

BGC CONCRETE & CONCRETE PUMPING - TERMS AND CONDITIONS OF SALE & INSTALLATION

1. Quotations, Orders and Contracts

(a) All quotations and all orders for the supply and installation of concrete are made and/or accepted by BGC (Australia) Pty Ltd (**BGC**) on and subject to these terms and conditions (**Terms**). The Purchaser's terms and conditions, howsoever provided, do not form part of these Terms (even if any representative of BGC signs those terms and conditions and/or they are annexed to these Terms or any quote or purchase order). Any variation or changes to these Terms (other than an update to these Terms by BGC), whether to apply to all subsequent orders, or any particular order, may only be made if it:

- (i) is in writing;
- (ii) is signed by authorised managers of both parties; and
- (iii) expressly states that it is a variation to these Terms, and

the parties agree and acknowledge that their representatives and employees who are not authorised managers as referred to in clause 1(a)(ii) above do not have the authority to vary these Terms.

- (b) Nothing in any quotation or purchase order gives the Purchaser any lease or right to use BGC's plant and equipment (**Equipment**) used to provide the services under these Terms. Title in and possession of the Equipment remains with BGC at all times.
- (c) Where the Purchaser has entered into an agreement with BGC for the provision of credit to the Purchaser (**Credit Agreement**) the terms of the Credit Agreement shall prevail over these Terms to the extent of any inconsistency.
- (d) If the Purchaser places an order with BGC after receiving these Terms, the Purchaser shall be deemed to have read and unconditionally agreed to these Terms.
- (e) The price of concrete and/or concrete pumping specified by BGC in any quotation:
 - (i) will remain valid for a period of 30 days for an order made by the Purchaser in accordance with the quotation, unless otherwise specified;
 - (ii) does not include any of the following unless otherwise agreed in writing by BGC:
 - (A) pest control and curing;
 - (B) hard digging and ground preparation work, including but not limited to, filling, backfill, earthworks, compacting and levelling;
 - (C) the grouting of walls and columns;
 - (D) the supply of waterproofing and shrinkage reducing additives;
 - (E) the disposal of soil and waste materials from the site to which the concrete is to be delivered (**Site**);
 - (F) the provision of any surveying, building inspection or engineering services, including the provision of engineering certification for formwork design;
 - (G) the provision of the provision of limestone, or coloured, exposed or polished concrete mixes;
 - (H) the provision of traffic management and any other site allowances;
 - (I) the provision of sealers, sealants and other applied finishes; or

- (J) the provision of external paving, kerbing and crossovers;
- (iii) is subject to any other conditions specified in the quotation.

- (f) A minimum of 24 hours' notice may be required for all orders for concrete. However, non-standard mixes may require at least 72 hours' notice subject to the availability of inclusions such as steel fibres, colours and waterproofing admixtures.
- (g) BGC reserves the right to accept or decline, in whole or in part, any order for concrete and/or concrete pumping placed by the Purchaser.

2. Quality / Strength of Concrete

- (a) The Purchaser warrants to BGC that all specifications and other design information (**Specifications**) provided to BGC for the selection, manufacture, supply or installation of concrete are accurate and correct and suitable in all respects for the Purchaser's intended use for the concrete.
- (b) Unless otherwise agreed in writing, BGC when giving the quotation or supplying and/or installing any concrete will not be taken to have approved any Specification as being suitable for any particular purpose and will not be liable for any loss or delay (or the cost associated with) resulting from any defects in or unsuitability of the Specification. The Purchaser shall be liable to BGC for any costs arising from the Specification as shown on the order or quotation being changed to that shown on the delivery docket.
- (c) Unless otherwise stated in writing, concrete delivered by BGC will comply with Standards Association of Australia AS 3600–2009 as amended at the time of delivery.
- (d) Testing will not automatically be carried out. Testing will be arranged if requested by the Purchaser and will be charged to the Purchaser at the rates specified in BGC's price list which is available on BGC's website, or as notified to the Purchaser from time to time. BGC does not recognise and will not be bound by any test results unless concrete is sampled at the agitator chute and tested strictly in accordance with AS 1379 2007 and AS 1012.9 2014/ 1012.23 2015 (as amended at the relevant time) by an approved NATA laboratory.
- (e) BGC shall not be liable for, and is hereby indemnified by the Purchaser in respect of, any claims made by the Purchaser or any third party which arise out of:
 - (i) contamination of the concrete, or any defects which may develop in the concrete due to:
 - (A) any faulty handling, placing or curing of the concrete by the Purchaser or any other person; or
 - (B) any the addition of water, additives or other material to the concrete at the request of the Purchaser or the Purchaser's concreter.
 - (ii) defects which may develop in the concrete due to:
 - (A) weather conditions;
 - (B) the use of specialised finishing equipment other than by BGC; or
 - (C) any combination of the above and other factors.
- (f) Concrete contains materials of BGC's choice unless otherwise stated. The strength characteristics of the concrete are those shown on the face of the delivery docket. Purchasers should ensure that the strength shown is in accordance with the requirements of the Specification at the time of delivery.

