

**1. Definitions**

- 1.1 “AJ” means Aitken Joinery Otago and Southland Limited T/A Aitken Joinery, its successors and assigns or any person acting on behalf of and with the authority of Aitken Joinery Otago and Southland Limited T/A Aitken Joinery.
- 1.2 “Customer” means the person/s ordering the works specified in any invoice, document or order, and if there is more than one customer is a reference to each customer jointly and severally.
- 1.3 “Works” means all works or materials supplied by AJ to the customer at the customer’s request from time to time (where the context so permits the terms ‘works’ or ‘materials’ shall be interchangeable for the other).
- 1.4 “Price” means the price payable (plus any goods and service tax (GST) where applicable) for the works as agreed between AJ and the customer in accordance with clause 5 below.

**2. Acceptance**

- 2.1 The customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the customer places an order for or accepts delivery of any works.
- 2.2 These terms and conditions may only be amended with the consent of both parties in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the customer and AJ.
- 2.3 Any advice, recommendations, information, assistance or service provided by AJ in relation to works or materials supplied is given in good faith, is based on AJ’s own knowledge and experience and shall be accepted without liability on the part of AJ and it shall be that responsibility of the customer to confirm the accuracy and reliability of the same in light of the use to which the customer makes or intends to make of the works or materials.

**3. Electronic Transactions Act 2002**

- 3.1 Electronic signatures shall be deemed to be acceptable by either party providing that the parties have complied with Section 22 of the Electronic Transactions Act 2002 or any other applicable provisions of that act or any regulations referred to in that act.

**4. Change in Control**

- 4.1 The Customer shall give AJ no less than fourteen (14) days prior written notice of any proposed change of ownership of the customer and/or any other change in the customer’s details (including but not limited to, changes in the customer’s name, address, contact phone or fax number/s, or business practice). The customer shall be liable for any loss incurred by AJ as a result of the customer’s failure to comply with this clause.

**5. Price and Payment**

- 5.1 At AJ’s sole discretion the price shall be either:
- (a) As indicated on invoices provided by AJ to the customer in respect of works performed or materials supplied; or
  - (b) AJ’s quoted price (subject to clause 5.2) which shall be binding upon AJ provided that the customer shall accept AJ’s quotation in writing within thirty (30) days.
- 5.2 AJ reserves the right to change the Price:
- (a) If a variation to the materials which are to be supplied is requested; or
  - (b) If a variation to the works originally scheduled (including any applicable plans or specifications) is requested; or
  - (c) Where additional works are required due to the discovery of hidden or unidentified difficulties (including, but not limited to, poor weather conditions, obscured site/building defects which require remedial work, health hazards and/or safety considerations (such as the discovery of borer, asbestos, rot or contaminated materials requiring removal), prerequisite work by the third party not being completed or non – compliant, limitations to accessing the site, availability of machinery, heavy equipment, scaffold or additional lifting equipment is required during installation, or change of design etc.) which are only discovered on commencement of the works; or
  - (d) In the event of increases to AJ in the cost of labour or materials which are beyond AJ’s control.
- 5.3 Variations will be charged for on the basis of AJ’s quotation, and will be detailed in writing, and shown as variations on AJ’s invoice. The Customer shall be required to respond to any variation submitted by AJ within ten (10) working days. Failure to do so will entitle AJ to add the cost of variation to the price. Payment for all variation must be made in full at the time of their completion.
- 5.4 At AJ’s sole discretion a deposit may be required.
- 5.5 Time for payment for the works being of the essence, the price will be payable by the customer on the date/s determined by AJ, which maybe:
- (a) On completion of the works; or
  - (b) By way of progress payments in accordance with AJ’s specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any materials delivered in the worksite but not yet installed;
  - (c) For certain approved customer’s, due twenty (20) days following the end of the month in which a statement is posted to the customer’s address or address for notices;
  - (d) The date specified on any invoice or other form as being the date for payment; or
  - (e) Failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the customer by AJ.

