

# Comfortech Building Performance Solutions™ Sales Terms

## 1. INCORPORATION

- 1.1 You acknowledge that these Sale Terms are to be read in conjunction, and supplement the Fletcher Building Terms of Credit. (together defined as Terms)
- 1.2 By ordering or purchasing Goods from the Supplier whether on trade account, in store or online, you, the Customer agree that these Terms will apply to those Goods and to any estimate or quote given in respect of them by the Supplier
- 1.3 These Terms take precedence over any existing or subsequent terms or variations provided by the Customer unless otherwise agreed by the Supplier in writing.
- 1.4 The Supplier may vary these Terms at any time by publishing the varied terms on the Comfortech™ website [comfortech.co.nz](http://comfortech.co.nz) Goods ordered after the date of the publication of the updated terms will be subject to the variation and the placing of an order will be deemed to be an acceptance of such terms.

## 2. ORDERS

- 2.1 An estimate or quote will not amount to an offer to sell Goods. No contract for the supply of Goods exists until the Customer's order has been accepted by the Supplier.
- 2.2 Each accepted order including delivery by instalment will constitute a separate contract incorporating these Terms and any further terms set out in the estimate or quote.
- 2.3 The Customer is liable for all orders and purchases made irrespective of whether it has taken delivery of the Goods.
- 2.4 The Supplier may cancel any part of an order (including any orders that have initially been accepted) without any liability to the Customer for that cancellation at any time if:
  - a) the Goods in that order are not available;
  - b) there is an error in the price of the Goods in that order;
  - c) there is an error in the Goods description; or
  - d) NZDBU believes the Customer's order has been placed in breach of these Terms.

## 3. PRICE

- 3.1 Pricing is indicative based on charges and rates in effect at the date of issue.
- 3.2 Any increase in the price of Goods (including but not limited to manufacturing costs price of raw materials shipping and freight costs and change in currency exchange rates) affecting the cost of supply, production and/or delivery of the Goods will be included in the invoiced price payable by the Customer.
- 3.3 The price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any estimate or quote given by the Supplier.
- 3.4 An extra charge may be made where additional work results from lack of precision or inaccuracy in the Customer's specifications or the Customer alters the specifications after the date of order
- 3.5 The Customer is bound to pay the price from the time that an order is placed with the Supplier, with there being no obligation on the Supplier to inquire as to the authority of any person placing an order on behalf of the Customer.
- 3.6 No order may be cancelled without the Supplier's prior approval, and then only upon such terms as the Supplier may specify.
- 3.7 Alterations to any product price list (excl delivery) shall be effective from the date specified by the Supplier at the time of giving notice to the Customer.

## 4. DELIVERY

- 4.1 Where delivery is to be made at the place specified in the order, the Supplier shall deliver, or arrange delivery of, the Goods to the place specified and pay any transportation costs incurred as a result unless otherwise agreed in writing and subject to such delivery costs being paid by the Customer.
- 4.2 If no place of delivery is specified, delivery shall be made at the Supplier's premises and shall take place at the time when the Goods are made available for despatch at the Supplier's premises.
- 4.3 Goods will be deemed accepted upon delivery.
- 4.4 If the Supplier subsequently arranges transportation, storage or insurance of the goods:
  - a) the Supplier does this as the Customer's agent;
  - b) the Customer must pay the Supplier all the costs of this service; and
  - c) the Customer shall indemnify the Supplier for any liability incurred by the Supplier in providing this service.

- 4.5 The Supplier may deliver the Goods by instalments, and each instalment shall be treated as a separate contract under these Terms.
- 4.6 If the Supplier fails to deliver or makes defective delivery of part of the Goods, this does not entitle the Customer to cancel the contract.
- 4.7 Any time stated for delivery is an estimate only. The Supplier is not liable for any delay in delivery.
- 4.8 If the Customer fails or refuses to accept delivery without reasonable cause of any of the Goods for which is has paid, the Supplier may charge the Customer for any additional costs incurred as a result, including storage and transportation costs.
- 4.9 If the Customer fails or refuses to accept delivery without reasonable cause of any unpaid Goods the Supplier may sell or dispose of the Goods and retain all sale proceeds. The Supplier may also recover from the Customer any difference in the price received from the sale of Goods together with interest and costs including the costs of recovery compared with the sale price to the Customer.

