

BROWN & SYME HOLDINGS LTD
TERMS AND CONDITIONS OF TRADE

1. Parties And Definitions To This Agreement

1.1. "Brown & Syme" for the purposes of this agreement, shall mean Brown & Syme Holdings Limited, any person or entity acting for or on behalf of Brown & Syme Holdings Limited or with the permission or authority of Brown & Syme.

1.2. "Customer" shall mean the Customer, Client any person or entity acting for or on behalf of the Customer or with the permission or authority of the Customer as detailed on any quotation, estimate, work authority or notation as provided by Brown & Syme to the Customer.

1.3. "Guarantor" shall mean any person (or persons), or entity, who agrees to be held liable for the debts incurred by the Customer in the course of business between the Customer and Brown & Syme on a principal debtor basis.

1.4. "Services" shall mean all services supplied by Brown & Syme to the Customer and includes any recommendations or consultancy advice.

1.5. "Price" shall mean the price payable for the goods and or service as agreed between Brown & Syme and the Customer in accordance with clause 3 of this contract.

2. Goods And Services

2.1. The Goods and Services provided shall be described on our invoices, quotation, and/or work authorisation, or any other such form as provided by Brown & Syme (Brown & Syme Limited) to the Buyer.

3. Price And Payment

3.1. At Brown & Syme's sole discretion the Price shall be either:

(a) As indicated on invoices provided by Brown & Syme to the Client in respect of Works supplied; or

(b) Brown & Syme's quoted Price (subject to clause 3.2) which shall be binding upon Brown & Syme provided that the Client shall accept Brown & Syme's quotation in writing within thirty (30) days.

3.2. The brown & Syme reserves the right to change the Price in the

event of a variation to Brown & Syme's quotation. Any variation from the plan of scheduled Works or specifications (including, but not limited to, any variation as a result of additional Works required due to hidden or unidentifiable difficulties beyond the reasonable control of Brown & Syme) will be detailed in writing and charged for on the basis of Brown & Syme'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.

3.3. All invoices will be directed to the Customer and invoiced in the Customers Legal Name unless otherwise agreed in writing by Brown & Syme to invoice a third (3rd) party.

3.4. At Brown & Syme's sole discretion a deposit may be required.

3.5. The Brown & Syme may submit a detailed payment claim at intervals not less than one (1) month for Works performed up to the end of each month. The value of Works so performed shall include the reasonable value of authorised variations and the value of Materials delivered to the site but not yet installed. Progress payment shall be made within twenty (20) working days of each monthly payment claim.

3.6. At Brown & Syme's sole discretion:

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

(b) payment shall be due before delivery of the Works; or

(c) payment for approved Clients shall be made by instalments in accordance with Brown & Syme's payment schedule; or

(d) payment shall be due the twentieth (20th) day following the end of the month.

3.7. Time for payment for the Works shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due twenty (20) days following the end of the month in which a statement is posted to the Client's address or address for notices.

3.8. Payment will not be deemed to have been made until payment has been received in clear funds.

4. Acceptance Of Terms Of Trade

4.1. Any engagement of Brown & Syme's Services including the supply of goods to the Customer shall constitute acceptance of the Terms and Conditions of Trade of Brown & Syme by the Customer. Should more than one Customer enter into this agreement the Customers shall be jointly and severally liable for payment in full of the Price.

4.2. The Customer must be either the rightful legal owner or have the full authority of the legal owner of the Property or Land to enter into a contract or provide instructions to Brown & Syme to undertake work or provide goods or services.

4.3. The Terms and conditions of this agreement can only be amended with the written consent of Brown & Syme and shall be binding on the Customer.

4.4. In the event that the Customer proposes any change to the structure of the Customers business, a change in Shareholding, Name, Directors, Premises, postal address, registered office or Sale of the business the Customer shall give no less than twenty one (21) days written notice of the proposed change or changes. If any loss is incurred by Brown & Syme the Customer shall be liable for any loss suffered by Brown & Syme due to the Customer not complying with this provision.

5. Title to Goods

5.1. Ownership and Title of any goods supplied by Brown & Syme to the Customer shall not take effect until:

(a) The Customer has paid Brown & Syme all invoiced amounts owing for the Goods and fulfilled all obligations to Brown & Syme in relation to this agreement.

(b) Any form of payment made by the Customer to Brown & Syme other than cash shall not be deemed to be payment until that form of payment has been cleared in accordance with clause 3.7 and until then Brown & Syme's rights and ownership in relation to the Goods shall continue. It is also agreed that:

(c) Once an order for Goods or provision of Services is placed,

no order may be withdrawn, revoked or cancelled without Brown & Syme's written consent.

