

TERMS OF TRADE

1. Definitions

1.1 "Builder" shall mean Powell Homes Ltd T/A The Building Guys, its successors and assigns or any person acting on behalf of and with the authority of Powell Homes Ltd.

1.2 "Client" shall mean the Client or any person acting on behalf of and with the written authority of the Client.

1.3 "Guarantor" shall mean that person (or persons) who agrees to be liable for the debts of the Client on a principal debtor basis.

1.4 "Works" shall mean all Works (including the supply of Materials) undertaken by the Builder, as described in the contract, on any invoices, quotation, work authorisation or any other forms as provided by the Builder to the Client, and includes any advice or recommendations.

1.5 "Materials" shall mean Materials supplied by the Builder, which are required to complete the Works.

1.6 "Prime Cost Item" shall mean an item that either has not been selected, or whose Price is not known, at the time the contract is entered into and for the cost of supply and delivery of which the Builder must make a reasonable allowance in the contract.

1.7 "Provisional Sum" shall mean an estimate of the cost of carrying out particular Works under the contract for which the Builder, after making all reasonable inquiries, cannot give a definite Price at the time the contract is entered into.

1.8 "Price" shall mean the Price of the Works as agreed between the Builder and the Client.

2. Acceptance

2.1 Any instructions received by the Builder from the Client for the supply of Works and/or the Client's acceptance of Works undertaken by the Builder 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2.3 Upon acceptance of this contract by the Client, the contract is binding and can only be rescinded in accordance with the contract or with the written consent of the Builder.

2.4 The Client shall give the Builder 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 Builder as a result of the Client's failure to comply with this clause.

2.5 Works are supplied by the Builder only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions.

3. Price and Payment

3.1 At the Builder's sole discretion the Price shall be either:

(a) as indicated on invoices provided by the Builder to the Client in respect of Works undertaken; or

(b) the Builder's quoted Price (subject to clause 4) which shall be binding upon the Builder provided that the Client shall accept the Builder's quotation in writing within twenty-eight (28) days.

3.2 At the Builder's sole discretion:

(a) a non-refundable deposit may be required.

(b) payment shall be due on completion of the Works; or

(c) detailed progress payment claims may be submitted by the Builder:

(i) in accordance with the specified payment schedule; or

November 2017 © Powell Homes Limited - www.powellhomes.co.nz

(ii) at intervals not less than fortnightly for Works performed up to the date of the invoice; and such payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the site but not yet installed.

(d) payment for approved Clients shall be due twenty (20) days following the end of the month in which a statement and/or invoice is posted to the Client's address or address for notices.

3.3 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 seven (7) days following the date of the invoice.

3.4 Payment will be made by cash, cheque, bank cheque, credit card (plus a surcharge of up to three percent (3.0%) of the Price), direct credit, or by any other method as agreed to between the Client and the Builder.

3.5 GST and other taxes and duties that may be applicable shall be added to the Price, except when they are expressly included in the Price.

4. Variations

4.1 In the event that the Client requests a variation all such requests shall be made in writing. If the Builder believes the variation will not require a variation to any permit and will not cause any delay, and will not add more than two percent (2%) to the Price then the Builder may carry out the variation and the Client agrees to pay any variation to the Price, otherwise the Builder will give the Client a written variation document detailing the Works, the amended Price, the estimated time to undertake the variation, and the likely delay, if any, and require written acceptance by the Client of the variation before commencing Work on the variation.

4.2 In the event that the Builder requests a variation, the Builder will, in writing:

(a) state the reason for the variation; and

(b) provide a full description of the variation; and

(c) state any effect the variation will have on the contract, including but not limited to, the Price, completion date and whether further permits or authorisations are required.

4.3 Other than for the events outlined in clause 4.4 the Builder shall obtain written acceptance by the Client of any variation submitted by the Builder before commencing Work on the variation.