## 5. GUARANTEES AND LIABILITY

- 5.1 Notwithstanding anything to the contrary in these Terms of Trade where the Customer is a Consumer as defined by the Consumer Guarantees Act 1993 ("CGA") then the terms of the CGA including all guarantees and remedies pursuant to that Act will apply for the benefit of the Customer.
- 5.2 If the Goods are acquired by the Customer for business purposes, the Customer agrees that the Consumer Guarantees Act 1993 and the Fair Trading Act 1986 and in particular sections 9, 12A, 13 and 14(1) of the Fair Trading Act do not apply to the contract in respect of those Goods.
- 5.3 Where the Customer supplies the Goods in trade to a person acquiring them for business purposes, it must be a term of the Customer's contract with that person that the Consumer Guarantees Act 1993 and the Fair Trading Act 1986 do not apply in respect of the Goods.
- 5.4 The Customer acknowledges that the Supplier does not provide any express guarantees (as defined in the Consumer Guarantees Act 1993) other than those expressly confirmed by the Supplier or the Goods manufacturer in writing.
- 5.5 Where the Customer supplies the Goods to any other person in the course of trading, the Customer must not give or make any undertaking, assertion or representation in relation to the Goods without the Supplier's prior approval in writing.
- 5.6 The Customer agrees to indemnify the Supplier against any liability or cost incurred by the Supplier under the Consumer Guarantees Act 1993 as a result of any breach by the Customer of the obligations contained in these Terms.
- 5.7 The following terms apply wherever the Consumer Guarantees Act 1993 does not apply to these terms, or where the following terms are not inconsistent with the Consumer Guarantees Act 1993:
  - a) defective Goods and services or Goods and services which do not comply with a contract shall, at the Supplier's discretion, be either repaired or replaced, or the price refunded;
  - b) any right which the Customer may have to reject non-conforming or defective goods shall only be effective if the Customer notifies the Supplier in writing within 5 days of discovery of the non-conformance or defect or within 5 days of when the non-conformance or defect should reasonably have been discovered and provided the Supplier is given a reasonable opportunity to investigate and resolve the claim.
  - c) no Goods shall be returned unless the Supplier has agreed in writing in advance;
  - d) the Supplier may, at its discretion, delay the repair or replacement of, or the refund of the price of, any Goods for so long as the Customer is in default in relation to the amount owing.
- 5.8 Nothing in these terms is intended to have the effect of contracting out of the provisions of the Consumer Guarantees Act 1993 except to the extent permitted by that Act, and these terms are to be modified to the extent necessary to give effect to that intention.

## 6. GOODS USE AND SAFETY

- 6.1 The Customer must ensure that:
  - a) Goods are installed, used and maintained in compliance with all manufacturer instructions, guidance, warranties and all Applicable Law.
  - b) Goods are used safely and where applicable, under appropriate supervision with appropriate training.
  - c) The Customer shall notify the Supplier immediately upon the discovery of any safety issue with the Goods.
- 6.2 Where the Customer is on a Supplier's site it will comply with all safety policies, protocols and directives made known to it by the Supplier

including but not limited to compliance with all safety notices displayed and all Applicable Law. Failure to comply may result in eviction from the site and closure of the Customer's credit account.

- 6.3 Where Goods are being delivered or installed by the Supplier the Customer must ensure that:
- a) it provides safe access to site and secure storage at the site for Goods materials and equipment which may be used in providing the installation services.

Failure to comply may result in the Supplier refusing to deliver or undertake the installation services.

## **7. PACKAGING**

- 7.1 The Supplier may charge a deposit in respect of any pallets, containers or cartons ("packaging") used in the delivery or packaging of the Goods and in such circumstances the packaging remains the property of the Supplier and the Supplier shall refund such deposit only after the return of the packaging (at the cost of the Customer) in good order and condition within a reasonable time of receipt by the Customer.

## **8. OWNERSHIP OF WORKS**

- 8.1 All works produced by the Supplier, and any intellectual property in and to such works, remain the exclusive property of the Supplier unless otherwise agreed in writing, and the Supplier may charge the Customer for maintenance of such works.
- 8.2 Where the Customer supplies a mould, die, tool, printing plate or any other item used in the manufacturing process.
- 8.3 The Supplier shall not be liable for any loss or damage of any such item; and the Customer shall reimburse the Supplier for all maintenance expenses.

## **9. INTELLECTUAL PROPERTY**

- 9.1 All right title and interest in all Intellectual property in all concepts, systems, written graphic and other material relating to the Supplier is owned by and will at all times remain the exclusive property of the Supplier, its licensors and the manufacturers or suppliers of any of the Goods it supplies and is protected by New Zealand and international law. Nothing in these Terms will constitute any licence of intellectual property rights to the Customer unless otherwise expressly and prior agreed in writing by a senior representative of the Supplier.
- 9.2 The Customer warrants that the use by the Supplier of any designs or instructions supplied by the Customer will not infringe the patents, trade marks, designs or copyright ("intellectual property") of any other person and the Customer agrees to indemnify the Supplier against any claim relating to or arising from the infringement of any intellectual property of any other person. If at any time a claim is made against the Supplier or the Supplier becomes aware that a claim is likely to be made against the Supplier for infringing any intellectual property or contributing to any such infringement by the Supplier or any other person as a result of supplying goods, the Supplier may immediately terminate or suspend these Terms.

## **10. MEDIATION**

- 10.1 Without limiting any rights of the Customer under the Consumer Guarantees Act, either party may require any dispute arising which has not been resolved within 14 days to be referred to mediation. The mediator shall be appointed by both parties or, where the parties cannot agree within 14 days, appointed by the chairperson or any other office holder of the New Zealand chapter of LEADR. The mediator shall conduct the mediation in accordance with the guidelines agreed between the parties or, if the parties cannot agree within 14 days following appointment of the mediator, in accordance with the guidelines set by the mediator. The costs and expenses of the mediator shall be shared by the parties equally. Such mediation to take place within 40 working days of the appointment of mediator.

