
Otago Painting Solutions 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 “Contractor” means Otago Painting Solutions Limited, its successors and assigns or any person acting on behalf of and with the authority of Otago Painting Solutions Limited.
- 1.3 “Client” means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting the Contractor to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
- (a) if there is more than one Client, is a reference to each Client jointly and severally; and
 - (b) if the Client is a partnership, it shall bind each partner jointly and severally; and
 - (c) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
 - (d) includes the Client’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 Contractor to the Client at the Client’s request from time to time (where the context so permits the terms ‘Works’ or ‘Materials’ shall be interchangeable for the other).
- 1.5 “Confidential Information” means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party’s intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, contracts, client information (including but not limited to, “**Personal Information**” such as: 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) and pricing details.
- 1.6 “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 Client does not wish to allow Cookies to operate in the background when ordering from the website, then the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to ordering Works via the website.**
- 1.7 “Price” means the Price payable (plus any Goods and Services Tax (“GST”) where applicable) for the Works as agreed between the Contractor and the Client in accordance with clause 6 below.

2. Acceptance

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client 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 Client acknowledges and accepts that:
- (a) the supply of Works on credit shall not take effect until the Client has completed a credit application with the Contractor and it has been approved with a credit limit established for the account; and
 - (b) in the event that the supply of Works request exceeds the Client’s credit limit and/or the account exceeds the payment terms, the Contractor reserves the right to refuse delivery; and
 - (c) the supply of Materials for accepted orders may be subject to availability and if, for any reason, Materials are not or cease to be available, the Contractor reserves the right to substitute comparable Materials (or components of the Materials) and vary the Price as per clause 6.3. In all such cases the Contractor will notify the Client in advance of any such substitution, and also reserves the right to place the Client’s order and/or Works on hold, as per clause 7.2 until such time as the Contractor and the Client agree to such changes.
- 2.5 In the event that the Contractor is required to provide the Works urgently, that may require the Contractor’s staff to work outside normal business hours (including but not limited to working through lunch breaks, weekends and/or Public Holidays) then the Contractor reserves the right to charge the Client additional labour costs (penalty rates will apply), unless otherwise agreed between the Contractor and the Client.
- 2.6 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. Authorised Representatives

- 3.1 The Client acknowledges that the Contractor shall (for the duration of the Works) liaise directly with any designated authorised representatives, and that once introduced as such to the Contractor, these people shall have the full authority of the Client to order any Works, Materials and/or to request any variation thereto on the Client’s behalf. The Client accepts that they will be solely liable to the Contractor for all additional costs incurred by the Contractor (including the Contractor’s profit margin) in providing any Works, Materials or variation/s requested thereto by the Client’s duly authorised representatives.

4. Errors and Omissions

- 4.1 The Client acknowledges and accepts that the Contractor shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by the Contractor 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 Contractor in respect of the Works.
- 4.2 In the event such an error and/or omission occurs in accordance with clause 4.1, and is not attributable to the negligence and/or wilful misconduct of the Contractor; the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.

5. Change in Control

- 5.1 The Client shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client’s details (including but not limited to, changes in the Client’s name, address, contact phone or fax

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number/s, change of trustees, or business practice). The Client shall be liable for any loss incurred by the Contractor as a result of the Client's failure to comply with this clause.