4.4 Where the Works involve additions or alterations to an existing building or structure then:

(a) the Builder shall not be liable for any loss or damage suffered by the Client in relation to the Works where such loss or damage results from the state or condition of the Client's existing building or structure, and the effect of such state or condition on the Works, or the effect of the Works on the existing building or structure, could not reasonably have been foreseen by the Builder during the course of the Works; and

(b) where as a result of opening up any part of the existing building or structure to carry out the Works, any additional or altered work is required because of non-standard construction or any substandard timber or other materials or because of any material which is required to be replaced or removed to carry out the Works, then the cost of any additional or altered work shall be borne by the Client and treated as a variation and the Contract Price adjusted accordingly.

5. Completion of the Works

5.1 Subject to clause 5.2, it is the Builder's responsibility to ensure that the Works start as soon as it is reasonably possible.

5.2 The Works commencement date will be put back and the building period extended by whatever time is reasonable in the event that the Builder claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond the Builder's control, including but not limited to any failure by the Client to:

(a) make a selection; or

(b) have the site ready for installation; or

(c) notify the Builder that the site is ready.

5.3 The Works shall be deemed to be completed when:

(a) the Works carried out under this contract have been completed in accordance with the plans and specifications set out in this contract; and

(b) the Client either;

(i) receives a certificate of acceptance where the Works were urgent and completed without a building consent; or

(ii) in any other case, upon the issuance of a Notice of Practical Completion.

5.4 The Client shall inspect the Works upon completion and shall within three (3) months notify the Builder of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Builder 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 Builder has agreed in writing that the Client is entitled to reject, the Builder's liability is limited to either (at the Builder's discretion) replacing the Works or repairing the Works.

5.5 The failure of the Builder to deliver shall not entitle either party to treat this contract as repudiated.

5.6 The Builder shall not be liable for any loss or damage whatever due to failure by the Builder to deliver the Works (or any of them) promptly or at all, where due to circumstances beyond the control of the Builder.

6. Site Access and Condition

6.1 It is the intention of the Builder and agreed by the Client that:

(a) it is the Client's responsibility to provide the Builder, while at the site, with adequate access to available water, electricity, toilet and washing facilities; and

(b) the Builder is not responsible for the removal of rubbish from, or clean up of, the building/construction site/s when it has been stated on the quotation/estimate that no allowance has been given for rubbish removal/dump fees. This is the responsibility of the Client or the Client's agent.

7. Compliance and Consents

7.1 The Client shall obtain and pay for any building consent and resource consent and other necessary approvals required for the Works, including consents and approval required after commencement of the Works.

7.2 The Builder shall comply with the terms and conditions of the building and resource consents and approvals as far as such consents and approvals relate to the carrying out of the Works.

7.3 Subject to section 364 of the Building Act 2004, the Client shall be responsible for applying for and obtaining the Code Compliance Certificate(s) for the Works.

7.4 The Builder shall provide the Client with all necessary information relating to the Works so that the Client may apply for a Code Compliance Certificate.

8. Works undertaken by Client

8.1 The Builder shall not be liable for any loss or damage howsoever caused as a result of any work performed by the Client, and the Builder shall be entitled to:

(a) rectify any such failure to make good a defect on the work; and

(b) charge the Client any extra costs incurred due to additional labour or material costs with any such costs being paid to the Builder as invoiced prior to possession being given and taken.

8.2 In the event of any loss arising out of any materials supplied by the Client, the Client shall be liable for all such loss or damage

9. Risk

9.1 If the Builder retains ownership of the Materials nonetheless, all risk for the Materials passes to the Client on completion.

9.2 The Builder shall be responsible for the Works from the date that the Builder takes possession of the building site until the date of Practical Completion recorded in the Notice of Practical Completion.

10. Insurance

10.1 The Builder shall maintain a public liability insurance policy indemnifying the Builder against claims in respect of loss or damage against any property or injury or death or illness to any person arising out of the operations of the Builder or any of its subcontractors in connection with the execution of the Works and shall be for an amount of not less than one million dollars (\$1,000,000). This insurance shall, at least, be kept continuously in force until any Works required to remedy defects has been completed.

