

# SDC Building Ltd t/a Auckland Fences TERMS OF TRADE

## 1. GENERAL

1.1 This agreement consists of these general terms and conditions and the Statement of Work which the parties may agree from time to time. Each Statement of Work takes effect on the date it is accepted by the Customer and shall terminate in accordance with this agreement or otherwise in accordance with any special conditions specified within the Statement of Work. These general terms and conditions apply to each Statement of Work.

## 2. DEFINITIONS AND INTERPRETATION

2.1 In this agreement, unless the context requires otherwise:

**"Additional Expenses Charge"** means the additional expenses charge (if any) set out in the Statement of Work; **"Company"** means SDC Building Ltd t/a Auckland Fences its permitted assigns and successors, and where the context permits the entitlements of the Company shall extend to agents, employees or subcontractors of the Company as appropriate; **"Customer"** means the customer as described in the Statement of Work and any person acting on behalf of or with the authority or apparent authority of the Customer; **"Force Majeure Event"** means an event or occurrence which is beyond the Company's reasonable control (including, without limitation, any natural disaster); **"Goods"** means goods, accessories, components and/or materials supplied by the Company to the Customer as part of the Works; **"Location"** means the site at which the Works are carried out for the Customer; **"Manufacturer's Instructions"** means the installation and/or operating instructions and/or guidelines for the Goods and/or Services supplied from time to time by the manufacturer of the Goods included in the Works as at the date of the acceptance of the Statement of Work; **"Manufacturer's Warranty"** means the warranty supplied from time to time by the manufacturer of the Goods as at the date of the acceptance of the Statement of Work; **"PPSA"** means the Personal Property Securities Act 1999; **"Price"** means the amount specified within each Statement of Work (subject to any Variation) or as otherwise specified from the Company to the Customer representing the cost for the Works; **"Related Work"** means any additional building, carpentry, painting, plastering, plumbing or other work or other trades that the Customer requires, which are not to be carried out by the Company; **"Services"** means the services provided by the Company to the Customer as part of the Works, which may include without limitation the installation of Goods; **"Services Delay Charge"** means the services delay charge (if any) set out in the Statement of Work; **"Services Interruption Event"** means any interruption to a Works caused by; a Force Majeure Event, the Customer's failure to carry out or perform any obligation required of it under this agreement which in the sole opinion of the Company does or may cause a delay in the Works and any other matter which in the reasonable opinion of the Company will cause an interruption or delay in the performance of the Works; **"Statement of Work"** means the details outlining the provision of the Works, which statement can be delivered verbally or in writing (including email) and may include (where applicable) an estimate or quotation (as specifically expressed as the case) of costs; **"Variation"** means a change in the Statement of Work including the specifications, scope, time of supply, price or scale of the Works and such variation shall form part of this agreement; **"Workmanship"** means a good and high quality and standard of delivery in connection with the Services performed; **"Works"** means the supply of Goods and the provision of Services to the Customer as per each Statement of Work;

## 3. OBLIGATIONS OF THE CUSTOMER

3.1 The Customer agrees to:

a) Pay the Company the Price for carrying out the Works in accordance with this agreement;

- b) Provide the Company with all necessary plans, specifications, services and amenities, so as to allow the Company to carry out the Works, provide access to the Location and ensure to the Company's reasonable satisfaction that the Location remains in a state and condition that is safe for the Company and its employees and agents;
- c) Ensure the Location complies with all necessary bylaws and restrictions is structurally sound (in accordance with all legislation governing safety in the workplace);
- d) Not to cause any disruption or obstruction to the carrying out of any Works and to follow any reasonable instructions provided by the Company about the Works;
- e) Where the Works requires co-ordination with other trades then the Customer will supply the Company with a schedule detailing all relevant information so as to allow the Company sufficient time to co-ordinate with the Customer's other tradespersons;
- f) Permit the Company to attach such reasonable signage as the Company may wish to any Works so as to identify that the Company is carrying out the Works;
- g) In circumstances where it wishes to make a claim against the Company pursuant to the guarantee given in clause 13.2, exclusively permit the Company or its authorised representative to remedy or make good any defects in its Workmanship and not permit any other third party to do so.

