

1. Definitions

In these terms and conditions (**Terms**):

BGC means BGC (Australia) Pty Ltd (ACN 005 736 005) trading as BGC Fibre Cement New Zealand.

Carriage of Goods means the road transport laws contained in the *Carriage of Goods Act 1979* and the *Land Transport Act 1998* and associated regulations.

Consequential Loss means loss beyond the normal measure of direct damages and includes without limitation, indirect loss (including loss arising from delays in the delivery of Products), loss of profit, loss of revenue, loss of business, loss of actual or anticipated savings, loss of bargain, loss of business reputation, loss of use, cost of capital or costs of substitute goods, facilities or services and loss of opportunity (including opportunities to enter into arrangements with third parties).

Credit Agreement means an agreement with BGC for the provision of credit to the Purchaser.

Delivery Fee means the fee for delivery of Products specified in BGC's price list from time to time.

Fibre Cement Products means BGC fibre cement products, including but not limited to internal and external walls, ceilings, cladding, flooring and accessories.

GST means goods and services tax as defined in the Goods and Services Tax Act 1985

Insolvency Event means the happening of any of the following events in relation to the Purchaser:

- (a) an order for payment is made or judgment for an amount exceeding \$10,000 is entered or signed against the Purchaser which is not satisfied within 7 days;
- (b) the Purchaser breaches any Credit Agreement;
- (c) the Purchaser suspends payment of its debts;
- (d) where the Purchaser is unable to pay its debts as and when they fall due;
- (e) The Purchaser becomes insolvent or bankrupt;
- (f) an application is made to wind up the Purchaser, where on a voluntary or involuntary basis; or
- (g) a petition has been presented against the Purchaser, an order made, a resolution passed or a meeting summoned or convened to consider a resolution for its winding up.

New Zealand Standards means:

- (a) the New Zealand Building Code (being Schedule 1 of the Building Regulations 1992);
- (b) any other relevant legislation or regulations as amended from time to time; and
- (c) any other relevant rules or standards imposed by any government authority or industry body as amended from time to time.

Plasterboard Products means BGC plasterboard products, including but not limited to internal walls, ceilings, cornices, jointing and finishing compounds.

Products means Fibre Cement Products and/or Plasterboard Products supplied by BGC and as described in the Quote.

Purchaser means the person or entity placing an order for the Products specified in the Quote.

Quote means the quotation form issued by BGC to the Purchaser, and if more than one such form is issued, means the latest such form. If an order is placed over the telephone, and a written Quote is not issued prior to acceptance of the order, BGC's records of the phone order shall be prima facie evidence of the Purchaser's order.

Restocking Fee means an amount equivalent to 10% of the value of the Products ordered.

Return Fee means an amount equivalent to 10% of the value of the Products ordered

Site means the address to which the Products will be delivered as specified in the Quote.

2. Quotes, Orders and Contracts

(a) All Quotes and all orders for the supply (without installation) of Products are made and/or accepted by BGC on and subject to these Terms. The Purchaser's terms and conditions, howsoever provided, do not form part of these Terms (even if any representative of BGC signs those terms and conditions and/or they are annexed to these Terms or any quote or purchase order). Any variation or changes to these Terms (other than an update to these Terms by BGC), whether to apply to all subsequent orders, or any particular order, may only be made if it:

- (i) is in writing;
- (ii) is signed by authorised managers of both parties; and
- (iii) expressly states that it is a variation to these Terms, and

the parties agree and acknowledge that their representatives and employees who are not authorised managers as referred to in clause 2(a)(ii) above do not have the authority to vary these Terms.

(b) If the Purchaser places an order with BGC after receiving these Terms, the Purchaser shall be deemed to have read and unconditionally agreed to these Terms.

(c) The price of Products specified by BGC in any Quote:

- (i) will remain valid for a period of 30 days for an order made by the Purchaser in accordance with the Quote, unless otherwise specified; and
- (ii) is subject to any other conditions specified in the Quote.

(d) A minimum of 48 hours' notice is required for all orders for standard Product unless otherwise agreed. The lead time for special or custom orders will be negotiated between the parties.

(e) BGC reserves the right to accept or decline, in whole or in part, any order for Products placed by the Purchaser. This right is not affected by any previous conduct or previous supplies.

3. Order Cancellations

(a) The Purchaser may cancel an order for Products without charge at any time prior to collection or delivery.

(b) If the Purchaser cancels an order for Products after collection or delivery, the Purchaser shall, on issue of an invoice by BGC, pay to BGC a /Return Fee and/or a Restocking Fee in addition to the Delivery Fee.