## **11. WAIVER**

- 11.1 If the Supplier exercises or fails to exercise any right or remedy available to it, this shall not prejudice the Supplier's rights in exercising that or any other right or remedy.
- 11.2 Waiver of any term of these Terms must be specified in writing and signed by an authorised officer of the Supplier.

## **12. FORCE MAJEURE**

- 12.1 The Supplier will not be liable under or in connection with these Terms for any delay or failure to perform in part or in full any of its obligations under these Terms to the extent that the delay or failure is caused by a Force Majeure Event. For the purposes of this clause Force Majeure event is defined as any cause that prevents the affected party from performing any or all of its obligations (in part or in full) under this agreement which

arises from or is attributable to acts, events, omissions or accidents beyond the control of the affected party.

## **13. MEDIATION**

- 13.1 Without limiting any rights of the Customer under the Consumer Guarantees Act, either party may require any dispute arising which has not been resolved within 14 days to be referred to mediation. The mediator shall be appointed by both parties or, where the parties cannot agree within 14 days, appointed by the chairperson or any other office holder of the New Zealand chapter of LEADR. The mediator shall conduct the mediation in accordance with the guidelines agreed between the parties or, if the parties cannot agree within 14 days following appointment of the mediator, in accordance with the guidelines set by the mediator. The costs and expenses of the mediator shall be shared by the parties equally. Such mediation to take place within 40 working days of the appointment of mediator.

## **14. WAIVER**

- 14.1 If the Supplier exercises or fails to exercise any right or remedy available to it, this shall not prejudice the Supplier's rights in exercising that or any other right or remedy.
- 14.2 Waiver of any term of these Terms must be specified in writing and signed by an authorised officer of the Supplier.

# Fletcher Building Terms of Credit

## 1. SIGNING AUTHORITY

- 1.1 Any person agreeing to these Terms of Credit and signing the Agreement to Execute on behalf of the Customer confirms that they are expressly authorised by the Customer to agree to these Terms of Credit and to sign the Acknowledgement of Transaction Documents which will bind the Customer (including where the Customer is a company, partnership, joint venture or a trust). In all cases where a person is signing on behalf of the Customer he/she must provide written confirmation from the Customer that the person has the express authority to bind the Customer to these Terms of Credit.
- 1.2 The Customer must return the signed copy of the Acknowledgement of Transaction Documents and all the Transaction Documents (including these Terms of Credit and any Guarantee) to the Supplier by scanning and emailing the documents to [onlinecreditapplication@fb.com](mailto:onlinecreditapplication@fb.com). The Customer must return by post the signed originals of the Transaction Documents as directed. Note, the return to the Supplier of the Transaction Documents by scanning and emailing constitutes a binding agreement and guarantee, irrespective of receipt by the Supplier of the original documents.

## 2. PAYMENT

- 2.1 Unless otherwise agreed in writing, the terms of payment are payment in full (including, without limitation, all G.S.T. and other value added tax) in cleared funds on the 20th day of the month following delivery of the Goods (including where Goods are delivered by instalments).
- 2.2 The Customer will pay to the Supplier all G.S.T. or other value added tax payable on the Goods supplied.
- 2.3 If the Customer fails to make any payment to the Supplier by the due date, the Customer will be liable to pay to the Supplier at the Supplier's discretion (and without prejudice to any other rights or remedies the Supplier may have) on demand, default interest at the rate of 18% per annum calculated on a daily basis on all monies outstanding from the date that payment is due until the date payment is received in full by the Supplier.
- 2.4 The Customer will be liable to pay all of the Supplier's costs and expenses (including legal costs calculated as between solicitor and own client) in enforcing these terms and conditions. Base collection costs incurred in recovering outstanding monies will be the Customer's liability and will be charged on a scale basis per table 1 below:

Table 1:

\$100 to \$5,000	20%
\$5,001 to \$10,000	15%
\$10,001 to \$50,000	10%
\$50,001 or more	5%

- 2.5 The Supplier may refuse to deliver Goods if there are any outstanding moneys or other obligations owing to the
- 2.6 Supplier or any Related Company by the Customer or if the Customer has breached any of these Terms of Credit.
- 2.7 The Customer will make all payments due to the Supplier whether in respect of the price of the Goods or otherwise, in full without deductions of any nature (whether by way of set off, counterclaim or other equitable or lawful claim or otherwise). The Supplier may at any time require the Customer to pay for Goods by bank cheque or post-dated cheque. Any payment received by the Supplier (or any amount withheld by the Supplier (whether by way of set off, counterclaim or other equitable or lawful claim or otherwise) may be applied in reduction of any amount owing to the Supplier or any Related Company, as determined by the Supplier.
- 2.8 The Supplier may deduct or withhold any amount (whether by way of set off, counterclaim or other equitable or lawful claim or otherwise) from any money owing by the Supplier or any Related Company to the Customer on any account whatsoever.