6. Price and Payment

- 6.1 At the Contractor's sole discretion the Price shall be either:
- (a) as indicated on invoices provided by the Contractor to the Client in respect of Works performed or Materials supplied; or
 - (b) the Contractor's quoted Price (subject to clause 6.2) which shall be binding upon the Contractor provided that the Client shall accept the Contractor's quotation in writing within thirty (30) days.
- 6.2 Where the Client elects for fixed price Works, this shall be charged for on an hourly rate or per square metreage.
- 6.3 The Contractor 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 conditions, limitations to accessing the site, obscured site defects which require remedial work, health hazards and safety considerations, hidden locations of asbestos or hazardous materials, or prerequisite work by any third party not being completed, etc.) which are only discovered on commencement of the Works; or
 - (d) in the event of increases to the Contractor in the cost of labour or materials which are beyond the Contractor's control.
- 6.4 Variations will be charged for on the basis of the Contractor's quotation, and will be detailed in writing, and shown as variations on the Contractor's invoice. The Client shall be required to respond to any variation submitted by the Contractor within ten (10) working days. Failure to do so will entitle the Contractor 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.
- 6.5 At the Contractor's sole discretion a non-refundable deposit may be required.
- 6.6 Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by the Contractor, which may be:
- (a) on completion of the Works; or
 - (b) before commencement of the Works; or
 - (c) by way of progress payments in accordance with the Contractor's specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the worksite but not yet installed;
 - (d) the date specified on any invoice or other form as being the date for payment; or
 - (e) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by the Contractor.
- 6.7 Indent orders are required to be paid in full at time of ordering.
- 6.8 At the agreement of both parties, payment of the Price may be subject to retention by the Client of an amount (hereafter called the "Retention Money"), being a set amount or equal to a percentage of the Price. The Client 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 section 18 of the Construction Contracts Act 2002.
- 6.9 Payment may be made by electronic/on-line banking, or by any other method as agreed to between the Client and the Contractor.
- 6.10 The Contractor may in its discretion allocate any payment received from the Client towards any invoice that the Contractor determines and may do so at the time of receipt or at any time afterwards. On any default by the Client the Contractor may re-allocate any payments previously received and allocated. In the absence of any payment allocation by the Contractor, payment will be deemed to be allocated in such manner as preserves the maximum value of the Contractor's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 6.11 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Contractor nor to withhold payment of any invoice because part of that invoice is in dispute unless the request for payment by the Contractor is a claim made under the Construction Contracts Act 2002.
- 6.12 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to the Contractor an amount equal to any GST the Contractor must pay for any supply by the Contractor under this or any other agreement for the sale of the Materials. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client 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.

7. Provision of the Works

- 7.1 Subject to clause 7.2 it is the Contractor'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 Contractor claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond the Contractor's control, including but not limited to forecast weather conditions (including, without limitations, extreme temperatures) or any failure by the Client to
- (a) make a selection; or
 - (b) have the site ready for the Works; or
 - (c) notify the Contractor that the site is ready.
- 7.3 Where the Client has caused significant delays after commencement of the Works, the Contractor reserves the right to charge for all completed Works to date and any remaining Works shall be requoted.
- 7.4 At the Contractor's sole discretion, the cost of delivery is included in the Price.
- 7.5 The Contractor 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.
- 7.6 Any time specified by the Contractor for delivery of the Works is an estimate only and the Contractor will not be liable for any loss or damage incurred by the Client 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 Contractor is unable to supply the

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Works as agreed solely due to any action or inaction of the Client, then the Contractor 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.

- 7.7 The Client acknowledges and accepts that where the Client wishes to postpone the Works that the Contractor must be notified more twenty-four (24) hours of the proposed commencement date as agreed to between both parties. Where such notice is received inside this timeframe, the Contractor reserves the right to charge a reasonable fee for the delay in the commencement of the Works.

8. Risk

- 8.1 If the Contractor retains ownership of the Materials under clause 14 then:

(a) where the Contractor is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery and the Client must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that the Materials are delivered by the Contractor or the Contractor's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address).

(b) where the Contractor is to both supply and install Materials then the Contractor shall maintain an appropriate insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Client.

- 8.2 Notwithstanding the provisions of clause 8.1 if the Client specifically requests the Contractor to leave Materials outside the Contractor'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 Client and it shall be the Client'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 Client's expense.

- 8.3 Where the Contractor has effected delivery all risk passes to the Client as per clause 8.1 and the Client claims the Materials have been stolen it shall be the Client's responsibility to notify the police and forward evidence to the Contractor, this shall not excuse the Client from fulfilling their financial obligations under this contract.

- 8.4 The Client warrants that the structure of the premises or equipment in or upon which these Materials are to be installed or erected is sound and will sustain the installation and Works incidental thereto and the Contractor shall not be liable for any claims, demands, losses, damages, costs and expenses howsoever caused or arising should the premises or equipment be unable to accommodate the installation.

