been complied with.
- (c) if the Company exercises the right to suspend work, the exercise of that right does not:
- (i) affect any rights that would otherwise have been available to the Company under the Contract and Commercial Law Act 2017; or
- (ii) enable the Customer to exercise any rights that may otherwise have been available to the Customer under that Act as a direct consequence of the Company suspending work under this provision;
- (d) due to any act or omission by the Customer, the Customer effectively precludes the Company from continuing the Works or performing or complying with the Company's obligations under this Contract, then without prejudice to the Company's other rights and remedies, the Company may suspend the Works immediately after serving on the Customer a written notice specifying the payment default or the act, omission or default upon which the suspension of the Works is based. All costs and expenses incurred by the Company as a result of such suspension and commencement shall be payable by the Customer as if they were a variation.
- 22.2 If pursuant to any right conferred by this Contract, the Company suspends the Works and the default that led to that suspension continues un-remedied subject to clause 20.1 for at least ten (10) working days, the Company shall be entitled to terminate the Contract, in accordance with clause 20.
- 23. Service of Notices**
- 23.1 Any written notice given under this Contract shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
- (b) by leaving it at the address of the other party as stated in this Contract;
- (c) by sending it by registered post to the address of the other party as stated in this Contract;
- (d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission;
- (e) if sent by email to the other party's last known email address.
- 23.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
- 24. Trusts**
- 24.1 If the Customer at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not the Company may have notice of the Trust, the Customer covenants with the Company as follows:
- (a) the Contract extends to all rights of indemnity which the Customer now or subsequently may have against the Trust and the trust fund;
- (b) the Customer has full and complete power and authority under the Trust to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Customer against the Trust or the trust fund. The Customer will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
- (c) the Customer will not without consent in writing of the Company (the Company will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
- (i) the removal, replacement or retirement of the Customer as trustee of the Trust;
- (ii) any alteration to or variation of the terms of the Trust;
- (iii) any advancement or distribution of capital of the Trust; or
- (iv) any resettlement of the trust property.
- 25. General**
- 25.1 Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising hereunder, shall be submitted to, and settled by, either adjudication in accordance with section 26 of the Construction Contracts Act 2002 and/or by arbitration in accordance with the Arbitration Act 1996 or its replacement(s). The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 25.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the Napier courts, New Zealand.
- 25.3 Subject to the CGA, the Company shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by the Company of these terms and conditions (alternatively the Company's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 25.4 The Company may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Customer's consent.
- 25.5 The Customer cannot licence or assign without the written approval of the Company. The Company may elect to subcontract out any part of the Works but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Customer agrees and understands that they have no authority to give any instruction to any of the Company's sub-contractors without the authority of the Company.
- 25.6 The Customer agrees that the Company may amend their general terms and conditions for subsequent future contracts with the Customer by disclosing such to the Customer in writing. These changes shall be deemed to take effect from the date on which the Customer accepts such changes, or otherwise at such time as the Customer makes a further request for the Company to provide Works to the Customer.
- 25.7 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc ("Force Majeure") or other event beyond the reasonable control of either party. This clause does not apply to a failure by the Customer to make a payment to the Company.
- Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.