## 3. OWNERSHIP AND RISK

- 3.1 Ownership of the Goods supplied will remain with the Supplier and will not pass to the Customer until all amounts owing by the Customer to the Supplier in respect of the Goods or otherwise have been paid for in full and all the Customer's other obligations to the Supplier have been met. Until ownership of the Goods passes to the Customer, the Customer agrees as follows:
  - a) The Customer holds the Goods on trust for the Supplier as bailee. The Customer will store the Goods safely at the Customer's cost so that they can be readily identified as belonging to the Supplier and shall not relinquish possession or remove the Goods from the Customer's premises except in the ordinary course of business.

- b) The Customer will only use or sell the Goods in the ordinary course of business. This authority is revoked immediately if a default or Enforcement Event occurs, or the Supplier notifies the Buyer in writing that this authority is revoked.
- c) The Customer must keep full and complete records of the Goods and make such records available to the Supplier upon the Supplier's reasonable request.
- d) The Customer will disclose to the Supplier all information reasonably required regarding the Goods and any on-sale of the Goods by the Customer.
- e) The Customer will immediately inform the Supplier of any attempt by any third party to exercise remedies against the Goods or of any
- f) circumstances that might jeopardize the Supplier's rights or interest in the Goods.
- g) The Customer gives the Supplier the right to inspect the Goods or any part of them at all reasonable times.
- h) The Customer must not do or allow to be done anything that might contribute to a deterioration in the value of the Goods or otherwise adversely affect the Supplier's rights or interest in the Goods.
- i) The Customer must return the Goods if requested to do so by the Supplier following non-payment of any amount owing by the Customer to the Supplier or any Related Company or non-fulfilment of any of the Customer's other obligations to the Supplier or any Related Company, without limiting any other right the Supplier or Related Company may have.

- 3.2 If the Goods have not been paid for in full by the due payment date or are at risk (as defined in PPSA), the Supplier or its agent(s) may (in addition to the Supplier's other rights but subject to the Credit Contracts and Consumer Finance Act 2003) enter the Customer's premises (or other premises to which the Customer has access and where the Goods are stored or where the Supplier reasonably believes the Goods are stored) at any time, without notice, and search for and recover the Goods and may resell the Goods or retain the Goods for its own benefit, without incurring any liability to the Customer or any person claiming through the Customer. The Customer may not revoke the permission granted in this sub-clause.
- 3.3 Where the Customer provides material to the Supplier to be processed, then the Supplier will have a general and particular lien in respect of those goods (of which the aforementioned material may be a part) for all sums due at any time from the Customer to the Supplier. The Supplier may sell or dispose of such goods at the Customer's expense and without liability to the Customer and may apply the proceeds in or towards such sums.
- 3.4 Notwithstanding that ownership of any Goods may remain with the Supplier all risk in respect of such Goods will pass to the Customer upon delivery. The Customer will insure (and keep insured) the Goods for full replacement value against all risks of loss or damage in the Customer's and the Supplier's name for the parties' respective interests. The Supplier may, at any time, request a copy of the policy of insurance and the Customer will promptly provide the same to the Supplier.
- 3.5 The Customer will remain liable for all Goods which are ordered by the Customer notwithstanding that the Customer has not taken delivery of the Goods and/or has changed its mind as to whether the Customer wishes for those Goods to be delivered to it. If the Customer fails to take delivery of the Goods within 30 days of the date that the Goods are available for delivery then the Supplier will, at its sole discretion, sell and/or dispose of the Goods in any manner that it sees fit. It will also recover from the Customer the difference in the price the Supplier would have received from the Customer and the price that the Supplier received from the Goods disposal together with interest and costs, including the costs of recovery, in accordance with these Terms of Credit.

## 4. GENERAL SECURITY INTEREST

- 4.1 To secure payment, first, of the purchase price for Goods until such amount is paid in full, and secondly, of all the other Secured Money,
- 4.2 and to secure the performance of all other obligations owing by the Customer to the Supplier, the Customer grants the Supplier a Security Interest in all of the Customer's personal property (as defined in the PPSA), which includes, without limitation, the Goods supplied to the Customer, and a fixed charge over all of the Customer's real property, wherever situated (such personal property and real property is, together, the "Secured Property").
- 4.3 The Customer must not consent to or enter into any agreement which permits any supplier or other person to register a Security Interest in respect of any Collateral subject to the Supplier's Security Interest, including, without limitation, the Goods (whether an accession or otherwise), which

ranks in priority to the Supplier's rights as first ranking security holder.

