

Interpretation

In these Terms, the following words have the following special meanings:

"ABCG"	means A Brilliant Concrete Grinder Company Limited and any related company (as defined by the Companies Act 1993) from time to time.
"Contract"	means the agreement between you and ABCG for the Supply formed on acceptance of a Quotation, which contract shall incorporate these Terms, the terms as stated in the Quotation, and any Variations from time to time;
"Goods"	means goods and materials supplied by us to you at any time as part of the Supply;
"PPSA"	means the Personal Property Securities Act 1999;
"Quotation"	means a quotation for the Supply on the terms set out on the quotation, the documents accompanying the quotation, and these Terms, including the Price which the Customer will be charged for the Supply;
"Supply"	means all services supplied by us to you at any time and, except where the context otherwise requires, includes the Goods;
"Terms"	means these terms of trade (as amended from time to time); and
"Customer"	means the person to whom the Quotation is addressed. The terms and expressions used in clause 9 have the special meanings given to them in, or by virtue of, the PPSA.

1. TERMS

- 1.1. These Terms are applicable to the Supply by ABCG to you. No other terms, conditions or deviations from these terms and conditions shall be binding unless accepted in writing by an authorised representative of ABCG. In the event of a conflict between these terms and conditions and any accompanying documentation, the terms and conditions of the accompanying documentation shall prevail.

2. QUOTATION AND ACCEPTANCE

- 2.1. ABCG shall produce a Quotation for the Customer for the Supply. The Quotation shall be subject to the clarifications and exclusions set out in the Quotation. The Quotation will constitute an offer to Supply, and shall remain open for a period of thirty (30) days from date of the Quotation, time being of the essence, after which the offer to Supply shall be deemed to have been automatically revoked.
- 2.2. The Customer shall accept the Quotation by:
- 2.2.1. signing an acceptance form accompanying the Quotation and signing a copy of any plans and specifications attached to the Quotation, if provided; or
 - 2.2.2. emailing ABCG to confirm that the Quotation has been accepted; or
 - 2.2.3. an instruction (whether verbal or in writing) from the Customer for ABCG to begin the Supply in accordance with the Quotation.
- The acceptance of the Quotation in the manner specified in this clause shall constitute a binding Contract and acceptance of the terms and conditions contained herein.

3. VARIATIONS

- 3.1. Except as expressly provided in these terms and conditions, all variations or alterations to the scope of the Supply shall be binding on the parties, including any adjustment to the Price. Any changes required as a result of information or documentation provided by the Customer or their agent to ABCG, where ABCG has relied on those materials provided and where the cost of the Supply will be effected upwards, such a change in supply will be treated as a variation to the Supply.

4. CANCELLATION

- 4.1. In the event that the Customer wishes to cancel the Contract for the Supply at any time after acceptance of the Quotation, the Customer shall pay all actual and reasonable costs and expenses incurred by ABCG together with a reasonable administration fee, provided that the Customer shall not be entitled to cancel the Contract once the Supply has commenced without the prior consent in writing of ABCG.
- 4.2. ABCG shall, without any liability, and without any prejudice to any other right it has in law or equity, have the right by notice to suspend or cancel in whole or in part any Contract for the Supply if the Customer fails to pay any money owing after the due date, or if the Customer commits an act of bankruptcy as defined in section 19 of the Insolvency Act 1967, or if liquidation proceedings are commenced in relation to the Customer, or if the Customer shall otherwise become bankrupt or insolvent, or if any other event occurs which evidences a lack of credit worthiness or insolvency on the part of the Customer.
- 4.3. Any cancellation or suspension by ABCG pursuant to this clause 4.3 shall not affect ABCG's claim for money due at the time of cancellation or suspension or for damages for any breach of any terms of this Contract or the Customer's obligations to ABCG under these terms and conditions.

