

## TERMS & CONDITIONS

By submitting a credit application and/or ordering goods from us, you agree that the following terms and conditions shall apply to the supply. These terms and conditions replace any previous terms and conditions of trade

### **1. Definitions**

In these terms and conditions and (unless the context otherwise requires):

- 1.1. "ACL" is an abbreviation of the Australian Consumer Law and includes all applicable State, Territory and Commonwealth law(s), including without limitation, Schedule 2 of the *Competition and Consumer Act 2010* (Cth) as amended from time to time;
- 1.2. "consequential loss" means loss of expected savings, loss of use, loss of opportunity, loss of profit, loss of revenue, increased financing costs, loss arising from delay, or any consequential, special or indirect loss or damage, whether or not the possibility or potential extent of the loss or damage was known or foreseeable, and whether arising from a claim under indemnity, contract, tort (including negligence), statute or otherwise;
- 1.3. "consumer" means a consumer as that term is defined in section 3 of the ACL;
- 1.4. "goods" includes any goods, components and/or parts thereof or any interest therein supplied to you by us and any services supplied to you by us;
- 1.5. "we", "us" and "our" means BE Switchcraft Pty Ltd ACN 007 630 855 and includes our employees, servants, agents, contractors and representatives;
- 1.6. "you" and "your" means the company, sole trader or partnership who orders goods, or submits a credit application, and it includes your personal representatives, successors and permitted assigns;
- 1.7. "PPSA" means the *Personal Property Securities Act 2009* (Cth);
- 1.8. "purchase money security interest", "security interest", "financing statement", "financing change statement", "verification statement", "interested person" "after acquired property" "security agreement", "proceeds", "accession" and "collateral" have the respective meanings given to them under, or in the context of the PPSA.
- 1.9. "small business" means a small business that meets the criteria of section 23(4)(b) of the ACL.

### **2. Quotations, Orders and Contracts**

- 2.1. These terms and conditions set out the terms of the agreement between us and you. The provision or acceptance of a quotation shall not form a separate agreement between us and you, but shall constitute part of the agreement. Any terms contained in any document, including any terms on your purchase order, will not form part of the agreement.
- 2.2. All quotations are made and all orders for goods are accepted by us on, and subject to, these conditions. Unless otherwise expressly agreed to by us in writing, previous dealings between us and you, or the imposition of additional or alternative terms and conditions by you shall not vary or replace these conditions.
- 2.3. Any instructions received by us from you for the supply of goods shall constitute acceptance of these conditions.
- 2.4. We may withdraw, revoke or vary a written quotation at any time prior to you submitting an order which accepts the offer to supply comprised by the written quotation.
- 2.5. We reserve the right to accept or decline, in whole or in part, any order for goods placed by you.
- 2.6. These conditions prevail over any of your terms and conditions of trade whether or not any inconsistency arises.
- 2.7. We may vary these terms and conditions by notice in writing to you (which notice may be given via the our website). You may consider the variation and, if not acceptable, may elect not to proceed with the purchase of the goods and/or services ordered before the date of the variation and which would be subject to the variation.
- 2.8. If you are a Consumer or a Small Business, then you may consider the variation and, if not acceptable, may elect not to proceed with the purchase of the goods ordered before the date of the variation and which would be subject to the variation.
- 2.9. If you are not a Consumer or a Small Business, you agree that goods delivered and/or ordered after the date of the notice of the variation will be subject to the variation and acceptance of the Goods or the placing of the order shall be deemed to be an acceptance of such varied terms and conditions.

### **3. Price and Payment**

- 3.1. At our sole discretion, the price payable for goods shall be either:
  - 3.1.1. As indicated on any invoice provided by us to you; or
  - 3.1.2. Our quoted price (subject to clause 3.2) which will remain valid for the period stated in the quotation or otherwise for a period of sixty (60) days; and is subject to any other conditions specified in the quotation.
- 3.2. We reserve the right to change the price if a variation to our quotation is requested. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation due to fluctuations in the currency exchange rate or as a result of increases to us in the cost of materials and labour) will be charged in addition to the original quoted price on our quotation, and will be shown as variations on the invoice.
- 3.3. Payment for all variations must be made in full at their time of completion.
- 3.4. At our sole discretion a non-refundable deposit may be required.
- 3.5. Time for payment of the goods is of the essence and the price will be payable by you on the date/s determined by us, which may be:
  - 3.5.1. on delivery/collection of the goods;
  - 3.5.2. thirty (30) days following the end of the month in which the goods were supplied; or
  - 3.5.3. the date specified on any invoice or other form as being the date for payment.
- 3.6. You must pay the price and the GST thereupon without set-off, deduction, withholding or counterclaim.
- 3.7. Unless otherwise stated, the price does not include GST. In addition to the price, you must pay to us an amount equal to any GST we must pay for any supply by us under this or any other agreement for the sale of the goods. In addition, you must pay any other taxes and duties (including, but not limited to, customs duty, packaging costs, freight charges or bank charges) that may be applicable in addition to the price except where they are expressly included in the price.
- 3.8. Any amounts received by us may be applied at our discretion: first against interest, fees, charges, collection expenses and legal expenses; and second, towards any amount that you owe to us from time to time.
- 3.9. You will not be entitled to set off against any money owing to you against amounts owed to us, by you, on any account whatsoever.

