

TERMS AND CONDITIONS OF SALE

1. DEFINITIONS

2. In these Sale Terms:

- "We" and "Us" means James Wilby Builders Merchant Limited and its employees and agents and "Our" shall be interpreted accordingly
- "You" means the person their employees and agents seeking to purchase Goods from Us and "Your" shall be interpreted accordingly
- "the Goods" means the goods and/or services to be supplied by Us.
- "the Terms" means these terms and any special terms agreed in writing between You and Us.
- "the Contract" means the contract for the supply of Goods incorporating these Terms.

THESE TERMS DO NOT APPLY IF YOU ARE A CONSUMER FOR THIS PURPOSE A CONSUMER MEANS ANY NATURAL PERSON ACTING FOR PURPOSES OUTSIDE HIS TRADE BUSINESS OR PROFESSION

HEALTH & SAFETY INFORMATION ABOUT THE USE OF THE GOODS IS PROVIDED AND IT IS YOUR RESPONSIBILITY TO BRING THIS TO THE ATTENTION OF THE USER OF THE GOODS. **THE CONTRACT**

- 2.1 All orders are accepted by Us only under these Terms and they may not be altered without Our written agreement. Any contrary or additional terms unless so agreed are excluded.
- 2.2 Quotations are invitations to treat only and shall lapse 30 days from their date.
- 2.3 You shall be responsible to Us for ensuring the accuracy of the terms of any order including any applicable design drawing or specification provided by You and for giving Us any necessary information relating to the Goods within a sufficient time to enable Us to perform the Contract in accordance with its Terms.
- 2.4 2.4.1. We shall not be liable in respect of any misrepresentation made by Us to You as to the condition of the Goods their fitness for any purpose or as to quantity or measurements unless the representation is:
- 2.4.1.1 made or confirmed in writing by Us; and/or
- 2.4.1.2 fraudulent.
- 2.4.2 Without prejudice to clause 2.4.1 of these Terms while We take every precaution in the preparation of Our catalogues technical circulars price lists and other literature these documents are for Your general guidance only and statements made therein (in the absence of fraud on Our part) shall not constitute representations by Us and We shall not be bound by them. If You require advice in relation to the Goods a specific request for advice should be made and any advice made or confirmed in writing in response to such a request shall amount to a representation and We shall be liable accordingly.

3. PRICE

- 3.1 Our quotations and prices are based on costs prevailing at the time when they are given or agreed. We shall be entitled to adjust the price of the Goods as at the time of delivery by such amount as may be necessary to cover any increase sustained by Us after the date of acceptance of Your order and any direct or indirect costs of making obtaining handling or supplying the Goods.
- 3.2 Prices quoted are applicable to the quantity specification delivery dates and information provided by You. If the order placed varies or delay is caused by Your instructions or lack of instructions We shall be entitled to adjust the price.

4. PAYMENT

- 4.1 Unless the sale is for cash or other credit terms have been agreed in writing all accounts are due for payment on the last day of the month following the month in which the Goods are delivered.
- 4.2 We reserve the right to refuse to execute any order or contract if the arrangements for payment are or Your credit is not satisfactory to Us and in our sole discretion We may require payment for each consignment when it is available and before it is despatched in which case delivery will not be effected until We are in receipt of cleared funds.
- 4.3 You may not withhold payment of any invoice or other amount due to Us by reason of any right of set off or counterclaim which You may have or allege to have for any reason whatever.
- 4.4 We shall be entitled at all times to set off any debt or claim of whatever nature which We may have against You against any sums due from Us to You.