- 4.4 An "Enforcement Event" occurs if:
- a) The Customer fails to pay, or in the Supplier's opinion is likely to fail to pay, any amount of the Secured Money when due; or
  - b) The Customer breaches, or in the Supplier's opinion is likely to breach, any non-monetary obligations owing to the Supplier or any Related Company; or
  - c) The Customer ceases or threatens to cease business; or The Customer is unable to pay any debts as they fall due or is declared insolvent or bankrupt; or The Customer makes an arrangement or compromise with creditors; or any step is made to dissolve it; or an encumbrancer takes possession of any Goods or other Collateral; or a liquidator, manager, administrator, or receiver (or any similar person) is appointed to the Customer or any of the Customer's property; or any analogous event occurs; or
  - d) The Customer's ownership or effective control is transferred, or in the Supplier's opinion the nature of the Customer's business is materially altered; or
  - e) any Guarantor breaches any obligations owing to the Supplier
- 4.5 If an Enforcement Event occurs then (in addition to and without prejudice to any other remedies the Supplier may have):
- a) Each Security Interest created under these Terms of Credit will become immediately enforceable; and
  - b) All of the Secured Money will be due and payable immediately; and the Supplier may at any time appoint in writing one or more Receivers (jointly and severally) in respect of any Secured Property on terms which the Supplier considers to be necessary or expedient; and
  - c) The remuneration of a Receiver may be fixed by the Supplier but is payable by the Customer and forms part of the Secured Money. To the fullest extent permitted by law a Receiver will be the agent of the Customer and the Customer will be solely responsible for the Receiver's acts and defaults; and
  - d) The Supplier may remove any Receiver appointed by providing that Receiver with written notice that the Receiver's appointment has ceased, upon which the Receiver will immediately cease to act; and
  - e) The Customer irrevocably appoints and ratifies the actions or omissions of the Supplier each Receiver, each nominee of the Supplier in whose name the Secured Money is registered and each duly authorized officer of the Supplier severally to be The Customer's attorney with full power to appoint substitutes and to sub-delegate) on behalf of the Customer and in the Customer's name or otherwise and at the Customer's expense to complete, execute and otherwise perfect all assignments, Security Interests and other agreements and documents, and generally to do all other things which the attorney may consider necessary or expedient to secure the full benefit to the Supplier of its rights and intended rights under these Terms of Credit, Transaction Documents and any other contract with the Supplier to secure payment of the Secured Money and performance of the Customer's obligations to the Supplier and any other incidental matters; and
  - f) The Supplier or a Receiver may take possession of the Goods and any other Secured Property (including any Goods that have become an accession under the PPSA) and may dispose of them or retain them for the Supplier's own benefit and for that purpose the Supplier may, subject to the Credit Contracts and Consumer Finance Act 2003, without notice, enter directly or by its agents on any premises where the Supplier believes Goods may be stored, without in any way being liable to any person. In respect of other Secured Property the Supplier may in the name of the Customer or otherwise, at any time
  - g) do anything and exercise any right which the Customer could do or exercise in relation to the Secured Property including the right to take possession of, demand, collect and get in any Secured Property, cancelling any contracts, borrowing any money, taking any proceedings in the Customer's name and settling any disputes or proceedings; and
  - h) A certificate signed by the Supplier as to an amount due by the Customer shall be conclusive evidence for all purposes, including for any proceedings; and
  - i) The Supplier may suspend all payment credit arrangements offered to the Customer by the Supplier immediately, without notice, until the Enforcement Event is remedied to the Supplier's satisfaction; and
  - j) The Supplier may suspend or cancel (in whole or in part) any outstanding order from the Customer to it or all or any part of any contract or contracts with the Customer which remain

unperformed; and

- k) the Supplier may require any future orders from the Customer to be paid in cash in full on placement of such order by the Customer.
- 4.6 The Customer acknowledges that it has received value as at the date of first delivery of Goods under these Terms of Credit and that nothing in these Terms of Credit is an agreement that a Security Interest created herein attaches at a later time than the time specified in section 40(1) of the PPSA, or an agreement to subordinate a Security Interest under these Terms of Credit in favour of any person.
- 4.7 Each Security Interest created under these Terms of Credit is a continuing security, notwithstanding any intermediate payments or settlements of accounts or anything else and is in addition to, and is not to be merged with, any other security or guarantee expressed or intended to be security for any Secured Money or any other obligations owing by the Customer to the Supplier.
- 4.8 Time is of the essence in respect of the Customer's obligations under these Terms of Credit. However, no Security Interest created under these Terms of Credit is discharged, nor is the Customer's obligations affected by any time, indulgence, waiver or consent at any time given to it or any other person; any amendment to, or the enforcement of or failure to enforce, these Terms of Credit or any other agreement; the insolvency, bankruptcy, liquidation, administration, amalgamation, change in status or reorganisation of the Customer or any other person; or anything else whatsoever.
- 4.9 The Supplier does not (and will not be deemed to) undertake any of the Customer's obligations in respect of the Customer's property (including any Secured Property) by virtue of these Terms of Credit.
- 4.10 The Supplier is not required to marshal, enforce or apply under any Security Interest, guarantee or other entitlement held by the Supplier at any time or any money or property that it at any time holds or is entitled to receive.