3.2 Without prejudice to any other right or remedy of the Company, if the Customer fails to carry out or perform any of its obligations pursuant to this clause 3 (excepting clause f)) then, in addition to any Additional Expenses Charge that may apply, the Company may charge the Customer a Services Delay Charge for each day (or part thereof) that the Company is, in its reasonable opinion, unable and/or not required to carry out or perform the Works as a result of such breach by the Customer.

3.3 Where the Customer requests any Related Work to be carried out, the Company will use its best endeavours to source suppliers and/or contractors to carry out the Related Work, but the Customer is responsible for the commissioning, controlling, and payment for such work.

3.4 The Customer acknowledges that unless otherwise agreed in writing between the Customer and the Company, the Customer shall be responsible for obtaining, paying for and maintaining in force all permits, approvals, authorisations, authorities, licences and consents of all regulatory authorities whatsoever which are or may be necessary or advisable in connection with the Works.

## 4. STATEMENT OF WORK AND VARIATIONS

4.1 For any Works to be carried out by the Company for the Customer, the Company will supply to the Customer a Statement of Work, and where such Statement of Work includes a quotation, the quotation shall be valid for 30 days from the date of the quotation, and thereafter a revised quotation may be required. The Statement of Work takes effect on the date that it is accepted by the Customer (whether that acceptance is implied or express). The Company reserves the right by notice to the Customer to alter or amend any Statement of Work before receipt by the Company of acceptance by the Statement of Work by or on behalf of the Customer. The Company further reserves the right, by notice to the Customer, to alter or amend any Statement of Work where:

- a) The Customer's original requirements are varied by the Customer in accordance with this agreement;
- b) Any plans, specifications or information provided by the Customer and relied upon by the Company for the purpose of providing the Statement of Work prove to be inaccurate or unreliable;
- c) There is an increase in the cost of the Goods or Services included in the Statement of Work where such increase is beyond the control of the Company;
- d) Conditions outside the Company's control cause delays to either the commencement or completion of the work to which the Statement of Work relates.

4.2 No Customer initiated Variations to any Works are allowed unless the following procedure is adhered to:

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- a) The Customer must submit a written request to the Company outlining the requested variation;
  - b) The Company must within five (5) working days of receiving the request, notify the Customer in writing advising of, any problems arising from the proposed change (including timing), an estimate of any additional costs arising from carrying out the change to the Works and any change to the Price. The Customer will have 5 working days from receiving the Company's notice to accept or reject those matters;
  - c) If the Customer does not provide notice of the above within the required time frame or accepts those matters contained in the Company's notice then the exchange of notices will together amount to a Variation.
  - d) If the Customer rejects those matters contained in the Company's notice, then the Company will continue to carry-out the Works according to the original Statement of Work.
- b) If the Company suspends work, it:
    - i. Is not in breach of this agreement;
    - ii. Is not liable for any loss or damage whatsoever suffered, or alleged to be suffered, by the Customer or by any person claiming through the Customer;
    - iii. Is entitled to an extension of time to complete the Works and to recover any costs incurred as a consequence of the extension of time;
    - iv. Keeps its rights under this agreement including the right to terminate this agreement;
    - v. 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.