5. PRICE

- 5.1. The Price of the Supply shall be the Price stated in the Quotation and subject to variation in accordance with clause 3 (the "Price"). The Price quoted for the Supply excludes GST. GST shall be payable by the Customer in addition to the Price quoted. Where no Price is stated in writing or agreed, the Supply shall be deemed to be at the current Price applying at the date upon which the invoice for the goods or Supply is issued to the Customer.
- 5.2. Notwithstanding anything contained in this clause or the Quotation, the Price of the Supply may be increased by the amount of any reasonable increase in cost of supply of the goods or services between the date upon which the Quotation is delivered to the Customer and the date upon which the Supply occurs and where such increase is beyond the reasonable control of ABCG.
- 5.4. Unless otherwise stated, the Price stated in the Quotation assumes free use of power, water and toilet facilities, along with removal of dust or slurry (bagged by ABCG). ABCG will remove bagged dust or slurry for \$25.00 (plus GST) per bag.
- 5.5. Unless otherwise stated, the Price stated in the Quotation assumes that all marking out has been done by the main contractor, not ABCG.
- 5.6. Unless otherwise stated, the Price stated in the Quotation assumes that all scaffolding and hoarding is to be supplied by main contractor, not ABCG. ABCG assumes no liability in respect of any scaffolding and hoarding on site.
- 5.7. Unless otherwise stated, the Price stated in the Quotation assumes normal hours of work, being 7:00am – 6:00pm Monday – Friday. If it is necessary for ABCG to complete work or utilise equipment outside of normal hours (unless elected solely by ABCG) then an overtime labour rate may be chargeable.
- 5.8. Unless otherwise stated, the Price contained in the Quotation shall include:
- 5.8.1. all costs related to health and safety obligations to be discharged by ABCG;
 - 5.8.2. required plant and equipment necessary for the Supply (unless such plant and equipment is excluded from the Quotation); and

- 5.8.3. travel costs of ABCG.

- 5.9. Where the Quotation includes an estimate, or a Price which relates to the costs to ABCG (i.e.: a costs + agreement) the Price shall be calculated in accordance with the terms stated in the Quotation, or shall be based on the current market rate for the Supply at the time, as determined by ABCG. Where the Quotation is based on an estimate, or a cost + Price basis:
- 5.9.1. The estimate will be only a best endeavours estimate of the Price, and ABCG will not be bound by the estimate given, but will be able to charge in accordance with clause 5.7;
 - 5.9.2. ABCG will use its best endeavours to advise you when it becomes aware that the estimate will be exceeded, but ABCG will continue with the Supply and will be entitled to charge in accordance with clause 5.7; and
 - 5.9.3. Where ABCG becomes aware that the estimate will be exceeded by 50%, ABCG will seek instructions from you as to whether you wish ABCG to continue with the Supply, and ABCG will cease the Supply if it is reasonable for ABCG to do so, and if ABCG will not incur losses and / or unrecoverable costs due to the ceasing of the Supply.
- 5.10. Where the Quotation and the Price include a PC Sum, the PC Sum will only be an estimate of the cost. If the actual cost of the Supply selected or approved by you turns out to be more than the value of the PC sum stipulated in the Quotation, then the Price will be adjusted upwards to reflect the increase between the PC sum and the actual cost.

6. PAYMENT

- 6.1. Payment for the Supply shall be made in full seven (7) days after invoice is issued, or as stated in the Quotation.
- 6.2. All invoices for progress payments will be issued in such a way as to meet the provisions of the Construction Contracts Act 2002. All invoices issued pursuant to the Contract shall be in the form of a payment claim within the meaning of the Construction Contracts Act 2002. The Customer is hereby put on notice of the requirements of the Construction Contracts Act 2002 in terms of the issuing of payment schedules.
- 6.3. ABCG reserves the right to charge interest on all overdue accounts at 15% per annum from the due date for payment until the date when payment is actually made and all expenses and costs (including legal costs as between solicitor and client and debt collection fees) incurred by ABCG in obtaining or attempting to obtain a remedy for the Customer's failure to pay.
- 6.4. The Customer may not deduct or withhold any amount (whether by way of a set-off, counterclaim or otherwise) from any money owing to ABCG.
- 6.5. Receipt of a cheque, bill of exchange, or other negotiable instrument shall not constitute payment until such negotiable instrument is paid in full.
- 6.6. The Customer expressly acknowledges that no retentions shall apply unless provision for a retention is incorporated within the Quotation.
- 6.7. Failure by ABCG to enforce any of the terms and conditions contained in this clause 6 shall not be deemed to be a waiver of any of the rights or obligations ABCG has under the Contract.

7. COMMENCEMENT AND COMPLETION

- 7.1. The Customer acknowledges that any estimates as to the time frames for the commencement and completion of the Supply are approximate only. ABCG will use all reasonable endeavours to ensure the Supply are commenced and completed within the time frame specified but shall not be liable for any delay or failure to do so. ABCG shall not be responsible for any delays caused by separate or nominated subcontractors. Should any delays occur the Customer agrees that all costs incurred by ABCG and resulting from such delays will be charged as a variation to the Contract Price.