(c) Products will only be accepted for return at BGC's absolute discretion after performing an inspection to determine that the Products are undamaged and fit for re-sale. If BGC accepts a return of the Products, the Purchaser shall pay to BGC a Restocking Fee.

4. Purchaser's Obligations

(a) The Purchaser warrants to BGC that all specifications and other design information (**Specifications**) provided to BGC for the selection, manufacture and supply of Products are accurate and correct and suitable in all respects for the Purchaser's intended use for the Products.

(b) If the Purchaser or their Builder provides BGC with Specifications, BGC has relied upon those Specifications in making any recommendation. If any Specifications provided are incorrect or incomplete, BGC is not liable for any failure of the Products to perform arising from incorrect selection of Products or incorrect method of installation.

(c) If the Purchaser has any doubts as to the accuracy or completeness of the Specifications provided to BGC, the Purchaser must ensure that BGC is provided with full, correct information (and the opportunity to revise any recommendations) prior to accepting any Quote.

5. Purchaser's Acknowledgements

(a) The Purchaser acknowledges and agrees that:

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- (i) Fibre Cement Products should be:
 - (A) delivered to Site immediately prior to installation to reduce the risk of damage; and
 - (B) protected from the weather, kept dry and stored in accordance with all relevant New Zealand Standards;
 - (ii) drilling, cutting or sanding Fibre Cement Products may release cellulose fibres, silica and calcium silicate dust which are hazardous. The Purchaser acknowledges that it has read the relevant Material Safety Data Sheet (**MSDS**) for the Product which is available on BGC's website and will make it available to its customers and installers prior to on-supplying the Products. To the extent permitted by law, the Purchaser indemnifies BGC from and against any loss, damage, injury or death arising from any failure of the Purchaser, its customers or installers to comply with the MSDS document or any breach of this clause;
 - (iii) care should be taken to avoid damage to the ends, edges and surfaces of the Products. The Purchaser indemnifies BGC from and against any loss or damage arising from such damage to the Products, unless such loss or damage is caused solely by BGC's negligent act or omission;
 - (iv) BGC supplies its Products in accordance with its warranty, available on its website. Installation of Products should be in accordance with BGC's technical brochures and New Zealand Standards;
 - (v) BGC does not guarantee colour consistency for any Products supplied as colour variations can be caused by various factors which are beyond BGC's control.
- (b) BGC shall not be liable for, and is hereby indemnified by the Purchaser in respect of, any claims made by the Purchaser or any third party which arise out of any defects which may develop in the Products due to:
- (i) any faulty storing, handling or installation of the Products by the Purchaser or any other person; or
 - (ii) incorrect or deficient preparation work by the Purchaser or any other person
 - (iii) the Products not being installed in accordance with BGC's technical brochures and New Zealand Standards.

6. BGC's Obligations

BGC will:

- (a) carry out and complete its obligations under these Terms to at least an industry standard of workmanship; and
- (b) comply with all relevant New Zealand Standards.

7. Delivery & Collection

Delivery – General

- (a) Following acceptance of the Purchaser's order, the Purchaser shall nominate an estimated date for delivery of the Products (**Nominated Delivery Date**). Upon that nomination BGC may, unless otherwise agreed, nominate an alternative delivery date based on its production schedule and the availability of the Products and transport.
- (b) Subject to 7(c), BGC will deliver the Products during normal working hours (being Monday to Friday from 7 am to 5pm) and within 7 days of the Nominated Delivery Date.
- (c) While BGC uses reasonable endeavours to achieve delivery times, the Purchaser acknowledges that all times quoted for delivery are estimates only, and BGC will not be liable for any failure to deliver or for delay in delivery of Products occasioned by strike, lockout or other industrial dispute, shortage of stock, shortage of labour, lack of skilled labour, delays in transit, fire, flood, hostility, civil commotion or any other cause whatsoever whether or not beyond the control of BGC.
- (d) The Purchaser shall not be relieved of any obligation to accept or pay for Products by reason of any delay in delivery.

- (e) If the Site is unattended at the time of delivery, BGC may leave the Products on Site and take photographs of the Products delivered. BGC shall not be responsible for any loss, damage or theft after delivery.
- (f) If collection or delivery of Products is made in accordance with the Purchaser's order, as evidenced by BGC's photographs or a signed delivery docket, the Purchaser shall be liable to pay for them.

