

Please in particular note Clause 5.4 (Additional Charges) and Clause 9 (Limitation of Liability)

1. DEFINITIONS AND INTERPRETATION

1.1 "Additional Charges" means the additional charges provided for in Clause 5.4 (Additional Charges); "Conditions" means the conditions set out in this document and includes any special terms and conditions expressly agreed in writing between the Seller and the Customer; "Consumer" has the meaning given to it by the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contract Regulations 1994; "Contract" means the contract between the Seller and the Customer for the supply and purchase of Materials which includes these Conditions; "Customer" means the person, firm or company who has agreed to purchase the Materials from the Seller as set out on the Order; "Delivery Ticket" means the proof of delivery/collection ticket to be signed by the Customer and returned to the Seller setting out various details including the Customer's details and a description of the product type and quantity, delivery date and purchase order number; "Destination" means the site and the point of unloading to which the Materials are to be delivered as set out in the Order (or such other location as the parties may agree); "the Seller" means Burton Brothers Ltd of Gate Farm Bourton Rugby Warwickshire CV239QX; "Losses" means any damages whatsoever whether direct, indirect or consequential (including any liability to any third party, pure economic loss, loss of profits, loss of business and loss of goodwill), costs (including legal costs), charges or expenses; "Materials" means the goods to be supplied by the Seller as set out in the Order; "Minimum Loads" means, for readymix concrete, 6 cubic metres and, for all other Materials, 20 tonnes; "Order" means the Customer's order for the Materials, as set out in the Customer's purchase order form, the Customer's written acceptance of the Seller's quotation, the Customer's verbal confirmation or overleaf, as the case may be; "Price" means the amount payable by the Customer to the Seller pursuant to the Contract in respect of the supply of the Materials (as detailed by Clause 3 (Price)); "Specification" means any specification for the Materials, including any related plans and drawings, that is agreed by the Customer and the Seller.

1.2 A reference to a particular law is a reference to it as it is in force for the time being (taking account of any amendments, extension, application or re-enactment and including any subordinate legislation for the time being in force made under it).

1.3 These Conditions shall apply to any replacement Materials supplied by the Seller under a Contract.

2. FORMATION OF CONTRACT, QUOTATIONS AND ORDERS

2.1 All Materials sold by the Seller shall be subject to these Conditions and any Contract shall be on the basis of these Conditions to the exclusion of all other terms and conditions that the Customer seeks to impose or incorporate, or which are implied by trade, custom, practice or course of dealing.

2.2 Any samples, drawings, descriptive matter, or advertising produced by the Seller and any descriptions or illustrations contained in the Seller's catalogues or brochures are produced for the sole purpose of giving an approximate idea of the Materials described in them. They shall not form part of the Contract or be treated as a description of the Materials unless expressly stated in writing as doing so in the Contract. No Materials are sold by sample.

2.3 The Order constitutes an offer by the Customer to purchase the Materials in accordance with these Conditions.

2.4 The Customer is responsible for ensuring that the terms of the Order and any applicable Specification are complete and accurate.

2.5 The Order shall be deemed to be accepted, and the Contract shall come into existence on the earlier of the Seller either:

- issuing a written acceptance of the Order; or
- commencing preparation for delivery of the Materials to the Destination.

2.6 Any quotation or estimate issued by the Seller may be withdrawn at any time before acceptance of an Order and shall be deemed to be withdrawn if an Order is not received within 30 days of its date.

2.7 A quotation or estimate given by the Seller does not constitute an offer to supply.

2.8 The Seller may make any changes to the Specification which are required to meet any applicable statutory or EU requirements or which do not materially affect their quality and performance.

3. PRICE
3.1 The Price is the price set out in the Seller's latest price list on the date of dispatch or as otherwise agreed between the parties in writing. Prices quoted are not fixed unless agreed in writing by the Seller.

3.2 The Price is exclusive of Value Added Tax, any other applicable tax and of any Additional Charges, all of which shall be invoiced to the Customer.