- 8.5 In the event that the Contractor discovers asbestos/hazardous materials whilst undertaking the Works, the Contractor shall immediately advise the Client of the same and shall be entitled to suspend the Works pending a risk assessment in relation to those materials. The Client shall be liable for all additional costs (howsoever arising) incurred by the Contractor as a result of the discovery of asbestos/hazardous materials and/or any suspension of the Works in relation thereto (including, but not limited to, where the Contractor agrees to remove any asbestos/hazardous materials on the Client's behalf).

- 8.6 In the event asbestos or any other toxic substances are discovered at the worksite, that it is the Client's responsibility to ensure the safe removal of the same. The Client further agrees to indemnify the Contractor against any costs incurred by the Contractor as a consequence of such discovery. Under no circumstances will the Contractor handle removal of asbestos product.

- 8.7 Where the Contractor gives advice or recommendations to the Client, or the Client's agent, regarding any aspect of the scope of the Works (including but not limited to, a particular course of action, product selection or the condition of materials supplied by the Client being inferior), and such advice or recommendations are not acted upon, then the Contractor shall require the Client or their agent to authorise commencement of the Works in writing. The Contractor shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Works nor will such losses or damages be deemed a defect.

- 8.8 Where the Client has supplied materials for the Contractor to complete the Works, the Client acknowledges and accepts responsibility for the suitability of purpose, quality and any faults inherent in the materials. The Contractor shall not be responsible for any defects in the materials, any loss or damage to the materials (or any part thereof), howsoever arising from the use of materials supplied by the Client.

- 8.9 The Contractor shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, the Contractor accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.

- 8.10 The Contractor shall not be liable for:

(a) inferior existing paintwork where the Contractor's paint has bonded to the existing paintwork and weakened the previous paint causing any kind of flake, crack or blemish; or

(b) the quality of the Works if the Client does not follow the Contractor's recommendations as to the number of coats of paint required to obtain the final finish if the Client chooses to accept a reduced Price based on fewer coats of paint; or

(c) any loss or damage whatsoever to the Works (including, but not limited to, painted surfaces) that is caused by any other tradesmen during and after the completion of the Works; or

(d) delays caused by any other third party suppliers that impacts on the provision of the Works by the Contractor; or

(e) any defect or damage resulting from incorrect or faulty installation carried out by any other third party; and

(f) furthermore, if the Client instructs the Contractor to rectify any damage caused by any other tradesman, this will become a variation to the original quotation and will be charged at the Contractor normal hourly rate.

- 8.11 The Client acknowledges and accepts that Materials (including but not limited to paint, timber, metal, etc.) supplied may:

(a) exhibit variations in shade tone, colour, texture, markings, veining, surface and finish, and contain natural fissures, occlusions, and indentations. The Contractor will make every effort to match batches/samples of the Materials supplied in order to minimise such variations, but shall not be liable in any way whatsoever where such variations occur;

(b) fade or change colour over time;

(c) expand, contract or distort as a result of exposure to heat, cold, weather;

(d) mark or stain if exposed to certain substances; and

(e) be damaged or disfigured by impact or scratching.

- 8.12 Timber is a hygroscopic material subject to expansion and contraction, therefore the Contractor will accept no responsibility for gaps that may appear during prolonged dry periods.

9. Client Responsibilities

- 9.1 It is the intention of the Contractor and agreed by the Client that it is the responsibility of the Client to:

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- (a) provide and have erected scaffolding to enable the Works to be undertaken (where it is not specifically included in the Contractor's Quotation). It is also agreed that all scaffolding erected will comply with industry safety standards and that any person erecting the scaffolding shall be suitably qualified to ensure its safe and proper erection and where necessary shall hold a current certificate of competency and/or be fully licensed; and
 - (b) remove any furniture, furnishings or personal goods from the vicinity of the Works and agrees that the Contractor shall not be liable for any damage caused to those items through the Client's failure to comply with this clause; and
 - (c) extinguish all naked flames prior to coating including but not limited to pilot lights heaters etc.; and
 - (d) provide the Contractor with adequate access to available water, electricity, toilet and washing facilities, if so required.
- 9.2 The Client acknowledges that they shall be:
- (a) be wholly responsible for animals and/or children on the worksite;
 - (b) be wholly responsible for the removal of rubbish from or clean-up of the worksite.
- 9.3 On completion of the Works, the Contractor shall provide the Client with maintenance instructions. Failure by the Client to adhere to said instructions may invalidate the warranty.