- 5.6 Payment may be made by cash, cheque, electronic/on-line banking, or by any other method as agreed to between the customer and AJ.
- 5.7 The Customer shall not be entitled to set off against, or deduct from the price, any sums owed or claimed to be owed to the customer by AJ nor to withhold payment of any invoice because part of that invoice is in dispute.
- 5.8 Unless otherwise the price does not include GST. In addition to the price, the customer must pay to AJ an amount equal to any GST AJ must pay for any supply by AJ under this or any other agreement for the sale of the materials. The customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the customer pays the price. In addition, the Customer must pay any other taxes and duties that may be applicable in addition to the price except where they are expressly included in the price.

## **6. Provision of the Works**

- 6.1 At AJ's sole discretion the cost of delivery is an addition to the price.
- 6.2 Subject to clause 6.3 it is AJ's responsibility to ensure that the works start as soon as it is reasonably possible.
- 6.3 The works' commencement date will be put back and the completion date extended by whatever time is reasonable in the event that AJ claims an extension of time (by giving the customer written notice) where completion is delayed by an event beyond AJ's control, including but not limited to any failure by the Customer to:
  - (a) Make a selection; or
  - (b) Have the site ready for the works; or
  - (c) Notify AJ that the site is ready.
- 6.4 AJ may deliver the works by separate installments. Each separate installment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 6.5 Any time specified by AJ for delivery of the works is an estimate only and AJ will not be liable for any loss or damage incurred by the customer as a result of the delivery being late. However both parties agree that they shall make every endeavour to enable the works to be supplied at the time and place as was arranged between both parties. In the event that AJ's unable to supply the works as agreed solely due to any action or inaction of the customer, then AJ shall be entitled to charge a reasonable fee for re-supplying the works at a later time and date, and/or for storage of the materials.

## **7. Risk**

- 7.1 If AJ retains ownership of the materials under clause 12 then:
  - (a) Where AJ is supplying material only, all risk of the materials shall immediately pass to the customer on delivery and the customer must insure the materials on or before delivery. Delivery of the materials shall be deemed to have taken place immediately at the time that either:
    - (i) The customer or the customer's nominated carrier takes possession of the materials at AJ's address; or
    - (ii) The materials are delivered by AJ or AJ's nominated carrier to the customer's nominated delivery address (even if the customer is not present at the address).
  - (b) Where AJ is to both supply and install materials then AJ shall maintain a contract works insurance policy until the works are completed. Upon completion of the works all risk for the works shall immediately pass to the customer.
- 7.2 Notwithstanding the provisions of clause 7.1 if the customer specifically requests AJ to leave materials outside AJ's premises for collection or to deliver the materials to an unattended location then such materials shall always be left at sole risk of the customer and it shall be the customers responsibility to ensure the materials are insured adequately or at all. In the event that such materials are lost, damaged or destroyed then replacement of the materials shall be at the customers expense.
- 7.3 The Customer acknowledges that materials supplied may exhibit variations in shade, colour, texture, surface and finish. AJ will make every effort to match batches/samples of product/Materials supplied in order to minimise such variations but shall not be liable in any way whatsoever where such variations occur.
- 7.4 The customer warrants that the structure of the premises or equipment in or upon which these materials are to be installed or erected is sound and will sustain the installation and work incidental thereto. If for any reason (including the discovery of borer, asbestos, rot or any other contaminated materials) that AJ, or AJ's employees, reasonably form the opinion that the customers premises in not safe for the works to proceed then AJ shall be entitled to delay the provision of the works (in accordance
- 7.5 With the provisions of clause 6.3 above) until AJ is satisfied that it is safe for the installation to proceed.
- 7.6 AJ shall not be liable for any defect or damage resulting from incorrect or faulty installation carried out by any other third party.
- 7.7 The customer acknowledges that AJ is only responsible for parts/materials that are supplied by AJ and does not at any stage accept any liability in respect of parts/materials supplied by any other third party that subsequently fail and/or are found to be the source of the failure, the customer agrees to indemnify AJ against any loss or damage to the materials, or any part thereof howsoever arising.
- 7.8 Where the customer has supplied materials for AJ to complete the works, the customer acknowledges that they accept responsibility for the suitability of purpose, quality and any faults inherent in those materials. AJ shall not be responsible for any defects in the materials, any loss or damage howsoever arising for the use of materials supplied by the customer.