3.3 The Price is inclusive of the Aggregates Levy at the appropriate rate (if applicable).

4. PAYMENT

4.1 The Seller may invoice the Customer on or at any time after the delivery of the Materials.

4.2 The Customer shall pay the Seller's invoices in pounds sterling and in cleared funds. Payments shall be made within 30 days from the date of the invoice.

4.3 Time for payment shall be of the essence and all payments payable to the Seller under the Contract shall become due immediately on its termination.

4.4 The Customer shall make all payments due under the Contract without deduction for set off, counterclaim, abatement or otherwise.

4.5 The Seller reserves the right in its absolute discretion at any time to demand reasonable security for payment or to insist upon payment by way of cleared funds for Materials before delivery.

5. DELIVERY
5.1 The Customer shall ensure that the Seller has reasonable prior notice (a minimum of 48 hours) of the required time and date of delivery/collection and, where the Materials are being delivered, that the Seller (or its agent) is given sufficient particulars of the Destination.

5.2 Delivery will be deemed to have taken place when, at the Seller's option unless otherwise agreed between the parties:

- The Seller notifies the Customer that the Materials are available for collection;
- the Materials arrive at the Destination; or
- delivery of the Materials is attempted by the Seller and the Seller is unable to deliver because the Customer re-directs a delivery, fails to take or provide a suitable or safe environment for a delivery (in whole or in part), fails to give the Seller adequate delivery instructions or fails to obtain appropriate licences or authorisations.

5.3 The Seller may deliver by instalments and tender a separate invoice for each instalment. Each delivery shall be a separate Contract and failure by the Seller to deliver any one or more of the instalments or any claim by the Customer in respect of any one or more instalments shall not entitle the Customer to terminate or rescind any individual Contract.

5.4 Without prejudice to any other rights or remedy available to the Seller an additional charge may be made if:

- the Customer incurs any of the additional charges set out on the relevant Seller quotation;
- the Customer requires delivery of Materials in quantities less than the Minimum Loads, of two different types of Materials on one vehicle or outside the core hours of 0630 and 1430 Monday to Friday (excluding public holidays);
- the Customer re-directs a delivery;
- the Customer fails to take delivery;
- the Customer delays the collection of Materials;
- the Customer fails to provide a suitable or safe environment for a delivery (in whole or in part);
- the Customer fails to give the Seller adequate delivery instructions;
- the Customer fails to obtain any appropriate licences or authorisations;
- unloading of the delivery vehicle is delayed for more than 30 minutes after the Seller is ready to unload or in the case of readymix concrete is not completed within 30 minutes of arrival at the Destination;
- delivery cannot be effected because of unsuitable access at the Destination;
- unused Materials are returned to the Seller for disposal; or
- the Seller provides day work services to the Customer.

Details of these charges are available on request.

5.5 The Customer must provide convenient and safe access to the Destination and the Seller shall be entitled to refuse to deliver over roads or over ground which it considers unsuitable. The Customer shall be liable if it shall fully indemnify the Seller against any Losses arising from any accident or damage occurring due to unsuitable access.

5.6 If the Materials are to be deposited on a street or public highway the Customer is 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 shall fully indemnify the Seller in respect of all Losses which the Seller may incur as a result of such delivery.

5.7 Dates and times quoted for delivery are approximate only. The Seller shall not be liable for Losses resulting from any delay in delivery of the Materials or failure to deliver the Materials within three working days whether such delay or failure is caused by the Seller's negligence or otherwise. The Customer may terminate the Contract immediately by written notice at the end of that period of three working days.

5.8 Subject to Clause 9.3 (Limitation of Liability), should the Customer not terminate the Contract under Clause 5.7 above then any liability of the Seller for continued non-delivery shall be limited to either (at the Seller's discretion):

- replacing the Materials within a reasonable time; or
- issuing a credit note for a reasonable percentage of the Price.

