

**1. Definitions**

- 1.1 "Seller" means Wellington Garage Door Company Limited T/A Wellington Garage Doors, its successors and assigns or any person acting on behalf of and with the authority of Wellington Garage Door Company Limited T/A Wellington Garage Doors.
- 1.2 "Customer" means the person/s ordering the Works as 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 the Seller 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 "Prime Cost Item" shall mean an item that either has not been selected, or whose Price is not known, at the time this contract is entered into and for the cost of supply and delivery of which the Seller must make a reasonable allowance in the contract.
- 1.5 "Provisional Sum" shall mean an estimate of the cost of carrying out particular Works under this contract for which the Seller, after making all reasonable inquiries, cannot give a definite Price at the time this contract is entered into.
- 1.6 "Price" means the Price payable for the Works as agreed between the Seller and the Customer in accordance with clause 4 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 Seller's consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Customer and the Seller.
- 2.3 The Customer acknowledges and accepts that the Seller at their discretion, reserves the right not to supply Materials if, for any reason (including but not limited to, where the Materials are not or cease to be available, account disputes or conditions placed on the Seller by their suppliers. The Seller shall not be liable to the Customer for any loss or damage the Customer suffers due to the Seller exercising its rights under this clause.
- 2.4 These terms and conditions are meant to be read in conjunction with the Terms and Conditions posted on the Seller's website. If there are any inconsistencies between the two documents then the terms and conditions contained in this document shall prevail.

**3. Change in Control**

- 3.1 The Customer shall give the Seller not 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 the Seller as a result of the Customer's failure to comply with this clause.

**4. Price and Payment**

- 4.1 At the Seller's sole discretion the Price shall be either:
- (a) as indicated on invoices provided by the Seller to the Customer in respect of Works performed or Materials supplied; or
  - (b) the Seller's quoted Price (subject to clause 4.2) which shall be binding upon the Seller provided that the Customer shall accept the Seller's quotation in writing within thirty (30) days.
- 4.2 The Seller 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 unidentifiable difficulties (including, but not limited to, foreign exchange fluctuations, increases in taxes or duties, insurance premiums, warehousing costs, poor weather conditions, limitations to accessing the site, availability of machinery, safety considerations, prerequisite work by any third party not being completed or inaccurate measurements provided by the Customer etc) which are only discovered on commencement of the Works; or
  - (d) in the event of increases to the Seller in the cost of labour or materials which are beyond the Seller's control.
- 4.3 The cost of installation is included in the original quotation based on the Materials supplied and installed at one time, in the event that the installation is staggered due to delay of Materials or the Customer changes the installation time, the Seller reserves the right to charge an additional fee for the time involved for this variation based on the Seller's hourly rate and shall be detailed on the invoice as per clause 4.2.
- 4.4 At the Seller's sole discretion a deposit may be required.
- 4.5 Time for payment for the Works being of the essence, the Price will be payable by the Customer on the date/s determined by the Seller, which may be:
- (a) on completion of the Works; or
  - (b) 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;
  - (c) the date specified on any invoice or other form as being the date for payment; or
  - (d) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by the Seller.
- 4.6 Payment may be made by cheque, electronic/on-line banking, credit card or by any other method as agreed to between the Customer and the Seller.
- 4.7 Unless otherwise stated the Price does not include GST. In addition to the Price the Customer must pay to the Seller an amount equal to any GST the Seller must pay for any supply by the Seller 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.

**5. Prime Cost Items and Provisional Sums**

- 5.1 For the purposes of this clause 5, the following words shall have their corresponding meanings:
- (a) "Prime Cost Item" shall mean an item that either has not been selected, or the price of which is not known, at the time this contract is entered into, and for which the cost of supply, delivery and installation the Seller must make a reasonable allowance for in this contract.
  - (b) "Provisional Sum" shall mean an estimate of the cost of carrying out particular Works under this contract for which the Seller, after making all reasonable inquiries, cannot give a definite price for at the time this contract is entered into.
- 5.2 If the Seller advises the Customer that a Prime Cost Item which the Customer has selected is not available then the Customer must advise the Seller in writing within five (5) working days of such notice of an alternative choice of item, failing which the Seller shall be entitled on the Customer's behalf to select an item of similar specification and quality as the unavailable item originally selected (providing details of the same to the Customer).
- 5.3 If the actual cost of a Prime Cost Item or the actual cost of the Works for a Provisional Sum is less than the sum allowed for that item, then the difference shall be deducted from the Price and shall be shown by the Seller as part of the next progress payment claim.
- 5.4 If the actual cost of a Prime Cost Item or the actual cost of the Works for a Provisional Sum is greater than the sum allowed for that item, then the difference shall be added to the Price and shall be claimed by the Seller as part of the next progress payment claim.