## **8. Customer's Responsibilities**

- 8.1 It is the Customers responsibility to provide access to the worksite, including but not limited to;

- (a) Have all areas are clean and clear and available to enable scheduled work to be completed by AJ, in accordance with the installation schedule. If installation is interrupted by the failure of the customer to adhere to the installation schedule agreed to between AJ and the Customer, any additional costs will be invoiced to the customer as a variation in accordance with clause 5.2; and
- (b) Fully disclose any information in writing prior to the scheduled installation that may affect AJ's installation procedures; and
- (c) Have erected scaffolding to enable the works to be undertaken (where an AJ's opinion it is deemed necessary). It is also agreed that all scaffolding erected will comply with industry safety standards and that any person erecting the scaffolding shall be suitably qualified to ensure its safe and proper erection and where necessary shall hold a current certificate of competency and/or be fully licenced; and
- (d) Provide adequate dustsheets to protect the customer's furniture and décor. AJ will not accept any responsibility for cleaning or repair costs attributed to dust or damage caused by any installation procedures; and
- (e) Remove all fragile items such as glassware, crockery, pot plants furniture and ornaments. Breakages and damages are the responsibility of the customer. All care taken but no responsibility accepted by AJ in this regard.

8.2 AJ is not insured to remove furniture or fittings and will not do so.

8.3 AJ is not responsible for the removal of rubbish from or clean-up of the building/construction site/s. this is the responsibility of the customer or the customer's agent. Under no circumstances will AJ handle removal of asbestos product.

#### **9. Accuracy of Customer's Plans and Measurements**

9.1 In the event the customer gives information relating to the materials (including plans, specifications, measurements, quantities and other information provided by the Customer):

- (a) It is the Customer's responsibility to verify the accuracy of the information before the customer or AJ places an order based on the information. AJ accepts no responsibility for the loss, damages, or costs however resulting from the customer's failure to comply with this clause;
- (b) AJ shall be entitled to rely on the accuracy of such information. The customer acknowledges and agrees that in the event that any of this information provided by the customer is inaccurate, AJ accepts no responsibility for any loss, damages or costs however resulting therefrom.

#### **10. Dimensions, Plans and Specifications**

10.1 All customary building industry tolerances shall apply to the dimensions and measurements for the Materials, unless AJ and the customer agree otherwise in writing.

#### **11. Compliance with Laws**

11.1 The customer and AJ shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable in the works, including any work health and safety (WHS) laws relating to building/construction sites and any other relevant safety standards or legislation.

11.2 The customer shall obtain (at the expense of the customer) all licenses and approvals that may be required for the works.

11.3 AJ has not and will not at any time assume any obligation as the customer's agent or otherwise which may be imposed upon the customer from time to time pursuant to the Health and Safety at Work Act 2015 (the "HSW Act") arising out of the agreement. The parties agree that for the purposes of the HSW Act, AJ shall not be the person who controls the place of work in terms of the HSW Act.

#### **12. Title**

12.1 AJ and the customer agree that ownership of the materials shall not pass until:

- (a) The customer has paid AJ all amounts owing to AJ; and
- (b) The customer has met all of its obligations to AJ.

12.2 Receipt by AJ 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.

12.3 It is further agreed that:

- (a) Until ownership of the materials passes to the customer in accordance with clause 12.1 that the customer is only a BAILEE OF THE materials and unless the materials have become fixtures must return the materials to AJ on request.
- (b) The customer holds the benefit of the customer's insurance of the materials on trust for AJ and must pay to AJ the proceeds of any insurance in the event of the materials being lost, damaged or destroyed.
- (c) The production of these terms and conditions by AJ shall be sufficient evidence of AJ's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with AJ to make further enquires.

- (d) The customer must not sell, dispose, or otherwise part with possession of the materials other than in the ordinary course of business and for market value. If the customer sells, disposes or parts with possession of the materials then the customer must hold the proceeds of any such act on trust for AJ and must pay or deliver the proceeds to AJ on demand.
- (e) The customer should not convert or process the materials or intermix them with other goods but if the customer does so then the customer holds the resulting product on trust for the benefit of AJ and must sell, dispose of or return the resulting product to AJ as it so directs.
- (f) Unless the materials have become fixtures the customer irrevocably authorises AJ to enter any premises where AJ believes the materials are kept and recover possession of the materials.
- (g) AJ may recover possession of any materials in transit whether or not delivery has occurred.
- (h) The customer shall not charge or grant an encumbrance over the materials nor grant nor otherwise give away any interest in the materials while they remain the property to AJ.
- (i) AJ may commence proceedings to recover the price of the materials sold notwithstanding that ownership of the materials has not passed to the customer.