6. INSPECTION AND SHORTAGES

6.1 The Seller shall use reasonable endeavours to supply the quantity of Materials provided for by the Contract.

6.2 Subject to Clause 6.5 below, if the Customer has a claim for short delivery it must telephone the Seller as soon as reasonably practicable and shall then advise the Seller in writing within 48 hours of delivery (the "Notice Procedure") of such a claim.

6.3 If the Notice Procedure is not followed the Materials will be deemed to have been delivered in the quantities shown on the Delivery Ticket or, where there is no Delivery Ticket containing such details, the quantities shown on the consignment note, and the Customer shall not be entitled to make a claim in respect of alleged shortfall in the Materials.

6.4 Subject to Clauses 6.2 and 6.3 above and 9.3. (Limitation of Liability), the Seller's liability for any shortfall is limited to either (at its discretion):

- making good the shortfall within a reasonable time; or
 - issuing a credit note for a reasonable percentage of the Price.
- 6.5 The Customer shall not in any case be entitled to reject the Materials if the Seller delivers up to and including 5% more or less than the quantity of Materials ordered, and the Customer accepts the delivery, a pro rata adjustment shall be made to the invoice for the Materials.

7. RISK AND TITLE

7.1 Risk in the Materials shall pass to the Customer on delivery as provided for in Clause 5.2 (Delivery).

7.2 Ownership of the Materials shall not pass to the Customer until the Seller has received payment in cleared funds:

- of all sums owed by the Customer to the Seller under the Contract; and
- for any other goods or services that the Seller has supplied to the Customer in respect of which payment has become due.

7.3 Until ownership passes to the Customer the Customer shall:

- hold the Materials as the Seller's fiduciary agent and Bailee;
- keep (at no cost to the Seller) the Materials separately and safely stored, satisfactorily protected and identified as the Seller's property; and
- only be entitled either to re-sell the Materials at full market value or use the Materials in the ordinary course of its business. For the avoidance of doubt it shall not be considered the "ordinary course of business" for the Customer to trade while subject to any of the matters or events described in Clause 11 (Default).

7.4 The Seller shall be entitled to recover payment for the Materials (including VAT, other taxes and Additional Charges) even though the ownership of any of the Materials has not passed from the Seller.

7.5 The Seller shall be entitled at any time to inspect or recover any or all of the Materials in the Customer's possession to which the Seller has title and for that purpose the Customer permits the Seller or its servants or agents to enter upon any premises occupied by the Customer or to which the Customer has access and where the Materials may be, or are believed to be, situated.

7.6 On termination of the Contract the Seller's rights in this Clause 7 shall remain in effect.

8. QUALITY

8.1 The Seller warrants that (subject to the other provisions of these Conditions) upon delivery the Materials shall:

- be of satisfactory quality;
 - be reasonably fit for the purpose for which they are normally used; and
 - be reasonably fit for any particular purpose for which the Materials are being bought if the Customer had made known that purpose to the Seller in writing and the Seller has confirmed in writing that it is reasonable for the Customer to rely on the skill and judgment of the Seller.
- 8.2 The Seller agrees to manufacture the Materials in accordance with any applicable British Standards and Materials covered by harmonised European Standards will carry CE marking to the extent this is practicable.
- 8.3 Whilst every effort is made to maintain consistency in the characteristics of the Materials some variation is unavoidable and the Seller shall not be liable in respect thereof.

8.4 If the Customer can establish to the reasonable satisfaction of the Seller that:

- there is a defect in the workmanship of the Seller in relation to the Materials; or
 - the Materials are not in accordance with the quality or Specification contained in the Contract; or
 - there is some other failure by the Seller in relation to the Materials to comply with the Contract;
- then subject to the conditions set out in Clause 8.5 below, any liability of the Seller shall be limited to (at the Seller's sole discretion) either:

- replacing the Materials within a reasonable time; or
 - issuing a credit note for a reasonable percentage of the Price.
- 8.5 Subject to Clause 9.3 (Limitation of Liability), in the case of a defect that is apparent on reasonable inspection or shortly after use, the Seller will not be liable under Clause 8.4 above unless:
- the Customer gives written notice of the defect to the Seller within 30 days of delivery / collection; and
 - the Seller is thereafter given a reasonable opportunity to examine the Materials before they are further used or in any way interfered with.