5. DELIVERY

- 5.1 Delivery will be effected when the Goods leave Our premises or the premises of Our suppliers when the Goods are delivered direct from suppliers to You.
- 5.2 Delivery dates are given in good faith but are estimates only.
- 5.3 Unless otherwise agreed time for delivery shall not be of the essence of the Contract.
- 5.4 We shall not be liable for any loss damages costs or expenses of any kind whatsoever whether direct or indirect (including for the avoidance of doubt any liability to any third party) resulting from any delay in delivery of the Goods or failure to deliver the Goods in a reasonable time.
- 5.5 If We fail to deliver the Goods Our entire liability shall be limited to the excess (if any) over the price of the Goods, of the cost to You (purchasing in the cheapest market reasonably available to You) of similar goods to replace those not delivered.
- 5.6 If You fail to take or make arrangements to accept delivery or collect the Goods or if We are unable to deliver because of inadequate access or instructions delivery shall be deemed and We may do any one or more of the following (without prejudice to any other right or remedy We may have):
- (a) make additional charges for failed delivery
- (b) store the Goods at Your risk and costs
- (c) invoice You for the Goods
- (d) terminate this Contract without liability on Our part
- (e) recover from You all costs and losses incurred by Us
- 5.7 We reserve the right to make delivery by instalments and tender a separate invoice in respect of each instalment. Any claim which You may have in respect of one instalment shall not affect Your liability in respect of any other instalment.
- 5.8 Unless otherwise stated all quotations and estimates assume delivery in full loads. We reserve the right to levy additional charges for deliveries by instalments where requested by You.
- 5.9 The price agreed includes the cost of delivery on week days and Saturday mornings during normal working hours. An additional charge will be made if We agree to Your request to deliver outside normal working hours, Saturday afternoons, Sundays and/or Bank Holidays.
- 5.10 You must provide the necessary labour for unloading the Goods and unloading is to be completed with reasonable speed. If Our delivery vehicle is kept waiting for an unreasonable time or is obliged to return without completing delivery or if We provide additional staff to unload Goods an additional charge will be made.
- 5.11 We shall deliver the Goods as near as possible to the delivery address as a safe hard road permits. We reserve the right to refuse to deliver the Goods to premises considered in the discretion of the driver to be unsuitable.
- 5.12 If Goods are to be deposited other than on Your private premises You shall be responsible for compliance with all regulations and for all steps which need to be taken for the protection at all times of persons or property and will

- indemnify Us in respect of all losses damages costs and expenses We may incur as a result of such delivery whether on the public highway or elsewhere.
- 5.13 You will indemnify Us in respect of all losses damages costs and expenses incurred as a result of delivery in accordance with Your instructions. This indemnity will be reduced in proportion to the extent that such losses damages costs or expenses are due to Our negligence.
- 6. INSPECTION**
- 6.1 You shall inspect the Goods at the place and time of unloading but nothing in these Terms shall require You to break packaging and/or unpack Goods which are intended to be stored before use.
- 6.2 6.2.1 You must give us written notice within 2 working days of unloading of any claim for short delivery.
- 6.2.2 If You do not give Us that notice within that time the Goods will be deemed to have been delivered in the quantities shown in the delivery documents.
- 6.2.3 You shall not be entitled and irrevocably and unconditionally waive any right to reject the Goods or claim any damages whatsoever for short delivery howsoever caused.
- 6.2.4 Our liability for short delivery is limited to making good the shortage.
- 6.3 6.3.1 Where it is or would have been apparent on a reasonable inspection that the Goods are not in conformity with the Contract or (where the Contract is a contract for sale by sample) that the bulk does not compare with the sample You must give Us written notice within 2 working days.
- 6.3.2 If You fail to give us that notice within that time the Goods will be deemed to have been accepted and You shall not be entitled and irrevocably and unconditionally waive any right to reject the Goods.
- 7. TITLE AND RISK**
- 7.1 Risk in the Goods shall pass to You when the Goods are delivered.
- 7.2 The title to the Goods shall remain with Us until You pay the price of the Goods and any other sums outstanding between You and Us whether in respect of this Contract or otherwise.
- 7.3 Until title passes:-
- 7.3.1 You shall hold the Goods as Our fiduciary agent and bailee
- 7.3.2 the Goods shall be stored separately from any other goods and You shall not interfere with any identification marks labels batch numbers or serial numbers on the Goods