## 5 CHARGES AND PAYMENT

- 5.1 The amount charged by the Company for carrying out any Works will be as specified in the Statement of Work (or as otherwise specified from the Company to the Customer), subject to any Variation and any Additional Expenses Charges and/or any Services Delay Charge. All prices in the Statement of Work are exclusive of GST unless stated otherwise.
- 5.2 Unless specifically stated in the Statement of Work or any agreed payment schedule for the Works (which shall form part of this agreement) payment is due on the due date as follows:
  - a) A deposit may be required of up to 50% of the Price for the Works is payable at the time of acceptance of the Statement of Work by or on behalf of the Customer;
  - b) The balance of the total price for the Works is payable without deduction or set off by the Customer to the Company on delivery of the Goods; and
  - c) Where the Customer holds a trade credit account with the Company, the total price for the Works is payable without setoff or deduction before the 20th day of the month following date of invoice.
- 5.3 If the Customer fails to make payment by the due date the Customer shall pay interest on the amount outstanding at the rate of 5% above the Company's bank's current variable lending rate from the due date for payment until payment is made. The Customer shall pay all costs, expenses and charges (including legal costs on a solicitor/client basis) that are incurred by the Company in recovering any money owing to the Company by the Customer.
- 5.4 The Company has the absolute right to withhold delivery or to suspend the Works where the Customer has not adhered to these payment terms.

## 6 CONSTRUCTION CONTRACTS ACT 2002

- 6.1 The Company shall be entitled to exercise all or any powers available to the Company under the Construction Contracts Act 2002 including suspension of work, adjudication and seeking charging orders.
- 6.2 The Customer acknowledges that:
  - a) The Company has the right to suspend work within five (5) working days of the date of any written notice of its intent to do so:
    - i. A Claimed Amount in a Payment Claim is not paid in full by the due date for payment and no Payment Schedule has been provided by the Customer; or
    - ii. A Scheduled Amount provided in a Payment Schedule provided by the Customer in relation to the Payment Claim is not paid in full by the due date for its payment; or
    - iii. The Customer has not complied with an adjudicator's notice that the Customer must pay an amount to the Company by a particular date; and
    - iv. The Company has given written notice to the Customer of its intention to suspend the carrying out of the Works.

- c) If the Company 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 Company under the Contractual Remedies Act 1979; or
  - ii. Enable the Customer to exercise any rights that may otherwise have been available to the Customer under that Act as a direct consequence of the Company suspending work under this provision.
- 6.3 In this clause 6 where used the following terms shall have the meanings ascribed to them in the Construction Contracts Act 2002; "Claimed Amount", "Payment Claim", "Payment Schedule" and "Scheduled Amount".

## 7 DELIVERY, RISK AND INSURANCE

- 7.1 If the Company has specified an anticipated delivery date, the Company will use its reasonable endeavours to arrange delivery of the Goods by that date. The Company is not liable for any failure to deliver, or for any delay.
- 7.2 Delivery shall be made at the place in New Zealand indicated in the Statement of Work and if no place is indicated then the Company will make the Goods available at the Company's premises for collection by the Customer. Delivery of Goods to the Customer shall be deemed completed either upon the Company delivering the Goods to the place named in the Statement of Work or, where no place is indicated in the Statement of Work, then upon the Company making the Goods available for collection at the Company's premises. Upon delivery being effected at the Company's premises the Customer shall bear all costs arising out of transportation of the Goods from the Company's premises to the Customer (including shipping, brokerage, freight, insurance and all taxes and duties payable).
- 7.3 At the Customer's request, the Company will take reasonable steps to obtain a quote from its usual carrier as to the cost of transporting the Goods to the Customer. If the Customer provides the Company with written acceptance of the quote during the period applicable to the quote, then the Customer is required to pay such amount either to the Company or the Company's carrier as the Company may direct. If the Customer does not accept that quote within the applicable period then the Customer is responsible for arranging transportation of the Goods through a reputable carrier.
- 7.4 Irrespective of whether ownership and title in the Goods remains vested in the Company, risk in the Goods shall pass to the Customer upon delivery. The Customer is responsible for all insurance of all Goods from the time of delivery.

## 8 INSPECTION

- 8.1 The Customer shall inspect the Goods upon delivery and shall within three (3) days after delivery notify the Company of any abnormalities (faults or damage) the Customer wishes to make a claim for. If the Customer does not, the Customer shall be deemed to have accepted the Goods and no returns shall be made or accepted by the Company.

## 9 TITLE AND SECURITY

- 9.1 Ownership and title in the Goods, or any proceeds from on-sale of the Goods, shall not pass to the Customer until the Customer has paid the Company in full for the Works and all other sums due to the Company by the Customer on any account whatsoever in accordance with this agreement.