10. Access

- 10.1 The Client shall ensure that the Contractor has clear and free access to the worksite at all times to enable them to undertake the Works. The Contractor shall not be liable for any loss or damage to the worksite (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of the Contractor.

11. Surplus Materials

- 11.1 Unless otherwise stated elsewhere in this contract:
- (a) only suitable new Materials will be used; and
 - (b) demolished materials remain the Client's property; and
 - (c) Materials that the Contractor brings to the worksite which are surplus remain the property of the Contractor.

12. Insurance

- 12.1 The Contractor shall have public liability insurance of at least ten million dollars (\$10m). It is the Client's responsibility to ensure that they are similarly insured.

13. Compliance with Laws

- 13.1 The Client and the Contractor shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works, including any WorkSafe guidelines regarding health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.
- 13.2 Notwithstanding clause 13.1 and pursuant to the Health & Safety at Work Act 2015 (the "HSW Act") the Contractor agrees at all times comply with sections 29 and 34 of the "HSW Act" with meeting their obligations for health and safety laws in the workplace regardless of whether they may be the party in control of the worksite or if in the event that they may be acting as a subcontractor for the Client's where the Client has engaged a thirty party head contractor.
- 13.3 Upon completion of the Works, the Contractor will provide the Client with a producer statement which will apply to the Works provided by the Contractor and can be used by the Client to gain relevant compliance.
- 13.4 The Client shall obtain (at the expense of the Client) all licenses, approvals, applications and permits that may be required for the Works.

14. Title

- 14.1 The Contractor and the Client agree that ownership of the Materials shall not pass until:
- (a) the Client has paid the Contractor all amounts owing to the Contractor; and
 - (b) the Client has met all of its other obligations to the Contractor.
- 14.2 Receipt by the Contractor 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.
- 14.3 It is further agreed that:
- (a) until ownership of the Materials passes to the Client in accordance with clause 14.1 that the Client is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to the Contractor on request;
 - (b) the Client holds the benefit of the Client's insurance of the Materials on trust for the Contractor and must pay to the Contractor 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 Contractor shall be sufficient evidence of the Contractor's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with the Contractor to make further enquiries;
 - (d) the Client 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 Client sells, disposes or parts with possession of the Materials then the Client must hold the proceeds of any such act on trust for the Contractor and must pay or deliver the proceeds to the Contractor on demand;
 - (e) the Client should not convert or process the Materials or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of the Contractor and must sell, dispose of or return the resulting product to the Contractor as it so directs;
 - (f) unless the Materials have become fixtures the Client irrevocably authorises the Contractor to enter any premises where the Contractor believes the Materials are kept and recover possession of the Materials;
 - (g) the Contractor may recover possession of any Materials in transit whether or not delivery has occurred;
 - (h) the Client 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 Contractor;
 - (i) the Contractor may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Client.

15. Personal Property Securities Act 1999 (“PPSA”)

- 15.1 Upon assenting to these terms and conditions in writing the Client 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 and/or collateral (account) – being a monetary obligation of the Client to the Contractor for Works – that have previously been supplied and that will be supplied in the future by the Contractor to the Client.
- 15.2 The Client undertakes to:
- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Contractor 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 Contractor 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 and/or collateral (account) in favour of a third party without the prior written consent of the Contractor; and
 - (d) immediately advise the Contractor 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.
- 15.3 The Contractor and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 15.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA.
- 15.5 Unless otherwise agreed to in writing by the Contractor, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 15.6 The Client shall unconditionally ratify any actions taken by the Contractor under clauses 15.1 to 15.5.
- 15.7 Subject to any express provisions to the contrary (including those contained in this clause 15), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

16. Security and Charge

- 16.1 In consideration of the Contractor agreeing to supply the Works, the Client 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 Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 16.2 The Client indemnifies the Contractor from and against all the Contractor’s costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Contractor’s rights under this clause.
- 16.3 The Client irrevocably appoints the Contractor and each director of the Contractor as the Client’s true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 16 including, but not limited to, signing any document on the Client’s behalf.

