
Bowers Brothers Concrete Limited – Terms & Conditions of Trade

1. Definitions

- 1.1 “BBCL” means Bowers Brothers Concrete Limited, its successors and assigns or any person acting on behalf of and with the authority of Bowers Brothers Concrete Limited.
- 1.2 “Customer” means the person/s buying the Goods 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 “Goods” means all Goods or Services supplied by BBCL to the Customer at the Customer’s request from time to time (where the context so permits the terms ‘Goods’ or ‘Services’ shall be interchangeable for the other).
- 1.4 “Price” means the Price payable for the Goods as agreed between BBCL and the Customer in accordance with clause 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 the Goods.
- 2.2 These terms and conditions may only be amended with BBCL’s consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Customer and BBCL.

3. Change in Control

- 3.1 The Customer shall give BBCL 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 BBCL as a result of the Customer’s failure to comply with this clause.

4. Price and Payment

- 4.1 At BBCL’s sole discretion the Price shall be either:
 - (a) as indicated on any invoice provided by BBCL to the Customer; or
 - (b) the Price as at the date of delivery of the Goods according to BBCL’s current price list; or
 - (c) BBCL’s quoted price (subject to clause) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- 4.2 BBCL reserves the right to change the Price if a variation to BBCL’s quotation is requested. Any variation from the plan of scheduled Services or specifications (including, but not limited to, any variation as a result of additional Services required due to unforeseen circumstances such as poor weather conditions, limitations to accessing the site, availability of machinery, safety considerations, prerequisite work by any third party not being completed or as a result of any increase to BBCL’s in the cost of materials and labour) will be charged for on the basis of BBCL’s quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 4.3 At BBCL’s sole discretion a deposit may be required.
- 4.4 Time for payment for the Goods being of the essence, the Price will be payable by the Customer on the date/s determined by BBCL, which may be:
 - (a) for certain approved Customers, 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;
 - (b) the date specified on any invoice or other form as being the date for payment; or
 - (c) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by BBCL.
- 4.5 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (plus a surcharge of up to one and a half percent (1.5%) of the Price), or by any other method as agreed to between the Customer and BBCL.
- 4.6 Unless otherwise stated the Price does not include GST. In addition to the Price the Customer must pay to BBCL an amount equal to any GST BBCL must pay for any supply by BBCL under this or any other agreement for the sale of the Goods. 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. Delivery of Goods

- 5.1 Delivery (“**Delivery**”) of the Goods is taken to occur at the time that BBCL (or BBCL’s nominated carrier) delivers the Goods to the Customer’s nominated address even if the Customer is not present at the address.
- 5.2 In respect of redimixed concrete, Delivery is taken to occur at the time that the concrete is batched. Cancellation of or changes to the order will not be accepted by BBCL after this time.
- 5.3 At BBCL’s sole discretion the cost of delivery is in addition to the Price.
- 5.4 The Customer must take delivery by receipt or collection of the Goods whenever they are tendered for delivery. In the event that the Customer is unable to take delivery of the Goods as arranged then BBCL shall be entitled to charge a reasonable fee for redelivery and/or storage.
- 5.5 BBCL may deliver the Goods in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 5.6 Any time or date given by BBCL to the Customer is an estimate only. The Customer must still accept delivery of the Goods even if late and BBCL will not be liable for any loss or damage incurred by the Customer as a result of the delivery being late.

6. Risk

- 6.1 Risk of damage to or loss of the Goods passes to the Customer on Delivery and the Customer must insure the Goods on or before Delivery.