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- (g) BGC's guarantee of strength (subject to clause 9 below) ceases if the concrete is not in situ in accordance with temperature requirements of the relevant Australian Standards, or if any of the events referred to in clause 2(e) above shall occur.
- (h) The Purchaser acknowledges that:
 - (i) BGC does not guarantee colour consistency for any concrete supplied as colour variations can be caused by various factors which are beyond BGC's control, including but not limited to, the amount of water added on Site, time and techniques of finishing, the time taken between pours, the age of the concrete, the curing environment and the sources of raw materials and pigments except to the extent specifically agreed under paragraph (ii) below;
 - (ii) where colour control is requested, BGC and the Purchaser must agree on the colour/tone and the number of tone variations deemed acceptable in accordance with AS 3610-1995 (as amended from time to time) before the concrete is poured, in which case BGC will ensure the variation of colour is within that range;
 - (iii) BGC does not guarantee the surface finish of the concrete resulting from same day washing of exposed mixes, or inconsistent or inappropriate application of surface retarders; or
 - (iv) BGC does not guarantee the quality of finished products where the Purchase does not order an adequate volume of concrete resulting in placement delays and cold joints.

3. Delivery

- (a) Delivery must be accepted by the Purchaser and discharge complete as soon as possible after the arrival of the delivery vehicle on Site. If discharge is not completed within 45 minutes after arrival on Site waiting time in excess thereof will be charged at the rates specified in BGC's price list which is available on BGC's website, or as notified to the Purchaser from time to time, save and except delay caused by BGC.
- (b) It is the Purchaser's responsibility to check the delivery docket and confirm that it is in accordance with the Purchaser's requirements before any concrete is unloaded. If delivery of concrete made in accordance with the description on the face of the docket is accepted, the Purchaser shall be liable to pay for it and shall have no claim against BGC for the concrete not being as ordered.
- (c) Delivery will be made to the kerb alignment or edge of the road unless previously agreed. If the Purchaser requires the delivery vehicle to leave a public road to gain access to the discharge or unloading location, the Purchaser shall:
 - (i) ensure that the vehicle has a safe, suitable and unrestricted route between the kerbside nearest to the delivery address and the discharge or unloading location; and
 - (ii) release and indemnify BGC against any loss, damage, cost (including recharges) or liability arising from events occurring while gaining or caused by such access unless solely caused by BGC's negligent act or omission. The signing of the final delivery docket (Total Order m³) of any concrete pour shall constitute acceptance of individual deliveries on previous dockets forming part of the same pour.
- (d) While BGC uses reasonable endeavours to achieve delivery times, the Purchaser acknowledges that all times quoted for delivery are estimates only, and BGC will not be liable for any failure to deliver or for delay in delivery of concrete occasioned by strike, lockout or other industrial dispute, shortage of stock, shortage of labour, lack of skilled labour, delays in

transit, fire, flood, hostility, civil commotion or any other cause whatsoever whether or not beyond the control of BGC.

