

WILTSHIRE HEAVY BUILDING MATERIALS STANDARD CONDITIONS OF SALE (READYMIX 12/16)

- 1 Definitions and Interpretation**
- 1.1 In these conditions the following words have the following meanings:
"Company" means Wiltshire Heavy Building Materials Ltd (Registered No: 04427023) whose registered office is at Hopton Park Industrial Estate, Devizes, Wiltshire, SN10 2EU.
"Contract" means any contract between the Company and the Customer for the sale of Goods, incorporating these Conditions;
"Customer" means the person(s), firm or company who purchases the Goods for the Company;
"Goods" means any goods agreed in the Contract to be supplied to the Customer by the Company (including any part or parts of them and pallets where applicable); and
"Group Company" means any subsidiary or holding company of the Company and the ultimate holding company of the Company and any subsidiary company of any of them (in each case from time to time) (and the terms "Subsidiary" and "Holding Company" shall have the meanings given to them by Sections 736 and 736A Companies Act 1985).
- 2 Basis of Contract**
- 2.1 Subject to any variation under Conditions 2.3 and/or 3.10 the Contract will be subject to these Conditions in the exclusion of all other terms and conditions (including any terms or conditions which the Customer purports to apply under any purchase order, confirmation of order, specification or other document whatsoever and whenever).
- 2.2 Each order for Goods by the Customer from the Company shall be deemed to be an offer by the Customer to purchase Goods subject to these Conditions. It is the Customer's obligation to ensure that the terms of its order and any applicable specifications are complete and accurate.
- 2.3 Subject to Conditions 2.10 and/or 3.10, any variation to these conditions and any representation about the Goods shall have no effect unless expressly agreed in writing and executed by a director of the Company.
- 2.4 No order placed by the Customer shall be deemed to be accepted by the Company until a written quote is issued by the Company or (if earlier) the Company commences manufacture or mixing the Goods, their appropriation to the Customer's order or despatch of the Goods to the Customer. Any order shall be accepted entirely at the discretion of the Company.
- 2.5 Any quotation or estimate made by the Company is given subject to these Conditions. Without prejudice to the Company's right not to accept an order, quotations will be valid for 60 days from date of issue.
- 2.6 Where the Company's written quote makes a reference to strength it is (unless otherwise agreed in writing) a reference to compressive strength assessed by:
(a) making and curing (in accordance with BS EN 12390) cubes from composite samples taken from a delivery at the time of discharge either from the truck making the delivery or (where collected by the Customer) from the Company's plant or from the Customer's vehicle.
(b) carrying out (also in accordance with BS EN 12390) compressive strength tests on such cubes; and
(c) interpreting (in accordance with BS EN 12390, BS8500 and BS EN 206-1) the result of such tests.
A reference to any other property and/or to the constituents of a delivery of Goods is (unless otherwise agreed in writing) a reference to such property and/or constituents as assessed by carrying out a test (or tests) in accordance with any appropriate BS (each test on fresh concrete to be carried out on samples of it taken in accordance with (a) of this Condition 2.6) and by interpreting the result (or results) on a basis agreed in writing.
- 2.7 All Goods are sold by reference to the Company's specification for those Goods in force at the date of the Company's acknowledgement of order.
- 2.8 The Customer can only cancel and order (or part of an order) which the Company has already accepted, with the Company's prior agreement in writing and providing that the Customer indemnifies the Company in full accordance with Condition 7.1.
- 2.9 Any advice or recommendation given by the Company or its employees or agents to the Customer or its employees or agents as the strength or use of the Goods by the Customer is followed or acted upon entirely at the Customer's own risk, such advice and/or recommendation should not be relied upon unless evidenced in writing and signed by a Director of the Company.
- 2.10 Any typographical, clerical or other error or omission in any sales literature, quotation, price list, acceptance of offer, invoice or other document or information issued by the Company shall be subject to correction without any liability on the part of the Company.
- 2.11 The description of the Goods shall be set out in the Company's acknowledgement of order or, in its absence, the Company's quotation.
- 2.12 All drawings, descriptive matter, specifications and advertising issued by the Company and any descriptions, details or illustrations contained in the Company's catalogues or brochures are issued or published for the sole purpose of giving an approximate idea of the Goods described in them and they will not form part of the Contract unless otherwise agreed in writing.
- 3 Delivery and Acceptance of Goods**
- 3.1 Unless otherwise agreed in writing by the Company delivery of the Goods shall take place at a discharge point agreed between the Customer and the Company in normal working hours.
- 3.2 The Customer shall provide and clearly indicate to the Company a safe and proper route from a metalled highway to the agreed discharge point.
- 3.3 Any dates or time of day specified by the Company for delivery of the Goods are intended to be an estimate only and time for delivery shall not be of the essence. If no dates or times are so specified, delivery will be within a reasonable time.