## **5. THE CUSTOMER'S OBLIGATIONS AND WAIVERS**

- 5.1 The Customer must not change its name, address or contact details without providing the Supplier with at least 30 days' prior written notice. The Customer must immediately notify the Supplier if the Customer intends to, or becomes aware of any step to, appoint an administrator or liquidator.
- 5.2 The Customer waives its rights under the PPSA to receive a copy of any verification statement, financing statement or financing change statement and unconditionally and irrevocably agrees that:
- a) to the maximum extent permitted, the Customer will have no rights under or by reference to sections 114(1)(a), 116, 120(2), 121, 125, 129, 131 133 and 134 of the PPSA;
  - b) where the Supplier has rights in addition to, or existing separately from, those in Part 9 of the PPSA, those rights will continue to apply and, in particular, those rights will not be limited by section 109; and
  - c) the Customer will not consent to or enter into any agreement which permits any supplier or other person to register a Security Interest in respect of the Goods (whether an accession or otherwise).
- 5.3 The Customer must not:
- a) give to the Supplier a written demand, or allow any other person to
  - b) give to the Supplier a written demand, requiring the Supplier to register a financing change statement; or
  - c) lodge a change demand or allow any other person to lodge a change demand, in each case in relation to a financing statement registered by the Supplier under the PPSA.
  - d) enter into or accept, or allow any other person to enter into or accept, a financing change statement in relation to a financing statement registered by reference to such other person under the PPSA.
- 5.4 The Customer will upon demand pay all of the Supplier's expenses and legal costs (including costs on a solicitor client basis) in relation to or in connection with the registration and maintenance of the Supplier's Security Interest.

## **6. SECURITY AGENCY**

- 6.1 From the date these Terms of Credit take effect, the Supplier will hold the benefit of all security created hereunder for all Related Companies (and, in such capacity, the Supplier is the Security Agent). The Customer acknowledges and agrees that the Supplier may, at any time, appoint a Related Company to serve as the Security Agent to act on its behalf and to exercise its rights under these Terms of Credit (including, without limitation, rights relating to the security created under these Terms of Credit, the Supplier's Terms of Sale and under any related or ancillary document).
- 6.2 Provided that the Customer is presented with a certificate from a party purporting to be the Security Agent which confirms such appointment under these Terms of Credit (which will be conclusive proof to the Customer of

such appointment), the Customer will not be concerned to enquire whether any instructions have been given to any such Security Agent by the Supplier and, as between the Customer and any such Security Agent, all actions taken by such Security Agent under these Terms of Credit, the Supplier's Terms of Sale and any related or ancillary document will be deemed to be authorised.

## 7. SUPPORTING GUARANTEE

7.1 At the Supplier's request, the Customer must procure that a Guarantee in the form attached as one of the Transaction Documents is executed and returned to the Supplier as directed as soon as possible, on the terms set out in the Guarantee (including as to seeking or waiving independent legal advice).

7.2 The Customer acknowledges and agrees that, to the extent that any Guarantee of any Secured Money or any other obligations owing by the Customer to the Supplier is in existence prior to the date that these Terms of Credit come into effect, the Customer will procure that such Guarantee will remain in full force and effect in respect of such Secured Money or other obligations.

## 8. ERRORS OR OMISSIONS

8.1 Clerical errors or omissions, whether in computation or otherwise in any quotation acknowledgements or invoice, will be subject to correction.

## 9. COMPLIANCE

9.1 The Customer will be solely responsible for obtaining any necessary permits under and for compliance with all legislation, regulations, by-laws or rules having the force of law in connection with the installation and operation of the Goods.

## 10. INDEMNITY FROM THE CUSTOMER

10.1 The Customer hereby indemnifies and undertakes to keep the Supplier, its officers, employees and agents, each Receiver and any attorney appointed under these Terms of Credit (the "Indemnified Party") at all times fully and effectively indemnified against all losses (including but not limited to direct loss, indirect loss, loss of profits (whether direct or indirect), consequential loss, liabilities, penalties, damages, claims, demands, actions, costs (including legal costs on a solicitor client basis), charges and expenses which the Indemnified Party (or any of them), may incur, or which may be made against the Indemnified Party (or any one of them) as a result of or in relation to:

- a) any act, omission, neglect or default by the Customer or any subsequent purchasers of Goods manufactured and/or supplied by the Supplier; or
- b) any breach by the Customer of any of the Customer's obligations under these Terms of Credit or any warranty given by the Customer; or
- c) anything done or omitted to be done by the Supplier and/or the Receiver and/or attorney in the exercise of or purported exercise of rights under these Terms of Credit or conferred on the Supplier by law (and whether or not arising out of the Supplier's Security Interest in any of the Secured Property); or
- d) any act or omission by the Customer which breaches or might breach any health and safety or environmental law.

## 11. THE SUPPLIER'S LIABILITY

11.1 To the fullest extent permitted by law, the Supplier will not be liable for:

- a) loss caused by any factor beyond the Supplier's control;
- b) failure to deliver to the Customer by any specified dates unless expressly agreed otherwise in this or any other written agreement;
- c) damage from misuse, accident, neglect or improper operation of the Goods supplied;
- d) any Goods to be treated as becoming wastage or scrap;
- e) the Customer testing the Goods unless expressly agreed to and authorised by the Supplier;
- f) the loss of or damage to any of the Customer's chattels left within the Supplier's possession or control (whether such loss or damage results from the Supplier's negligence or default or otherwise howsoever);
- g) the loss of or damage to Goods while in transit (whether such loss or damage results from the Supplier's negligence or default or otherwise howsoever) unless expressly agreed otherwise;
- h) deterioration of Goods as a result of exposure to the elements, after delivery;
- i) any act or omission by the Customer, subcontractor or any third party, including but not limited to maintenance, installation, modification of adjustments of the Goods supplied;

j) Goods that have been tampered with or modified by the Customer; Goods that have been stored in an improper manner by the Customer;

k) any delay or failure to perform in part or in full any of its obligations to the extent that the delay or failure is caused by a Force Majeure Event or due to a cause beyond the Supplier's control.