(d) If any part of the goods shall become incorporated into land so as to lose its separate identity then the title of that proportion of the goods so integrated equal in value to the price owed to the Company shall be reserved and vested in the Company until all money the Customer owes to the Company has been paid in full.

6. **Indemnity from Claims**

6.1. The Buyer warrants that no instruction, Design, Plan, Colour scheme or drawing provided to Brown & Syme will be misleading, infringe or result in the infringement of any copyright and or any intellectual property right of any person, and/or result in the breach of any law, statute, regulation or ordinance.

7. **Compliance with Laws**

7.1. Brown & Syme and the Customer shall comply with the provisions of all regulations and bylaws of government, local and other public authorities that may have any jurisdiction or authority to the works being undertaken..

7.2. The Customer shall obtain (at the expense of the Customer) all Permits and approvals that may be required for the works unless otherwise agreed in writing by Brown & Syme.

8. The Customer will ensure 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.

9. **Damage to site**

10. The Customer shall ensure that Brown & Syme has clear and free access to the work site at all times to enable them to carry out the works without delay. Brown & Syme will not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of Brown & Syme.

11. **Defects**

11.1. The Customer shall inspect the Goods and Services provided by

Brown & Syme and shall within seven (7) days of delivery (time being of the essence) notify Brown & Syme of any alleged defect, damage or failure to comply with the description or quote. The Customer shall afford Brown & Syme an opportunity to inspect the area serviced within a reasonable time following completion of the service provided if the Customer believes the Service provided is defective in any way. If the Customer shall fail to comply with these provisions the completed works shall be presumed to be free from any defect. For defective Works, Brown & Syme's liability is limited to undertaking remedial work on the agreed fault.

12. **Personal Property Securities Act 1999 ("PPSA")**

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 PPBL to the Customer (if any) and all Goods that will be supplied in the future by PPBL to the Customer.

The Customer undertakes to:

(c) Sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which PPBL may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;

(d) Indemnify, and upon demand reimburse, PPBL 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;

(e) Not register a financing change statement or a change

demand without the prior written consent of PPBL; and

(f) Immediately advise PPBL 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.

12.1. PPBL and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions. The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA. Unless otherwise agreed to in writing by PPBL, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA. The Customer shall unconditionally ratify any actions taken by PPBL under clauses 10.1 to 10.

13. **Warranty**

13.1. For Goods not supplied by Brown & Syme, the warranty shall be the current warranty provided by the manufacturer of the Goods. Brown & Syme shall not be responsible for or bound by any term, representation made, or warranty given other than that which is given by the manufacturer of the Goods or Product supplied or applied in the course of the work undertaken..

13.2. Subject to the warranty conditions as set out in Clause 13.1 Brown & Syme warrants that if any fault in any of Brown & Syme's workmanship comes to the Customer's attention and is reported to the Brown & Syme within twelve (12) months of the date of completion (time being of the essence) Brown & Syme will either (at the Brown & Syme's sole discretion) replace or remedy the defective workmanship.

14. **Default and Consequences of Non Payment**

14.1. If the Customer defaults in payment of any invoice when due, the Customer shall pay all costs and disbursements incurred by Brown & Syme in pursuing the debt including legal costs on a solicitor and own client basis and Brown & Syme's collection agency costs.

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14.2. Interest on overdue or unpaid invoices shall accrue from the date when payment becomes due daily until the date payment is received at a rate of 2.5% per calendar month and all interest shall compound monthly before and after any judgement until payment is received in full.

14.3. Brown & Syme at its discretion may suspend or terminate the supply of goods and/or services should the Customer, at any time be in breach of any obligation to Brown & Syme (including those relating to payment). Brown & Syme will not be liable for any loss or damages the Customer has deemed to have suffered because Brown & Syme has exercised its rights under this clause.

14.4. If any account remains overdue after thirty (30) days then an amount of \$20.00 or 10.00% of the amount overdue (up to a maximum of \$200) whichever is the greater, shall be charged for administration fees and shall become immediately due and payable.

14.5. Without prejudice to Brown & Syme other remedies at law, Brown & Syme shall be entitled to cancel all or any part of any supply agreement with the Customer which remains unfilled and all amounts owing to Brown & Syme shall, whether or not due for payment, become immediately payable in the event that:

- (a) any money payable to Brown & Syme becomes overdue of payment, or in Brown & Syme's opinion the Customer will be unable to meet its payments as they become due; or
- (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, liquidator, manager (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

15. **Right of Cancellation**

15.1. Brown & Syme may cancel any contract to which these Terms and Conditions apply or cancel the delivery of materials products or goods or Service at any time before the materials, goods, services alike are delivered by giving written notice to the Customer. On giving notice Brown & Syme shall repay to the Customer any sums paid in respect of the Price. Brown & Syme shall not be liable for any damages or losses arising from any such cancellation.