### **4. Delivery of goods and Risk**

- 4.1. Delivery of the goods is taken to occur at the time that we (or our nominated carrier) leaves our premises to deliver the goods to your nominated address. If no such address is nominated, then delivery will be deemed to occur at the time when the goods are ready for collection from our premises.
- 4.2. At our sole discretion, the cost of delivery is in addition to the price.
- 4.3. Goods will be available to be collected from our premises. Alternatively, if requested by you in writing, we will arrange delivery of the goods to the place you nominate or, if none is nominated, at your place of business. We will arrange for freight (and freight insurance if requested by you in writing) to deliver the goods to that place. You must pay to us all freight and insurance costs.
- 4.4. All risk in connection with the goods passes to you on delivery of the goods to you or your servant(s), agent(s) or nominated representative(s). Any claim concerning shortage(s) of goods on delivery must be made in writing within 7 days of delivery of the goods or it will be of no force or effect whatsoever.
- 4.5. If within 48 hours of us notifying you that the goods are ready for dispatch and we have not received from you sufficient forwarding instructions to enable us to dispatch the goods, you will be deemed to have taken delivery of the goods from the expiry of that 48 hour period. The goods will be at your risk from that time and unless otherwise agreed by us in writing you will be liable for monthly storage charges.

### **5. Time of dispatch**

- 5.1. Any times quoted by us for the completion or dispatch of goods are estimates only and do not give rise to any contractual obligation unless we have specifically contracted in writing to complete or dispatch goods within a specified time or by a specified date. Any such contractual obligation is subject to us not being delayed by an amendment or lack of instructions from you or by an act of god, industrial dispute or by any other cause whatsoever beyond our reasonable control.

### **6. Returns policy**

- 6.1. The goods are not supplied on a sale or return basis. Once we accept your order, you are obliged to take the goods and pay for the goods in accordance with these terms and conditions, although property in the goods will only pass in accordance with the terms and conditions set out in clause 8 below.
- 6.2. We may, in the exercise of our discretion, agree to accept the return of any goods on terms nominated by us.

**7. Default and Consequences of Default**

- 7.1. Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of one percent (1.0%) per calendar month or part thereof, and you shall be liable for, and expressly undertake to pay, all such interest.
- 7.2. You must pay us all costs (including legal costs on an indemnity basis and all other debt collection costs including any debt collector's costs or commissions) incurred by us in connection with either the recovery of any sums due by you under these terms and conditions or any default by you under these terms and conditions. Your liability for our costs extends to administrative, collection and solicitor fees (on an indemnity basis) that are incurred by us or will be incurred by us in preserving and/or enforcing our rights under the PPSA.
- 7.3. Without prejudice to any other remedies we may have, if at any time you are in breach of any obligation (including those relating to payment) under these terms and conditions, we may suspend or terminate the supply of goods to you. We will not be liable to you for any loss or damage you suffer because we have exercised our rights under this clause 7.
- 7.4. If:
- 7.4.1. we have any reasonable grounds to believe that you may not be able to make due and punctual payment to us, or there is any default or failure by you in making due and punctual payment to us of any moneys owing by you; or
  - 7.4.2. you become bankrupt or insolvent, convene a meeting with its creditors or propose or enter into an arrangement with creditors, or makes an assignment for the benefit of you creditors or cease to carry on a business; or
  - 7.4.3. a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of you or any asset of yours, then, all amounts owing to us shall, whether or not due for payment, become immediately payable, and, without prejudice to our other remedies at law, we shall be entitled to do any or all of the following:
    - 7.4.4. place on stop any credit facilities which may have been extended to you;
    - 7.4.5. withdraw any credit facilities which may have been extended to you;
    - 7.4.6. withhold any further delivery of goods;
    - 7.4.7. in respect of goods already delivered, enter onto your premises to recover and resell the goods for our own benefit;
    - 7.4.8. recover from you the cost of materials or goods acquired for the purpose of future deliveries; or
    - 7.4.9. exercise such rights as are afforded to us under the PPSA.