8. REPAIR OF DEFECTS

- 8.1. ABCG will carry out any workmanship that forms part of the Supply to a standard of reasonable care and skill.
- 8.2. ABCG shall at its sole cost rectify any defects in the workmanship which are notified to ABCG within ninety (90) days of completion of the Supply and within a reasonable time of receiving written notification of those defects. ABCG shall not be liable under this clause to remedy:
- 8.2.1. defects covered by a manufacturer's or supplier's guarantee that is available to and may be enforced by the Customer; or
 - 8.2.2. defects or damage caused by work undertaken by the Customer or the any of the Customer's contractors.

9. RISK AND INSURANCE

- 9.1. Any goods supplied by ABCG shall be at the sole risk of the Customer from the time the goods or materials are delivered to the Customer's premises where the Supply is to take place. The Customer shall be solely responsible for arranging suitable insurance to provide insurance cover for all associated risks.

10. OWNERSHIP

- 10.1. Ownership of any goods and/or materials supplied as part of the Supply shall not pass to the Customer until all amounts owing by the Customer to ABCG in respect of the goods and/or materials have been paid in full.
- 10.2. The Customer acknowledges and agrees that by agreeing to these terms & conditions, the Customer grants a Purchase Money Security Interest to ABCG, as that term is defined in the Personal Property Securities Act 1999 ("PPSA"), in all goods and/or materials supplied by ABCG to the Customer.
- 10.3. The Customer irrevocably undertakes to sign any further documents and/or provide any further information (which information the Customer warrants to be complete, accurate and up-to-date in all respects) which ABCG may reasonably require to enable registration of a financing statement or financing change statement on the Personal Property Securities Register. The Customer shall not agree to allow any person to register a financing statement over any of the goods supplied by ABCG without the prior written consent of ABCG and will immediately notify ABCG in writing if the Customer becomes aware of any person taking steps to register a financing statement in relation to such goods.
- 10.4. The Customer waives its rights to:
- 10.4.1. receive a copy of any verification statement;
 - 10.4.2. receive a copy of any financing change statement;
- 10.5. If the Goods are for the Customer's business use, the Customer agrees, to the extent Part 9 of the PPSA applies, that it will have no rights under Part 9 of the PPSA
- 10.6. The Customer irrevocably grants to ABCG the right to enter upon the Customer's property or premises, without notice, and without being in any way liable to the Customer or to any third party, if ABCG has cause to exercise any of ABCG's rights under section 109 of the PPSA, and the Customer shall indemnify ABCG from any claims made by any third party as a result of such exercise.

