

## **B&D CONDITIONS OF SALE (NEW ZEALAND)**

### **1. DEFINITIONS**

In these terms and conditions:

“**B&D**” means B&D Doors (NZ) Limited and its agents, servants and employees and any related bodies corporate as defined in the Companies Act 1993 (if such related body corporate is named as the party making or accepting the Buyer’s order of Goods or Services).

“**Buyer**” means the person to whom any quotation is made by B&D, any person offering to contract with B&D on these terms and conditions and any person who purchases Goods or Services from B&D;

“**Consequential Loss**” means any loss or damage suffered by a party or any other person which is indirect or consequential, including but not limited to loss of revenue, loss of income, loss of business, loss of profits, loss of goodwill or credit, loss of business reputation, future reputation or publicity, loss of use, loss of interest, damage to credit rating, or loss or denial of opportunity;

“**Defect**” means a defect, flaw or imperfection in the Goods which prevents the Goods from being used for the purposes intended for such Goods or which makes the use of the Goods dangerous, but does not include anything which has been disclosed as a feature or limitation of the Goods by B&D prior to the date of purchase, or any defect, flaw or imperfection that is trivial or insubstantial;

“**Goods**” means all products agreed to be supplied by B&D to the Buyer under any contract, arrangement or understanding between B&D and the Buyer;

“**GST**” means any goods and services tax and any replacement or similar tax;

“**GST Law**” means Goods and Services Tax Act 1985 (NZ);

“**Invoice**” means the invoice issued by B&D to the Buyer setting out the amount to be paid by the Buyer;

“**Order**” means any order for Goods or Services placed by the Buyer with B&D, in whatever form; and

“**Services**” means all services agreed to be supplied by B&D to the Buyer under any contract, arrangement or understanding between B&D and the Buyer.

### **2. GENERAL**

a) Unless B&D otherwise agrees in writing, these are the only terms and conditions which apply to the sale of Goods or Services by B&D and the Buyer agrees that these terms and conditions will in all circumstances prevail over any other document, Order or other terms, including the Buyer’s terms and conditions of purchase (if any).

b) These terms and conditions supersede and exclude all prior and other discussions, dealings, representations (contractual or otherwise) and arrangements relating to the supply of the Goods or Services including, but not limited to, those relating to the performance of the Goods or the results that ought to be expected from using the Goods.

c) If there is an inconsistency between any other terms agreed by the Buyer and B&D in writing and/or these terms and conditions, the terms agreed by the Buyer and B&D in writing will prevail to the extent of any inconsistency.

### **3. ORDERS**

a) B&D has sole discretion to accept or reject any Order or any variation or modification of an Order requested by the Buyer.

b) B&D has sole discretion to accept or reject any Order cancellation request by the Buyer. If a cancellation request is accepted by B&D, the Buyer will be liable for any direct loss or expense incurred by B&D in respect of that Order (including, without limitation, payment for any Goods or Services ordered by B&D from its suppliers relating to that Order).

### **4. WARRANTIES**

a) If the Buyer is a “consumer” under the Consumer Guarantees Act 1993, B&D warrants that the Goods supplied will be of an acceptable quality and will conform to the specifications published by it in relation to the Goods. However, B&D does not guarantee that repair facilities and spare parts for the Goods will be available.

b) If the Goods or Services are acquired for business purposes, the Buyer agrees that the Consumer Guarantees Act 1993 does not apply.

c) B&D also accepts liability for all warranties implied to the transactions under these terms and conditions under the Consumer Guarantees Act 1993, the Sale of Goods Act 1908, and any statutory amendment or re-enactment thereof or any other legislation the effect of which cannot be excluded. All warranties and conditions that are capable of exclusion and would, apart from this provision, form part of these terms and conditions, are expressly excluded.

d) Except where by legislation liability may not be limited, or where a limitation of liability would otherwise render B&D liable to a penalty, B&D’s liability in connection with the sale of the Goods or Services and these terms of sale is limited to any one of the following, as determined by B&D, (i) the replacement of the Goods or the supply of equivalent Goods or Services; (ii) the repair of the Goods or payment of the cost of having the Goods repaired; or (iii) the refund of the price paid by the Buyer for the Goods or Services.

e) To the extent the law permits and notwithstanding any other clause of these terms and conditions, B&D excludes all liability whatsoever to the Buyer for any Consequential Loss.