**6. Delivery of the Works**

- 6.1 Delivery ("**Delivery**") of the Materials is taken to occur at the time that the Seller (or the Seller's nominated carrier) delivers the Materials to the Customer's nominated address even if the Customer is not present at the address.
- 6.2 At the Seller's sole discretion the cost of delivery is included in the Price.
- 6.3 Subject to clause 6.4 it is the Seller's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 6.4 The Works commencement date will be put back and the completion date extended by whatever time is reasonable in the event that the Seller claims an extension of time (by giving the Customer written notice) where completion is delayed by an event beyond the Seller'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 the Seller that the site is ready.
- 6.5 The Seller may deliver the Works by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 6.6 Any time or date given by the Seller to the Customer is an estimate only. The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Works (or any part of them) promptly or at all, where due to circumstances beyond the reasonable control of the Seller.

**7. Risk**

- 7.1 Risk of damage to or loss of the Materials passes to the Customer on Delivery and the Customer must insure the Materials on or before Delivery.
- 7.2 If any of the Materials are damaged or destroyed following delivery but prior to ownership passing to the Customer, the Seller is entitled to receive all insurance proceeds payable for the Materials. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.
- 7.3 If the Customer requests the Seller to leave Materials outside the Seller's premises for collection or to deliver the Materials to an unattended location then such Materials shall be left at the Customer's sole risk.
- 7.4 The Seller is not responsible for the removal of rubbish from or clean-up of the building/constructions site/s. This is the responsibility of the Customer or the Customer's agent, unless otherwise agreed between the Seller and the Customer at the time of quotation.

**8. Access**

- 8.1 The Customer shall ensure that the Seller has clear and free access to the work site at all times to enable them to undertake the works. The Seller shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of the Seller.

**9. Title**

- 9.1 The Seller and the Customer agree that ownership of the Materials shall not pass until:
- (a) the Customer has paid the Seller all amounts owing to the Seller; and
  - (b) the Customer has met all of its other obligations to the Seller.
- 9.2 Receipt by the Seller 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.
- 9.3 It is further agreed that:

- (a) until ownership of the Materials passes to the Customer in accordance with clause 9.1 that the Customer is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to the Seller on request.
- (b) the Customer holds the benefit of the Customer's insurance of the Materials on trust for the Seller and must pay to the Seller 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 the Seller shall be sufficient evidence of the Seller's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with the Seller to make further enquiries.
- (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 the Seller and must pay or deliver the proceeds to the Seller on demand.
- (e) the Customer should not convert or process the Materials or intermix them with other Materials but if the Customer does so then the Customer holds the resulting product on trust for the benefit of the Seller and must sell, dispose of or return the resulting product to the Seller as it so directs.
- (f) unless the Materials have become fixtures the Customer irrevocably authorises the Seller to enter any premises where the Seller believes the Materials are kept and recover possession of the Materials.
- (g) the Seller 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 of the Seller.
- (i) the Seller may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Customer.

#### **10. Personal Property Securities Act 1999 ("PPSA")**

- 10.1 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 previously supplied by the Seller to the Customer (if any) and all Materials that will be supplied in the future by the Seller to the Customer.
- 10.2 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 the Seller 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 Seller 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 a financing change statement or a change demand without the prior written consent of the Seller; and
  - (d) immediately advise the Seller 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.
- 10.3 The Seller and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 10.4 The Customer 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 Seller, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 10.6 The Customer shall unconditionally ratify any actions taken by the Seller under clauses 10.1 to 10.5.

#### **11. Security and Charge**

- 11.1 In consideration of the Seller agreeing to supply the Materials, 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).
- 11.2 The Customer indemnifies the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Seller's rights under this clause.
- 11.3 The Customer irrevocably appoints the Seller and each director of the Seller as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 11 including, but not limited to, signing any document on the Customer's behalf.

#### **12. Customer's Disclaimer**

- 12.1 The Customer hereby disclaims any right to rescind, or cancel any contract with the Seller or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Customer by the Seller and the Customer acknowledges that the Works are bought relying solely upon the Customer's skill and judgment.

#### **13. Defects In Materials**

- 13.1 The Customer shall inspect the Materials on delivery and shall within seven (7) days of delivery (time being of the essence) notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford the Seller 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 the Seller has agreed in writing that the Customer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Materials or repairing the Materials.

13.2 Materials will not be accepted for return other than in accordance with 13.1 above.

#### **14. Warranties**

14.1 Subject to the conditions of warranty set out in clause 14.2 the Seller warrants that if any defect in any workmanship of the Seller becomes apparent and is reported to the Seller within three (3) months of the date of delivery (time being of the essence) then the Seller will either (at the Seller's sole discretion) replace or remedy the workmanship.