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9.2 If the Company supplies Goods without first obtaining payment in full for the same, then the Customer acknowledges and agrees that the Company shall be entitled at the cost in all respects of the Customer to register on the Personal Property Securities Register any security interest that the Company possesses in respect of all Goods supplied and the proceeds of on-sale of such Goods and the Customer acknowledges that the Company's security interest survives until the Customer pays in full all sums due to the Company under this agreement.

9.3 The Customer acknowledges and agrees that until payment in full has been made to the Company for all of the Goods supplied:

- a) The Company possesses a Purchase Money Security Interest (as that term is defined in the PPSA) in the Goods; and
- b) If the Customer on-sells the Goods prior to payment to the Company, the Customer will pay the proceeds derived from that on-sale into a separate account for the benefit and as trustee for the Company so that those proceeds remain identifiable in connection with that on-sale and the Goods.

9.4 If at any time the Company has sufficient cause to exercise its rights under section 109 of the PPSA, the Customer irrevocably grants the Company the right and licence to enter upon the Location and/or any premises where the Goods are located to remove and repossess the Goods, without notice and without liability whatsoever to the Customer, or to any person or company claiming through the Customer.

9.5 The Customer covenants to assist and co-operate with the Company by completing any documentation and/or providing any information as may be required by the Company in order for the Company to achieve and perfect its desired security position under the PPSA and the Customer waives any right to receive a verification statement in respect of any financing statement or financing change statement relating to the security interest under the PPSA.

9.6 Nothing in sections 114(1)(a), 117(1), 133 and 134 of the PPSA shall apply to this agreement nor shall the Customer's rights as a debtor in sections 116, 119, 120(2), 121, 125-127, 129 and 132 of the PPSA apply to this agreement. The Customer agrees that any rights the Company has in addition to those in Part 9 of the PPSA will continue to apply.

## 10 RIGHTS OF TERMINATION

10.1 The Company may in its sole discretion terminate this agreement by written notice to the Customer if:

- a) The Customer defaults in performing its obligations under this agreement and the default, if capable of being remedied, is not remedied within seven (7) days from receiving a notice specifying the default and requiring remedy; or
- b) The Customer defaults in the performance of its obligations under this agreement and the default is in the Company's reasonable opinion incapable of being remedied; or
- c) The Customer commits an act of insolvency including a compromise with creditors or appoints a voluntary administrator; or if a receiver is appointed in respect of the assets of the Customer; or if an arrangement with the Customer's creditors is made or likely to be made; or if the Customer ceases or threatens to cease carrying on business; or if the ownership or effective control of the Customer is transferred or the nature of the Customer's business is materially altered, or the Customer is adjudicated bankrupt.

10.2 Termination of this agreement will not prejudice or affect the rights, remedies and claims and/or any liabilities of the Company. The Company shall have no liability or responsibility whatsoever to the Customer for any loss or damage of any kind which may result directly or indirectly from such termination of this agreement.

## 11 PAYMENT OF THE COMPANY UPON TERMINATION

11.1 Upon termination of this agreement, the Customer will, subject to any specific remuneration obligation set out in the Statement of Work, be liable to pay the Company for:

- a) The value of that part of the completed Works delivered, performed and payable according to the terms of this agreement and not previously paid for as at the date of termination; and

- b) Any reasonable costs that the Company has incurred as a result of the early termination.

## 12 INTELLECTUAL PROPERTY & USE BY THE CUSTOMER

12.1 All of the trademarks, patents, copyright, designs (including rights of drawings, calculations, models, samples, descriptions, figures, dimension specifications and the like) or other intellectual property rights (whether or not registered) in respect of the Goods and the Works (collectively "Intellectual Property") remain the Company's property notwithstanding the sale of the Goods and the provision of the Works to the Customer. The Customer may not use, reverse engineer, remove, interfere with or alter the Intellectual Property in any way. Intellectual Property owned by the Company may not be copied, reproduced, distributed, modified, published, uploaded, posted, or transmitted in any way without the Company's prior written consent.