- (e) The Purchaser shall not be relieved of any obligation to accept or pay for concrete by reason of any delay in delivery.

4. Installation

- (a) Where BGC is required to install concrete on Site:
 - (i) BGC will do so in accordance with the Specifications and industry standards;
 - (ii) BGC warrants that it will perform its services in a proper and workman-like manner;
 - (iii) the Purchaser acknowledges that any boom pumps provided by BGC must not be used as a crane; and
 - (iv) the Purchaser must:
 - (A) provide safe, suitable and adequate access to the Site for delivery;
 - (B) provide scaffolding, handrails and edge protection and access;
 - (C) provide a minimum of one bag of cement slurry and a pumpable concrete mix that meets their Specifications and complies with all applicable Australian Standards;
 - (D) comply with all instructions and recommendations given by BGC regarding safety with respect to the use or operation of any pumps on Site;
 - (E) must comply with the *Occupational Safety and Health Act 1984* and *Occupational Safety and Health Regulations 1996*, including any other relevant safety legislation, regulations, rules or by-laws;
 - (F) take all necessary precautions to ensure that anyone (other than BGC) avoids or minimises skin contact with wet concrete;
 - (G) prior to the installation date, procure and maintain all necessary insurances, including but not limited to, public liability for an amount no less than \$10 million dollars;
 - (H) prior to the installation date, ensure all Site preparation work is completed, including but not limited to, filling, compacting and levelling and correct location of survey pegs; and
 - (I) ensure water and a suitable "wash out" area is made available to BGC, if required.
- (b) BGC may subcontract its obligation to install in its absolute discretion. BGC will be responsible for its obligations under these Terms notwithstanding that subcontracting.

5. Price / Payments

- (a) In this clause, any reference to a "surcharge" will mean the surcharge published by BGC in its price list which is available on BGC's website, or as notified to the Purchaser from time to time.
- (b) Credit account customers must pay BGC's tax invoices in accordance with the Credit Agreement. Other Purchasers must pay cash before delivery or collection.
- (c) The price for concrete is quoted per cubic metre (m³) delivered for a minimum load of 3.4m³. For loads of less than 3.4m³ a surcharge will be payable. A surcharge will be payable for all deliveries before 6.00am (WST) or after 3.00pm (WST) on weekdays or for deliveries after

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12pm (WST) on Saturdays and all day Sundays and Public Holidays. Unless expressly stated otherwise, the rate for the supply of concrete does not include installation costs.

- (d) Where the Purchaser fails to comply with:
 - (i) clause 4(a)(iv)(H) above, BGC will be entitled to charge reasonable rates for labour and materials, plus an administration fee of \$80 plus GST; or
 - (ii) clauses 4(a)(iv)(B), 4(a)(iv)(C) and 4(a)(iv)(I) above, a surcharge will be payable by the Purchaser.
- (e) BGC reserves the right to change its price list at any time upon notice to the Purchaser. The price notified at the time the Purchaser places an order will continue to apply even if the price changes before the Purchaser's order is accepted by BGC.
- (f) If any concrete ordered for delivery is later cancelled, the Purchaser shall (on demand) pay BGC all expenses incurred up to the time of cancellation (including any concrete batched at that time unless resold). BGC's statement of expenses shall be prima facie evidence of its contents.
- (g) All concrete returned to BGC (or batched prior to a cancellation) will be paid for in full by the Purchaser and in addition, the Purchaser shall pay for the handling and disposal of the returned or batched concrete at BGC's ruling rates, save and except concrete with defects caused directly by BGC or returned due to a breach of these Terms by BGC.
- (h) If the Purchaser cancels an order that includes the use of a concrete pump, the Purchaser must (on demand) pay a cancellation fee as published by BGC in its price list which is available on BGC's website, or as notified to the Purchaser from time to time. Where the order is cancelled after the departure of the vehicle to the Site, the Purchaser shall (on demand) also pay BGC the minimum rate charge for the pump as notified to the Purchaser.

6. Variations

The Purchaser must pay the agreed price of any variations in addition to the price quoted, and any applicable surcharges specified in BGC's price list which is available on BGC's website. For the purposes of this clause, a "variation" includes (but is not limited to) any of the following:

- (a) variations to any orders for concrete where the variations are received after the minimum order notice in clause 1(f) and BGC incurs costs as a result; or
- (b) any changes to Site access as a result of the storage of materials, service trenches, road closures or any other matter which affects the Equipment to be used or the duration of the pour.

7. GST

- (a) Any expression used in this clause 7 and which is defined in the *A New Tax System (Goods and Services Tax) Act 1999* has the same meaning in this clause 7.
- (b) Unless otherwise expressly stated, all amounts stated to be payable by the Purchaser under these Terms are exclusive of GST. GST is imposed on any supply made under or in accordance with these Terms, and the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply. Payment of the additional amount will be made at the same time as payment for the taxable supply is required to be made in accordance with this document, subject to the provision of a tax invoice by the supplier to the recipient.

8. Termination

- (a) A party (**Non-defaulting Party**) may terminate these Terms at any time by written notice to the other party (**Defaulting Party**) if any of the following apply:
 - (i) the Defaulting Party fails to carry out any provision of these Terms, the failure is capable of remedy and the Defaulting Party does not remedy that failure within 7 days after written notice to the Defaulting Party requiring it to be remedied;
 - (ii) a judgement, order or encumbrance is enforced, or becomes enforceable upon any of the Defaulting Party's property;
 - (iii) an order for payment is made or judgment for an amount exceeding \$10,000 is entered or signed against the Defaulting Party which is not satisfied within 7 days;
 - (iv) the Defaulting Party suspends or delays payment of its debts;
 - (v) the Defaulting Party is unable to pay its debts as and when they fall due or goes into bankruptcy;
 - (vi) the Defaulting Party (being a corporation) has a liquidator appointed to it, or has a mortgagee of the corporation assume control of, or a receiver appointed to any of the assets or undertakings of the Defaulting Party (not being an InsolvencyEvent);
 - (vii) the Defaulting Party (being a corporation) is deregistered; or
 - (viii) the Defaulting Party breaches a Credit Agreement; or
 - (ix) to the extent permitted by law, the Defaulting Party is subject to an InsolvencyEvent.
- (b) These Terms may be terminated by BGC at any time effective immediately upon the giving of notice if a change occurs in the Purchaser's circumstances which, in BGC's reasonable opinion, may have a material adverse effect on the Purchaser's ability to comply with its obligations under these Terms. Examples include (but are not limited to):
 - (i) a change in the Purchaser's financial position up and until an Insolvency Event occurring;
 - (ii) the Purchaser factoring its debts; or
 - (iii) the Purchaser becoming party to litigation, arbitration or any other administrative proceeding.
- (c) If the Purchaser is the Defaulting Party under these Terms (or where any of the events in clause 8(b) occurs) BGC may, at its option, exercise any or all of the following rights in addition to any other rights it may have under these Terms or at law:
 - (i) suspend deliveries of further concrete to the Purchaser whether under these Terms or otherwise; and/or
 - (ii) withdraw any credit facilities which may have been extended to the Purchaser under a Credit Agreement, and require immediate payment of all moneys owed to BGC by the Purchaser.
- (d) The Defaulting Party (or in the case of an event under clause 8(b), the Purchaser) will be responsible for, and will indemnify the Non-Defaulting Party (or BGC, as applicable) against, any damages, costs (including, without limitation, legal fees on a solicitor-client basis), losses and expenses, incurred by the Non-Defaulting Party (or BGC, as applicable) as a result of the breach or event.

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- (e) On termination of these Terms under this clause 8, each party retains its rights against the other party in respect of any past breach, in addition to any other rights, powers or remedies provided by law.
- (f) In these Terms, an **Insolvency Event** means the happening of any of these events in relation to the Defaulting Party:
 - (i) where the Defaulting Party enters into a compromise or arrangement (or announces one) under section 411 of the *Corporations Act 2001* (Cth);
 - (ii) where a managing controller is appointed over the whole (or substantially the whole) of the Defaulting Party's property; or
 - (iii) where the Defaulting Party enters into voluntary administration.