14.2 The conditions applicable to the warranty given by clause 14.1 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 Customer to properly maintain any Materials; or
  - (ii) failure on the part of the Customer to follow any instructions or guidelines provided by the Seller; or
  - (iii) any use of any Materials otherwise than for any application specified on a quote or order form; or
  - (iv) the continued use of any Materials after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
  - (v) fair wear and tear, any accident or act of God.
- (b) the warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Seller's consent.
- (c) the warranty shall only be applicable on the Materials, once the Seller has received payment in full for all Materials and Works provided.
- (d) any warranty implied does not include prefinished surface coatings.
- (e) in respect of all claims the Seller shall not be liable to compensate the Customer for any delay in either replacing or remedying the workmanship or in properly assessing the Customer's claim.

14.3 For Materials not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Materials. The Seller 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.

#### **15. Intellectual Property**

15.1 Where the Seller 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 the Seller, and shall only be used by the Customer at the Seller's discretion.

15.2 The Customer warrants that all designs, specifications or instructions given to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify the Seller against any action taken by a third party against the Seller in respect of any such infringement.

15.3 The Customer agrees that the Seller may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which the Seller has created for the Customer.

#### **16. Default and 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 a half percent (2.5%) per calendar month (and at the Seller's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

16.2 If the Customer owes the Seller any money the Customer shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Seller's collection agency costs, and bank dishonour fees).

16.3 Without prejudice to any other remedies the Seller may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions the Seller may suspend or terminate the supply of Works to the Customer. The Seller will not be liable to the Customer for any loss or damage the Customer suffers because the Seller has exercised its rights under this clause.

16.4 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable if:

- (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Customer will be unable to make a payment when it falls due;
- (b) the Customer becomes 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
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

#### **17. Compliance with Laws**

17.1 The Customer and the Seller 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.

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

17.3 The Customer 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.

## **18. Cancellation**

18.1 The Seller 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 the Seller shall repay to the Customer any sums paid in respect of the Price, less any amounts owing by the Customer to the Seller for Works already performed. The Seller shall not be liable for any loss or damage whatsoever arising from such cancellation.

18.2 In the event that the Customer cancels the delivery of Works the Customer shall be liable for any and all loss incurred (whether direct or indirect) by the Seller as a direct result of the cancellation (including, but not limited to, any loss of profits).

18.3 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.

## **19. Privacy Act 1993**

19.1 The Customer authorises the Seller or the Seller'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 collected by the Seller from the Customer directly or obtained by the Seller 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 Customer.

19.2 Where the Customer is an individual the authorities under clause 19.1 are authorities or consents for the purposes of the Privacy Act 1993.

19.3 The Customer shall have the right to request the Seller for a copy of the information about the Customer retained by the Seller and the right to request the Seller to correct any incorrect information about the Customer held by the Seller.

## **20. Unpaid Seller's Rights**

20.1 Where the Customer has left any item with the Seller for repair, modification, exchange or for the Seller to perform any other service in relation to the item and the Seller has not received or been tendered the whole of any moneys owing to it by the Customer, the Seller shall have, until all moneys owing to the Seller are paid:

(a) a lien on the item; and

(b) the right to retain or sell the item, such sale to be undertaken in accordance with any legislation applicable to the sale or disposal of uncollected Materials.

20.2 The lien of the Seller shall continue despite the commencement of proceedings, or judgment for any moneys owing to the Seller having been obtained against the Customer.

## **19. Construction Contract Act 2002**

19.1 The Customer hereby expressly acknowledges that:

(b) the Seller 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 the Seller by a particular date; and

(iv) the Seller has given written notice to the Customer of its intention to suspend the carrying out of construction work under the construction contract.

(c) if the Seller 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.

(d) if the Seller 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 Seller 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 Seller suspending work under this provision.

**21. General**

- 21.1 The failure by the Seller to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision. 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.
- 21.2 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 Wellington Courts of New Zealand.
- 21.3 The Seller shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by the Seller of these terms and conditions (alternatively the Seller's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 21.4 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 the Seller nor to withhold payment of any invoice because part of that invoice is in dispute.
- 21.5 The Seller may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 21.6 The Customer agrees that the Seller may amend these terms and conditions at any time. If the Seller makes a change to these terms and conditions, then that change will take effect from the date on which the Seller notifies the Customer of such change. The Customer will be taken to have accepted such changes if the Customer makes a further request for the Seller to provide any Works to the Customer.
- 21.7 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 21.8 The Customer warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.