- 3.4 If for any reason the Customer does not accept delivery of any of the Goods within the sum of 10 minutes plus 5 minutes per cubic metre of Goods being delivered ("Delivery Time") of when the Goods arrive at the agreed discharge point the Company reserves the right to make a waiting time charge for the time in excess of the Delivery Time the delivery truck is kept waiting.
- 3.5 Where the Company is unable to deliver the goods on time because the Customer has not provided appropriate instructions, appropriate access to the discharge point, documents, licences or authorisation then the Goods will be deemed to have been delivered, risk passing to the Customer (including for loss or damage caused by the Customer's negligence) and the Company may be in its absolute discretion;
(a) sell the goods at the best price readily obtainable and (after deduction of all reasonable selling expenses) charge the Customer for any shortfall below the Contract price; or
(b) dispose of the Goods and charge the Customer for any costs incurred in doing this plus the contract price for the Goods.
- 3.6 The quantity of any consignment of Goods as recorded by the Company upon despatch from the Company's place of business shall be conclusive evidence of the quantity received by the Customer on delivery unless the Customer can provide conclusive evidence proving the contrary.
- 3.7 Given the nature of the Goods, the Customer will be deemed to have accepted the Goods as being in accordance with the Contract on signature of the delivery docket or on delivery, whichever is the earlier and the Customer shall be bound to pay the price as if the Goods had been delivered in accordance with the Contract.
- 3.8 At the anticipated time of delivery the Customer shall ensure that an authorised person is present at the agreed discharge point to accept the Goods and to sign the delivery docket.
- 3.9 The Customer shall ensure that all authorised person shall sign a delivery docket on delivery. By signing the delivery docket the Customer;
(a) acknowledges that the mix description set out on such delivery docket describes the Goods required by the Customer;
(b) authorises the addition to the Goods of water or any other materials and shall record this on the delivery docket;
(c) confirms the times of arrival of the truck at the agreed point of discharge and of completion of discharge; and
(d) acknowledges receipt of the delivery.
- 3.10 Where the Company complies with a request from the Customer or from a person reasonably believed by the Company to be acting on his behalf for a variation in the mix description of a delivery the Customer shall accept any consequential variation in the properties and/or the constituents of such a delivery.
- 3.11 Title and risk in the Goods shall pass on delivery.
- 3.12 The Company shall be entitled at its discretion to make delivery of the Goods by instalments and to invoice the Customer for each instalment individually. Where the Goods are to be delivered in instalments, each delivery shall constitute a separate contract and failure by the Company to deliver any one or more of the instalments in accordance with these Conditions or any claim by the Customer in respect of any one or more instalments shall not entitle the Customer to treat the Contract as a whole as repudiated or to refuse to accept subsequent instalments.
- 4 Price and Payment**
- 4.1 Unless otherwise agreed by the Company in writing the price for the Goods shall be the price set out in the Company's quotation, delivery or invoice documentation.
- 4.2 The Company reserves the right, by giving notice to the Customer at any time before delivery, to increase the price of the Goods to reflect any increase in the cost to the Company which is due to any factor beyond the control of the Company (including, without limitation, any increase in the costs of labour, materials, or other costs of manufacture or supply), any change in the quantities of the Goods requested by the Customer or any change in the delivery dates or location for the Goods requested by the Customer, or any delay caused by any instructions of the Customer or failure of the Customer to give the Company adequate information or instructions.
- 4.3 Unless otherwise agreed in writing the price for the Goods shall be inclusive of all costs or charges in relation to loading, unloading, carriage and freight. For the avoidance of doubt, this does not affect the Company's right to charge for delivery related charges as set out herein.
- 4.4 The price for the Goods shall be exclusive of value added tax and any other taxes, duties or levies and insurance all of which amounts the Customer will pay in addition when it is due to pay for the Goods.
- 4.5 The Company reserves the right to levy a "part load" charge, the amount to be determined by the Company upon request.
- 4.6 The Company reserves the right to make a charge for delivery of the Goods on the request of the Customer at a specific time or outside normal working hours.
- 4.7 Except where otherwise agreed by the Company or where the Company is a credit account holder, payment of the price for the Goods is due upon delivery of the Goods. Time for payment of the Goods shall be of the essence.
- 4.8 The Customer shall make all payments due under the Contract without any deduction whether by way of set-off, withholding, counterclaim, discount, abatement or otherwise.
- 4.9 The Company shall be entitled to apply any amount due to the Customer under this or any other agreement in or towards payment of any sum owing by the Customer to the Company in relation to any matter whatsoever.
- 4.10 If any sum due from the Customer to the Company under the Contract or any other contract is not paid on or before the due date for payment then all sums owing by the Customer to the Company shall become due and payable immediately and the Company shall be entitled to:
(a) cancel or suspend its performance of the Contract or any order including suspending deliveries of the Goods; and/or
(b) require the Customer to pay for Goods prior to their despatch or collection from the Company's place of business; and/or
(c) charge the Customer
(i) interest calculated on a daily basis on all overdue amounts (both before and after judgement) until actual payment at the statutory rate of interest for commercial debts prevailing from time to time until payment is made in full; and
(ii) the cost of obtaining judgement or payment to include all reasonable professional costs (including legal fees)
- 4.11 and other costs of issuing proceedings or otherwise pursuing a debt recovery procedure.
- 5 Warranty of Quality of Goods**
- 5.1 The Company gives no warranty that Goods will achieve a particular strength or will be fit for any particular purpose unless this has been expressly agreed between the parties to the Contract.
- 5.2 Subject to Conditions 5.3 and 5.4, if the Customer establishes to the Company's reasonable satisfaction that there is a defect in the Goods or there is some other failure in relation to the conformity of the Goods with the Contract, and such non-conformity is the fault of the Company, then the Company shall at its option, at its sole discretion and within a reasonable time:
(a) subject to the reasonable co-operation of the Customer, break up and remove the defective Goods free of charge to the Customer and replace such Goods with Goods which are in all respects in accordance with the Contract (including the cost of transporting the Goods to and from the Customer for that purpose); or
(b) issue a credit note to the Customer in respect of the whole or part of the Contract price of such Goods plus the reasonable costs of breaking and removing the defective Goods
(c) and performance of any one of the above options shall constitute an entire discharge of the Company's liability under this warranty.
- 5.3 The Company shall be under no liability under the warranty at Condition at 5.2 above:
(a) in respect of any defect arising from fair wear and tear, wilful damage, negligence, abnormal working conditions, failure to follow the Company's approval; and/or
(b) if the total price for the Goods has not been paid by the due date for payment; and/or
(c) if any Goods manufactured or appropriated to the Contract in accordance with any specification, instruction or recommendation made to the Company by the Customer; or
(d) in respect of any type of defect, damage or wear specifically excluded by the Company by notice in writing.
- 5.4 If the Customer believes that there is some defect or other non-conformance of the Goods with the Contract then the Customer shall give:
(a) written notification of such alleged defect to the Company which notice shall include details of such suspected non-conformance or defect and the precise location of where such Goods were placed as soon as such defect or non-conformance is suspected or discovered or ought to have been discovered but in any event within 40 days after delivery of the Goods within 7 days if the volume of Goods delivered do not correspond to the volume shown on the delivery docket; and
(b) the Company a reasonable opportunity to inspect the relevant Goods and, if so requested by the Company and, promptly return to the Company or such other person nominated by the Company a sample of the Goods within 14 days, carriage paid by the Customer, for inspection, examination and testing and/or otherwise permit the Company to have access to the Goods at the Customer's premises or other location where they may be for such purposes.
- 5.5 The warranties set out in this Contract are the only warranties which shall be given by the Company and all warranties, conditions and other terms implied by statute or common law are, to the fullest extent permitted by law, excluded from the Contract.
- 6 Exclusion and Limitation Liability**
- 6.1 The Company's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation or otherwise, arising in connection with the performance or contemplated performance of this Contract shall be limited to 20 times the price of the Goods.
- 6.2 The Company shall not be liable to the Customer (whether in negligence or otherwise) for any loss of profit or other economic loss (direct or indirect), indirect or consequential loss or damage, costs, expenses or other claims for consequential compensation whatsoever (howsoever caused) or loss or damage (contractual, tortious, breach of statutory duty or otherwise) which arises out of or in connection with the Contract, or for any liability incurred by the Customer to any other person for any economic loss, claim for damages or awards howsoever arising from the Goods or otherwise.
- 6.3 Nothing in these conditions excludes or limits the liability of the Company for death or personal injury caused by the Company's negligence, or for fraudulent misrepresentation.
- 7 Customers Indemnity**
- 7.1 The Customer irrevocably and unconditionally agrees to indemnify the Company, its employees, sub-contractors and agents in full and on demand and keep them so indemnified against all claims, demands, proceedings and all damages, losses, costs and expenses (including without limitation loss of profit, future revenue, reputation or goodwill and anticipated savings) whether direct or indirect made against or incurred or suffered by any of them directly or indirectly and whether wholly or part resulting from the matters listed below whether or not such losses or the consequences of the matters listed below were foreseeable at the date of the Contract
(a) the manufacture and sale of the Goods by the Company in accordance with the Customer's specification or other data or information furnished or instructions given by the Customer; and/or
(b) the cancellation of any order by the Customer after its acceptance by the Company in accordance with Condition 2.8; and/or
(c) any breach by the Customer of its obligations under the Contract; and/or
(d) any breach by the Company of its obligations under the Contract or any other act or omission (including, without limitation, negligence) of the Company, its employees and agents in excess of the liability of the Company under the Contract.