10.2 Where the Works involve physical change to an existing structure including additions or alterations Works then the Client shall arrange insurance:

(a) for the Works against loss or damage for not less than the total of the contract Price; and

(b) for full replacement value against loss or damage to the Client's existing structure made available to enable performance of the Works or adjacent to the Works and against loss or damage to the Client's contents; and

(c) against consequential loss arising from loss or damage to the Client's existing structures made available for the Works to be carried out

10.3 In the case of additions or alterations Works, insurance cover under clause 10.2 may be provided under the Client's existing policy of insurance in relation to the existing building or structure as an extension of such policy and:

(a) shall be in the joint names of the Client and the mortgagee (if any); and

(b) shall not be able to be cancelled or materially changed without giving at least ten (10) working days prior notification by the insurer in writing to the Builder and the Client; and

(c) shall include a waiver of the insurer's right to subrogation against the insurer parties.

10.4 For new dwellings the Client shall from the date that the Works are due to be commenced until the date that the Works are completed keep the Works insured against loss or damage. The insurance policy shall be in the names of the Client and the mortgagee (if any). Such cover shall also be maintained after completion if any defects require rectification by the Builder and until such time as those Works have been completed.

11. Surplus Materials

11.1 Unless otherwise stated elsewhere in this contract:

(a) only suitable new Materials will be used; and

(b) demolished Materials remain the Client's property; and

11.2 Materials that the Builder brings to the site which are surplus remain the property of the Builder.

12. Title

12.1 It is the intention of the Builder and agreed by the Client that ownership of Materials shall not pass until:

(a) the Client has paid all amounts owing for the particular Materials; and

(b) the Client has met all other obligations due by the Client to the Builder in respect of all contracts between the Builder and the Client.

12.2 Receipt by the Builder 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 Builder's ownership or rights in respect of Materials, and this contract, shall continue.

12.3 It is further agreed that:

(a) where practicable the Materials shall be kept separate and identifiable until the Builder 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 Builder to the Client the Builder may give notice in writing to the Client to return the Materials or any of them to the Builder. Upon such notice the rights of the Client to obtain ownership or any other interest in the Materials shall cease; and

(c) the Builder shall have the right of stopping the Materials in transit whether or not delivery has been made; and

(d) if the Client fails to return the Materials to the Builder then the Builder or the Builder's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Materials are situated and take possession of the Materials.

13. Warranty

13.1 Subject to the conditions of warranty set out in clause 13.2, the Builder warrants that if any defect in any workmanship of the Builder becomes apparent and is reported to the Builder within six (6) months of the date of completion (time being of the essence) then the Builder will either (at the Builder's sole discretion) replace or remedy the workmanship.

13.2 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 the Works; or

(ii) failure on the part of the Client to follow any instructions or guidelines provided by the Builder; or

(iii) any use of the Works otherwise than for any application specified on a quote or order form; or

(iv) the continued use of the Works 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 Builder shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Builder's consent.

(c) in respect of all claims the Builder 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.

13.3 The Builder will use reasonable endeavours to match new Materials to existing Materials. However, the parties recognise that it may not be possible to provide an exact matching of Materials and in such event there shall be no claim against the Builder.

14. Construction Contracts Act 2002

14.1 In the event that the Client is a residential occupier as defined by the Construction Contracts Act 2002 the Client hereby expressly acknowledges that:

(a) the Builder 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 Builder by a particular date; and

(iv) the Builder 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 Builder 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 Builder 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 Builder 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 Builder suspending work under this provision.

15. Intellectual Property

15.1 Where the Builder has designed, drawn or written plans or a schedule of Works for the Client, then the copyright in those plans, schedules, designs and drawings shall remain vested in the Builder, and shall only be used by the Client at the Builder's discretion.

15.2 The Client warrants that all designs or instructions to the Builder will not cause the Builder to infringe any patent, registered design or trademark in the execution of the Client's order.

15.3 The Client agrees that the Builder may use any documents, photos, plans, schedules, designs, drawings related to the Works for the purposes of advertising, marketing, or entry into any competition.

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 Builder'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 Builder.

16.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify the Builder from and against all costs and disbursements incurred by the Builder in pursuing the debt including legal costs on a solicitor and own Client basis and the Builder's collection agency costs.