TERMS AND CONDITION OF TRADE

- 10.7. ABCG and the Customer agree that nothing in sections 114(1)(a), 116, 117(1)(c), 119, 120(2), 121, 125, 126, 127, 129, 131, and 132 of the PPSA will apply to these terms and conditions, or the security interest under these terms and conditions.
- 10.8. The Customer will be responsible to ABCG for any costs or damages incurred in reclaiming and disposing of the unpaid goods and/or materials. Such costs include but are not limited to loss in value, cost or repossession, damaged premises and recovery, storage, resale and legal costs, on a solicitor and client basis. These costs shall be recoverable as a debt due to ABCG by the Customer.
- 11. WARRANTY AND LIABILITY**
- 11.1. The warranties, descriptions, representations, or conditions whether implied by law, trade, custom or otherwise are, and all other liability of ABCG, whether in tort (including negligence), Contract or otherwise is, expressly excluded to the fullest extent permitted by law. In particular, where the Supply for the purposes of a business, (as provided in section 2 and 43 of the Consumer Guarantees Act 1993), that Act shall not apply.
- 11.2. In so far as ABCG is able, ABCG will assign all manufacturer / supplier warranties and will assist the Customer in obtaining the benefit of any such all manufacturer / supplier warranties provided that ABCG will not be required to expend funds or commence proceedings against any manufacturer or supplier.
- 11.3. Insofar as ABCG may be liable, notwithstanding anything contained in these terms and conditions, to the extent permitted by law the total liability of the ABCG whether in tort (including negligence), Contract or otherwise for any loss, damage or injury arising directly or indirectly out of completion of the Supply or any other breach of ABCG's obligations is limited to the lesser of:
- 11.3.1. the Price of goods and/or materials complained of;
 - 11.3.2. the cost of completing any necessary repairs/remedial work; or
 - 11.3.3. the actual loss or damage suffered by the Customer.
- 11.4. Except where statute expressly requires otherwise, ABCG is not liable in any event for any loss of profits, consequential, indirect or special damage, loss or injury of any kind suffered by the Customer or any other person.
- 11.5. This clause 11 shall survive termination of the Contract.
- 12. CUSTOMER OBLIGATIONS**
- 12.1. The Customer must:
- 12.1.1. Deal with ABCG in good faith and disclose to ABCG any information that may be material to the Supply;
 - 12.1.2. Ensure that all information provided to ABCG is accurate;
 - 12.1.3. Co-operate with ABCG on all matters in relation to the Supply;
 - 12.1.4. Provide ABCG and ABCG's employees, agents and subcontractors, with access to the Customer's premises, office accommodation and such other facilities as reasonably necessary for ABCG to be able to carry out the Supply;
 - 12.1.5. Provide ABCG with all information and materials ABCG may reasonably require to deliver the Supply, and ensure that such information is accurate in all respects;
 - 12.1.6. (where relevant) prepare the Customer's premises for the Supply; and
 - 12.1.7. Obtain and maintain all necessary licences, equipment, documents and property ("**ABCG Materials**") at the Customer's premises in safe custody and at the Customer's risk, maintain them in good condition until they are returned to ABCG and not dispose of or use them other than in accordance with ABCG's written instructions or authorisation.
- 12.2. If ABCG's performance of any of ABCG's obligations in respect of the Supply is prevented or delayed by any act or omission of the Customer, or failure to perform any relevant obligation of the Customer ("**Default**"):
 - 12.2.1. ABCG shall, without limiting the other rights and remedies available, have the right to suspend performance of the Supply until the Customer remedies the default. ABCG shall rely on the default to relieve ABCG from the performance of any of the obligations under the Contract to the extent that the Default prevents or delays such performance;
 - 12.2.2. ABCG shall not be liable for any costs or losses sustained or incurred by the Customer arising directly or indirectly from ABCG's failure to delay to perform these obligations; and
 - 12.2.3. The Customer must reimburse ABCG on a written demand for any costs or losses sustained or incurred by ABCG arising directly or indirectly from the Default.
- 13. COLLECTION AND USE OF INFORMATION**
- 13.1. The Customer authorises ABCG to collect, retain and use any information about the Customer for the purpose of assessing the Customer's creditworthiness and/or enforcing any rights under this Contract.
- 13.2. The Customer authorises ABCG to disclose any information obtained to any person for the purposes set out in this clause. Where the Customer is a natural person, the authorities under this clause are authorities or consents for the purposes of the Privacy Act 1993.
- 14. INTELLECTUAL PROPERTY RIGHTS**
- 14.1. All intellectual property rights in or arising out of or in connection with the Supply shall be owned by ABCG.
- 15. CONFIDENTIALITY**
- 15.1. The Customer must keep in strict confidence all technical and commercial know-how, specifications, inventions, processes, or initiatives which are of a confidential nature and have been disclosed to you by ABCG's employees, agents or subcontractors, and any other confidential information concerning ABCG's business or our products or Supply which the Customer may obtain. The Customer shall restrict such disclosure of such confidential information to such of its employees, agents or subcontractors who need to know it for the purpose of discharging obligations under this Contract, and ensure that such employees, agents or subcontractors are subject to obligations of confidentiality corresponding to those which bind the Customer. This clause 10 shall survive termination of the Contract.
- 16. MISCELLANEOUS**
- 16.1. ABCG shall not be liable for delay or failure to perform its obligations if the cause of the delay or failure is beyond its control.
- 16.2. If any provision of this Contract shall be invalid, void or illegal or unenforceable, the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or implied.
- 16.3. The Customer may not assign any of its rights or obligations under this Contract without the prior written consent of ABCG.
- 17. PERSONAL GUARANTEE**
