

TRU-BILT Industries Limited – Terms & Conditions of Trade – New Zealand

- 1. Definitions**
- 1.1 "Seller" shall mean Tru-Bilt Industries Limited its successors and assigns or any person acting on behalf of and with the authority of Tru-Bilt Industries Limited.
- 1.2 "Buyer" shall mean the Buyer (or any person acting on behalf of and with the authority of the Buyer) as described on any quotation, work authorisation or other form as provided by the Seller to the Buyer.
- 1.3 "Guarantor" shall mean that person (or persons) who agrees to be liable for the debts of the Buyer on a principal debtor basis.
- 1.4 "Goods" shall mean all Goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined) and includes Goods described on any invoices, quotation, work authorisation or any other forms as provided by the Seller to the Buyer.
- 1.5 "Services" shall mean all services supplied by the Seller to the Buyer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.6 "Price" shall mean the price payable for the Goods as agreed between the Seller and the Buyer in accordance with clause 3 of this contract.
- 2. Acceptance**
- 2.1 Any instructions received by the Seller from the Buyer for the supply of Goods and/or the Buyer's acceptance of Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Buyer has entered into this agreement, the Buyers shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Buyer the terms and conditions are binding and can only be amended with the written consent of the Seller.
- 2.4 The Buyer shall give the Seller not less than fourteen (14) days prior written notice of any proposed change of ownership of the Buyer or any change in the Buyer's name and/or any other change in the Buyer's details (including but not limited to, changes in the Buyer's address, facsimile number, or business practice). The Buyer shall be liable for any loss incurred by the Seller as a result of the Buyer's failure to comply with this clause.
- 2.5 Goods are supplied by the Seller only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Buyer's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
- 3. Price And Payment**
- 3.1 At the Seller's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by the Seller to the Buyer in respect of Goods supplied; or
 - (b) the Seller's current price at the date of delivery of the Goods according to the Seller's current Price list; or
 - (c) the Seller's quoted Price (subject to clause 3.2) which shall be binding upon the Seller provided that the Buyer shall accept the Seller's quotation in writing within thirty (30) days.
- 3.2 The Seller reserves the right to change the Price in the event of a variation to the Seller's quotation. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation due to fluctuations in the currency exchange rate, or due to unforeseen circumstances) will be charged for on the basis of the Seller's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 3.3 The Seller may submit detailed progress payment claims in accordance with the Seller's specified payment schedule. Such payment claims may include the reasonable value of authorised variations and the value of any materials delivered to the site but not yet installed.
- 3.4 At the Seller's sole discretion a non-refundable deposit may be required.
- 3.5 At the Seller's sole discretion:
 - (a) payment shall be due on delivery of the Goods; or
 - (b) payment for approved Buyers shall be made by instalments in accordance with the Seller's payment schedule; or
 - (c) payment for approved Buyers shall be due twenty (20) days following the end of the month in which a statement is posted to the Buyer's address or address for notices.
- 3.6 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 3.7 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Buyer and the Seller.
- 3.8 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.
- 4. Delivery Of Goods**
- 4.1 At the Seller's sole discretion delivery of the Goods shall take place when:
 - (a) the Buyer takes possession of the Goods at the Seller's address; or
 - (b) the Buyer takes possession of the Goods at the Buyer's nominated address (in the event that the Goods are delivered by the Seller or the Seller's nominated carrier); or
 - (c) the Buyer's nominated carrier takes possession of the Goods in which event the carrier shall be deemed to be the Buyer's agent.
- 4.2 At the Seller's sole discretion the costs of delivery are:
 - (a) included in the Price; or
 - (b) in addition to the Price; or
 - (c) for the Buyer's account.
- 4.3 The Buyer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Buyer is unable to take delivery of the Goods as arranged then the Seller shall be entitled to charge a reasonable fee for redelivery.
- 4.4 Delivery of the Goods to a third party nominated by the Buyer is deemed to be delivery to the Buyer for the purposes of this agreement.
- 4.5 The Seller may deliver the Goods by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the provisions in these terms and conditions.
- 4.6 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.
- 4.7 The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of the Seller.
- 5. Risk**
- 5.1 If the Seller retains ownership of the Goods nonetheless, all risk for the Goods passes to the Buyer on delivery.
- 5.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Buyer, the Seller is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.
- 6. Title**
- 6.1 The Seller and Buyer agree that ownership of the Goods shall not pass until:
 - (a) the Buyer has paid the Seller all amounts owing for the particular Goods; and
 - (b) the Buyer has met all other obligations due by the Buyer to the Seller in respect of all contracts between the Seller and the Buyer.
- 6.2 Receipt by the Seller 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 and until then the Seller's ownership or rights in respect of the Goods shall continue.