Delivery – to Site

- (g) Where the Purchaser requires a crane, this can be requested by the Purchaser and BGC in its discretion may arrange a Site inspection to confirm that the Site is suitable for a crane, and provide a quote to the Purchaser.
- (h) The Purchaser must ensure that the delivery vehicle or crane has a safe, suitable and unrestricted route between the kerbside nearest to the delivery address and the discharge or unloading location. If BGC (acting reasonably) considers the Site unsafe or inaccessible then BGC reserves the right not to make the delivery of the Products until such time as the Site is safe or an alternative address supplied. If delivery is not completed within 30 minutes after arrival on Site:
 - (i) then BGC will charge the Purchaser additional delivery costs at the rates notified to the Purchaser from time to time, save and except delay caused by BGC; and
 - (ii) the Products may be taken back and stored at BGC's premises (at the Purchaser's cost) until such time as they are re-delivered.
- (i) The Purchaser releases and indemnifies BGC against any loss, damage, cost or liability arising from events occurring while accessing the Site unless solely caused by BGC's negligent act or omission.

Collection

- (j) The Purchaser will ensure that the Purchaser's motor vehicle used to collect and transport the Products is maintained in a mechanically sound condition that is fit for the purpose of collecting and transporting the Products.
- (k) BGC may refuse to release the Products to the Purchaser where BGC has reasonable grounds to believe that the Purchaser's motor vehicle is not fit for the purpose of collecting and transporting the Products.
- (l) The Purchaser will comply with all relevant laws, including without limitation, all safety laws applicable to the supply of the Products and Carriage of Goods obligations with respect to the collection and transportation of the Products.
- (m) It is the Purchaser's responsibility to check the Products and confirm that they are in accordance with the Purchaser's Order and requirements before any Products leave BGC's facility.

8. Risk & Title

- (a) Risk in the Products passes to the Purchaser on the earlier of delivery to Site (or any designated freight depot in New Zealand) or collection of the Products by the Purchaser or its road carrier from BGC's premises, whether or not they have been paid for in full.
- (b) Title in the Products will not pass to the Purchaser until such time as the Products are paid for in full.

9. Price / Payments

- (a) Terms of payment are cash before delivery or collection (in cleared funds) unless the Purchaser has entered into a Credit Agreement, in which case the terms of that Credit Agreement will apply.
- (b) BGC reserves the right to change its price list by providing the Purchaser with at least 30 days' notice. The price notified at the time the Purchaser places an order will continue to apply even if the price changes before the Purchaser's order is accepted by BGC.
- (c) The Purchaser must pay the agreed price, or where no price is agreed, the reasonable costs of all variations to orders in addition to the price quoted where variations are received after the Purchaser's order has been processed and BGC incurs costs as a result. The reasonable costs of a variation will be calculated by BGC at reasonable rates for labour and materials and will include a reasonable administration charge, allowance

for overheads and profit and other costs incurred by BGC as a result of the variation. BGC will take reasonable steps to limit these costs once informed of the variation.

10. GST

- (a) Any expression used in this clause 10 and which is defined in the *Goods and Services Tax Act 1985* has the same meaning in this clause 10.
- (b) Unless otherwise expressly stated, all amounts stated to be payable by the Purchaser under these Terms are exclusive of GST. GST is imposed on any supply made under or in accordance with these Terms, and the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply. Payment of the additional amount will be made at the same time as payment for the taxable supply is required to be made in accordance with this document, subject to the provision of a tax invoice by the supplier to the recipient.
- (c) The provisions of section 8(4) of the Goods and Services Tax Act 1985 will not apply to the supplies of goods and services made by The Supplier to The Recipient on or after this date and therefore these supplies will be treated as being subject to GST at 15% where applicable.

11. Termination

- (a) BGC may terminate these Terms at any time by written notice to Purchaser if any of the following apply:
 - (i) the Purchaser fails to carry out any provision of these Terms, the failure is capable of remedy and the Purchaser does not remedy that failure within 7 days after written notice to the Purchaser requiring it to be remedied; or
 - (ii) the Purchaser is subject to an Insolvency Event.
- (b) In addition to the rights set out in the paragraph above, BGC may, at its option, exercise any or all of the following rights in addition to any other rights it may have under these Terms or at law:
 - (i) suspend deliveries of further Products to the Purchaser whether under these Terms or otherwise; and/or
 - (ii) withdraw any credit facilities under a Credit Agreement which may have been extended to the Purchaser and require immediate payment of all moneys owed to BGC by the Purchaser.
- (c) The Purchaser will be responsible for, and will indemnify BGC against, any damages, costs (including, without limitation, legal fees on a solicitor-client basis), losses and expenses, incurred by BGC as a result of the breach.
- (d) On termination of these Terms under this clause 11, each party retains its rights against the other party in respect of any past breach, in addition to any other rights, powers or remedies provided by law.