17. Defects In Materials

- 17.1 The Client shall inspect the Materials on delivery and shall within seven (7) days of delivery (time being of the essence) notify the Contractor of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Contractor an opportunity to inspect the Materials within a reasonable time following delivery if the Client believes the Materials are defective in any way. If the Client 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 Contractor has agreed in writing that the Client is entitled to reject, the Contractor’s liability is limited to either (at the Contractor’s discretion) replacing the Materials or repairing the Materials.
- 17.2 Materials will not be accepted for return other than in accordance with 17.1 above.

18. Returns

- 18.1 Returns will only be accepted provided that:
- (a) the Client has complied with the provisions of clause 17.1; and
 - (b) the Contractor has agreed in writing to accept the return of the Materials; and
 - (c) the Materials are returned at the Client’s cost within fourteen (14) days of the delivery date; and
 - (d) the Contractor will not be liable for Materials which have not been 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.
- 18.2 The Contractor will not accept the return of non-defective Materials for credit.
- 18.3 Non-stocklist items or Materials made to the Client’s specifications are under no circumstances acceptable for credit or return.

19. Warranties

- 19.1 Subject to the conditions of warranty set out in clause 19.2 the Contractor warrants that if any defect in any workmanship of the Contractor becomes apparent and is reported to the Contractor within two (2) years of the date of delivery (time being of the essence) then the Contractor will either (at the Contractor’s sole discretion) replace or remedy the workmanship.
- 19.2 The conditions applicable to the warranty given by clause 19.1 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 Client to properly maintain any Materials; or
 - (ii) failure on the part of the Client to follow any instructions or guidelines provided by the Contractor; or
 - (iii) any use of any Materials otherwise than for any application specified on a quote or order form; or
 - (iv) the continued use of any Materials 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 Contractor shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Contractor’s consent.

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- (c) in respect of all claims the Contractor shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.
- 19.3 For Materials not manufactured by the Contractor, the warranty shall be the current warranty provided by the manufacturer of the Materials. The Contractor 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.
- 20. Consumer Guarantees Act 1993**
- 20.1 If the Client is acquiring Materials for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Materials by the Contractor to the Client.
- 21. Intellectual Property**
- 21.1 Where the Contractor has designed, drawn, written plans or a schedule of Works, or created any products for the Client, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in the Contractor, and shall only be used by the Client at the Contractor's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of the Contractor.
- 21.2 The Client warrants that all designs, specifications or instructions given to the Contractor will not cause the Contractor to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Contractor against any action taken by a third party against the Contractor in respect of any such infringement.
- 21.3 The Client agrees that the Contractor may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which the Contractor has created for the Client.
- 22. Default and Consequences of Default**
- 22.1 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 Contractor's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 22.2 If the Client owes the Contractor any money the Client shall indemnify the Contractor from and against all costs and disbursements incurred by the Contractor in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Contractor's collection agency costs, and bank dishonour fees).
- 22.3 Further to any other rights or remedies the Contractor may have under this Contract, if a Client has made payment to the Contractor, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Contractor under this clause 22, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- 22.4 Without prejudice to the Contractor's other remedies at law the Contractor shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Client will be unable to make a payment when it falls due;
 - (b) the Client has exceeded any applicable credit limit provided by the Contractor;
 - (c) the Client 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 Client or any asset of the Client.
- 23. Cancellation**
- 23.1 Without prejudice to any other rights or remedies the Contractor may have, if at any time the Client 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 Client of such notice/s) then the Contractor may suspend the Works immediately. The Contractor will not be liable to the Client for any loss or damage the Client suffers because the Contractor has exercised its rights under this clause.
- 23.2 The Contractor 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 Client. On giving such notice the Contractor shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to the Contractor for Works already performed. The Contractor shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 23.3 In the event that the Client cancels the delivery of Works the Client shall be liable for any and all loss incurred (whether direct or indirect) by the Contractor as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 23.4 Cancellation of orders for products made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 24. Privacy Policy**
- 24.1 All emails, documents, images or other recorded information held or used by the Contractor is Personal Information as defined and referred to in clause 24.3 and therefore considered confidential. The Contractor acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1993 ("the Act") including Part II of the OECD Guidelines and as set out in Schedule 5A of the Act and any statutory requirements where relevant in a European Economic Area "EEA" then the EU Data Privacy Laws (including the General Data Protection Regulation "GDPR") (collectively, "EU Data Privacy Laws"). The Contractor acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by the Contractor that may result in serious harm to the Client, the Contractor will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client by written consent, unless subject to an operation of law.
- 24.2 Notwithstanding clause 24.1, privacy limitations will extend to the Contractor in respect of Cookies where transactions for purchases/orders transpire directly from the Contractor's website. The Contractor agrees to display reference to such Cookies and/or similar tracking