12.2 The Customer acknowledges that it is aware that any breach of this clause 12 may result in the Company suffering damage. The Customer indemnifies the Company against all losses, damages, expenses and legal costs (including on a solicitor and client basis) that the Company may reasonably sustain or incur as a result, whether directly or indirectly, of any breach by the Customer of the provisions of this clause 12.

12.3 This clause 12 survives termination of this agreement.

## 13 WARRANTIES/GUARANTEES

13.1 The Company guarantees that:

- a) The Works will conform to the Statement of Work; and
- b) Subject to clause 14.3 the Goods will be free from material defects at the time of installation and for the period contained in the Manufacturer's Warranty ("Warranty Period").

13.2 The Company guarantees that it will repair or make good any defects in its Workmanship arising within five years following completion of the Services for which the defect is claimed, ("Workmanship Guarantee"). This Workmanship Guarantee is subject to the following conditions:

- a) The Workmanship Guarantee does not apply to the Goods provided (for which the Customer acknowledges clause 13.1 of this agreement applies);
- b) The Company's liability in respect of all claims arising from the Workmanship Guarantee will be limited to the labour value of the Workmanship;
- c) The Workmanship Guarantee does not cover any occurrence which would normally be covered by public liability insurance or any other form of insurance;
- d) The Workmanship Guarantee does not apply where alterations or repairs are made by the Customer or any third party to the Works without the knowledge and prior written consent of the Company (and without the Company first having the opportunity to remedy the same to its satisfaction);
- e) The benefit of the Workmanship Guarantee is not assignable by the Customer to any other person
- f) The Workmanship Guarantee does not apply for so long as the Works have not been completed in full or the Customer is in default in relation to any payment owing to the Company; and
- g) The Workmanship Guarantee does not apply to any appliance service repair work;
- h) The Workmanship Guarantee does not cover any loss or damage caused by the matters listed in clauses 14.3(c) to 14.3(k) (inclusive);
- i) The Workmanship Guarantee does not cover any indirect, special, incidental or consequential loss or damage, however caused; and
- j) The Company is not liable to carry out any remedial work under the Workmanship Guarantee unless they receive written notice from the Customer of the claim within seven days after discovery of the defect.

## 14 LIMITATION OF LIABILITY

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14.1 The guarantees/warranties provided in clauses 13.1 and 13.2 replace all other representations, guarantees or warranties (statutory, expressed or implied, including, but not limited to, the implied warranties of merchantability and fitness for a particular purpose) and all such representations, guarantees and warranties (excepting those which may not be lawfully excluded) are specifically excluded.

14.2 The exclusions and the limitations contained in clause 14.3 do not apply to rights granted to the Customer under the Consumer Guarantees Act 1993, unless the Customer is acquiring the Goods or Services for the purposes of a business in which case the provisions contained in the Consumer Guarantees Act 1993 shall not apply.

14.3 Under no circumstances will any guarantee or warranty express or implied relating to the Goods and/or any Works extend to or include nor will the Company be liable (whether vicariously or otherwise) under the law of tort, contract or otherwise for:

- a) Any loss or damage not covered by the Manufacturer's Warranty;
- b) Any loss or damage occurring at the expiry of the Warranty Period;
- c) Any loss or damage caused by non-adherence to the Manufacturer's Instructions;
- d) Any loss or damage caused by the Company altering the Location due to structural, electrical, safety or other concerns as to the Location;
- e) Any loss or damage caused by the Company failing to recognise the possible presence of asbestos in any roof cladding, soffit, eaves, gables or interior ceilings;
- f) Any loss or damage caused by a Force Majeure Event;
- g) Any loss or damage caused by the acts or omissions of any third party;
- h) Any loss or damage caused by a contractor and/or supplier carrying out any Related Work, whether or not the Company had arranged for such Related Work to be carried out;
- i) Any loss or damage caused by having repairs or alterations carried out to any Works by any person other than the Company;
- j) Any loss or damage caused by a Services Interruption Event;
- k) Any loss or damage arising from the termination of this agreement; or
- l) Any loss of profits or savings or any indirect, special, incidental or consequential loss or damage, however caused, arising out of or in connection with the performance or non-performance of the Company, any Works, Goods and/or this agreement.