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- 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, BBCL is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by BBCL is sufficient evidence of BBCL's rights to receive the insurance proceeds without the need for any person dealing with BBCL to make further enquiries.
- 6.3 If the Customer requests BBCL to leave Goods outside BBCL's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Customer's sole risk.
- 7. Tile/Paver/Brick Risk**
- 7.1 The Customer acknowledges that variations of colour, shade, texture and size are inherent in all masonry products. While every effort will be taken by BBCL to match colour, shade or grain of product, BBCL shall not be liable for any loss, damages or costs howsoever arising resulting from any variation in colour, shading or grain between batches of product or sale samples and the final product supplied.
- 7.2 BBCL gives no guarantee (expressed or implied) against crazing, cracking, chipping or scratching that may occur that is beyond BBCL's control due to the nature of the product at the time of installation, therefore it is recommended that the Customer allows for extra product for such breakages.
- 8. Concrete Risk**
- 8.1 The Customer acknowledges that variations of colour and texture are inherent in concrete. BBCL shall not be liable for any loss, damages or costs howsoever arising resulting from any variation of the colour or texture between different batches of product.
- 8.2 BBCL gives no guarantee (expressed or implied) as to the length of time the curing process will take and/or against cracking of concrete that may occur naturally in the works such as:
- (a) cracking and delaminating of concrete; or
 - (b) damage caused by contact with chemicals, solvents, oils or any other substances; or
 - (c) the effects by elements such as weather conditions.
- 8.3 The Customer acknowledges and agrees that it is their responsibility to organise and be liable for all costs associated with protecting the concrete and shall take all reasonable precautions to protect against destruction or damage by way of vandalism. In the event that the concrete is destroyed or damaged due to vandalism then the cost of repair or replacement shall be borne by the Customer.
- 8.4 BBCL shall not be liable for any defect in the Goods if the Customer does not comply with NZS Standards.
- 8.5 The Customer shall supply an area suitable for washing out BBCL's equipment and for depositing all unused concrete and slurry.
- 9. Dimensions, Plans and Specifications**
- 9.1 All customary building industry tolerances shall apply to the dimensions and measurements of the Goods unless BBCL and the Customer agree otherwise in writing.
- 9.2 BBCL shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Customer.
- 9.3 If the giving of an estimate or quotation for the supply of Goods involves BBCL estimating measurements and quantities, it shall be the responsibility of the Customer to verify the accuracy of BBCL's estimated measurements and quantities, before the Customer places an order based on such estimate or accepts such quotation.
- 9.4 Should the Customer require any changes to BBCL's estimated measurements and quantities, the Customer shall request such changes in writing, in the case of an estimate before placing an order based on that estimate and in the case of a quotation before acceptance of that quotation.
- 10. Access**
- 10.1 The Customer shall ensure that BBCL has clear and free access to the work site at all times to enable them to deliver the Goods. BBCL shall not be liable for any loss or damage to the site (including, without limitation, damage to kerbs, pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of BBCL.
- 10.2 It is the responsibility of the Customer to ensure that access is suitable to accept the weight of laden trucks. The Customer agrees to indemnify BBCL against all costs incurred by BBCL in recovering such vehicles in the event they become bogged or otherwise immovable.
- 11. Title**
- 11.1 BBCL and the Customer agree that ownership of the Goods shall not pass until:
- (a) the Customer has paid BBCL all amounts owing to BBCL; and
 - (b) the Customer has met all of its other obligations to BBCL.
- 11.2 Receipt by BBCL 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.
- 11.3 It is further agreed that:
- (a) until ownership of the Goods passes to the Customer in accordance with clause that the Customer is only a bailee of the Goods and must return the Goods to BBCL on request.
 - (b) the Customer holds the benefit of the Customer's insurance of the Goods on trust for BBCL and must pay to BBCL the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed.
 - (c) the Customer must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Customer sells, disposes or parts with possession of the Goods then the Customer must hold the proceeds of any such act on trust for BBCL and must pay or deliver the proceeds to BBCL on demand.
 - (d) the Customer should not convert or process the Goods or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of BBCL and must sell, dispose of or return the resulting product to BBCL as it so directs.
 - (e) the Customer irrevocably authorises BBCL to enter any premises where BBCL believes the Goods are kept and recover possession of the Goods.
 - (f) BBCL may recover possession of any Goods in transit whether or not delivery has occurred.

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- (g) the Customer shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of BBCL.
 - (h) BBCL may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Customer.
- 12. Personal Property Securities Act 1999 (“PPSA”)**
- 12.1 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 Goods previously supplied by BBCL to the Customer (if any) and all Goods that will be supplied in the future by BBCL to the Customer.
- 12.2 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 BBCL may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, BBCL for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;
 - (c) not register a financing change statement or a change demand without the prior written consent of BBCL; and
 - (d) immediately advise BBCL of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 12.3 BBCL and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 12.4 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
- 12.5 Unless otherwise agreed to in writing by BBCL, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 12.6 The Customer shall unconditionally ratify any actions taken by BBCL under clauses to .
- 13. Customer’s Disclaimer**
- 13.1 The Customer hereby disclaims any right to rescind, or cancel any contract with BBCL or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Customer by BBCL and the Customer acknowledges that the Goods are bought relying solely upon the Customer’s skill and judgment.
- 14. Defects**
- 14.1 The Customer shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify BBCL of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford BBCL an opportunity to inspect the Goods within a reasonable time following delivery if the Customer believes the Goods are defective in any way. If the Customer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which BBCL has agreed in writing that the Customer is entitled to reject, BBCL’s liability is limited to either (at BBCL’s discretion) replacing the Goods or repairing the Goods.
- 15. Returns**
- 15.1 Returns will only be accepted provided that:
- (a) the Customer has complied with the provisions of clause ; and
 - (b) BBCL has agreed in writing to accept the return of the Goods; and
 - (c) the Goods are returned at the Customer’s cost within thirty (30) days of the delivery date; and
 - (d) BBCL will not be liable for Goods which have not been stored or used in a proper manner; and
 - (e) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
- 15.2 BBCL may (in its discretion) accept the return of Goods for credit but this may incur a handling fee of fifteen percent (15%) of the value of the returned Goods plus any freight.
- 15.3 Non-stocklist items or Goods made to the Customer’s specifications are under no circumstances acceptable for credit or return.
- 16. Warranty**
- 16.1 For Goods not manufactured by BBCL, the warranty shall be the current warranty provided by the manufacturer of the Goods. BBCL 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 Goods.
- 16.2 To the extent permitted by statute, no warranty is given by BBCL as to the quality or suitability of the Goods for any purpose and any implied warranty, is expressly excluded. BBCL shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.
- 17. Consumer Guarantees Act 1993**
- 17.1 If the Customer is acquiring Goods for the purposes of a trade or business, the Customer acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods by BBCL to the Customer.
- 18. Intellectual Property**
- 18.1 Where BBCL has designed, drawn or developed Goods for the Customer, then the copyright in any designs and drawings and documents shall remain the property of BBCL.