12. Liability

- (a) In the event any Products supplied by BGC under these Terms being defective, to the extent permitted by law, the liability of BGC (if any) shall be limited to removal and replacement of such defective material.
- (b) To the extent permitted by law, BGC's liability under any condition or warranty which cannot legally be excluded is limited to:
 - (i) the replacement of the Products;
 - (ii) the repair of the Products (if applicable);
 - (iii) the payment of the cost of replacing the Products; or
 - (iv) the payment of the cost of having the Products repaired (if applicable).
- (c) If any Products to be supplied by BGC under these Terms fail to conform in a material respect with the Specifications then:

- (i) BGC is not liable unless the Purchaser notifies BGC of the failure within 10 days after the date of delivery of the Products; and
- (ii) the liability of BGC is in any case limited as set out in clause 12(b).

- (d) Where the Purchaser acquires Products from BGC for the purpose of on-supplying to another person ("**consumer**"), BGC shall not be liable for any Consequential Loss suffered by the Purchaser unless otherwise stated in a contract or agreement. However, to the extent required by the Consumer Guarantees Act 1993, BGC may be liable for any Consequential Loss suffered by the consumer.
- (e) The provisions of clause 12(c) and 12(d) are subject to the provisions of any statutory condition or warranty which cannot legally be excluded.
- (f) BGC's warranty sets out instructions on how to make a claim, and is available at <http://www.bgcinnovadesign.co.nz>

13. Force Majeure

- (a) A party (**Affected Party**) is not liable for any delay or failure to perform an obligation (other than to pay money) under these Terms caused by an act of God, war, riot, insurrection, vandalism or sabotage, strike, lockout, ban, limitation of work or other industrial disturbance or a law, rule or regulation of any government or governmental agency.
- (b) The Affected Party must notify each other party as soon as practical of any anticipated delay or failure caused by an event specified in clause 13(a) (**Event**).
- (c) The performance of the Affected Party's obligation is suspended for the period of delay caused by the Event.
- (d) Any party may terminate these Terms at the expiration of not less than 7 days' notice to the other party if performance of an obligation is prevented by an Event, or a delay caused by the Event exceeds 30 days.
- (e) If a party terminates these Terms under clause 13(d), all money previously paid under these Terms for which no products, services or other consideration has been provided must be refunded.

14. Dispute Resolution

- (a) If a dispute or difference arises between BGC and the Purchaser in respect of any fact, act, matter or thing arising out of or in any way connected with these Terms and one party requires the dispute or difference to be resolved, then that party will promptly give the other party a written notice giving details of the dispute.
- (b) Within 14 days of a party receiving a notice, the parties, and/or their delegates, must meet and attempt to resolve the dispute in good faith.
- (c) If, within 14 days of the meeting, the dispute is still not resolved, then, either party may proceed to litigation.
- (d) In the event of any dispute between the parties, the Purchaser shall pay all undisputed amounts to BGC.

15. General

- (a) A statement signed by BGC's authorised representative, certifying the amount of any increased cost or other claim by BGC shall in the absence of manifest error be prima facie evidence of its contents.
- (b) These Terms do not create or evidence a partnership or joint venture between the parties.
- (c) These Terms are governed by and are to be construed according to the laws of Western Australia and the parties submit to the exclusive jurisdiction of the courts of Western Australia.
- (d) If any part of these Terms is, or becomes, void or unenforceable, that part is, or will be, severed from these Terms so that all parts that are not, or do not become, void or unenforceable remain in full force and effect and are unaffected by that severance.
- (e) A failure to exercise or delay in exercising any right, power or privilege by any party will not operate as a waiver of that right, power or privilege. A single or partial exercise of any right, power or privilege will not preclude any other or further exercise of that right, power or privilege, or the exercise of any right, power or privilege.

- (f) These Terms constitute the entire agreement between the parties with respect to the subject matter of these Terms and contains all of the representations, warranties, covenants and agreements of the parties in relation to the subject matter of these Terms as at the date of these Terms. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by these Terms and has no further effect.
- (g) A party may not assign or otherwise deal with these Terms except with the prior written consent of every other party. A party is not required to give consent or to justify the withholding of consent. For the purpose of this clause, if the Purchaser is a corporation (not being a company listed on any Stock Exchange in Australia or New Zealand) any change in the beneficial ownership of 20% or more (in aggregate) of the voting shares in the corporation or any change in the effective control of the corporation, are deemed to be an assignment of the Agreement requiring the prior written consent of BGC.
- (h) The Purchaser acknowledges that BGC may use tracking devices or other surveillance devices at its premises, manufacturing sites and in its vehicles. Tracking or surveillance devices may also be used at any delivery sites.
- (i) BGC may collect the Purchaser's personal information for the purpose of supplying Products and keeping a record of transactions on BGC's file. Personal information can include sensitive health information as required by BGC from time to time. BGC's Privacy Policy can be found at <http://www.bgcinnovadesign.com.au/Privacy Policy>