- 17.1. In consideration for ABCG agreeing to complete the Supply at the request of the Customer, where the Customer is a company or trust, the directors or trustees signing this Contract also sign this Contract in their personal capacity and jointly and severally personally undertake as principal debtors to ABCG the payment of any and all moneys owed by the Customer to ABCG and indemnify ABCG against non-payment by the Customer.
- 18. GOVERNING LAW**
- 18.1. The within terms and conditions shall be governed by and construed in accordance with the laws of New Zealand and the parties shall submit to the exclusive jurisdiction of the New Zealand Courts.
- 19. AGENCY**
- 19.1. The Customer authorises ABCG to contract, either as principal or agent, for the Supply, or any part thereof ("**sub-contract**").
- 19.2. Where ABCG enters into a sub-contract, the Customer agrees to pay any amounts due under that sub-contract.
- 19.3. Any list of proposed subcontractors supplied by ABCG is provided on a without prejudice basis and ABCG reserves the exclusive right to change subcontractors without adjustment to the Quotation.
- 20. DISPUTE RESOLUTION**
- 20.1. In the event of a dispute or disagreement arising between ABCG and the Customer the party with a grievance may give written notice to the other party specifying the nature of the dispute or disagreement, the remedy sought and requiring that the dispute or disagreement be determined and settled in accordance with this clause.
- 20.2. Any notice or other communication given to a party under, or in connection with, this Contract shall be in writing, addressed to that party at its registered office or such other address as that party may have specified to the other party in writing in accordance with this clause, and shall be delivered personally, or sent by pre-paid fast post, commercial courier, facsimile or email. A notice or other communication shall be deemed to have been received:
 - 20.2.1. If delivered personally, when left at the address referred to in this clause;
 - 20.2.2. If sent by pre-paid fast post, at 9:00am on the second working day after posting;
 - 20.2.3. If delivered by commercial courier, on the date and at the time that the courier's delivery receipt is signed, or
 - 20.2.4. If sent by fax or email, one working day after transmission.
- The provisions in this clause shall not apply to the service of any proceedings or other documents in any legal action.
- 20.3. On receipt of the notice, the parties shall each appoint a representative who has authority to determine the grievance or dispute, and those two representatives shall meet as soon as reasonably possible to see if they can determine the grievance. All discussions, meetings and correspondence between the two representatives shall be deemed without prejudice and without concession of liability and shall not be used by either party in any later proceedings unless:
 - o Both parties agree, or
 - o The two representatives reach agreement, but one party fails to honour such agreement.
- 20.4. If the two representatives cannot within fourteen (14) days of being appointed reach agreement on how the grievance or dispute is to be determined, the parties shall refer the dispute to an independent expert who is acceptable to both parties. If the parties cannot or do not agree on an independent expert within three (3) days of the first suggestion of a suitable person, either party may ask the President of the New Zealand Law Society to nominate a person to act as an independent expert and the first person so nominated who is able and willing to be appointed shall be deemed the independent expert for the purposes of this clause. The independent expert shall:
 - o Set his or her own rules and procedure for the resolution of the grievance or disagreement;
 - o At all times act in good faith and in an unbiased way;
 - o Promptly hear and determine the dispute; and
 - o Provide a written decision (with reasons for that decision) if requested by either party.
- 20.5. The independent expert's:
 - o Decision shall be binding on both parties; and
 - o Costs shall be paid equally by the parties unless the independent expert decides otherwise in his or her decision.
- 20.6. Notwithstanding anything contained in any dispute resolution clause, disputes in excess of ten thousand dollars (\$10,000.00) shall be referred at ABCG's sole discretion to arbitration under the Arbitration Act 1996 or any subsequent Act passed in its place.
- 21. MORTGAGE**
- 21.1. The Customer agrees that while the Customer owes ABCG any sum under the Contract (whether disputed or otherwise) the Customer shall upon written demand be made by ABCG at any time but before payment in full is made to ABCG, execute a Memorandum of Mortgage ("**Mortgage**") over any real property owned by the Customer from time to time in favour of ABCG (to be prepared by ABCG's solicitors at the Customer's cost), for the amount equivalent to the unpaid balance owing plus any interest and costs owing thereon until paid in full.
- 21.2. The terms of such mortgage shall be collateral to the terms hereof and payment in full of the amounts owing to ABCG hereunder shall operate as a full discharge of the mortgage. ABCG agrees not to make demand on the Customer to execute such a mortgage unless any of the following occur:
 - 21.2.1. Failures to make payment on the due date;
 - 21.2.2. Any composition with creditors, act of bankruptcy, winding up or receivership of the Customer.
- 21.3. The Mortgage referred to in this clause 21 hereof shall be the ADLS form approved by the Registrar General of Land 2007/4237, and the covenants of the said form whether executed by the Customer or not shall be deemed to be included. The Customer hereby authorises ABCG to lodge and maintain a Caveat against the title to the subject property for the protection of the agreement to mortgage described above should ABCG in its absolute discretion consider it necessary to lodge such a Caveat. The Customer hereby grants to ABCG an irrevocable power of attorney in relation to the subject property to execute the mortgage referred to in this clause 21 hereof should the mortgage not be executed by the Customer for any reason whatsoever PROVIDED THAT ABCG will not execute a mortgage as attorney for the Customer unless ABCG has requested in writing that the Customer execute the mortgage pursuant to the terms of this agreement and the Customer has failed to execute such a mortgage within five (5) working days of such request.