**8. Title and the PPSA**

- 8.1. You agree that property in each and every part of the goods shall not pass until all monies due to us by you are paid in full.
- 8.2. You agree to grant a purchase money security interest to us in each and every part of the goods (and their proceeds) as security for payment of the purchase price.
- 8.3. In addition, and as further security, you agree to grant a general security interest to us in all your present and after-acquired property and its proceeds (except for that property which is or comprises items of kinds of personal property which have not been supplied by us ("excepted property")) as security for payment of any and all monies at any time owed by you to us
- 8.4. You undertake to:
- 8.4.1. provide any further documents and/or provide further information, such information to be complete, accurate and up-to-date in all respects which we may reasonably require to register any financing statement or financing statement on the PPSA register;
  - 8.4.2. indemnify and reimburse us for all expenses incurred in registering any financing statement or financing change statement on the PPSA register;
  - 8.4.3. give us not less than 14 days prior written notice of any proposed change in your details, including but not limited to, changes in address, company name and/or contact details.
- 8.5. We may allocate amounts received from you in any manner we determine including any manner required to preserve our purchase money security interest we have in the goods.
- 8.6. Unless otherwise agreed to us in writing, you, nor we, shall disclose to an interested person information pertaining to our purchase money security interest or general security interest.
- 8.7. You waive your right to receive any verification statement under section 157 of the PPSA.
- 8.8. You agree, pursuant to section 115 of the PPSA and to the fullest extent permitted by law, that you shall have no rights to receive:
- 8.8.1. a notice of removal of accession;
  - 8.8.2. a notice of enforcing decisions in accordance with land law decisions;
  - 8.8.3. a notice of disposal of collateral;
  - 8.8.4. a statement of account where there is no disposal of collateral;
  - 8.8.5. a notice of retention of collateral.
- 8.9. The parties agree that these terms and conditions constitute a security agreement for the purposes of the PPSA.
- 8.10. It is further agreed, without prejudice to our rights under the PPSA, that:
- 8.10.1. until such time as ownership of the goods shall pass from us to you, we may give notice in writing to you to return the goods or any portion of them to us. Upon such notice your rights to obtain ownership or any other interest in the goods shall cease;
  - 8.10.2. if you fail to return the goods to us then we or our agent may enter as your invitee upon any premises owned, occupied or used by you, where we believe the goods to be situated and take possession of the goods, without being responsible for any damage thereby caused;
  - 8.10.3. you are only a bailee of the goods and until such time as we have received payment in full for the goods you shall hold any proceeds from the sale or disposal of the goods on trust for us in a separate account;
  - 8.10.4. you shall not deal with our money held in trust by you in any way which may be adverse to us;
  - 8.10.5. receipt by you of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then our ownership and rights in respect of the goods shall continue;
  - 8.10.6. we may require payment of the price of the goods or the balance of the price of the goods due together with any other amounts due from you to us arising out of these terms and conditions, and we may take any lawful steps to require payment of the amounts due and the price;
  - 8.10.7. we can issue proceedings to recover the price of the goods sold notwithstanding that ownership of the goods may not have passed to you;
  - 8.10.8. until such time as you have our authority to convert the goods into other products, and if the goods are so converted, the parties agree that we will be the owner of the end product.

**9. Drawings**

- 9.1. All descriptive and forwarding specifications, drawings, descriptions, and particulars of weights and dimensions submitted by us are approximates only, and are intended to present only a general description or conceptual idea of the goods concerned.
- 9.2. Unless otherwise specifically nominated by you in writing as essential requirements on your part, such matters are not contractual terms or binding requirements.

**10. Testing and inspection**

- 10.1. All necessary testing and inspection will be conducted at our premises. All costs and fees incurred in connection with any testing and inspection additional to those specifically included in our quote or contractual documentation may in the exercise of our discretion be charged as extras to your account.

**11. Suspension or delay of work**

- 11.1. If work to be performed by us is suspended or delayed by reason of your instructions or lack of instructions, we may in the exercise of our discretion increase the contract price to cover any extra costs or expenses incurred by us.

**12. Replacement or repair**

- 12.1. You must inspect the goods, once received, and must within 7 days of delivery notify us in writing of any evident damage or failure to supply in accordance with any order. If you fail to provide such notice then the you shall be deemed to have accepted the goods.

- 12.2. Under applicable State, Territory and Commonwealth Law (including, without limitation the ACL), certain statutory implied guarantees and warranties (including, without

- 12.3. limitation the statutory guarantees under the ACL) may be implied into these terms and conditions ("Non-Excluded Guarantees").
- 12.4. We acknowledge that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 12.5. Notwithstanding clauses to 12.3 but subject to the ACL, our liability for breach of any Non-Excluded Guarantees, conditions or warranty is limited, at our option, to:
- 12.5.1. in the case of goods, the repair of the goods, the replacement of the goods or paying for the cost of repair or replacement of the goods; or
- 12.5.2. in the case of services, the resupply of services or paying for the cost of resupplying the services. We shall not be liable for any indirect loss or damages whatsoever, including consequential loss, loss of profits, loss of opportunity or loss of use.
- 12.6. Notwithstanding clause to 12.3 but subject to the ACL, and also subject to clause 12.4.1, we are not liable to you or anyone else in connection with the goods or with these terms and conditions (including any changes to the terms and conditions), including without limitation for:
- 12.6.1. any direct, indirect or consequential loss or damage, any loss of actual or anticipated savings, opportunity, revenue, profit or goodwill, or other economic loss; and
- 12.6.2. any claim, action or proceeding by a third party against you (or any loss, damages or liability incurred or suffered by you as a result of any such claim, action or proceeding).
- 12.7. Subject to this clause 12 and the terms of any applicable written warranty provided by us, we make no warranty or other representations under these terms and conditions including but not limited to the quality or suitability of the goods. All implied conditions, warranties, undertakings, inducements or representations whether express or implied, statutory or otherwise, relating to these terms and conditions or their subject matter are excluded to the maximum extent permitted by law.
- 13. Security, Charge and Indemnity**
- 13.1. In consideration of us agreeing to supply the goods, you hereby charge in our favour, all of your respective present and future rights, title and interests (whether joint or several) in any land, realty or other assets capable of being charged, owned by you either now or in the future, to secure the performance by you of your obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 13.2. You agree that, on demand by us, you will immediately execute such mortgage or other instrument of security ("Security Instrument"), as we may require, and in the event that you fail to do so with a reasonable time of being so requested, you hereby irrevocably appoints any credit manager or solicitor engaged by us and each director of us as the your true and lawful attorney/s to execute and register any such Security Instruments including, but not limited to, signing any document on your behalf. You will not object to the lodgement by us of a caveat noting the interest given by this clause 13, or any other Security Instrument, on the title of the charged property.
- 13.3. You agree to hold harmless and indemnify us on demand, on a full indemnity basis, as a separate obligation against any liability (including but not limited to all losses, costs, charges, expenses, disbursements, collection and legal costs) incurred by, or assessed against, us in connection with:
- 13.3.1. the supply of goods and/or services to us;
- 13.3.2. your breach of any of these terms and conditions of trade;
- 13.3.3. any cheque given by you, or electronic banking transaction made by you, being dishonoured for whatever reason;
- 13.3.4. obtaining, or attempting to obtain, payment for any amount due by you;
- 13.3.5. otherwise arising out of the business relationship between you and us;
- 13.3.6. moneys paid by us with your consent in settlement of a dispute that arises or results from a dispute between, us, the you, and a third party or any combination thereof, over the supply of goods and/or services by us to you.
- 13.3.7. the enforcement or discharge of this clause, clause 7 or clause 8.
- 13.4. You acknowledge that collection costs may be calculated on a commission basis at a percentage rate of up to 20% of the amount due and expressly agrees to pay for those expenses, irrespective of the amount of work actually performed by the collection agent.
- 14. Privacy**
- 14.1. Our Privacy Policy and Credit Reporting Policy, available on our website or upon request to us, are agreed to by you.\
- 14.2. Our website may be hosted, or some data may be stored overseas. All personal information derived from Australia will still be treated in accordance with our policies whilst being stored overseas.
- 14.3. In accordance with our policies, you agree that we may use or disclose information to its suppliers and to third parties for the purpose of providing the goods, providing information about goods; sending information about us and/or our services; performing administrative and marketing operations; complying with legislative and regulatory requirements or as otherwise permitted or authorised by law; considering any other application you make to us; managing our rights and obligations in relation to external payment systems, e.g. credit card schemes and debit payment schemes; conducting market research or satisfaction research; and developing and identifying products and services that may interest you.
- 15. Miscellaneous**
- 15.1. Unless otherwise specifically agreed in writing by us, where any terms and conditions of the your order are inconsistent with these terms and conditions, then these terms and conditions will prevail. Any variations or additions to these terms and conditions not expressly agreed to in writing by us are expressly rejected.
- 15.2. The failure by us to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect our right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 15.3. These terms and conditions and any contract to which they apply shall be governed by the laws of South Australia, and are subject to the non-exclusive jurisdiction of the Courts in that state.
- 15.4. Where you are a trustee:
- 15.4.1. you agree to produce a stamped copy of the trust deed (with all amendments) if and when requested by us;
- 15.4.2. you warrant that you have full power and authority to enter into these terms and conditions in your capacity as trustee of its trust.
- 15.5. We may assign any of our rights arising under or in connection with this document without your consent, but you may only assign any of your rights arising under or in connection with this document with our prior written consent. In the event of an assignment by either us or you, the terms and conditions contained herein, including the guarantee set out above, will continue to apply as between us and you and will also apply to the assignee(s).