

PRO-STRUCTURE LIMITED – Terms and Conditions of Trade

1. **Definitions**
- 1.1 "Contractor" shall mean PRO-STRUCTURE LTD, PRO-SCHEMA LTD a division of PRO-STRUCTURE, its successors and assigns or any person acting on behalf of and with the authority of PRO-STRUCTURE LTD.
- 1.2 "Client" shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by the Contractor to the Client.
- 1.3 "Guarantor" shall mean that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 "Works" shall mean Works supplied by the Contractor to the Client (and where the context so permits shall include any supply of Materials as hereinafter defined) and includes Works described on any invoices, quotation, work authorisation or any other forms as provided by the Contractor to the Client.
- 1.5 "Materials" shall mean all Materials supplied by the Contractor to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Works as defined above).
- 1.6 "Price" shall mean the price payable for the Works as agreed between the Contractor and the Client in accordance with clause 3 of this contract.
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 supplied 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 these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of the Contractor.
- 2.4 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. **Price And Payment**
- 3.1 At the Contractor's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by the Contractor to the Client in respect of Works supplied; or
 - (b) the Contractor's quoted Price (subject to clause 3.2) which shall be binding upon the Contractor provided that the Client shall accept the Contractor's quotation in writing within thirty (30) days.
- 3.2 The Contractor reserves the right to change the Price in the event of a variation to the Contractor's quotation. Any variation from the plan of scheduled Works or specifications (including, but not limited to, any variation as a result of additional Works required due to hidden or unidentifiable difficulties beyond the reasonable control of the Contractor) will be detailed in writing and charged for on the basis of the Contractor's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 3.3 At the Contractor's sole discretion a deposit may be required.
- 3.4 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 and the value of Materials delivered to the site but not yet installed. Progress payment shall be made within twenty (20) working days of each monthly payment claim.
- 3.5 At the Contractor's sole discretion:
 - (a) payment shall be due on completion of the Works; or
 - (b) payment shall be due before delivery of the Works; or
 - (c) payment for approved Clients shall be made by instalments in accordance with the Contractor's payment schedule; or
 - (d) payment shall be due seven (7) days following the date of the invoice.
- 3.6 Time for payment for the Works shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due twenty (20) days following the end of the month in which a statement is posted to the Client's address or address for notices.
- 3.7 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Client and the Contractor.
- 3.8 GST and other taxes and duties that may be applicable shall be added to the Price except where expressly included in the Price.
- 3.9 No allowance has been made in the Price for the deduction of retentions. In the event that retentions are made, the Contractor reserves the right to treat retentions as placing the Client's account into default.
4. **Delivery Of Works**
- 4.1 At the Contractor's sole discretion delivery of the Works shall take place when the Client takes possession of the Works at the Client's nominated address (in the event that the Works are delivered by the Contractor or the Contractor's nominated carrier).
- 4.2 At the Contractor's sole discretion the costs of delivery are:
 - (a) in addition to the Price; or
 - (b) for the Client's account.
- 4.3 The Client shall make all arrangements necessary to take delivery of the Works whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Works as arranged then the Contractor shall be entitled to charge a reasonable fee for redelivery.
- 4.4 Delivery of the Works to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
- 4.5 The Contractor may deliver the Works by separate instalments. Each separate instalment shall be invoiced and paid for in accordance with the provisions in these terms and conditions.
- 4.6 The failure of the Contractor to deliver shall not entitle either party to treat this contract as repudiated.
- 4.7 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.
5. **Risk**
- 5.1 If the Contractor retains ownership of the Materials nonetheless, all risk for the Materials passes to the Client on delivery.
- 5.2 If any of the Materials are damaged or destroyed following delivery but prior to ownership passing to the Client, the Contractor is entitled to receive all insurance proceeds payable for the Materials. The production of these terms and conditions by the Contractor is sufficient evidence of the Contractor's rights to receive the insurance proceeds without the need for any person dealing with the Contractor to make further enquiries.
- 5.3 The Contractor shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. Furthermore, the Contractor shall not be liable for any defective Works caused by incorrect information provided by the Client, and furthermore, the Contractor shall be entitled to charge the Client for any required, or requested, variation to the Works.
6. **Damages**
- 6.1 The Contractor shall not be liable for any loss or damage caused in accessing the work site beyond reasonable control of the Contractor (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas).
7. **Compliance with Laws**
- 7.1 The Client and the Contractor shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works.
- 7.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.
- 7.3 The Client agrees that the site will comply with any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.