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- 18.2 The Customer warrants that all designs, specifications or instructions given to BBCL will not cause BBCL to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify BBCL against any action taken by a third party against BBCL in respect of any such infringement.
- 18.3 The Customer agrees that BBCL may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings or Goods which BBCL has created for the Customer.

19. Default and Consequences of Default

- 19.1 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 BBCL's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 19.2 If the Customer owes BBCL any money the Customer shall indemnify BBCL from and against all costs and disbursements incurred by BBCL in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, BBCL's collection agency costs, and bank dishonour fees).
- 19.3 Without prejudice to any other remedies BBCL may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions BBCL may suspend or terminate the supply of Goods to the Customer. BBCL will not be liable to the Customer for any loss or damage the Customer suffers because BBCL has exercised its rights under this clause.
- 19.4 Without prejudice to BBCL's other remedies at law BBCL shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to BBCL shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to BBCL becomes overdue, or in BBCL's opinion the Customer will be unable to make a payment when it falls due;
 - (b) the Customer 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 Customer or any asset of the Customer.

20. Cancellation

- 20.1 BBCL may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Customer. On giving such notice BBCL shall repay to the Customer any money paid by the Customer for the Goods. BBCL shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 20.2 In the event that the Customer cancels delivery of Goods the Customer shall be liable for any and all loss incurred (whether direct or indirect) by BBCL as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 20.3 Cancellation of orders for Goods 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.

21. Privacy Act 1993

- 21.1 The Customer authorises BBCL or BBCL'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 BBCL from the Customer directly or obtained by BBCL 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.
- 21.2 Where the Customer is an individual the authorities under clause are authorities or consents for the purposes of the Privacy Act 1993.
- 21.3 The Customer shall have the right to request BBCL for a copy of the information about the Customer retained by BBCL and the right to request BBCL to correct any incorrect information about the Customer held by BBCL.

22. Dispute Resolution

- 22.1 All disputes and differences between the Customer and BBCL touching and concerning this agreement shall be referred to arbitration under a single arbitrator agreed upon by both parties, or failing agreement, by two arbitrators (one to be appointed by each party) and their umpire (appointed by them prior to arbitration), such arbitration to be carried out in accordance with provisions of the Arbitration Act 1996.

23. Compliance with Laws

- 23.1 The Customer and BBCL shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Services.
- 23.2 The Customer shall obtain (at the expense of the Customer) all licenses and approvals that may be required for the Services.
- 23.3 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.

24. Construction Contracts Act 2002

- 24.1 The Customer hereby expressly acknowledges that:
- (a) the BBCL 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

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- (iii) the Customer has not complied with an adjudicator's notice that the Customer must pay an amount to BBCL by a particular date; and
 - (iv) BBCL has given written notice to the Customer of its intention to suspend the carrying out of construction work under the construction contract.
- (b) if BBCL 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.
- (c) if BBCL exercises the right to suspend work, the exercise of that right does not:
- (i) affect any rights that would otherwise have been available to BBCL 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 BBCL suspending work under this provision.

25. General

- 25.1 The failure by BBCL to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect BBCL'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.
- 25.2 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 Morrinsville in New Zealand.
- 25.3 BBCL 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 BBCL of these terms and conditions (alternatively BBCL's liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
- 25.4 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 BBCL nor to withhold payment of any invoice because part of that invoice is in dispute.
- 25.5 BBCL may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 25.6 The Customer agrees that BBCL may amend these terms and conditions at any time. If BBCL makes a change to these terms and conditions, then that change will take effect from the date on which BBCL notifies the Customer of such change. The Customer will be taken to have accepted such changes if the Customer makes a further request for BBCL to provide Goods to the Customer.
- 25.7 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.
- 25.8 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.