### **5. ADVICES**

The Buyer hereby acknowledges that it has not relied on any service involving skill or judgment, or on any advice, recommendation, information or assistance provided by B&D in relation to the Goods or Services or their use or application.

### **6. DELIVERY**

a) B&D will make all reasonable efforts to have the Goods delivered to the Buyer on the date agreed between the parties as the delivery date. However, time is not of the essence under these terms and conditions and B&D shall not be liable for any failure to deliver or delay in delivery for any reason.

b) If B&D does not receive forwarding instructions sufficient to enable it to dispatch the Goods within 14 days of notification to the Buyer that they are ready, the Buyer shall be deemed to have taken delivery of the Goods from the date on which they are ready and B&D can accordingly issue an Invoice to the Buyer in respect of such Goods. The Buyer shall be liable for storage charges payable in relation to such Goods not delivered monthly on demand by B&D in accordance with the payment terms set out in clause 11.

### **7. DEFECTS**

a) The Buyer must examine the Goods for Defects upon delivery and notify B&D of any Defects in writing within 30 days of delivery. If the Buyer does not notify B&D within 30 days of delivery the Buyer shall be deemed to have accepted the Goods.

b) The Buyer must preserve any Goods that is found to have a Defect in the state in which they were delivered and allow B&D (or its nominated agent) access to the Buyer’s premises to inspect the Goods. If B&D, upon inspection, agrees with the Buyer that such Goods have a Defect, the remedies set out in clause 4(c)(i)-(iii) will apply.

### **8. RISK AND TITLE**

a) Unless otherwise agreed in writing, all risk in and to the Goods purchased shall pass to the Buyer upon delivery to the Buyer or any agent or other carrier commissioned by the Buyer to take possession of the Goods. Legal and equitable title in and to the Goods shall not pass to the Buyer until payment in full for all Goods is made.

b) The Buyer acknowledges that until title in and to the Goods passes to the Buyer in accordance with this clause 8, the Buyer holds the Goods as bailee of B&D and that a fiduciary relationship exists between the Buyer and B&D.

c) Until title in and to the Goods passes to the Buyer in accordance with this clause 8, the Buyer shall store the Goods separately and in such a manner that they are clearly identified as the property of B&D and ensure that the Goods are properly stored, protected, readily identifiable and insured. B&D shall be entitled at any time until title in and to the Goods passes to the Buyer to demand the return of the Goods and shall be entitled without notice to the Buyer and without liability to the Buyer to enter any premises occupied by the Buyer (or any other premises where the Buyer is holding the Goods) in order to search for and remove the Goods.

d) The Buyer acknowledges that if it sells the Goods before title in and to the Goods has passed to the Buyer in accordance with this clause 8, it sells the Goods as a fiduciary agent of B&D provided that such sales shall not give rise to any obligations on the part of B&D. The Buyer shall hold the proceeds of sale on trust for B&D in a separate account and must pay to B&D such amount as B&D requests.

e) If title in and to the Goods has not passed to the Buyer in accordance with this clause 8, the Buyer’s implied right to sell the Goods shall immediately terminate upon the happening of any of the events stipulated in clause 11(c)(i)-(v).

f) Subject to clause 21, the parties agree that this clause 8 is not intended to create a charge or any other form of security interest and that if and to the extent that, as a matter of law, this clause 8 creates a charge or any other form of security interest, the offending words shall be deleted.

## 9. PRICE

a) Unless otherwise agreed in writing, the price charged for the Goods or Services shall be the price ruling as determined by B&D at the date of delivery or supply (plus any GST payable in accordance with clause 17 of these terms and conditions).

b) Any price indications or price lists provided by B&D to the Buyer or otherwise made available to the Buyer are subject to alteration in accordance with the price ruling at the date of delivery or supply.