### **13. Personal Property Securities Act 1999 (“PPSA”)**

- 13.1 Upon assenting to these terms and conditions in writing the customer 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 materials and/or collateral (account) – being a monetary obligation of the customer to AJ for works – that have previously been supplied and that will be supplied in the future by AJ to the customer.
- 13.2 The Customer 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 AJ may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
  - (b) Indemnify, and upon demand reimburse, AJ for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any materials charged thereby;
  - (c) Not register, or permit to be registered, a financing statement or a financing change statement in relation to the materials and/or collateral (account) in favour of the third party without the prior written consent of AJ; and
  - (d) Immediately advise AJ of any material change in its business practices of selling materials which would result in a change in the nature of proceeds derived from such sales
- 13.3 AJ and the customer agree that nothing in sections 114(1)(a), 113 and 114 of the PPSA shall apply to these terms and conditions 13.4 The customer waives its rights as a debtor under sections 116, 120(2), 112, 125, 126, 127, 129, 131 and 132 of the PPSA.
- 13.5 Unless otherwise agreed to in writing by AJ, the customer waives its rights to receive a verification statement in accordance with section 148 of the PPSA
- 13.6 The customer shall unconditionally ratify any actions taken by AJ under clauses 13.1 to 13.5.

### **14. Security and Charge**

- 14.1 In consideration of AJ agreeing to supply the works, the customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the customer either now or in the future, to secure the performance by the customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 14.2 The customer indemnifies AJ from and against all AJ’s costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising AJ’s rights under this clause.
- 14.3 The customer irrevocably appoints AJ and each director of AJ as the customer’s true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 14 including, but not limited to, signing any document on the customer’s behalf.

### **15. Customers Disclaimer**

- 15.1 the customer hereby disclaims any right to rescind, or cancel any contract with AJ or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the customer by AJ and the customer acknowledges that the works are bought relying solely upon the customer’s skill and judgement.

### **16. Defects and Returns**

- 16.1 The customer shall inspect the materials on delivery and shall within three (3) days of delivery (time being the essence) notify AJ of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The customer shall afford AJ an opportunity to inspect the materials within a reasonable time following delivery if the customer believes the materials are defective in any way. If the customer shall fail to comply with these provisions the materials shall be presumed to be free from any defect or damage. For defective materials, which AJ has agreed in writing that the customer is entitled to reject, AJ’s liability is limited to either (at AJ’s discretion) replacing the materials or repairing the materials.
- 16.2 Materials will not be accepted for return other than in accordance with 16.1 above.
- 16.3 Returns will only be accepted providing that:
  - (a) The customer has complied with the provisions of clause 16.1; and
  - (b) AJ has agreed in writing to accept the return of the materials; and

- (c) The materials are returned at the customer's cost within fourteen (14) days of the delivery date; and
  - (d) AJ will not be liable for materials which have not been stored or used in a proper manner; and
  - (e) The materials are returned in a condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
- 16.4 AJ will not accept the return of materials for credit.
- 16.5 Returned materials may (at AJ's sole discretion), incur restocking and handling fees.
- 16.6 Non-stocklist items or materials made to the customer's specifications are under no circumstances acceptable for credit or return.

## **17. Warranties**

- 17.1 Subject to the conditions of warranty set out in clause 17.1. AJ warrants that if any defect in the workmanship of AJ becomes apparent and is reported to AJ within twelve (12) months of the date of delivery (time being of the essence) then AJ with either (at AJ's sole discretion) replace or remedy the workmanship.
- 17.2 The conditions applicable to the warranty given in clause 17.1 are:
- (a) The warranty shall not cover any defect for damage which may be caused or partly caused by or arise through:
    - i. Failure on the part of the customer to properly maintain any materials; or
    - ii. Failure on the part of the customer to follow any instructions or guidelines provided by AJ; or
    - iii. Any use of materials otherwise than for any application specified on a quote or order form; or
    - iv. The continued use of any materials after any defect become apparent or would have become apparent to be reasonably prudent operator or user; or
    - v. Fair wear and tear, and accident or act of God.
  - (b) The warranty shall cease and AJ shall therefore in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without AJ's consent.
  - (c) In respect of all claims AJ shall not be liable to compensate the customers for any delay in either replacing or remedying the workmanship or in properly assessing the customer's claim.
- 17.3 For Materials not manufactured by AJ, the warranty shall be the current warrant provided by the manufacturer of the Materials. AJ shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Materials.