- 6.3 It is further agreed that:
 - (a) where practicable the Goods shall be kept separate and identifiable until the Seller shall have received payment and all other obligations of the Buyer are met; and
 - (b) until such time as ownership of the Goods shall pass from the Seller to the Buyer the Seller may give notice in writing to the Buyer to return the Goods or any of them to the Seller. Upon such notice being given the rights of the Buyer to obtain ownership or any other interest in the Goods shall cease; and
 - (c) the Buyer is only a bailee of the Goods and until such time as the Seller has received payment in full for the Goods then the Buyer shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Buyer owes to the Seller for the Goods, on trust for the Seller; and
 - (d) until such time that ownership in the Goods passes to the Buyer, if the Goods are converted into other products, the parties agree that the Seller will be the owner of the end products; and
 - (e) if the Buyer fails to return the Goods to the Seller then the Seller or the Seller's agent may (as the invitee of the Buyer) enter upon and into land and premises owned, occupied or used by the Buyer, or any premises where the Goods are situated and take possession of the Goods, and the Seller will not be liable for any reasonable loss or damage suffered as a result of any action by the Seller under this clause.
- 7. Personal Property Securities Act 1999 ("PPSA")**
- 7.1 Upon assenting to these terms and conditions in writing the Buyer 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 Goods previously supplied by the Seller to the Buyer (if any) and all Goods that will be supplied in the future by the Seller to the Buyer.
- 7.2 The Buyer 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 Seller 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 Seller for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;
 - (c) not register a financing change statement or a change demand without the prior written consent of the Seller; and
 - (d) immediately advise the Seller of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 7.3 The Seller and the Buyer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 7.4 The Buyer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
- 7.5 Unless otherwise agreed to in writing by the Seller, the Buyer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 7.6 The Buyer shall unconditionally ratify any actions taken by the Seller under clauses 7.1 to 7.5.
- 8. Security And Charge**
- 8.1 Despite anything to the contrary contained herein or any other rights which the Seller may have howsoever:
 - (a) where the Buyer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Buyer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Buyer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Buyer and/or Guarantor shall indemnify the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) the Buyer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Seller or the Seller's nominee as the Buyer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 8.1.
- 9. Buyer's Disclaimer**
- 9.1 The Buyer hereby disclaims any right to rescind, or cancel any contract with the Seller or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Buyer by the Seller and the Buyer acknowledges that the Goods are bought relying solely upon the Buyer's skill and judgment.
- 10. Defects**
- 10.1 The Buyer shall inspect the Goods on delivery and shall within fourteen (14) days of delivery (time being of the essence) notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Buyer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery if the Buyer believes the Goods are defective in any way. If the Buyer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Seller has agreed in writing that the Buyer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods.
- 11. Returns**
- 11.1 Returns will only be accepted provided that:
 - (a) the Buyer has complied with the provisions of clause 10.1; and
 - (b) the Seller has agreed in writing to accept the return of the Goods; and
 - (c) the Goods are returned at the Buyer's cost within thirty (30) days of the delivery date; and
 - (d) the Seller will not be liable for Goods which have not been stored or used in a proper manner; and
 - (e) the Goods 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.
- 11.2 The Seller may (in its discretion) accept the return of Goods for credit but this may incur a handling fee of fifteen percent (15%) of the value of the returned Goods plus any freight.
- 11.3 Non-stocklist items or Goods made to the Buyer's specifications are under no circumstances acceptable for credit or return.
- 12. Warranty**
- 12.1 Subject to the conditions of warranty set out in Clause 12.2 the Seller warrants that if any defect in any workmanship of the Seller becomes apparent and is reported to the Seller within twelve (12) months of the date of delivery (time being of the essence) then the Seller will either (at the Seller's sole discretion) replace or remedy the workmanship.
- 12.2 The conditions applicable to the warranty given by Clause 12.1 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 Buyer to properly maintain any Goods; or
 - (ii) failure on the part of the Buyer to follow any instructions or guidelines provided by the Seller; or
 - (iii) any use of any Goods otherwise than for any application specified on a quote or order form; or
 - (iv) the continued use of any Goods 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 Seller shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Seller's consent.
 - (c) in respect of all claims the Seller shall not be liable to compensate the Buyer for any delay in either replacing or remedying the workmanship or in properly assessing the Buyer's claim.
- 12.3 For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller 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 Goods.
- 13. Consumer Guarantees Act 1993**
- 13.1 If the Buyer is acquiring Goods for the purposes of a trade or business, the Buyer acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods by the Seller to the Buyer.
- 14. Intellectual Property**
- 14.1 Where the Seller has designed, drawn or written Goods for the Buyer, then the copyright in those designs and drawings and documents shall remain vested in the Seller, and shall only be used by the Buyer at the Seller's discretion.