11.2 To the fullest extent permitted by law, the Supplier has no liability (whether statutory, in contract or tort (including negligence), (or howsoever)) to the Customer or any of the Customer's agents or employees for any physical, or special damage, direct loss, indirect loss, loss of profits (whether direct or indirect), economic loss of any kind (including loss of profits and expectation loss), consequential loss or any other loss or costs (including legal costs on a solicitor client basis) caused or contributed to by the Supplier or any of its agents or employees in respect of any Goods, credit or services supplied.

11.3 To the fullest extent permitted by law the Supplier excludes its liability for business-to-business transactions under the Consumer Guarantees Act, Fair Trading Act, in particular sections 9,12A,13 and 14 of the Fair Trading Act and any other applicable consumer law. Where the Customer is a "Consumer" under the provisions of the Consumer Guarantees Act, the Consumer Guarantees Act is to apply.

11.4 Subject to the above and to any express warranties given by the Supplier or any other manufacturer of the Goods in writing, all conditions, warranties, descriptions, representations and statements as to fitness or suitability for purpose, workmanship, tolerance to any conditions, merchantability or otherwise, advice, recommendation or information express or implied are expressly excluded to the fullest extent permitted by law.

11.5 Subject to any limitation on the Supplier's liability which may be expressed within these Terms of Credit, other Transaction Documents or which may be permitted by operation of the law, the Supplier's total liability whether in tort (including negligence), contract or otherwise for any loss or damage or injury arising directly or indirectly from any defect in or non-compliance of any Goods or any other breach of the Supplier's obligations is, limited to, at the Supplier's option:

- a) replacing, at the Supplier's premises, the relevant Goods; or
- b) refunding the sale price of the relevant Goods; or repairing the Goods; or
- c) paying the actual loss or damage suffered by the Customer.

11.6 In respect of defective Goods not manufactured by the Supplier, the Supplier will in no event be liable to pay to the Customer any amount in excess of such amount (if any) as the Supplier has received from its supplier in respect of the Goods.

11.7 The Supplier's liability for shortages in quantity and loss consequential to shortages in quantity is, subject to the application of the Consumer Guarantees Act 1993, limited to making up shortages. No claim for shortages in quantity will be allowed unless:

- a) the claim is notified to the Supplier within seven days of receipt of the Goods by the Customer; and
- b) the Supplier is given reasonable opportunity and time to investigate the claim.

## 12. SECURITY, RIGHT TO CAVEAT AND REGISTER A MORTGAGE

12.1 The Customer and/or the Guarantor(s) charge in favour of the Supplier, as security for the Customer's obligations to the Supplier, all rights, title and interest (whether a beneficial or legal interest owned jointly or alone, and as trustee or otherwise) in any property held by the Customer and/or the Guarantor(s) either alone or jointly with anyone or acquired by the Customer and/or the Guarantor(s) now or in the future.

12.2 For the purposes of this clause, 'property' shall include property owned by the beneficiaries of any trust where Goods have been supplied to the property and may have become affixed to and/or formed part of any structure on that property (which may include above or below ground services to the property). In signing these Terms of Credit the trustee(s) acknowledge that they have the express authority to bind the beneficiaries to this obligation, and that the provisions of Section 24 Property Law Act 2007 (or its amendments) are satisfied, and that the Supplier is not required to make any further investigation as to the trustee(s) authorisation to bind the beneficiaries to this obligation.

12.3 The creation of the charge is the creation of an agreement to mortgage which shall mean that at the Supplier's discretion it shall be entitled to register a mortgage ("the Mortgage"), such Mortgage to be in the form of an All Obligations Auckland District Law Society Memorandum of General Terms and Condition (or at the Supplier's discretion, any such equivalent form).

12.4 The Customer and/or the Guarantor(s) specifically authorise(s) the Supplier to lodge the Mortgage for registration or a caveat against any such property and appoint(s) the Supplier to be the Customer's and/or the Guarantor(s)

lawful attorney for this purpose to sign in the Customer's name and to do all things necessary to give effect to this clause.

### 13. CHANGE OF LEGAL ENTITY

13.1 The Customer will notify the Supplier in writing of any change in legal entity and the Customer will complete a new set of Transaction Documents for the new legal entity if requested by the Supplier.