## 10. FORCE MAJEURE

a) B&D is not liable for any failure to perform any of its obligations under these terms and conditions as a result of any event beyond its reasonable control including, without limitation, where B&D is prevented or hindered from manufacturing, delivering or supplying the Goods or Services as a result of any strikes, lockouts or other labour difficulty, inability to obtain any necessary materials, products, equipment, facilities or services from usual suppliers on usual terms, power or water shortage, accidents or breakdowns of plant, machinery, software, hardware or communication network. In such circumstances, B&D may suspend performance of any obligations under these terms and conditions while the event continues. B&D shall not incur any liability to the Buyer in respect of such suspension.

b) If any of the above events occur for more than 30 days, B&D may, without liability, terminate any affected Order and/or these terms and conditions immediately by notice in writing to the Buyer.

## 11. PAYMENT AND DEFAULT

a) Subject to clause 11(c), and unless otherwise agreed in writing by B&D (including where otherwise identified on any Invoice issued by B&D), all Invoices shall be payable by the Buyer within 30 days of delivery of the Goods or supply of the Services.

b) B&D reserves the right to charge interest on any overdue amount at a rate equal to the Reserve Bank of New Zealand 90 day bank bill rate plus 2% per annum from the due date until payment in full is made.

c) If: (i) the Buyer makes defaults on any payments or is unable or states that it is unable to pay its debts as and when they fall due; (ii) the Buyer being an individual commits an act of bankruptcy or has a controller or trustee appointed in respect of the Buyer's estate or any part of the Buyer's property or assets; (iii) the Buyer being a company passes a resolution for its winding up or enters into liquidation or has an application for winding up filed against it; (iv) a receiver, receiver and manager, controller or voluntary administrator is appointed over any part of the property or assets of the Buyer; or (v) the Buyer experiences any analogous event having substantially similar effect to any of the events specified above, then B&D may, at its option, withhold further deliveries or cancel any Order without notice to the Buyer and without prejudice to any other action or remedy which B&D has or might otherwise have under these terms and conditions. In such circumstances, all moneys owing and outstanding to B&D on any Invoice and irrespective of whether the due date on any Invoice has occurred or passed shall become immediately due and payable.

d) The Buyer will pay, at B&D's discretion (and without affecting any other rights B&D may have), on demand all expenses and costs (including legal costs as between solicitor and client and any debt collection costs) incurred by B&D in enforcing these terms and conditions.

e) Notwithstanding clause 11(a), B&D may at all times in its sole and unfettered discretion and without being under any duty or obligation to assign reasons to such discretion, alter or terminate the Buyer's credit limit or payment terms without notice. Without limiting the generality of the foregoing, the decision of B&D shall be final and B&D accepts no liability or responsibility for any loss (including Consequential Loss), howsoever arising, incurred by the Buyer due to the operation of this condition.

## 12. RELEASE

Except where legislation which cannot be excluded (such as the Consumer Guarantees Act 1993, the Sale of Goods Act 1908 and any statutory amendment or reenactment thereof) would make this clause 12 illegal, or where the inclusion of this clause 12 would otherwise make B&D liable to a penalty the Buyer releases B&D from any claim that is made against B&D for damages or otherwise in respect of any loss, damage, death or injury arising from negligence or otherwise caused directly or indirectly by or arising out of the use or condition of Goods or Services sold to the Buyer, except to the extent that such loss, damage, death or injury has been caused by B&D.

## 13. GENERAL LIEN

In addition to any right of lien to which B&D may be entitled under the common law, B&D shall be entitled to exercise a general lien over all items in its possession belonging to the Buyer until the Buyer has paid in full for all Goods supplied by B&D to the Buyer. B&D may in its sole discretion sell any item that is subject to a lien, provided that B&D shall pay to the Buyer any surplus proceeds that are realised by it from a sale of any such items after discharging in full all monies

outstanding to B&D in respect of unpaid Goods and all reasonable costs of sale incurred by B&D.