16.4 Without prejudice to any other remedies the Builder may have, if at any time the Client is in breach of any obligation (including those relating to payment) the Builder may suspend or terminate the supply of Works to the Client under the Construction Contracts Act 2002. The Builder will not be liable to the Client for any loss or damage the Client suffers because the Builder 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 Builder's other remedies at law the Builder shall be entitled to cancel all or any part of any order of the Client which remains unperformed and all amounts owing to the Builder shall, whether or not due for payment, become immediately payable in the event that:

(a) any money payable to the Builder becomes overdue, or in the Builder'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 Builder 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 Builder or the Builder'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 Builder (or the Builder'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 Builder elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify the Builder from and against all the Builder'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 Builder or the Builder'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 Builder may cancel any contract to which these terms and conditions apply or cancel the Works at any time before the Works are completed by giving written notice to the Client. On giving such notice the Builder shall repay to the Client any sums paid in respect of the Price, less any amount owing by the Client to the Builder for Works already undertaken. The Builder shall not be liable for any loss or damage whatsoever arising from such cancellation.

18.2 In the event that the Client cancels the Works, then the Client shall be liable for any loss incurred by the Builder (including, but not limited to, any amount owing by the Client to the Builder for Works already undertaken and any loss of profits) up to the time of cancellation.

19. Privacy Act 1993

19.1 The Client and the Guarantor/s (if separate to the Client) authorises the Builder 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 services to the Client and/or Guarantors; and

(b) disclose information about the Client and/or Guarantors, whether collected by the Builder from the Client and/or Guarantors directly or obtained by the Builder 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 Builder for a copy of the information about the Client and/or Guarantors retained by the Builder and the right to request the Builder to correct any incorrect information about the Client and/or Guarantors held by the Builder.

20. Personal Property Securities Act 1999 ("PPSA")

20.1 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 Builder to the Client (if any) and all Works that will be supplied in the future by the Builder to the Client.

20.2 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 Builder 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 Builder 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 or a change demand without the prior written consent of the Builder; and

(d) immediately advise the Builder 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.

20.3 The Builder and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.

20.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.

20.5 Unless otherwise agreed to in writing by the Builder, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.

20.6 The Client shall unconditionally ratify any actions taken by the Builder under clauses 20.1 to 20.5.

21. Consumer Guarantees Act 1993

21.1 If the Client is acquiring Materials 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 Materials by the Builder to the Client.

22. General

22.1 If any provision of this contract 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 Builder shall be under no liability whatever to the Client for any indirect loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Builder of this contract.

22.4 In the event of any breach of this contract by the Builder the remedies of the Client shall be limited to damages. Under no circumstances shall the liability of the Builder 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 Builder.

22.6 The Builder may license or sub-contract all or any part of its rights and obligations without the Client's consent. The Client agrees and understands that they have no authority to give any instruction to any of the Builder's sub-contractors without the authority of the Builder.

22.7 The Builder reserves the right to review this contract at any time. If, following any such review, there is to be any change to this contract, then that change will take effect from the date on which the Builder notifies the Client of such change.

22.8 Neither party shall be liable for any default due to any act of God, war, terrorism, fire, flood, drought, storm or other event beyond the reasonable control of either party.

22.9 The failure by the Builder to enforce any provision of this contract shall not be treated as a waiver of that provision, nor shall it affect the Builder's right to subsequently enforce that provision.

22.10 This contract, the plans and specifications have precedence in that order if there is any inconsistency between them.

23. Provisional Sums

23.1 Calculation of Provisional Sums by the Builder must be based on a reasonable estimate of the likely cost of the materials or services specified.

23.2 Any Provisional Sums shall be recalculated by reference to the actual expenditure incurred in connection with the relevant aspect of the Building Work, as soon as it is known. The actual expenditure shall be calculated on a cost reimbursement basis using the actual cost of labour, materials and other inputs provided in connection with the relevant aspect of the Building Work, plus the Builder's margin for administration, overhead and profit all as set out in 23.3. Any difference between the Provisional Sum and the actual expenditure shall be reflected in either a credit or an additional charge in the Builder's invoice.

23.3 The Builder's margin for administration, overhead and profit shall be 25%.