- 8 Subcontracting, Assignment and Third Party Rights**
- 8.1 The Customer shall not be entitled to assign, charge, subcontract or transfer the Contract or any part of it without the prior written consent of the Company
- 8.2 The Company may assign, charge, subcontract or transfer the Contract or any part of it to any person or Group Company. The Customer irrevocably consents to novation of the Company's rights and obligations pursuant to this Agreement to any Group Company.
- 8.3 A Group Company may enforce any term of the Contract, Save for the Group Companies, no person who is not a party to the Contract (including any employee, officer, agent, representative or sub-contractor of either party) shall have the right (whether under the Contracts (Rights of Third Parties) Act 1999 (the "Act") or otherwise) to enforce any term of the Contract which expressly or by implication confers a benefit on that person without the express prior agreement in writing of the Company and the Customer which agreement must refer to this Condition 8.3.
- 8.4 Even if a person who is not party to the Contract has a right to enforce any term of the Contract by virtue of Section 1 of the Act, the parties may, notwithstanding Section 2(i) of the Act, vary or cancel the Contract by agreement between them without requiring the consent of such third party.
- 9 Force Majeure (Greater Force)**
- 9.1 Force Majeure Event means any circumstance not within a party's reasonable control including, without limitation:
(a) acts of God, flood, drought, earthquake or other natural disaster;
(b) epidemic or pandemic;
(c) terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations;
(d) nuclear, chemical or biological contamination or sonic boom;
(e) any law, order, directive or action taken by a local or national government, regulatory body, or agency, including without limitation imposing an export or import restriction, quota or prohibition, failing to grant a necessary licence or consent, or restricting or disconnecting access to utility services such as electricity, water and gas;
(f) collapse of buildings, fire, explosion or accident;
(g) non-performance by suppliers or subcontractors; and
(h) restriction, disconnection, shortage, or reduction in the supply of power and/or any utility services.
- 9.2 If a Force Majeure is prevented, hindered or delayed in or from performing any of its obligations under this agreement by a Force Majeure Event, the Company shall not be in breach of the Contract or otherwise liable for any such failure or delay in the performance of such obligations.
- 10 Breach of Contract or Insolvency**
- 10.1 The Company may immediately suspend performance of the Contract, cancel any outstanding delivery of the Goods, stop any Goods in transit by notice in writing to the Customer terminate the Contract without liability to the Company if:
(a) the Customer commits a material breach of any of its obligations under the Contract which is incapable of remedy or fails to remedy any breach of its obligations under the Contract which is capable of remedy, or persists in any breach of any of its obligations under the Contract after having been requested in writing by the Company to remedy or desist from such breach within a period of 14 days;
(b) the Customer enters into bankruptcy, individual voluntary arrangement as defined by the Insolvency Act 1986; any sum payable under the Contract is not paid within 7 days of its due date for payment in accordance with this contract.
- 10.2 Notwithstanding any such termination in accordance with Condition 10.1 above the Customer shall pay the Company for all Goods delivered up to and including the date of suspension or termination.
- 10.3 Termination of the Contract for any reason shall be without prejudice to the rights and remedies of either party which may have accrued up to termination.
- 11 General**
- 11.1 Nothing in the Contract shall create, or be deemed to create a partnership or joint venture or relationship of employer and employee or principal and agent between the parties.
- 11.2 The waiver by either party of any breach of the Contract shall not prevent the subsequent enforcement of that breach and shall not be deemed to be a waiver of any subsequent breach of that or any other provision.
- 11.3 If at any time one or more of the Conditions or part of them of the Contract is to be held to be or becomes void or otherwise unenforceable for any reason under any applicable law, the same shall be deemed omitted from the Contract and the validity and/or enforceability of the remaining provisions of the Contract shall not in anyway be affected or impaired as a result of that omission.
- 11.4 Any communication between the parties relating to the obligations of the Contract must be in writing and delivered by hand (when delivery shall be deemed to be the day of delivery) or sent by pre-paid first class post (when delivery shall be deemed to be 48 hours after posting) or send by fax (when delivery shall be deemed to be the time of transmission provided that any normal confirmation fax communication shall have been received), to the address, or such change of address as shall be notified to either party by the other.
- 11.5 The Contract sets out the entire agreement and understanding between the Customer and the Company in connection with the sale of the Goods and shall supersede and replace all documentation previously issued by the Company purporting to set out its terms and conditions of sale of the Goods.
- 11.6 This Contract shall be governed by and be construed in all respects in accordance with English law and all disputes or claims arising out of or relating to this Contract shall be subject to the exclusive jurisdiction of the English courts to which the parties irrevocably submit.