

NZ Foam Limited - Terms & Conditions of Trade

1. Definitions

- 1.1 "Contractor" shall mean NZ Foam Limited its successors and assigns or any person acting on behalf of and with the authority of NZ Foam Limited.
- 1.2 "Client" shall mean the Client or any person acting on behalf of and with the written authority of the Client.
- 1.3 "Works" shall mean all Works (including the supply of Materials) undertaken by the Contractor and described in this contract and includes any advice or recommendations.
- 1.4 "Materials" shall mean Materials required to complete the Works.
- 1.5 "Prime Cost Item" shall mean an item that either has not been selected, or whose Price is not known, at the time this contract is entered into and for the cost of supply and delivery of which the Contractor must make a reasonable allowance in the contract.
- 1.6 "Provisional Sum" shall mean an estimate of the cost of carrying out particular Works under this contract for which the Contractor, after making all reasonable inquiries, cannot give a definite Price at the time this contract is entered into.
- 1.7 "Price" shall mean the Price of the Works as agreed between the Contractor and the Client.

2. Acceptance

- 2.1 Any instructions received by the Contractor from the Client for the supply of Works and/or the Client's acceptance of Works undertaken by the Contractor shall constitute acceptance of the terms and conditions contained herein
- 2.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of this contract by the Client, this contract is binding and can only be rescinded in accordance with this contract or with the written consent of the Contractor.
- 2.4 None of the Contractor's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Contractor in writing nor is the Contractor bound by any such unauthorised statements.
- 2.5 The Client shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, 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.

3. Variations

- 3.1 In the event that the Client requests a variation all such requests shall be made in writing. If the Contractor believes the variation will not require a variation to any permit and will not cause any delay, and will not add more than two percent (2%) to the Price then the Contractor may carry out the variation and the Client agrees to pay any variation to the Price, otherwise the Contractor will give the Client a written variation document detailing the Works, the amended Price, the estimated time to undertake the variation, and the likely delay, if any, and require written acceptance by the Client of the variation before commencing Work on the variation.
- 3.2 In the event that the Contractor requests a variation, the Contractor will, in writing:
 - (a) state the reason for the variation;
 - (b) and provide a full description of the variation;
 - (c) and state any effect the variation will have on the contract, including but not limited to, the Price, completion date and whether further permits or authorisations are required.
- 3.3 Other than for the events outlined in clause 3.4 the Contractor shall obtain written acceptance by the Client of any variation submitted by the Contractor before commencing Work on the variation.
- 3.4 Where the Works involve additions or alterations to an existing building or structure then:
 - (a) the Contractor shall not be liable for any loss or damage suffered by the Client in relation to the Works where such loss or damage results from the state or condition of the Client's existing building or structure, and the effect of such state or condition on the Works, or the effect of the Works on the existing building or structure, could not reasonably have been foreseen by the Contractor during the course of the Works;
 - (b) and where as a result of opening up any part of the existing building or structure to carry out the Works, any additional or altered work is required because of non-standard construction or any substandard timber or other materials or because of any material which is required to be replaced or removed to carry out the Works, then the cost of any additional or altered work shall be borne by the Client and treated as a variation and the Contract Price adjusted accordingly.

4. Price And Payment

- 4.1 At the Contractor's sole discretion a non-refundable deposit may be required.
- 4.2 Time for payment for the Works shall be of the essence and will be stated on the invoice. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 4.3 Where no payment stages have been specified the Contractor may submit a detailed payment claim at intervals not less than one (1) month for Works performed up to the end of each month. The value of Works so performed shall include the reasonable value of authorised variations, whether or not the value of such variations has been finally agreed between the parties, and the value of Materials delivered to the site but not installed.
- 4.4 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 Client and the Contractor.
- 4.5 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in the building contract schedule.