8.6 Subject to Clause 9.3 (Limitation of Liability), if the Seller either replaces the Materials or issues a credit note under Clause 8.4 then it shall have no further liability for a breach of Clauses 8.1 or 8.2. This Clause does not affect any other rights or claims of the Customer arising out of any other provision of the Contract.

9. LIMITATION OF LIABILITY

9.1 Save for where the Contract provides specific remedies to the Customer in respect of delay under Clauses 5 (Delivery), short delivery under Clause 6 (Inspection and Shortages) and defective Materials under Clause 8 (Quality), the following provisions set out the total liability of the Seller (including any liability for the acts or omissions of its employees, agents and contractors) for other loss and damage suffered by the Customer in respect of:

- any breach of the Contract;
- any use made or resale by the Customer of the Materials, or any products incorporating the Materials; and/or
- any representation, statement or tortious act or omission (including negligence) arising under or in connection with the Contract or the supply of the Materials.

9.2 All warranties, conditions and other terms implied by statute or common law which may be excluded by law are, to the fullest extent permitted by law, excluded from the Contract.

9.3 Nothing in these Conditions shall exclude or restrict the Seller's liability:

- for death or personal injury resulting from the Seller's negligence;
- under section 2(3) of the Consumer Protection Act 1987;
- for any matter which it would be unlawful for the Seller to exclude or attempt to exclude its liability; or
- for fraud or fraudulent misrepresentation.

9.4 The Seller shall have no liability for any defect in the Materials to the extent that the Losses suffered by the Customer or any third-party results from:

- fair wear and tear;
- bulb or lamp failure, negligence, abnormal working conditions, mis-use, alteration or repair of the Materials, failure to follow any British Standard, the Seller's or industry instructions relevant to the Materials, or storage of the Materials in unsuitable conditions (but this sub clause shall not apply to any act or omission of the Seller);
- use of Materials following the expiry of the recommended shelf life; or
- in respect of readymix concrete:

 - water or any other spoiling material or contamination being added to the Materials; or
 - the Materials not being sampled and tested in accordance with the relevant British Standard specification or other standard agreed in writing by the Seller.

9.5 Subject to Clauses 9.1, 9.2, 9.3 and 9.4 above:

a) The Seller's total liability in contract, tort, misrepresentation, restitution or otherwise, arising in connection with the performance of or contemplated performance of the Contract and the supply of the Materials shall be limited to the lower of: i) fifty thousand pounds (£50,000); or ii) the Price.

b) The Seller shall under no circumstances whatever be liable to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise for any of the following arising under or in connection with the Contract: i) pure economic loss; ii) loss of profits; iii) loss of business; iv) loss of goodwill; and v) any additional costs, charges or expenses (including legal costs).

9.6 If the Materials are manufactured, processed or mixed by the Seller to the specification of the Customer or its agents the Customer fully indemnifies the Seller against all Losses awarded against, incurred by, paid or agreed to be paid by the Seller in settlement of any claim for infringement of any industrial or intellectual property rights of any other person.

9.7 The Customer fully indemnifies the Seller against all Losses awarded against, incurred by, paid or agreed to be paid by the Seller in settlement of any other claim arising from any such manufacturing, processing or mixing described in Clause 9.6 above. The indemnity will be reduced in proportion to the extent that such Losses are due to the negligence of the Seller.

9.8 The legal rights of a Customer dealing as a Consumer are not affected by these Conditions.

10. FORCE MAJEURE

10.1 The Seller may defer delivery, terminate the Contract or reduce the volume of Materials delivered to the Customer and shall not be liable to the Customer or be deemed to be in breach of the Contract by reason of the aforesaid delay, termination or reduced delivery or any failure to perform any of the Seller's obligations where it was due to any cause beyond the Seller's reasonable control (a "Force Majeure Event").

