



TERMS & CONDITIONS OF TRADE

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1 DEFINITIONS

- 1.1 "Seller" shall mean MPM Waterproofing Services Limited.
- 1.2 "Buyer" shall mean the Buyer or any person or Seller acting on behalf of and with the authority of the Buyer.
- 1.3 "Guarantor" means that person (or persons) who agrees herein to be liable for the debts of the Buyer if a Limited Liability Seller on a principal debtor basis.
- 1.4 "Goods" shall mean:
- 1.4.1 All goods supplied by the seller to the Buyer (and includes any incidental supply of services).
 - 1.4.2 All the Buyer's present and after acquired products that the seller has performed work on or to or in which goods or materials supplied or financed by the Seller have been attached or incorporated.
 - 1.4.3 All goods marked as having being supplied by the Seller or that are stored by the Buyer in a manner that enables them to be identified as having been supplied by the Seller.
- 1.5 "PPSA" means the Personal Property Securities Act 1999.
- 1.6 "Services" shall mean all services supplied by the Seller to the Buyer and includes any advice or recommendations (and includes any incidental supply of goods).
- 1.7 "Goods and Services" shall mean all goods, services and advice provided by the Seller to the Buyer and shall include without limitation the supply, installation, fixing, repairing and maintaining of all waterproofing and/or roofing products and membranes and associated goods and services (including scaffolding) and all charges for time and attendances, hire charges, insurance charges or any fee or charge associated with the supply of goods and services by the Seller.
- 1.8 "Price" shall mean the cost of the goods as agreed between the Seller and the Buyer subject to clause 5 of this contract.

2 ACCEPTANCE

- 2.1 Any instructions received by the Seller from the Buyer for the supply of Goods and/or Services and/or acceptance of Goods and/or Services by the Buyer shall constitute acceptance of the terms and conditions contained herein. Upon acceptance of these terms and conditions by the Buyer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the Manager of the Seller.
- 2.2 If a Tender is given the Seller's Tender shall be deemed to be withdrawn unless accepted by the Buyer within a period of sixty (60) days from the date of issue, unless otherwise agreed. No contract shall be concluded until the Seller has ratified in writing to the Buyer's order.

- 2.3 None of the Seller's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the Manager of the Seller in writing nor is the Seller bound by any such unauthorised statements.

3 GOODS/SERVICES

- 3.1 The Goods are as described on the invoices, quotation, tender documents, work authorisation or any other work commencement forms as provided by the Seller to the Buyer.

4 SALE

- 4.1 The Goods shall be supplied in accordance with the description contained in the Seller's specification, quotation, work authorisation, or any other work commencement forms.
- (a) The Seller may from time to time make changes in the specification of the Goods which are required to comply with safety or statutory requirements or which do not materially affect the quality or fitness for purpose of the Goods.

5 PRICE AND PAYMENT

- 5.1 The price shall be as indicated on invoices provided by the Seller to the Buyer in respect of goods supplied, or
- 5.2 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 any quotation given by the Seller.
- 5.3 The price of the Goods shall be the Seller's quoted price which shall be binding upon the Seller provided that the Buyer shall accept in writing the Seller's quotation within sixty (60) days.
- 5.4 The price may be increased by the amount of any reasonable increases in the cost of supply of the goods and services that is beyond the control of the Seller between the date of the contract and delivery of the goods and services.
- 5.5 Time for payment for the Goods and/or Service shall be of the essence and will be stated on the invoice, quotation, tender documents, work authorisation form or any other work commencement forms. With respect to domestic clients payments for goods and services including invoiced payment claims for progress payments shall be made in full on or before the 7th day following the date of the invoice (the due date).
- 5.6 The method of 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.

6 DELIVERY OF GOODS

- 6.1 Delivery of the Goods shall be made to the Buyer's address. The Buyer shall make all necessary arrangements to take delivery of the Goods whenever they are tendered for delivery.
- 6.2 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.

7 AGENCY AND SUB-CONTRACTING

- 7.1 The Buyer authorises the Seller to contract either as principal or agent for the provision of goods and services that are the matter of this Contract.
- 7.2 Where the Seller enters into a contract of the type referred to in clause 7.1 it shall be read with and form part of this Agreement and the Buyer agrees to pay any amounts due under that Contract.

8 RISK

- 8.1 If the Seller retains property in the Goods nonetheless all risk for the Goods passes to the Buyer on delivery.
- 8.2 If any of the Goods are damaged or destroyed prior to property in them passing to the Buyer, the Seller is entitled, without prejudice to any of its other rights or remedies under these Terms and Conditions of Trade (including the right to receive payment of the balance of the Contract Price for the Goods), to receive all insurance proceeds payable for the Goods. This applies whether or not the Contract Price has become payable under the Contract. 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. The Seller will apply the insurance proceeds as follows:
- (i) First, in payment of the Contract Price of the Goods that are damaged or destroyed, if unpaid.
 - (ii) Second, in payment of the outstanding Contract Price of any other Goods supplied to the Buyer by the Seller whether under the Contract or otherwise.
 - (iii) Third, in payment of any other sums payable to the Seller by the Buyer on any account.
 - (iv) Fourth, any balance is to be paid to the Buyer.
- 8.3 The Seller shall not be liable for any loss or damage whatever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.

9 DISCLAIMER

- 9.1 The Buyer hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him and the

Buyer acknowledges that he buys the Goods relying solely upon his own skill and judgement and that the Seller shall not be bound by nor responsible for any term, condition, representation or guarantee other than the guarantee given by the Manufacturer.

10 CONDITIONS OF WARRANTY

- 10.1 This warranty is strictly limited to the Seller's workmanship in applying waterproofing materials, and does not extend or cover any failure or deterioration of any materials applied or the nature, standard or quality of any surface on which materials are applied.
- 10.2 The Seller's liability in the event of any failure of workmanship is limited to the reinstatement of a watertight surface membrane. The Seller shall be under no further liability.
- 10.3 The conditions applicable to the warranty are as follows.
- 10.4 The warranty period is (unless a different period is agreed to in writing) 3 years from the date of application of the waterproofing Goods.
- 10.5 The warranty shall not cover any claim that is not made within the applicable warranty period, and in accordance with the procedures and requirements set out in this Clause.
- 10.6 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 the product, or
 - (ii) Failure on the part of the Buyer to follow any instructions or guidelines provided by the manufacturer of the product or by the Seller, or
 - (iii) Any use of the product otherwise than for any application specified on a quote or order form, or
 - (iv) The continued use of the product after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user of the product, or
 - (v) Fair wear and tear on the product, or
 - (vi) Fire, war, riots, civil commotions or disturbances, vandalism or any criminal act, or
 - (vii) Any movement or vibration in the building or the surface where the waterproofing materials have been applied, or
 - (viii) The failure or deterioration of materials used on the surface on which materials are applied, or
 - (ix) Any water, gas, telecommunications or electrical services or equipment howsoever arising, or

- (x) Any accident, or
 - (xi) An act of God
- 10.7 Notwithstanding any of the above mentioned clauses, the warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty
- (i) If the product is repaired, altered or overhauled without the Seller's consent
 - (ii) In the event that the Buyer fails to notify the Seller within seven (7) days of the discovery of any defect then the warranty will be invalid. The Buyer shall give the Seller all and any assistance and access to any premises to inspect the defect and make repairs if necessary.
- 10.8 If the Buyer's account is in default then no warranty will be valid.
- 10.9 This warranty is not assignable by the Buyer to any other party unless the Manager of the Seller has agreed to this assignment in writing.
- 10.10 The Seller shall not in any circumstances be liable at any time for any loss or damage including but not by way of limitation any contractual, tortious, or consequential loss or damages suffered by the Buyer or any third person arising directly or indirectly from a failure of the Seller's workmanship or the materials other than the obligations to make good any defective workmanship pursuant to this warranty.
- 10.11 If notwithstanding the provisions of the above clause the Seller is found liable for any loss or damage the liability of the Seller shall to the maximum extent permitted by law not exceed the price paid by the Buyer or the Seller to carry out the waterproofing work, less the cost of all or any materials supplied.

11 CONSUMER GUARANTEES ACT 1993 ("THE ACT")

- 11.1 The guarantees contained in the Consumer Guarantees Act 1993 are excluded where the Buyer acquires goods and services from the Seller for the purposes of a business in terms of section 2 and 43 of that Act.

12 DEFAULT & CONSEQUENCES OF DEFAULT

- 12.1 Interest on overdue invoices shall accrue from the date when payment becomes due from day to day until the date of payment at a rate of 2% per calendar month and shall accrue at such a rate after as well as before any judgement.
- 12.2 Any expenses, disbursements and legal costs incurred by the Seller in the enforcement of any rights contained in this Contract including the recovery of any monies due

shall be paid by the Buyer including any lawyer's fees and debt collection agency fees.

- 12.3 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 Contract. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller exercised its rights under this clause.
- 12.4 If any account remains unpaid at the end of the second month after supply of the Goods or services the following shall apply. An immediate amount equivalent to 10% of the amount overdue shall be levied for administration fees which sum shall become immediately due and payable.
- 12.5 In the event that
- (a) any monies payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to meet its payment 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 any Buyer, then
 - (i) the Seller shall be entitled to cancel all or any part of any order with the Buyer which remains unperformed in addition to and without prejudice to any other remedies, and
 - (ii) all amounts owing to the Seller shall, whether or not due for payment, immediately become due and payable, and
 - (iii) the Seller shall be entitled to reclaim any Goods in the Buyer's possession or control, which have been supplied by the Seller and to dispose of the Goods for its own benefit and shall be entitled to enter, directly or by its agents, upon any land or premises where the Seller believed the Goods which it has supplied are stored without being liable to any person.

13. OWNERSHIP

- 13.1 Ownership of the goods shall not pass to the Buyer and any proceeds of sale of the goods shall belong to the Seller until the Buyer has paid for the goods in full.
- 13.2 The Buyer acknowledges and agrees that the Seller may register any security interest that the Seller has in respect of the goods and their proceeds on the Personal Property

Securities Register and that such security interest survives until the goods are paid for in full.

13.3 Until the Seller has received payment in full for the goods, the Buyer acknowledges and agrees that:

- (i) The Seller supplies the goods to the Buyer on the condition that the Seller has a PMSI in the goods;
- (ii) In relation to goods that are inventory, the Buyer will not allow any non-purchase money security interest to arise in respect of the goods unless the Seller has perfected its PMSI prior to the Buyer's possession of the goods;
- (iii) The Buyer will not permit the goods to become accessions or commingled with other goods or mass if the Seller has not perfected any security interest that the Seller has in relation to the goods;
- (iv) If the Buyer, notwithstanding clause 13.1 of this agreement, sells the goods before paying the Seller for them, the Buyer will pay the proceeds arising from the sale into a separate account with separate records so that those proceeds remain identifiable and traceable to that sale and the goods. The Buyer agrees that there will be no other funds in the account. If the Buyer further deals with such proceeds, the Buyer will manage those dealings in a manner so that the proceeds remain identifiable or traceable to the original goods. If the Buyer sells the goods before paying the Seller for them, all claims which the Buyer holds against third parties shall be handed over to the Seller.

13.4 If the Seller perfects any security interest that it has in relation to the goods, the Buyer will not do anything that results in the Seller having less than the security or priority position in respect of the PPSA that the Seller assumed at the time of perfection.

13.5 If the Seller is a secured party under the PPSA;

- (i) The parties contract out of Part 9 of the PPSA as follows; the rights and obligations contained in sections 114, 125, 129, 132, 133 and 134 of that Part do not apply between the Seller and the Buyer, and
- (ii) The Buyer waives its rights under section 121 and 131 of the PPSA. Further, in accordance with section 148 of the PPSA, the Buyer waives its right to receive any financing statement or financing change statement from the Seller.

13.6 The Buyer will assist the Seller by completing any formalities or providing any information required by the Seller to establish and maintain the best security position that it is entitled to under the PPSA.¹⁴

14. SECURITY AND CHARGE

14.1 Notwithstanding anything to the contrary contained herein or any other rights which the Seller may have howsoever

- (a) The Buyer shall if required by the Seller execute a registerable charge, or otherwise permit the Seller or the Seller's nominee to register a security interest securing payment of the price for the Goods and/or services provided by the Seller hereunder to the Buyer together with any monetary obligations arising hereunder whether pursuant to the existing law or that contemplated by the Personal Properties Securities Act 1999 or otherwise howsoever, and/or
- (b) Where the Seller, as sub-contractor, provides any Goods and/or services to the Buyer as head contractor, the Buyer hereby acknowledges that the Seller shall be entitled to a charge on any monies payable to the Buyer by whom the Buyer is contracted or employed. The Buyer shall provide all reasonable details and particulars of his/her/its/their employment or superior contract in writing and upon reasonable request of the seller. The Buyer acknowledges and agrees that the Sellers shall be entitled to demand payment directly from whosoever has contracted or employed the Buyer and the production of these terms and conditions of trade by the Seller shall be sufficient evidence of the Seller's right to receive such monies without the need for the payee, employer, head contractor or any other persons dealing with the Seller to make further enquiries, and/or
- (c) 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 interests 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 the within terms and conditions of trade. 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 released once all payments and other monetary obligations payable hereunder have been met.
- (d) Should the Seller elect to proceed in any manner in accordance with this clause and its sub-clauses, the Buyer and/or guarantor shall indemnify the Seller from and against all the Seller's legal costs and disbursements calculated on solicitor and own client basis plus all reasonable costs of the Seller's appointed attorney (if any)
- (e) To give effect to the provisions of clause 13(a) to (d) inclusive hereof the Buyer and/or the guarantor (if any) do hereby 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 execute mortgages and charges (whether registerable or not) and including such other terms and conditions as the Seller shall think fit in his/her/its/their absolute discretion against the joint

and/or several interest of the Buyer and/or the guarantor in any land, realty or asset in favour of the Seller and in the Buyer's and/or guarantor's name as may be necessary to secure the said Buyer's and/or guarantor's obligations and indebtedness to the Seller and further to do and perform all necessary and other acts including instituting any necessary legal proceedings and further to execute all or any documents in the Seller's absolute discretion which may be necessary or advantageous to give effect to the provisions of this clause.

15 PERSONAL GUARANTEE OF COMPANY DIRECTORS AND TRUSTEES

15.1 If the Buyer is a company or trust the director(s) or trustee(s) signing this Contract in consideration for the Seller agreeing to supply goods and services and grant credit to the Buyer at their request also sign this Contract in their personal capacity and jointly and severally personally undertake as principal debtors to the Seller the payment of any and all monies now or hereafter are owed by the Buyer to the Seller and indemnify the Seller against non-payment by the Buyer. Any personal liability of a signatory hereto shall not exclude the Buyer in any way whatsoever from the liabilities and obligations contained in this Contract. The signatories and Buyer shall be jointly and severally liable under the terms and conditions of this Contract and for payment of all sums due hereunder.

16 ASSIGNMENT

16.1 The Seller may license or sub-contract all or any part of its rights and obligations under this contract without the Buyer's consent.

17. CANCELLATION

17.1 The Seller may cancel this contract at any time before the Goods are delivered by giving written notice. On giving such notice the Seller shall promptly repay to the Buyer any sums paid in respect of the price. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.

18 CONTRACTUAL REMEDIES ACT

18.1 The provisions of the Contractual Remedies Act 1979 shall apply to this contract as if Section 15(d) of the Act which states that nothing in the Act shall affect the Sale of Goods Act 1908, were omitted from the Contractual Remedies Act 1979.

19 MISCELLANEOUS

- 19.1 If any provision of these terms and conditions shall be invalid, void or illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 19.2 All Goods and services supplied by the Seller are subject to the laws of New Zealand and the Seller takes no responsibility for changes in the law which affect the Goods or services supplied.
- 19.3 The Seller shall be under no liability whatever to the Buyer for any indirect loss and/or expense (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of this contract.
- 19.4 Neither party shall be liable for any default due to any act of God, war, strike, lock out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 19.5 The Buyer shall not set off against the price amounts due from the Seller whether under the applicable contract of sale or otherwise.
- 19.6 The Seller shall not be liable for delay or failure to perform its obligations if the cause of the delay or failure is beyond its control.
- 19.7 Failure by the Seller to enforce any of the terms and conditions contained in this Contract shall not be deemed to be a waiver of any of the rights or obligations the Seller has under this Contract.
- 19.8 Where applicable the Construction Contracts Act 2002 applies to this Contract and the goods and services supplied by the Seller.

20. PRIVACY ACT 1993

- 20.1 The Buyer authorises the Seller to collect, retain and use any information about the Buyer for the purposes of assessing the Buyer's credit worthiness enforcing any rights under this Contract or marketing any goods and services provided by the Seller to any other party.
- 20.2 The Buyer authorises the Seller to disclose any information obtained to any person for the purposes set out in clause 18.1.
- 20.3 Where the Buyer is a natural person the authorities under clauses 19.1 and 19.2 are authorities or consents for the purposes of the Privacy Act 1993.