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technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Client'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 Contractor when the Contractor sends an email to the Client, so the Contractor may collect and review that information ("collectively Personal Information")

In order to enable / disable the collection of Personal Information by way of Cookies, the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable, provided on the website prior to proceeding with a purchase/order via the Contractor's website.

24.3 The Client authorises the Contractor or the Contractor's agent to:

- (a) access, collect, retain and use any information about the Client;
 - (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 Client's creditworthiness; or
 - (ii) for the purpose of marketing products and services to the Client.
- (b) disclose information about the Client, whether collected by the Contractor from the Client directly or obtained by the Contractor from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.

24.4 Where the Client is an individual the authorities under clause 24.3 are authorities or consents for the purposes of the Privacy Act 1993.

24.5 The Client shall have the right to request the Contractor for a copy of the Personal Information about the Client retained by the Contractor and the right to request the Contractor to correct any incorrect Personal Information about the Client held by the Contractor.

25. Suspension of Works

25.1 Where the Contract is subject to the Construction Contracts Act 2002, the Client hereby expressly acknowledges that:

- (a) the Contractor 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 Client, and:
 - (i) the payment is not paid in full by the due date for payment in accordance with clause 6.6 and/or any subsequent amendments or new legislation and no payment schedule has been given by the Client; or
 - (ii) a scheduled amount stated in a payment schedule issued by the Client in relation to the payment claim is not paid in full by the due date for its payment; or
 - (iii) the Client has not complied with an adjudicator's notice that the Client must pay an amount to the Contractor by a particular date; and
 - (iv) the Contractor has given written notice to the Client of its intention to suspend the carrying out of construction work under the construction Contract.
- (b) if the Contractor 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 Client or by any person claiming through the Client; 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 Contractor 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 Contractor under the Contract and Commercial Law Act 2017; or
 - (ii) enable the Client to exercise any rights that may otherwise have been available to the Client under that Act as a direct consequence of the Contractor suspending work under this provision;
- (d) due to any act or omission by the Client, the Client effectively precludes the Contractor from continuing the Works or performing or complying with the Contractor's obligations under this Contract, then without prejudice to the Contractor's other rights and remedies, the Contractor may suspend the Works immediately after serving on the Client 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 Contractor as a result of such suspension and recommencement shall be payable by the Client as if they were a variation.

25.2 If pursuant to any right conferred by this Contract, the Contractor suspends the Works and the default that led to that suspension continues un-remedied subject to clause 23.1 for at least ten (10) working days, the Contractor shall be entitled to terminate the Contract, in accordance with clause 23.

26. Service of Notices

26.1 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 email to the other party's last known email address.

26.2 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.

27. Trusts

27.1 If the Client 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 Contractor may have notice of the Trust, the Client covenants with the Contractor as follows:

- (a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;

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- (b) the Client 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 Client against the Trust or the trust fund. The Client 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 Client will not without consent in writing of the Contractor (the Contractor will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
 - (i) the removal, replacement or retirement of the Client 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.

28. General

- 28.1 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 the Construction Contracts Act 2002 and/or by arbitration in accordance with the Arbitration Act 1996 or its replacement(s).
- 28.2 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.
- 28.3 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 Otago Courts of New Zealand.
- 28.4 The Contractor shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Contractor of these terms and conditions (alternatively the Contractor's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 28.5 The Contractor may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.
- 28.6 The Client cannot licence or assign without the written approval of the Contractor.
- 28.7 The Contractor 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 Client agrees and understands that they have no authority to give any instruction to any of the Contractor's sub-contractors without the authority of the Contractor.
- 28.8 The Client agrees that the Contractor may amend their general terms and conditions for subsequent future contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for the Contractor to provide Works to the Client.
- 28.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 28.10 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.