5. Completion Of Works

- 5.1 Subject to clause 5.2 it is the Contractor's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 5.2 The Works commencement date will be put back and the building period 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 any failure by the Client to:
 - (a) make a selection; or
 - (b) have the site ready for installation; or
 - (c) notify the Contractor that the site is ready.
- 5.3 The Works shall be deemed to be completed when:
 - (a) the Works carried out under this contract have been completed in accordance with the plans and specifications set out in this contract; and the Client either;
 - (b) receives a certificate of acceptance where the Works were urgent and completed without a building consent; or
 - (c) in any other case, upon the issuance of a Notice of Practical Completion.
- 5.4 The Client shall inspect the Works upon completion and shall within one (1) month 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 Works within a reasonable time following delivery if the Client believes the Works are defective in any way. If the Client shall fail to comply with these provisions the Works shall be presumed to be free from any defect or damage. For defective Works, 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 Works or repairing the Works.
- 5.5 The failure of the Contractor to deliver shall not entitle either party to treat this contract as repudiated.
- 5.6 The Contractor shall not be liable for any loss or damage whatever due to failure by the Contractor to deliver the Works (or any of them) promptly or at all, where due to circumstances beyond the control of the Contractor.

6. Site Access and Condition

- 6.1 It is the intention of the Contractor and agreed by the Client that:
 - (a) it is the Client's responsibility to provide the Contractor, while at the site, with adequate access to available water, electricity, toilet and washing facilities; and
 - (b) the Client is entitled to have reasonable access to inspect the Works at all reasonable hours in the presence of the Contractor provided that the Contractor shall not be responsible for any damage done to the Works by the Client, and the Client does not interfere with the progress of the Works, and the Client complies with all requirements of Health and Safety in Employment Act 1992; and
 - (c) the Contractor is not responsible for the removal of rubbish from, or clean up of, the building/construction site/s when it has been stated on the quotation/estimate that no allowance has been given for rubbish removal/dump fees. This is the responsibility of the Client or the Client's agent; and,
 - (d) the Contractor shall not be responsible for the removal of rubbish left by any other contractor or sub-contractor.

7. Compliance & Consents

- 7.1 The Client shall obtain and pay for any building consent and resource consent and other necessary approvals required for the Works, including consents and approval required after commencement of the Works.
- 7.2 The Contractor shall comply with the terms and conditions of the building and resource consents and approvals as far as such consents and approvals relate to the carrying out of the Works.
- 7.3 Subject to section 364 of the Building Act 2004, the Client shall be responsible for applying for and obtaining the Code Compliance Certificate(s) for the Works.
- 7.4 The Contractor shall provide the Client with all necessary information relating to the Works so that the Client may apply for a Code Compliance Certificate.

8. Works undertaken by Client

- 8.1 In the event that any part of the Works is undertaken by, or is reliant upon Works undertaken by the Client then any Works undertaken by the Client shall be at the written permission of the Contractor and executed in accordance with a timetable provided to the Client by the Contractor and shall be undertaken strictly in accordance with the plans and specifications, the Building Act 2004 and relevant regulations made under that Act including the building code, and any direction given by the Contractor.
- 8.2 In the event of the Client failing to undertake any such Works strictly in accordance with clause 8.1, the Contractor shall be entitled to:
 - (a) rectify any such failure to make a good defect; and
 - (b) charge the Client any extra costs incurred due to additional labour or material costs with any such costs being paid to the Contractor as invoiced prior to possession being given and taken.
- 8.3 The Contractor shall not be liable for any loss or damage howsoever caused as a result of any Works performed by the Client.
- 8.4 In the event of any loss arising out of any Materials supplied by the Client, the Client shall be liable for all such loss or damage.
- 8.5 During any period that the Client is working on the Works the Client shall take all practical steps to prevent harm to the Contractor and shall comply with the provisions of the Health and Safety in Employment Act 1992.

9. Risk

- 9.1 If the Contractor retains ownership of the Materials nonetheless, all risk for the Materials passes to the Client on completion.
- 9.2 The Contractor shall be responsible for the Works from the date that the Contractor takes possession of the building site until the date of Practical Completion recorded in the Notice of Practical Completion.

10. Insurance

- 10.1 The Contractor shall maintain a public liability insurance policy indemnifying the Contractor against claims in respect of loss or damage against any property or injury or death or illness to any person arising out of the operations of the Contractor or any of its subcontractors in connection with the execution of the Works. The policy shall be in the joint names of the Contractor and the Client and shall be for an amount of not less than one million dollars (\$1,000,000) and shall be kept continuously in force until any Works required to remedy defects have been completed.
- 10.2 Where the Works involve physical change to an existing structure including additions or alterations Works then the Client shall arrange insurance:
 - (a) for the Works against loss or damage for not less than the total of the contract Price; and
 - (b) for full replacement value against loss or damage to the Client's existing structure made available to enable performance of the Works or adjacent to the Works and against loss or damage to the Client's contents; and
 - (c) against consequential loss arising from loss or damage to the Client's existing structures made available for the Works to be carried out
- 10.3 In the case of additions or alterations Works, insurance cover under clause 10.2 may be provided under the Client's existing policy of insurance in relation to the existing building or structure as an extension of such policy and:
 - (a) shall be in the joint names of the Client, the Contractor and the mortgagee (if any); and
 - (b) shall not be able to be cancelled or materially changed without giving at least ten (10) working days prior notification by the insurer in writing to the Contractor and the Client; and
 - (c) shall include a waiver of the insurer's right to subrogation against the insurer parties.
- 10.4 For new dwellings the Contractor shall from the date that the Works are due to be commenced until the date that the Works are completed keep the Works insured against loss or damage. The insurance policy shall be in the names of the Client, the Contractor and the mortgagee (if any). Such cover shall also be maintained after completion if any defects require rectification by the Contractor and until such time as those Works have been completed.

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 site which are surplus remain the property of the Contractor.

12. Title

- 12.1 It is the intention of the Contractor and agreed by the Client that ownership of Materials shall not pass until:
 - (a) the Client has paid all amounts owing for the particular Materials; and
 - (b) the Client has met all other obligations due by the Client to the Contractor in respect of all contracts between the Contractor and the Client.
- 12.2 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 and until then the Contractor's ownership or rights in respect of Materials shall continue.
- 12.3 It is further agreed that:
 - (a) where practicable the Materials shall be kept separate and identifiable until the Contractor shall have received payment and all other obligations of the Client are met; and
 - (b) until such time as ownership of the Materials shall pass from the Contractor to the Client the Contractor may give notice in writing to the Client to return the Materials or any of them to the Contractor. Upon such notice the rights of the Client to obtain ownership or any other interest in the Materials shall cease; and
 - (c) the Contractor shall have the right of stopping the Materials in transit whether or not delivery has been made; and
 - (d) if the Client fails to return the Materials to the Contractor then the Contractor or the Contractor's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Materials are situated and take possession of the Materials.

13. Warranty

- 13.1 To the extent required by statute, the Contractor warrants that:
 - (a) the Works shall be carried out in a proper and workmanlike manner;
 - (b) all Materials supplied be good and, having regard to the relevant criteria, suitable for the purpose for which they are used and that, unless otherwise stated in this contract, those Materials will be new;
 - (c) the Works will be carried out in accordance with all relevant laws and legal requirements (including, but not limited to, the Building Act 2004 and the Building Code);
 - (d) the Works will be carried out in an appropriate and skilful way, with reasonable skill and care;
 - (e) the Works will be carried out in accordance with the plans and the specifications to this contract;
 - (f) if the Works consist of the construction of a detached dwelling or are intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, that the detached dwelling or home will be suitable for occupation when the Works are finished; and
 - (g) if the contract states the particular purpose for which the Works are required, or the result which the Client wishes the Works to achieve (so as to show that the Client relies on the Contractor's skill and judgement) then the Works and any Materials will be reasonably fit for that purpose or will be of such a nature and quality that they might reasonably be expected to achieve that result.
- 13.2 In the case of second hand Materials, the Client acknowledges that they have had full opportunity to inspect the same and that they accept the same with all faults and that no warranty is given by the Contractor as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Contractor shall not be responsible for any loss or damage to the Materials, or caused by the Materials, or any part thereof however arising.

14. Construction Contracts Act 2002

- 14.1 In the event that the Client is a residential occupier as defined by 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 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 Contractual Remedies Act 1979; 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.

15. Intellectual Property

- 15.1 Where the Contractor has designed, drawn or written plans or a schedule of Works for the Client, then the copyright in those plans, schedules, designs and drawings shall remain vested in the Contractor, and shall only be used by the Client at the Contractor's discretion.
15.2 The Client warrants that all designs or instructions to the Contractor will not cause the Contractor to infringe any patent, registered design or trademark in the execution of the Client's order.
15.3 The Client agrees that the Contractor may use any documents, designs, drawings or Goods created by the Contractor for the purposes of advertising, marketing, or entry into any competition.

16. Default & Consequences of Default

- 16.1 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.
16.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by the Contractor.
16.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify the Contractor from and against all costs and disbursements incurred by the Contractor in pursuing the debt including legal costs on a solicitor and own Client basis and the Contractor's collection agency costs.
16.4 Without prejudice to any other remedies the Contractor may have, if at any time the Client is in breach of any obligation (including those relating to payment) the Contractor may suspend or terminate the supply of Works to the Client under the Construction Contracts Act 2002. The Contractor will not be liable to the Client for any loss or damage the Client suffers because the Contractor exercised its rights under this clause.
16.5 If any account remains overdue after thirty (30) days then an amount of the greater of \$20.00 or 10.00% of the amount overdue (up to a maximum of \$200) shall be levied for administration fees which sum shall become immediately due and payable.
16.6 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 unperformed and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable in the event that:
(a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Client will be unable to meet its payments as they fall due; or
(b) the Client 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 Client or any asset of the Client.

17. Security And Charge

- 17.1 Despite anything to the contrary contained herein or any other rights which the Contractor may have howsoever:
(a) where the Client and/or the Guarantor (if any) is the Client of land, realty or any other asset capable of being charged, both the Client 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 Contractor or the Contractor's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that the Contractor (or the Contractor'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 Contractor elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify the Contractor from and against all the Contractor's costs and disbursements including legal costs on a solicitor and own Client basis.
(c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Contractor or the Contractor's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 17.1.

18. Cancellation

- 18.1 Subject to clauses 18.2 to 18.4 the Client may cancel this contract if:
(a) either;
(i) the Price rises by fifteen (15) percent or more after the contract was entered into; or
(ii) the contract has not been completed within 1% times the period it was to have been completed by; and
(b) the reason for the increased time or cost was something that could not have been reasonably foreseen by the Contractor on the date the contract was made.
18.2 For the purposes of clause 18.1 any increased time or cost that arises as a result of a Prime Cost Item or a Provisional Sum or that is caused by a variation is to be ignored in calculating any Price rise or increase in time.
18.3 To end the contract, the Client must give the Contractor a signed notice stating that the Client is ending the contract under this clause and giving the details of why the contract is being ended.
18.4 If a contract is ended under this clause, the Contractor is entitled to a reasonable Price for the Work carried out under the contract to the date the contract is ended. However, the Contractor may not recover more than the Contractor would have been entitled to recover under the contract.

19. Privacy Act 1993

- 19.1 The Client and the guarantor/s (if separate to the Client) authorises the Contractor to:
(a) collect, retain and use any information about the Client and/or guarantors, for the purpose of assessing the Client's and/or guarantors creditworthiness or marketing products and services to the Client and/or guarantors; and
(b) disclose information about the Client and/or guarantors, whether collected by the Contractor from the Client and/or guarantors 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 and/or guarantors.
19.2 Where the Client and/or guarantors are an individual the authorities under clause 19.1 are authorities or consents for the purposes of the Privacy Act 1993.
19.3 The Client and/or guarantors shall have the right to request the Contractor for a copy of the information about the Client and/or guarantors retained by the Contractor and the right to request the Contractor to correct any incorrect information about the Client and/or guarantors held by the Contractor.

20. Personal Property Securities Act 1999 ("PPSA")

- 20.1 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 Works previously supplied by the Contractor to the Client (if any) and all Works that will be supplied in the future by the Contractor to the Client.
20.2 The Client undertakes to:
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 (a) 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 Works charged thereby;
(c) not register a financing or a change demand without the prior written consent of the Contractor; and
(d) immediately advise the Contractor of any material change in its business practices of selling the Works which would result in a change in the nature of proceeds derived from such sales.
20.3 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.
20.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
20.5 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.
20.6 The Client shall unconditionally ratify any actions taken by the Contractor under clauses 20.1 to 20.5.

21. 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.

22. General

- 22.1 If any provision of this contract shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
22.2 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.
22.3 The Contractor shall be under no liability whatever to the Client for any indirect loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Contractor of this contract.
22.4 In the event of any breach of this contract by the Contractor the remedies of the Client shall be limited to damages. Under no circumstances shall the liability of the Contractor exceed the Price of the Works.
22.5 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.
22.6 The Contractor may license or sub-contract all or any part of its rights and obligations without the Client's consent. 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.
22.7 The Contractor reserves the right to review this contract at any time. If, following any such review, there is to be any change to this contract, then that change will take effect from the date on which the Contractor notifies the Client of such change.
22.8 Neither party shall be liable for any default due to any act of God, war, terrorism, fire, flood, drought, storm or other event beyond the reasonable control of either party.