- 14.2 The Buyer warrants that all designs or instructions to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Buyer's order and the Buyer agrees to indemnify the Seller against any action taken by a third party against the Seller in respect of any such infringement.
- 14.3 The Buyer agrees that the Seller may use any documents, designs, drawings or Goods created by the Seller for the purposes of advertising, marketing, or entry into any competition.
- 15. Default & Consequences Of Default**
- 15.1 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 Seller's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 15.2 In the event that the Buyer's payment is dishonoured for any reason the Buyer shall be liable for any dishonour fees incurred by the Seller.
- 15.3 If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in pursuing the debt including legal costs on a solicitor and own client basis and the Seller's collection agency costs.
- 15.4 Without prejudice to any other remedies the Seller may have, if at any time the Buyer is in breach of any obligation (including those relating to payment) the Seller may suspend or terminate the supply of Goods to the Buyer and any of its other obligations under the terms and conditions. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller has exercised its rights under this clause.
- 15.5 If any amount remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 15.6 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Buyer which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable in the event that:
 - (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to meet its payments as they fall due; or
 - (b) the Buyer becomes insolvent, 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
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer.
- 16. Cancellation**
- 16.1 The Seller may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Buyer. On giving such notice the Seller shall repay to the Buyer any sums paid in respect of the Price. The Seller shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 16.2 In the event that the Buyer cancels delivery of the Goods the Buyer shall be liable for any loss incurred by the Seller (including, but not limited to, any loss of profits) up to the time of cancellation.
- 16.3 Cancellation of orders for Goods made to the Buyer's specifications or non-stocklist items will definitely not be accepted, once production has commenced.
- 17. Privacy Act 1993**
- 17.1 The Buyer and the Guarantor(s) (if separate to the Buyer) authorises the Seller to:
 - (a) collect, retain and use any information about the Buyer and/or Guarantors, for the purpose of assessing the Buyer's and/or Guarantors creditworthiness or marketing products and services to the Buyer and/or Guarantors; and
 - (b) disclose information about the Buyer and/or Guarantors, whether collected by the Seller from the Buyer and/or Guarantors directly or obtained by the Seller 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 Buyer and/or Guarantors.
- 17.2 Where the Buyer and/or Guarantors are an individual the authorities under clause 17.1 are authorities or consents for the purposes of the Privacy Act 1993.
- 17.3 The Buyer and/or Guarantors shall have the right to request the Seller for a copy of the information about the Buyer and/or Guarantors retained by the Seller and the right to request the Seller to correct any incorrect information about the Buyer and/or Guarantors held by the Seller.
- 18. Unpaid Seller's Rights**
- 18.1 Where the Buyer has left any item with Seller for repair, modification, exchange or for the Seller to perform any other Service in relation to the item and the Seller has not received or been tendered the whole of the Price, or the payment has been dishonoured, the Seller shall have:
 - (a) a lien on the item;
 - (b) the right to retain the item for the Price while the Seller is in possession of the item;
 - (c) a right to sell the item.
- 18.2 The lien of the Seller shall continue despite the commencement of proceedings, or judgment for the Price having been obtained.
- 19. Construction Contract Act 2002**
- 19.1 The Buyer hereby expressly acknowledges that:
 - (a) the Seller 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 Buyer; and
 - (i) the payment is not paid in full by the due date for payment and no payment schedule has been given by the Buyer; or
 - (ii) a scheduled amount stated in a payment schedule issued by the Buyer in relation to the payment claim is not paid in full by the due date for its payment; or
 - (iii) the Buyer has not complied with an adjudicator's notice that the Buyer must pay an amount to the Seller by a particular date; and
 - (iv) the Seller has given written notice to the Buyer of its intention to suspend the carrying out of construction work under the construction contract.
 - (b) if the Seller 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 Buyer or by any person claiming through the Buyer; 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 Seller 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 Seller under the Contractual Remedies Act 1979; or
 - (ii) enable the Buyer to exercise any rights that may otherwise have been available to the Buyer under that Act as a direct consequence of the Seller suspending work under this provision.
- 20. General**
- 20.1 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.
- 20.2 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 courts of New Zealand.
- 20.3 The Seller shall be under no liability whatsoever to the Buyer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of these terms and conditions.
- 20.4 In the event of any breach of this contract by the Seller the remedies of the Buyer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 20.5 The Buyer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Buyer by the Seller nor to withhold payment of any invoice because part of that invoice is in dispute.
- 20.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.
- 20.7 The Seller reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Seller notifies the Buyer of such change.
- 20.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 20.9 The failure by the Seller to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision.