

Fletcher Insulation Pty Ltd – Terms & Conditions of Sale

1. INTERPRETATION

(a) Definitions

The following words have the following meanings in this Terms and Conditions, unless the context requires otherwise.

Company means Fletcher Insulation Pty Ltd ABN 72 001 175 355 trading as Fletcher Insulation, and its agents, servants and employees, and any of its subsidiaries or associated entities as defined in accordance with Section 9 of the *Corporations Act 2001* (Cth) (if such subsidiary or associated entity is named as the party making or accepting the order).

Goods means any goods or services supplied by the Company to the Purchaser pursuant to these Terms and Conditions.

PPSA means the *Personal Property Securities Act 2009* (Cth).

Purchaser means and includes the person to whom any quotation is made and shall include any person offering to contract with the Company on these Terms and Conditions.

(b) Interpretation

The following apply in the interpretation of this Terms and Conditions, unless the context requires otherwise.

- (i) a reference to the singular includes the plural number and vice versa.
- (ii) a reference to a gender includes a reference to each gender.
- (iii) person includes, without limitation a firm, corporation, body corporate, unincorporated association and a governmental authority.

2. OFFER AND ACCEPTANCE

- (a) Any quotation or price list given by the Company is not an offer to sell or to provide the Goods and no order given in pursuance of any quotation shall bind the Company until accepted by it in writing or by the commencement of supply or the provision of services. Unless otherwise agreed in writing all orders are subject to acceptance by the Company within 30 days of receipt by the Company of the Purchaser's order and these terms and conditions shall be deemed to be incorporated in any agreement between the Company and the Purchaser.
- (b) Notwithstanding any prior or existing agreement, the Company reserves the right to alter the quote or price list without notice to the Purchaser.
- (c) For the avoidance of doubt, unless otherwise agreed in writing, any Goods supplied by the Company are part of an ongoing supply under these Terms and Conditions and do not constitute a separate or new agreement.
- (d) Any terms and conditions contained in any order, offer, acceptance or other document of the Purchaser and all representations, statements, terms conditions and warranties (whether implied by statute or otherwise) not embodied herein are expressly excluded to the fullest extent permitted by law.

3. DELIVERY OF GOODS AND SERVICES

- (a) Any date quoted for delivery is an estimate only and unless a guarantee has been given by the Company in writing providing for liquidated damages for failure to deliver by the quoted date, the Company shall not be liable to the Purchaser for any loss or damage, howsoever arising, even if arising out of the negligence of the Company for failure to deliver on or before the quoted date. The Purchaser shall accept and pay for Goods if and when tendered notwithstanding any failure by the Company to deliver by the quoted date. Written advice to the Purchaser that Goods are ready for delivery, whether in whole or in part, shall constitute tendering and the terms of payment shall apply.
- (b) The Company reserves the right to deliver by instalments. If delivery is made by instalments the Purchaser shall not be entitled:
 - (i) to terminate or cancel the contract; or
 - (ii) to make any claim for any loss or damage, howsoever arising, for failure by the Company to deliver any instalments on or before the quoted date.
- (c) It is agreed that the Company shall not be responsible for delay in manufacture or delivery caused by, or in any way incidental to, an act of God, war, fires, breakages of machinery or strikes, or arising out of any other unexpected or exceptional cause, or any cause beyond the Company's reasonable control.
- (d) Any quotation containing a provision to supply Goods "ex stock" is subject to fulfilment of prior orders at the date of receipt of the Purchaser's order.

4. RETURNS

The Purchaser may only return Goods with the prior approval of the Company as per the company returns policy published by the company at the date of the invoice.

5. CANCELLATION

Without limiting any statutory entitlement of a consumer to rescind a contract, any order may only be cancelled, varied or suspended with the written consent of the Company and in the event of such cancellation, variation or suspension, the Purchaser undertakes to reimburse and indemnify the Company for any costs, expenses or charges incurred by the Company in preparation for, and in the execution of, an order which, without limiting the generality thereof, shall include an amount equal to 50 per cent of the net profits to the Company of the order had the order not been cancelled, varied or suspended.

6. QUANTITIES

No claim for shortage of delivery or shortfall or excess in capacity or performance of less than ten per cent of that ordered will be made by the Purchaser and in any event shall not exceed the invoiced unit price of the Goods in respect of which the claim is made. Excess delivery of up to ten per cent of quantities ordered will be accepted by the Purchaser and payment made for such excess quantities

7. DESCRIPTION AND SPECIFICATIONS

- (a) Whilst every effort is made to ensure their accuracy, the descriptions, illustrations and material contained in any catalogue, price list, brochures, leaflets or other descriptive matter provided by or on behalf of the Company, represent the general nature only of the items described therein and, save where the Company has accepted an order for Goods specified as so described or illustrated, shall not form any part of any order or agreement or amount to any representation or warranty and, save as aforesaid, the use of such description or illustration shall not constitute a contract of a sale by description. The Company reserves the right to modify the design of goods without notice.
- (b) The Purchaser warrants that any goods manufactured, constructed or supplied by the Company, which are based in whole or in part upon designs, drawings or specifications supplied to the Company by or on behalf of the Purchaser shall not infringe any letters patent or registered designs. The Purchaser shall indemnify and keep indemnified and hold harmless the Company against any action, loss, cost, claim or damage that may be brought against or suffered by the Company for any breach of this warranty by the Purchaser.
- (c) The Company does not warrant or guarantee, and it shall not be a term of any agreement between the Company and the Purchaser that any Goods manufactured, constructed or supplied by the Company which are based upon any designs drawings or specifications supplied to the Company by or on behalf of the Purchaser, will achieve any standard of performance or capacity whatsoever and the Purchaser acknowledges that it does not rely on the skill and judgment of the Company for the fitness for any purpose of any Goods so manufactured, constructed or supplied.

8. ACCESS

In respect of any work done on the Purchaser's premises or elsewhere other than at the Company's premises it shall, subject to any written agreement to the contrary, be the duty of the Purchaser to ensure that the conditions under which the work has to be performed, the layout, means of access, accessibility of the different parts of the subject matter being worked upon or handled and other material circumstances shall be suitable to the Company failing which the Company shall be entitled to charge a reasonable increase in the price having regard to the prevailing circumstances.

9. MINIMUM CHARGE

The Company reserves the right to increase the amount charged on any invoice up to the minimum charge as notified or otherwise published by the Company at the date of the invoice.

10. WAIVER

Failure by the Company to insist upon strict performance of any of the Terms and Conditions hereof shall not be deemed a waiver thereof or of any rights which the Company may have and shall not, and nor shall any express waiver, be deemed to be a waiver of any subsequent breach of any of the Terms and Conditions

11. LIABILITY, GUARANTEE AND WARRANTY

- (a) Subject to any conditions, warranties and rights implied by statute which cannot by law be excluded by agreement:
 - (i) the Company gives no warranties, and the Purchaser has no other rights other than those, if any, expressly set out in these Terms and Conditions and in any express written warranties provided by the Company to the Purchaser; and
 - (ii) all implied conditions, warranties and rights are excluded.
- (b) Where any condition, warranty or right is implied by law and cannot be excluded, the Company limits its liability to the Purchaser for breach of, or other act contrary to, that implied condition, warranty or right in respect of any Goods manufactured, work executed or Goods provided by or on behalf of or under any arrangement with the Company to the Purchaser or any other person, subject to the qualifications in section 64A of Schedule 2 of the *Competition and Consumer Act 2010* or any other law, as set out in clause 11(d) below or, otherwise, to the extent permitted by law.
- (c) The Company limits any other liability it may have in relation to any claim, demand or proceedings of any kind in respect of any Goods manufactured, work executed or Goods provided by or on behalf of or under any arrangement with the Company to the Purchaser or any other person, whether in contract, in tort (including negligence), under any statute (to the extent permitted by law) or otherwise, as set out in clause 11(d), below.
- (d) Pursuant to clause 11(b) and (c), the Company limits its liability:
 - (i) in connection with any Goods supplied, to any one or more of the following (as the Company may determine):
 - (A) the replacement of the Goods or the supply of equivalent Goods.
 - (B) the repair of the goods.

- (C) payment of the costs of replacement or of acquiring equivalent Goods.
- (D) payment of the costs of having the Goods repaired; and
- (ii) in connection with any services supplied, to one of the following (as the Company may determine):
 - (A) the supply of the services again; or
 - (B) payment of the costs of having the services supplied again.
- (e) Subject to the provisions of clause 11(a) to (d), and despite any implication arising from any other agreement between the Company and the Purchaser, the Company is not, and will not be, liable to the Purchaser or any other person in contract, in tort (including negligence), under any statute (to the extent permitted by law) or otherwise for, or in respect of any direct, indirect or consequential loss of any kind suffered by the Purchaser or any other person and arising out of any breach or other act or omission in connection with any Contract or with any Goods or services supplied under clause 11(d) including, without limitation, any:
 - (i) damage or loss caused by anyone other than the Company or by any other factor beyond the reasonable control of the Company including, without limitation, fire, lightning, salt air, chemicals, industrial fall-out, fumes, liquids, animals or precipitation;
 - (ii) damage or loss sustained during or as a result of handling, storage or installation;
 - (iii) the removal of any Goods installed or the installation of replacement or equivalent products, or the cost of removal or installation; and
 - (iv) any loss of profits, sales, turnover, reputation (or damage to it), production, anticipated savings, goodwill, business opportunities, customers, premises or facilities, or loss under, or in in relation to, any other contract, in each case, whether of a direct, indirect or consequential nature.
- (f) The Purchaser will indemnify the Company for all liabilities, losses, damages, costs or expenses suffered or incurred by the Company as a result of:
 - (i) the Company's compliance with the Purchaser's instructions regarding the Goods damage;
 - (ii) the Purchaser's failure to:
 - (A) provide or display safety information on or relating to the Goods;
 - (B) comply with laws relating to the use, sale, marketing, labelling or marking of the Goods; or
 - (C) detect and bring to the Company's attention matters for which the Company may become liable, whether for negligence, under legislation or otherwise;
 - (iii) any statement the Purchaser makes about the Goods without the Company's written approval;
 - (iv) the use of the Goods by a third party;
 - (v) any loss, damage or injury to a person or to the Purchaser's property arising out of the use or possession of the Goods sold to the Purchaser;
 - (vi) the Purchaser's negligence or breach of these Terms and Conditions; or
 - (vii) the Purchaser's failure to pay the Company any amounts owing to the Company, including without limitation any reasonable costs or expenses incurred by the Company in collecting such amounts, including any fees, costs or expenses in respect of mercantile, collection or other agents engaged by the Company to collect any amounts owing, except, in relation to commercial agents costs or expenses, to the extent the law of Queensland prevents their recovery.
- (g) As soon as any of the facts or matters which form part of any claim or complaint whatsoever become known to the Purchaser, the Purchaser shall within fourteen days notify the Company in writing of the same. If the Purchaser does not notify the Company within that period, it will be deemed to have accepted the Goods as being of merchantable quality, free from defects, and compliant with the agreed specifications.

12. CONTAINERS

Containers (which expression shall include but shall not be limited to, stillages, bobbins and pallets) in or on which goods are delivered and for which a deposit charge is made, remain the property of the Company. On the containers return in good order and condition the deposit will be returned to the Purchaser. The deposit for containers which the Purchaser returns otherwise than in good order and condition shall only be refunded in part having regard to their actual condition. Containers will be deemed to be not returned by the Purchaser until received into the Company's stores.

13. INSOLVENCY & DEFAULT

If -

- (a) The Purchaser makes default in any payment due hereunder;
 - (b) A resolution is passed or proposed or a petition is presented or an application filed for the winding up of the Purchaser;
 - (c) A receiver or receiver and manager is appointed of the property or any part of the property of the Purchaser;
 - (d) The Purchaser makes or proposes to make any arrangement with its creditors;
 - (e) The Purchaser is placed under administration;
 - (f) Execution is levied upon the assets of the Purchaser for an amount in excess of \$1,000.00 and is not within seven days satisfied,
- then, and in any such event, the Company may at its option cancel any contract, cancel any trade credit which may have been provided to the Purchaser, demand immediate payment of the account balance in full, withhold further deliveries or cancel any agreement in relation to the Goods without prejudice to its rights under these Terms and Conditions PROVIDED HOWEVER that the Company may at any time, and from time to time upon such terms as it may determine, waive any of its rights under this clause, but without prejudice to its rights thereafter, to rely upon the happening thereafter of any of the events herein before referred to or upon the continuation after any such waiver of any state of affairs the subject of such waiver.

14. TITLE

- (a) Title in and to the goods will not pass from the Company to the Purchaser until the Company receives payment (without deduction or set-off) in full for all goods and all monies owing by the Purchaser to the Company on any account whatsoever.
- (b) Until title in and to the goods has passed to the Purchaser in accordance with clause 14(a), the Purchaser holds the goods as fiduciary agent and bailee and the Purchaser will store the goods separately in such a manner that they are clearly identified as the property of the Company. The Company shall be entitled at any time to demand the return of the goods and shall be entitled, without notice to the Purchaser to enter the Purchaser's premises or any other premises upon which the goods are held in order to search for, stocktake and remove the goods.
- (c) Notwithstanding that title in and to the goods may not have passed to the Purchaser, the Purchaser may sell the goods to a customer in the ordinary course of its business. In such circumstances, the Purchaser sells the goods as fiduciary agent of the Company provided that such sales shall not give rise to any obligations on the part of the Company.
- (d) If the Purchaser sells any of the goods before title in and to the goods has passed in accordance with clause 14(a), the Purchaser will hold such part of the proceeds of sale equal to the amount owed by the Purchaser to the Company on trust for the Company and will hold such proceeds in a separate account which clearly identifies such proceeds as monies held on trust for and on behalf of the Company.
- (e) If the Purchaser uses the Goods in manufacturing or production and sells the finished product in the ordinary course of business (which it is authorised to do unless otherwise notified in writing) the Purchaser must hold that part of the proceeds of the finished product relating to the Company's Goods in a separate account in trust for the Company. That part will be taken to be of equal value to the amount owing by the Purchaser to the Company at the time of receipt of the proceeds.

15. SECURITY INTEREST UNDER PPSA

- (a) The Purchaser agrees that:
 - (i) each order accepted by the Company, being an order accepted under these Terms and Conditions, creates a registrable security interest under the PPSA in any Goods supplied under it;
 - (ii) the Purchaser acknowledges the right of the Company to register a financing statement under the PPSA with respect to the security interest created by these Terms and Conditions;
 - (iii) if the Company registers a security interest under the PPSA, the Company may exercise any or all remedies afforded to the Company as a secured party under it without prejudice to any other rights or remedies arising out of a breach by the Purchaser of any agreement with the Company; and
 - (iv) the goods are collateral for the purposes of the PPSA.
- (b) The Purchaser waives any right the purchaser has under the PPSA to receive notice in relation to registration events.
- (c) The Purchaser and the Company agree that neither will disclose information of the kind specified in Section 275 (1) of the PPSA.
- (d) At the election of the Company to be exercised at any time in its absolute discretion, any section of the PPSA specified in section 115 will not apply to the extent permitted by Section 115.

16. INSURANCE

In the event that the Goods are covered by insurance taken out by the Company, the Company will only be liable to the extent of any indemnity provided.

17. RISK

Unless otherwise agreed in writing all Goods shall be at the Purchaser's risk upon delivery to the Purchaser, its carrier or agent.

18. PAYMENT

- (a) Unless otherwise agreed in writing, payment terms are nett cash 30 days from the end of the month in which the Goods are delivered to the Purchaser, its carrier or agent.
- (b) If payment is not received by the Company within the time frame allowed for in 18 (a):
 - (i) the Company reserves the right to charge interest on the debt at the rate prescribed pursuant to section 100 of the *Civil Procedure Act 2005* (NSW); and

- (ii) the Company will charge an administration fee for any payments by an accepted credit card (Bankcard, Mastercard or Visa only).
- (c) If the Company does not receive forwarding instructions sufficient to enable it to dispatch the Goods within 14 days of notification that they are ready, the Purchaser shall be deemed to have taken delivery of the goods and the terms of payment shall apply from such date. The Purchaser shall be liable for storage charges payable monthly on demand, storage being at the Purchaser's risk.
- (d) Payment of any amount by the Purchaser must be treated as being received in the following order:
- (i) First, to obligations that are not secure ("secured" in this clause means secured under the PPSA), in the order in which those obligations were incurred;
 - (ii) Second, to obligations that are secured, but not by purchase money security interests, in order in which those obligations were incurred; then,
 - (iii) Third, to obligations that are secured by purchase money security interests, in the order in which those obligations were incurred.

19. SECURITY FOR PAYMENT

- (a) The Purchaser as beneficial owner hereby charges in favour of the Company (and where there is more than one person trading together as the Purchaser, jointly and severally) all freehold and leasehold interests in land which the Purchaser now has or may acquire with the payment of all money which become owing to the Company by the Purchaser.
- (b) The Purchaser further acknowledges that the Company is entitled to register a caveat at LPI NSW or the equivalent authority in another State or Territory to protect its interest under such charge.

20. PRICE

- (a) Unless otherwise expressly agreed in writing, the price of the Goods shall be that price charged by the Company at the date of delivery plus the amount which the Company is required to pay on account of any goods and services tax, excise or any other taxes or charges which may be established or levied by any governmental authority (domestic or foreign) upon the Goods or any part thereof, or the manufacture, use, sale of or delivery thereof.
- (b) Unless otherwise specified any prices quoted do not include transportation costs. Goods shall be supplied ex works.
- (c) The prices quoted are based on present day cost of labour and materials and will be subject to contract price adjustment at the option of the Company.

21. GST

- (a) Unless stated otherwise, the price quoted by the Company does not include goods and services tax (GST) (as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth)).
- (b) The Purchaser must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis, as it pays the price.

22. PRIVACY, DISCLOSURE AND SPAM ACT CONSENT

- (a) The Company collects personal information (as defined in the Privacy Act 1988) such as billing, delivery names and addresses to assess the Purchaser's credit application and for the other credit reporting purposes set out in the credit application and to facilitate provision of the Goods requested by the Purchaser, after-sales service and, unless the Company is told otherwise, for marketing purposes. If the Purchaser provides to the Company personal information about any other person, it is the Purchaser's responsibility to bring to their attention the contents of the clause. The Company may disclose the personal information to its agents, contractors and external advisers (for example, transport contractors and debt collection agencies) who are bound by confidentiality obligations. Failure to provide requested personal information may mean the Company is unable to provide the Goods requested. Requests for access to personal information held by the Company and for a copy of the Company's Privacy Statement should be made to the Company's Privacy Officer who may be contacted using the address or telephone number printed elsewhere on this form.
- (b) The Purchaser consents to any electronic address it has set out on the application form being used by the Company to send the Purchaser electronic messages for the purposes of administering the Purchaser's account and, unless the Company is told otherwise, for marketing purposes.

23. ASSIGNMENT

These Terms and Conditions and any contract formed incorporating these Terms and Conditions ("Contract") may not be assigned by the Purchaser without the prior written consent of the Company. The Company may assign a Contract to another party, if it gives written notice of that assignment to the Purchaser.

24. VARIATION AND SEVERANCE

- (a) The Company is entitled to vary the terms and conditions in these Terms and Conditions at any time by giving the Purchaser written notice.
- (b) If any of the terms and conditions in these Terms and Conditions are invalid or unenforceable in any jurisdiction, they are, if possible, to be read down so as to be valid and enforceable. The read down provision will only apply in the relevant jurisdiction. If the provision cannot be read down, and it can be severed to the extent of the invalidity or unenforceability, it is to be severed. The rest of the provisions, and the validity and enforceability of the affected provision in any other jurisdiction, will not be affected.

25. NEW SOUTH WALES LAW

This contract is governed by the laws of New South Wales. The Purchaser and the Company irrevocably submit to the exclusive jurisdiction of the New South Wales courts and Federal courts sitting in New South Wales.