10.2 If the Force Majeure Event in question continues for a continuous period in excess of 90 days, either Party may give notice in writing to the other terminating the Contract.

11. DEFAULT

If the Customer:

- fails to make any payment to the Seller on the due date;
- suspends, or threatens to suspend, payment of its debts, or is unable to pay its debts as they fall due or admits inability to pay its debts;
- exceeds any credit limit assigned to the Customer from time to time by the Seller;
- commences negotiations with all or any class of its creditors with a view to re-scheduling any of its debts;
- has a petition filed, notice given, resolution passed, or order made, for or in connection with its winding up or bankruptcy;
- the subject of an application to court or order for the appointment of an administrator;
- has a receiver or an administrative receiver or an administrator appointed over any of its assets; or
- is in breach of any term of this Contract and (where such breach is capable of remedy) fails to remedy such breach within 14 days of being so requested to do so, then the full balance outstanding on any account between the Seller and the Customer shall become immediately payable and the Seller shall be entitled to do one or more of the following (without prejudice to any other right or remedy it may have): i) require payment in cash or cleared funds in advance of delivery of any undelivered Materials; ii) cancel or suspend any further delivery to the Customer under any contract; iii) sell or otherwise dispose of any Materials which are the subject of any contract with the Customer; and/or iv) charge the Customer interest on the balance of monies due at the rate of 4% per annum above The Royal Bank of Scotland base rate in force from time to time from the date the payment became due until actual payment (whether before or after judgment).

12. GENERAL

12.1 Governing law and jurisdiction: The Contract, and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims), shall be governed by, and construed in accordance with English law and the parties submit to the exclusive jurisdiction of the courts of England and Wales.

12.2 Variation: Except as set out in these Conditions, any amendment or variation to a Contract or these Conditions shall have no effect unless expressly agreed in writing and signed by an authorised employee of the Seller.

12.3 Entire Agreement: The Contract constitutes the entire agreement between the parties and supersedes and extinguishes any previous arrangement, understanding or agreement between them relating to the subject matter of this Contract. The Customer acknowledges that it has not relied on any statement, promise or representation made or given by or on behalf of the Seller which is not set out in the Contract.

12.4 Safety Data Sheets: The Seller is required to produce health and safety/hazard data sheets for some of the products it sells. These sheets are available on request. These sheets are for information purposes only and do not form part of the Contract and the Customer agrees that the Seller will have no liability in respect of them.

12.5 Severance: If any Clause or sub clause of these Conditions is held by any court or other authority of competent jurisdiction to be wholly or partly void or unenforceable the validity of the other Clauses or sub clauses of these Conditions shall not be affected and they shall remain in full force and effect. If any invalid, unenforceable or illegal provision of the Contract would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.

12.6 Assignment: The Seller may at any time assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract. The Customer may not assign, transfer, charge, subcontract or deal in any other manner with all or any of its rights or obligations under the Contract without the prior written consent of the Seller.

12.7 Waiver: A waiver of any right or remedy under the Contract is only effective if given in writing and shall not be deemed a waiver of any subsequent breach or default. No failure or delay by a party to exercise any right or remedy provided under the Contract or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.

12.8 Termination of the Contract, however arising, shall not affect any rights or remedies of either party which have accrued prior to the date of termination; and termination of the Contract shall not affect the continuing force and effect of any provision of the Contract which, whether expressly or by implication, is to survive termination of the Contract.

12.9 Third Party Rights: The Parties to the Contract do not intend that any term of the Contract shall be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person that is not party to it.

12.10 Notice: Any notice by either Party to the other shall be in writing addressed to that other Party at its registered office or principal place of business or such other address as notified to the Party giving the notice. Notices shall be deemed to have been received 48 hours after posting (exclusive of the day of posting) if sent by first class post; on the day of delivery by hand; or at the time of transmission if sent by facsimile or e-mail.