- 7.3.3 We agree that You may use or agree to sell the Goods as principal and not as Our agents in the ordinary course of Your business subject to the following express conditions
- (a) that the entire proceeds of any sale or insurance proceeds received in respect of the Goods are held in trust for Us and not mixed with any other monies or paid into an overdrawn bank account and shall at all times be identifiable as Our money;
- (b) that You notify Your customer that We remain the legal owner of the Goods until We receive payment in accordance with Clause 7.2 and We reserve the right to label the Goods accordingly;
- (c) that You will at Our request and at Your expense assign to Us all rights You may have against Your customer; and
- (d) that Your right to use or sell the Goods may be withdrawn by Us on notice at any time and will automatically cease if You become Insolvent.
- 7.3.4 If the Goods are to become affixed to any land or building You must ensure that they are capable of removal without material injury to the land or building and You shall take all necessary steps to prevent title to the Goods from passing to the owner or landlord of such land or building.
- 7.4 We shall be entitled to recover the price of the Goods including VAT even though the property in any of the Goods remains with Us.
- 7.5 We shall be entitled at any time to recover any or all of the Goods to which We have title and for that purpose We may with such transport as is necessary enter upon any premises occupied by You or to which You have access and where the Goods may be or are believed to be situated.
- 8. RESPONSIBILITIES**
- 8.1 Nothing in these Terms shall exclude or restrict Our liability for death or personal injury resulting from Our negligence or Our liability for fraudulent misrepresentation.
- 8.2 We are willing to undertake liability in addition to that provided by these Terms if a higher selling price for the Goods is agreed.
- 8.3 If You deal as a consumer as defined by the Unfair Contract Terms Act 1977 ("a Consumer") any provision of these Terms which is of no effect shall not apply. The statutory rights of a Consumer are not affected by these Terms.
- 8.4 In this clause "Defect" shall mean the condition and/or any attribute of the Goods and/or any condition or other circumstances which but for the effect of these Terms would have entitled You to damages.
- 8.5 Subject to Clauses 8.1 to 8.3 of these Terms We shall not be liable by reason of any misrepresentation (unless fraudulent) or any breach of warranty condition or other term express or implied or any breach of duty (common law or statutory) or negligence for any loss damages costs or expenses of any kind whatsoever. Instead of liability in damages We undertake liability under Clause 8.6 below.
- 8.6 Where but for the effect of Clause 8.5 of these Terms You would have been entitled to damages against Us We shall not be liable to pay damages but subject to the conditions set out in Clause 8.7 below shall in Our sole discretion either repair the Goods at Our own expense or supply replacement Goods free of charge or refund all (or where appropriate part) of the price paid for the relevant Goods.
- 8.7 We will not be liable under Clause 8.6:
- (a) if the Defect would have been apparent on a reasonable inspection under Clause 6.1 of these Terms at the time of unloading unless You give Us written notice within 2 working days of the time of unloading;
- (b) unless the Defect is discovered within 1 months from the date of delivery and We are given written notice of the Defect within 2 working days of it being discovered;
- (c) if the Defect arises from fair wear and tear;
- (d) if the Defect arises from Your wilful damage negligence abnormal working conditions mis-use alteration or repair of the Goods failure to follow British Standard or industry instructions relevant to the Goods or storage of the Goods in unsuitable conditions; or
- (e) unless after discovery of the Defect We are given a reasonable opportunity to inspect the Goods before they are used or in any way interfered with. We acknowledge that the costs of suspending works are relevant to the determination of what is a reasonable opportunity and this sub-clause shall not apply to any works affecting the Goods which it may be reasonably necessary to carry out in the interests of safety and/or as emergency measures.
- 8.8 If the Goods are not manufactured by Us or have been processed or milled by a third party whether or not at Our or Your request Our liability in respect of any defect in workmanship or materials of the Goods will be limited to such rights against the manufacturer or the third party as We may have in respect of the Goods. We will on written request provide details of Our rights against the manufacturer or third party and any other terms and conditions imposed by the manufacturer or the third party and so far as possible will on request assign to You any such rights.
- 8.9 If the Goods are manufactured processed or milled by Us to the design quantity measurement or specification of You then:

- 8.9.1 Subject to Clauses 8.1 to 8.3 of these Terms We shall not be under any liability for any loss damages costs or expenses of any kind whatsoever or under Clause 8.6 of these Terms as the case may be except in the event of:
- (a) fraudulent misrepresentation;
 - (b) misrepresentation where the representation was made or confirmed in writing;
 - (c) non-compliance with such design quantity measurement or specification; or
 - (d) breach of a written warranty by Us that the Goods are fit for that purpose.
- 8.9.2 You will unconditionally fully and effectively indemnify Us against all losses damages costs on an indemnity basis and expenses awarded against or incurred by Us in connection with or paid or agreed to be paid by Us in settlement of any claim:-
- (a) for infringement of any patents copyright design trademark or any other industrial or intellectual property rights of any other person; and/or
 - (b) arising from any such manufacturing processing or milling including but not limited to any Defect in the Goods.
- This indemnity will be reduced in proportion to the extent that such losses damage costs and expenses are due to Our negligence.
- 8.10 Subject to Clauses 8.1 to 8.3 of these Terms We shall not be liable for misrepresentation (unless fraudulent) or in contract tort (including negligence or breach of statutory duty) or otherwise howsoever and whatever the cause for:
- (a) any loss of profit, business, contracts, revenues or anticipated savings; or
 - (b) any special, indirect or consequential damage of any nature whatsoever.
- 8.11 You will unconditionally fully and effectively indemnify Us against all losses damages costs on an indemnity basis and expenses awarded against or incurred by Us in connection with or paid or agreed to be paid by Us in settlement of any claim by any third party arising from the supply or use of the Goods including loss arising from Our negligence. This indemnity will be reduced in proportion to the extent that such losses damages penalties costs and expenses are due to Our negligence.
- 8.12 Without prejudice to any other provisions in these Terms in any event Our total liability for any one claim or for the total of all claims arising from any one act of default on Our part (whether arising from Our negligence or otherwise) shall not exceed [the purchase price of the Goods the subject matter of any claim]
- 9. NON-PAYMENT/INSOLVENCY**
- 9.1 "Insolvent" means You becoming unable to pay Your debts within the meaning of Section 123 (Company) or Section 268 (Individual) of the Insolvency Act 1986; the levying or the threat of execution of distress on any of Your property; notice of intention to appoint or the appointment of a receiver, administrative receiver or administrator over all or any part of Your property; a proposal for a voluntary arrangement or compromise between You and Your creditors whether pursuant to the Insolvency Act 1986 or otherwise; the passing of a resolution for voluntary winding-up or summoning a meeting to pass such a resolution otherwise than for the purposes of a bona fide amalgamation or reconstruction; the presentation of a petition for Your winding-up (Company) or bankruptcy (Individual) or for an administration order in relation to You; if You suffer any analogous step or proceedings under foreign law or You ceasing to pay Your debts in the ordinary course of business or ceasing or threatening to cease to carry on Your business.
- 9.2 If You fail to pay any invoice or any sum due to Us under any contract on the due date or You become Insolvent or if there is a material change in Your constitution or You commit a material breach of this Contract and fail to remedy that breach all sums outstanding between You and Us shall become immediately due and payable and We shall be entitled to do any one or more of the following (without prejudice to any other right or remedy We may have):-
- 9.2.1 require payment in cleared funds in advance of further deliveries;
 - 9.2.2 cancel or suspend any further deliveries to You under this or any other contract without liability on Our part;
 - 9.2.2 claim interest and compensation on the sums outstanding pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 from the due date until payment is received after as well as before judgment;
 - 9.2.4 without prejudice to the generality of Clause 7 of these Terms exercise any of Our rights pursuant to that clause; and/or
 - 9.2.5 terminate this or any other contract with You without liability on Our part.
- 9.3 You shall reimburse Our costs including legal costs on an indemnity basis which We incur in enforcing this Contract including but not limited to recovery of any sums due. Such sums shall be in addition to statutory compensation payable.
- 10. DATA PROTECTION**
- 10.1 If You are an individual or a group of individuals You agree that We may:-
- 10.1.1 Seek, hold and process any information obtained about You as a result of applications You have made to Us for credit and/or in connection with this or any other contractor agreement You may have with Us.
 - 10.1.2 Use this information for credit assessment purposes and to administer and operate the credit account granted to you and to monitor and analyse the conduct of that credit account and to assess your credit limit.
- 10.2 We will not disclose any information we hold about You except to licensed credit reference agencies, other suppliers and creditors to help us and others make credit decisions, to help prevent or detect fraud or other crimes and to trace debtors, on a confidential basis to our agents and sub-contractors, to insurance companies for the purposes connected with insurance products that relate or might relate to your credit account, to any person to whom we propose to transfer our rights and/or responsibilities under this Contract and to the extent we are required or permitted to do so by law.
- 10. GENERAL**
- 11.1 This Contract shall be governed and interpreted exclusively according to the Law of England and Wales and You agree to submit to the non exclusive jurisdiction of the English Courts.
- 11.2 We shall not be liable for any breach of contract delay or failure to perform any of Our obligations if the breach delay or failure was due to any cause beyond Our reasonable control including industrial action.
- 11.3 The waiver by Us of any breach or default of these Terms shall not be construed as a continued waiver of that breach nor as a waiver of any subsequent breach of the same or any other provision.
- 11.4 If any clause or sub-clause of these terms is held by a competent authority to be invalid or unenforceable the validity of the other clauses and subclauses of these Terms shall not be affected and they shall remain in full force and effect.
- 11.5 If the Housing Grants, Construction and Regeneration Act 1996 Part II applies to this Contract the Scheme under that Act shall apply and take precedence in the event of conflict between the Scheme and these Terms.
- 11.6 Any reference in these Terms to any Statute, Statutory Provision or Regulation includes a reference to that Statute, Statutory Provision or Regulation as amended extended or re-enacted at the relevant time.
- 11.7 The headings of these Terms are for convenience only and shall not affect their interpretation.
- 11.8 Termination of this Contract shall not affect rights and obligations which have already accrued at the time of termination.

- 10.9 Nothing in these terms or the Contract is intended to or will create any benefit for or right to enforce any of the terms of the Contract to any third party.
- 11.10 This Contract contains the whole agreement between You and Us in respect of the supply of Goods to You and supersedes any prior written or oral agreement between You and Us relating to it and You confirm that You have not entered into this Contract on the basis of any representations that are not expressly incorporated in this Contract. Nothing in this Contract purports to exclude liability for any fraudulent statement or act.



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