## 14. SEVERANCE

If any provision of these terms and conditions or its application to any person or circumstance is or becomes invalid, illegal or unenforceable the provision shall, so far as possible, be read down to such extent as may be necessary to ensure that it is not invalid, illegal or unenforceable. If any provision or part of it cannot be so read down the provision or part of it shall be deemed to be void and severable and the remaining provisions of these terms and conditions shall not in any way be affected or impaired.

## 15. VARIATION AND ASSIGNMENT

These terms and conditions may be varied by agreement between the parties in writing only. The Buyer may not assign its rights under these terms and conditions without B&D's prior written consent

## 16. GOVERNING LAW

These terms and conditions are governed by the law of New Zealand. B&D and the Buyer submit to the non-exclusive jurisdiction of the courts of New Zealand.

## 17. GST AND OTHER TAXES AND DUTIES

Notwithstanding any other clause in these terms and conditions, to the extent that any supply made under or in connection with these terms and conditions is a taxable supply (as defined by the GST Law), the Buyer must pay to B&D, in addition to the consideration provided for under these terms and conditions for that supply (unless it expressly includes GST) an amount (additional amount) equal to the amount of that consideration (or its GST exclusive market value) multiplied by the rate at which GST is imposed in respect of the supply. The Buyer must pay to B&D the additional amount at the same time as the consideration to which it is referable. The Buyer is responsible for paying any other duties, taxes or charges, including any stamp duty (if applicable), in relation to the Goods or Services.

## 18. WAIVER

Waiver by B&D of a breach of these terms and conditions or of any right or power arising on a breach of these terms and conditions must be in writing and signed by B&D. A right or power created or arising on a breach of these terms and conditions is not waived by any failure to exercise or delay in exercising, or a partial exercise of, that or any other right or power.

## 19. NO RIGHT TO OFFSET

No amount owing, whether present or future, actual, contingent or prospective and on any account whatsoever by the Buyer to B&D may be offset against any amount owing whether present, future, actual, contingent or prospective of the Buyer to B&D hereunder or on any other account whatsoever.

## 20. INTELLECTUAL PROPERTY

The purchase of Goods or Services under these terms and conditions does not confer on the Buyer any licence or assignment of any copyright, patent, design or trademark, or any other intellectual property right (whether registered, registrable or not) that subsists in the Goods or Services.

## 21. PERSONAL PROPERTIES SECURITIES ACT 1999 ("PPSA")

The Buyer consents to B&D registering a financing statement under the PPSA in respect of the Goods supplied (for which express purpose credit has been extended) in accordance with clause 8 of these terms and conditions to create a purchase money security interest ("PMSI") (as that term is defined in the PPSA). The Buyer agrees to the debiting of its accounts with B&D with the cost of registration of the PMSI and all other costs associated with perfection and enforcement of the PMSI (including B&D's full solicitor/own client costs). So far as permitted by s107 of a PPSA, the Buyer will have no rights under s114, s120 and s133 of the PPSA including the right to receive any notices. The Buyer waives its rights to receive a verification statement in respect of any financing statement or financing change statement registered by B&D. The Buyer agrees to B&D exercising its rights under s109 and s120 concurrently and to B&D retaining any repossessed Goods immediately so that B&D's rights under s123 of the PPSA shall become effective immediately upon repossession. The Buyer agrees that repossession and retention of the Goods under s120 - 123 will only satisfy so much of the Buyer's debt to B&D as is equivalent to B&D's estimation of the market value of the Goods as they are to be used by B&D at the date of repossession and the repossession and retention will immediately extinguish any rights and/or interest the Buyer has in the Goods. The Buyer will indemnify B&D for any claims brought by a third party against B&D as a result of B&D's repossession and retention of the Goods. The Buyer acknowledges that B&D may allocate any monies it receives from the Buyer towards debts, changes and expenses in any priority it determines to maintain the PMSI in the Goods.