8. **Insurance**
- 8.1 The Contractor shall have public liability insurance of at least \$2m. It is the Client's responsibility to ensure that they are similarly insured.
9. **Title**
- 9.1 The Contractor and Client agree that ownership of the Materials shall not pass until:
 - (a) the Client has paid the Contractor 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.
- 9.2 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 the Materials shall continue.
- 9.3 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 being given the rights of the Client to obtain ownership or any other interest in the Materials shall cease; and
 - (c) the Client is only a bailee of the Materials and until such time as the Materials are received payment in full for the Materials then the Client shall hold any proceeds from the sale or disposal of the Materials on trust for the Contractor; and
 - (d) until such time that ownership in the Materials passes to the Client, if the Materials are converted into other products, the parties agree that the Contractor will be the owner of the end products, unless they have become fixtures; and
 - (e) 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 where the Materials are situated as the invitee of the Client and take possession of the Materials, and the Contractor will not be liable for any reasonable loss or damage suffered as a result of any action by the Contractor under this clause.
10. **Personal Property Securities Act 1999 ("PPSA")**
- 10.1 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.
- 10.2 The Client undertakes to:
 - (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Contractor may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, the 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 change statement 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.
- 10.3 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.
- 10.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
- 10.5 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.
- 10.6 The Client shall unconditionally ratify any actions taken by the Contractor under clauses 10.1 to 10.5.
11. **Client's Disclaimer**
- 11.1 The Client hereby disclaims any right to rescind, or cancel any contract with the Contractor or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Client by the Contractor and the Client acknowledges that the Works are bought relying solely upon the Client's skill and judgment.
12. **Defects**
- 12.1 The Client shall inspect the Works on delivery and shall within seven (7) days of delivery (time being of the essence) 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 Materials or repairing the Works.
13. **Warranty**
- 13.1 Subject to the conditions of warranty set out in Clause 13.2 the Contractor warrants that if any defect in any workmanship of the Contractor becomes apparent and is reported to the Contractor within twelve (12) months of the date of delivery (time being of the essence) then the Contractor will either (at the Contractor's sole discretion) replace or remedy the workmanship. The conditions applicable to the warranty given by Clause 13.1 are:
 - (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - (i) failure on the part of the Client to properly maintain any Works; or
 - (ii) failure on the part of the Client to follow any instructions or guidelines provided by the Contractor; or
 - (iii) any use of any Works otherwise than for any application specified on a quote or order form; or
 - (iv) the continued use of any Works after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user;
 - (b) fair wear and tear, any accident or act of God.
 - (b) the warranty shall cease and the Contractor shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Contractor's consent.
 - (c) in respect of all claims the Contractor shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.
- 13.2 For Materials not manufactured by the Contractor, the warranty shall be the current warranty provided by the manufacturer of the Materials. The Contractor shall not be bound by or responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Materials.
14. **Consumer Guarantees Act 1993**
- 14.1 If the Client is acquiring Works 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 Works by the Contractor to the Client.
15. **Intellectual Property**
- 15.1 Where the Contractor has designed, drawn or written Works for the Client, then the copyright in those designs and drawings and documents 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 and the Client agrees to indemnify the Contractor against any action taken by a third party against the Contractor in respect of any such infringement.
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 one 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 and any of its other obligations under the terms and conditions. The Contractor will not be liable to the Client for any loss or damage the Client suffers because the Contractor has 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 unfulfilled 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 owner 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 The Contractor may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are delivered by giving written notice to the Client. On giving such notice the Contractor shall repay to the Client any sums paid in respect of the Price. The Contractor shall not be liable for any loss or damage whatever arising from such cancellation. In the event that the Client cancels delivery of the Works the Client shall be liable for any loss incurred by the Contractor (including, but not limited to, any loss of profits) up to the time of cancellation.
- 18.2
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 Materials 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. **Construction Contracts Act 2002**
- 20.1 The Client hereby expressly acknowledges that:
 - (a) the Client 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.
21. **Dispute Resolution**
- 21.1 If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration.
22. **General**
- 22.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 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 or expense (including loss of profit) suffered by the Client arising out of a breach by the Contractor of these terms and conditions.
- 22.4 In the event of any breach of this contract by the Contractor the remedies of the Client shall be limited to damages which under no circumstances shall 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.
- 22.7 The Contractor reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Contractor notifies the Client of such change.
- 22.8 The provisions of the Contractual Remedies Act 1979 shall apply to this contract as if section 15(d) were omitted from the Contractual Remedies Act 1979.
- 22.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 22.10 The failure by the Contractor to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Contractor's right to subsequently enforce that provision.