### 14. ASSIGNMENT

14.1 The Supplier may at any time assign or transfer to any other person (including without limitation to a Related Company, whether or not acting as a Security Agent or security trustee of the security created under these Terms of Credit) all or any part of the Supplier's rights, remedies and obligations under these terms and any related or ancillary document including the other Transaction Documents without the Customer's consent. Each of the Supplier's assignees and transferees will have the same rights and remedies against the Customer as the Supplier has under these Terms of Credit and the other Transaction Documents. The Customer must not assign or transfer any of the Customer's rights or obligations under these Terms of Credit or the other Transaction Documents.

### 15. PRIVACY ACT

15.1 The Customer agrees that, from time to time, the Supplier may collect, hold and use the information for purposes relating to the application for credit, provision of credit, card assessment and debt recovery (including collecting information from, and disclosing information to, Related Companies, credit reporting agencies, debt collection agencies, trade referees and other third parties), to register any Security Interest and to provide you with marketing materials. Information disclosed to credit reporting agencies will be held and used by such agencies to provide credit reporting services (including supplying the information to other applicants who use their services). Under the Privacy Act, individuals have rights of access to, and correction of, their personal information. Personal information collected by the Supplier will be held by Comfortech™ at 810 Great South Road, Penrose, Auckland. To request access to your personal information contact The Privacy Officer, Fletcher Building, 810 Great South Road, Penrose.

15.2 The Customer authorises Fletcher Building to collect, hold and use information collected from the Customer, each such individual, and any other person or entity for any of the above purposes, and for such person or entity to disclose information to Fletcher Building, and also authorises Fletcher Building to disclose information to any person or entity for any of the above purposes and such person or entity to collect and use information from Fletcher Building.

### 16. AGREEMENT PRECEDENCE

16.1 These Terms of Credit will prevail against the Supplier's Terms of Sale to the extent of any inconsistency unless otherwise determined by the Supplier at its sole discretion.

### 17. ENTIRE AGREEMENT

17.1 These Terms of Credit, together with the other Transaction Documents, records the entire understanding and agreement of the parties relating to the supply of Goods and credit by the Supplier. These Terms of Credit, together with the other Transaction Documents, supersede all previous understandings or agreements (whether written or oral or both) between the parties relating to these matters.

### 18. GOVERNING LAW

18.1 These Terms of Credit will be governed by the laws of New Zealand. The Customer irrevocably agrees to submit to the non-exclusive jurisdiction of the New Zealand Courts.

### 19. DEFINED TERMS

**"Application Form"** means the Fletcher Building online credit application form

**"Collateral"** has the meaning given to it in the PPSA; **"Customer"** means the customer as legal entity and party to the Transaction Documents (including the Comfortech Building Performance Solutions™ Sale Terms and these Terms of Credit);

**"Enforcement Event"** has the meaning given to it in these Terms of Credit;

**"Fletcher Building"** means Fletcher Building Limited (including its related companies (as defined in the Companies Act 1993, including a "holding company" and a "subsidiary" as defined in that Act)

**"Force Majeure Event"** means any cause that prevents the affected party from performing any or all of its obligations under this agreement which arises from or is attributable to acts, events, omissions

or accidents beyond the reasonable control of the affected party. For the avoidance of doubt refusal or failure to pay does not amount of a Force Majeure Event.

**"Goods"** means any product or thing purchased from the Supplier, as listed in the Supplier's Terms of Sale which the Customer acknowledged on the Supplier's website;

**"G.S.T."** means any amounts levied or charged pursuant to the Goods and Services Tax Act 1985;

**"Guarantee"** means the guarantee as executed in the Transaction Documents;

**"Guarantor"** means the party listed as the Guarantor in the Guarantee;

**"PPSA"** means the Personal Property Securities Act 1999;

**"Receiver"** means any person appointed as a receiver or receiver and manager under these Terms of Credit or any Collateral security;

**"Related Company"** has the meaning given to it in the Companies Act 1993, and includes a "holding company" and a "subsidiary" as defined in the Companies Act 1993 and, when used in these Terms of Credit, will mean each Related Company of Fletcher Building Limited from time to time;

**"Security Interest"** has the meaning given to it in the PPSA;

**"Secured Money"** means all amounts from time to time due from the Customer to the Supplier including, without limitation, under these Terms of Credit (including, for the purposes of sections 71 and 72 of the PPSA, future advances under or in connection with these Terms of Credit or any related or ancillary documents);

**"Secured Property"** has the meaning given to it in these Terms of Credit;

**"Supplier"** means the applicable Fletcher Building Limited Related Company entity selected by the Customer in the Application Form as the supplier of credit and Goods to the Customer, and which the Customer acknowledged to be the supplier of the Goods in the Terms of Sale on that Related Company's website, as party to the Transaction Documents (including these Terms of Credit);

**"Transaction Documents"** means, together, these Terms of Credit, Guarantee, the Supplier's Terms of Sale (under which the Customer is supplied Goods and credit from time to time and which the Customer selected on the Supplier's website), Privacy Statement and Acknowledgement of Transaction Documents.

References to any legislation include that legislation as amended, and any replacement of that legislation, from time to time.

References to a time or time period applicable to the Customer's obligations are deemed to mean that the time or time period is of the essence

Headings do not form part of these Terms of Credit and are for convenience only