## **18. Consumer Guarantees Act 1993**

- 18.1 If the customer is acquiring materials for the purposes of a trade or business, the customer acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of the materials by AJ to the consumer.

## **19. Intellectual Property**

- 19.1 Where AJ has designed, drawn, written plans or a schedule of works, or created any products for the customer, then the copyright in all such designs, drawings, documents, plans schedules and products shall remain vested in AJ, and shall only be used by the customer at AJ's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of AJ.
- 19.2 The customer warrants that all designs, specifications or instructions given to AJ will not cause AJ to infringe any patent, registered design or trade mark in the execution of the Customer's order and the Customer agrees to indemnify AJ against any action taken by a third party against AJ in respect of such infringement
- 19.3 The customer agrees that AJ may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans and products which AJ has created for the customer.

## **20. Default and Consequences of Default**

- 20.1 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 a half percent (2.5%) per calendar month (and at AJ's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgement.
- 20.2 If the Customer owes AJ any money the Customer shall indemnify AJ from and against all costs and disbursements incurred by AJ in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, AJ's collection agency costs, and bank dishonour fees).
- 20.3 Further to any other rights or remedies AJ may have under this contract, if a customer has made payment to AJ, and the transaction is subsequently reversed, the customer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by AJ under this clause 20, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the customer's obligations under this agreement.
- 20.4 Without prejudice to any other remedies AJ may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions AJ may suspend or terminate the supply of Works to the Customer. AJ will not be liable to the Customer for any loss or damage the Customer suffers because AJ has exercised its rights under this clause.

- 20.5 Without prejudice to AJ's other remedies at law AJ shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to AJ shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to AJ becomes overdue, or in AJ's opinion the Customer will be unable to make a payment when it falls due;
  - (b) the customer has exceeded any applicable credit limit provided by AJ;
  - (c) the Customer become insolvent or bankrupt, 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
  - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

## **21. Cancellation**

- 21.1 Without prejudice to any other remedies AJ may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions AJ may suspend or terminate the supply of Works to the Customer. AJ will not be liable to the Customer for any loss or damage the Customer suffers because AJ has exercised its rights under this clause.
- 21.2 AJ may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are commenced by giving written notice to the Customer. On giving such notice AJ shall repay to the Customer any sums paid in respect of the Price, less any amounts owing by the Customer to AJ for Works already preformed. AJ shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 21.3 In the event that the Customer cancels the delivery of the Works the Customer shall be liable for any and all loss incurred (whether direct or indirect) by AJ as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 21.4 Cancellation of orders for products made to the Customer's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.

## **22. Privacy Act 1993**

- 22.1 The Customer authorises AJ or AJ's agent to:
- (a) Access, collect, retain and use any information about the Customer;
    - i. (including any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Customer's creditworthiness; or
    - ii. for the purpose of marketing products and services to the Customer.
  - (b) Disclose information about the Customer, whether collecting by AJ from the Customer directly or obtained by AJ 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 collecting or notifying a default by the Customer.
- 22.2 Where the Customer is an individual the authorities under clause 22.1 are authorities or consents for the purposes of the Privacy Act 1993.
- 22.3 The Customer shall have the right to request AJ for a copy of the information about the Customer retained by AJ and the right to request AJ to correct any incorrect information about the Customer held by AJ.

## **23. Construction Contracts Act 2002**

- 23.1 The Customer hereby expressly acknowledges that:
- (a) AJ 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 Customer, and;
    - i. The payment is not paid in full by the due date for payment and no payment schedule has been given by the Customer; or
    - ii. A scheduled amount stated in a payment schedule issued 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 AJ by a particular date; and
    - iv. AJ has given written notice to the Customer of its intention to suspend the carrying out of construction work under the construction contract.
  - (b) If AJ 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 Customer or by any person claiming through the Customer; 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.