14.4 Notwithstanding any other provision of this agreement and without prejudice to clause 14.3, if for any reason the Company becomes liable for loss or damage that would have otherwise been excluded then its total liability to the Customer arising out of any claim for damages for any cause will be limited at the Company's election to either the monetary amount of the value of that part of the Works giving rise to the claim, the actual damage or loss suffered by the Customer or the sum (if any) which is specified in any special conditions set out in the Statement of Work, whichever is lesser.

## 15 DISPUTES

15.1 No party to this agreement shall begin any court proceedings relating to any dispute arising out of this agreement (including any dispute as to the validity, breach or termination of this agreement or as to any claim in tort, in equity pursuant to any statute) unless that party has complied with the following paragraphs of this clause.

15.2 Any party who claims that a dispute has arisen under or about this agreement must give written notice to the other party specifying the nature of the dispute.

15.3 On receipt of the notice by the other party, the parties to this agreement:

- a) Must co-operate and use their reasonable endeavours to resolve the dispute quickly;
- b) Must, if they do not within seven (7) days of receiving the notice (or any further period as they may agree in writing) resolve the dispute, refer the dispute to mediation ("mediation").

15.4 The mediation shall be conducted in terms of the LEADR New Zealand Inc. Standard Mediation Agreement and the mediation shall be conducted by a mediator and at a fee agreed by the parties, failing agreement between the parties, the mediator shall be selected, and the mediator's fee shall be decided by the Chair for the time being of LEADR New Zealand Incorporated.

## 16 SERVICES INTERRUPTION

16.1 Without prejudice to any other right or remedy of the Company, the parties acknowledge that from time to time a Services Interruption Event may occur and, in that case, such occurrence will delay the Works and will entitle the Company to immediately cease the performance of all or any part of the Works until the Services Interruption Event ends or is remedied (as the case may be). The Customer acknowledges that there may be an Additional Expenses Charge relating to recommencement of the Works after the occurrence of a Services Interruption Event. The Customer agrees to pay the Additional Expenses Charge upon rendering of an invoice by the Company.

## 17 MISCELLANEOUS

17.1 The Company may assign its rights under this agreement, provided however the Customer shall not assign all or any of its rights or obligations under this agreement without the written consent of the Company

17.2 All notices authorised or required to be made under this agreement shall be sent by facsimile transmission, delivered personally or sent by prepaid mail and in each case addressed to the party at the address notified to the other party. All notices shall be deemed to have been received the day they are sent except where sent by post that shall be deemed to have been received two (2) days after the date of posting and where sent by facsimile transmission upon receipt of the correct and complete transmission report at the close of transmission.

17.3 Save as specifically and expressly contemplated in this agreement no provision hereof shall be changed, waived or modified without the express written agreement of the Company

17.4 This agreement contains all terms of the arrangement between the parties and supersedes and extinguishes all prior agreements, discussions, representations and arrangements between the parties about the matters covered in this agreement.

17.5 Any waiver or failure to execute any rights by the Company shall not be deemed a waiver of any further or other right of the Company in respect of the Customer.

17.6 The Customer shall not be entitled to rely upon any statement of any kind made by a person including a representative or agent of the Company, which include a representation of any kind, which contradicts or is contrary to this agreement.

17.7 The parties acknowledge that this agreement may be signed in two (2) or more counterparts each of which may be a facsimile or PDF copy and which shall be deemed to be an original but together shall constitute the same instrument and shall be binding on the parties. For the avoidance of doubt, where the Customer has signed the Company's credit account application, or any document forming the Statement of Work, then the Customer shall be deemed to have read and accepted these general terms and conditions as if the Customer had signed these general terms and conditions.