15.2. Should the Customer cancel any contract with Brown & Syme the Customer shall be liable for any loss incurred by Brown & Syme (including but not limited to loss of profits) up to the time of Cancellation.

16. **Security Agreement**

16.1. Despite anything to the contrary contained in these Terms and Conditions or any other rights which Brown & Syme may have:

- (a) Where the Customer and/or the Guarantor (if any) is the owner of land, realty, asset or property capable of being charged, the Customer and/or the Customers Guarantor agree to mortgage and/or charge all or any of their joint and/or several interest in the said land, realty, asset or property to Brown & Syme or Brown & Syme's nominee to secure all amounts and other monetary obligations due and payable under these terms and conditions. The Customer and/or the Guarantor acknowledge and agree that Brown & Syme (or Brown & Syme's nominee) shall be entitled to lodge where appropriate a caveat over the said land, realty asset or property. Once all payments and other monetary obligations payable to Brown & Syme hereunder have been met the caveat shall be removed.

- (b) The Customer and/or Guarantor shall indemnify Brown & Syme against all Brown & Syme's costs, any disbursements and any legal costs incurred on a solicitor client own basis in the event Brown & Syme elect to proceed in any manner in accordance with this clause and/or its sub-clauses.

- (c) The Customer and/or the Guarantor (if any) agree to

irrevocably appoint Brown & Syme's nominated attorney as the Customer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause.

17. **Privacy Act 1993**

17.1. The Customer and the Guarantor/s (if separate to the Customer) authorises Brown & Syme to:

collect, use and retain any information about the Customer, for the purpose of assessing the Customer's creditworthiness or marketing products and services to the Customer; and

Disclose information about the Customer, whether collected by Brown & Syme from the Customer directly or obtained by Brown & Syme from any other party, 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.

17.2. The Customer and/or Guarantors are individual authorities and under clause 17.1 are authorities or consents for the purposes of the Privacy Act 1993.

17.3. The Customer and/or Guarantors shall have the right to request Brown & Syme for a copy of the information about the Customer and/or Guarantors retained by Brown & Syme and the right to request Brown & Syme to correct any incorrect information about the Customer and/or Guarantors held by Brown & Syme.

18. **The Consumer Guarantees Act 1993**

18.1. If the Customer is acquiring Goods for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods and Services by BSNL to the Client.

19. **The Construction Contracts Act 2002**

19.1. The Customer hereby expressly acknowledges that:

- (a) Brown & Syme 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
 - (iii) the Customer has not complied with an adjudicator's notice that the Customer must pay an amount to Brown & Syme by a particular date; and
 - (iv) Brown & Syme has given written notice to the Customer of its intention to suspend the carrying out of construction work under the construction contract.
- (b) If Brown & Syme 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 Brown & Syme exercises the right to suspend work, the exercise of that right does not:
- (i) affect any rights that would otherwise have been available to Brown & Syme under the Contractual Remedies Act 1979; or:
20. Enable the customer to exercise any rights that may otherwise have been available to the customer under the Act as a direct consequence of Brown & Syme suspending work under this provision.
21. **Risk**
- 21.1. If Brown & Syme retains ownership of the Goods nonetheless, all risk for the Goods supplied passes to the Customer when the goods are delivered.
- 21.2. If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, Brown & Syme is entitled

to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by Brown & Syme is sufficient evidence of Brown & Syme's rights to receive the insurance proceeds without the need for any person dealing with Brown & Syme to make further enquiries.

Dispute Resolution

22. All disputes and differences between the Customer and Brown & Syme 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

General

23.1. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the existence, validity legality and enforceability of the remaining provisions shall not be prejudiced, affected or impaired.

23.2. 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 Nelson New Zealand.

23.3. Brown & Syme shall be under no liability whatever to the Customer for any indirect loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by Brown & Syme of these terms and conditions.

23.4. In the event of any breach of this contract by Brown & Syme the remedies of the Customer shall be limited to damages which under no circumstances shall exceed the contract price for Services provided and limited to the amount of monies paid to Brown & Syme by the Customer in Part or Full whichever is the lesser amount.

23.5. 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 Brown & Syme.

23.6. Brown & Syme may license or sub-contract all or any part of its rights

and obligations without the Customer's consent.

23.7. Brown & Syme reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which Brown & Syme notifies the Customer of such change.

23.8. The provisions of the Contractual Remedies Act 1979 shall apply to this contract as if section 15(d) were omitted from the Contractual Remedies Act 1979.

23.9. Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.

23.10. The failure by the Supplier to enforce any provision of these terms and conditions shall not be treated as a

23.11. waiver of that provision, nor shall it affect Brown & Syme's right to subsequently enforce that provision.