9. Liability

- (a) In the event any material supplied by BGC under this contract being defective, to the extent permitted by law, the liability of BGC (if any) shall be limited to removal and replacement of such defective material.
- (b) To the extent permitted by law, BGC's liability under any condition or warranty which cannot legally be excluded is limited to:
 - (i) the replacement of the concrete;
 - (ii) the repair of the concrete (if applicable);
 - (iii) the payment of the cost of replacing the concrete; or
 - (iv) the payment of the cost of having the concrete repaired (if applicable).
- (c) If any concrete to be supplied by BGC under these Terms fail to conform in a material respect with the Specifications then:
 - (i) BGC is not liable unless the Purchaser notifies BGC of the failure within 10 days after the date of delivery of the concrete; and
 - (ii) the liability of BGC is in any case limited as set out in clause 9(b).
- (d) Where the Purchaser acquires concrete from BGC for the purpose of on-supplying to another person ("**consumer**"), BGC shall not be liable for any consequential loss suffered by the Purchaser unless otherwise stated in a contract or agreement. However, to the extent required by the Australian Consumer Law, BGC may be liable for any consequential loss suffered by the consumer.
- (e) The provisions of clause 9(c) and (d) are subject to the provisions of any statutory condition or warranty which cannot legally be excluded.
- (f) In these Terms, "**consequential loss**" means loss beyond the normal measure of direct damages and includes without limitation and whether or not such loss would be within the normal measure of direct damages, indirect loss, loss of profit, loss of revenue, loss of business, loss of actual or anticipated savings, loss of bargain, loss of business reputation, loss of use, cost of capital or costs of substitute goods, facilities or services and loss of opportunity (including opportunities to enter into arrangements with third parties).

10. Force Majeure

- (a) A party (**Affected Party**) is not liable for any delay or failure to perform an obligation (other than to pay money) under these Terms caused by an act of God, fire, war, insurrection or other

armed conflict, riot, vandalism or sabotage, strike, lockout, ban, transport or port accident or congestion, pandemic, epidemic, quarantine of persons or goods, limitation of work or other industrial disturbance or any law, rule, regulation, order, requirement or restraint imposed by any government or governmental agency whether local, state, national or international (other than an order, requirement or restraint resulting from the Affected Party's breach of any law, permit or authorisation).

- (b) The Affected Party must notify each other party as soon as practical of any anticipated delay or failure caused by an event specified in clause 10(a) (**Event**).
- (c) The performance of the Affected Party's obligation is suspended for the period of delay caused by the Event to the extent performance is prevented by the Event from the date notice is given under clause 10(b) and any such non-performance or delay in performance of these Terms will not be a breach of these Terms.
- (d) Any party may terminate this agreement at the expiration of not less than 7 days' notice to the other party if prevention of performance of a material obligation by an Event, or a delay caused by the Event, exceeds 90 days.
- (e) If a party terminates this agreement under clause 10(d), all money previously paid under this agreement for which no goods, services or other consideration has been provided must be refunded.

11. Dispute Resolution

- (a) If a dispute or difference arises between BGC and the Purchaser in respect of any fact, act, matter or thing arising out of or in any way connected with these Terms and one party requires the dispute or difference to be resolved, then that party will promptly give the other party a written notice giving details of the dispute.
- (b) Within 14 days of a party receiving a notice, the parties, and/or their delegates, must meet and attempt to resolve the dispute in good faith.
- (c) If, within 14 days of the meeting, the dispute is still not resolved, then, either party may proceed to litigation.
- (d) In the event of any dispute between the parties, the Purchaser shall pay all undisputed amounts to BGC.

12. General

- (a) Any reference to the Purchaser in these Terms means and includes the Purchaser, his employees, agents, subcontractors, assignees of, and any entity claiming through or under the Purchaser. The actions or signatures of any person appearing to have the authority of the Purchaser shall bind the Purchaser.
- (b) In the event of any dispute arising between BGC and the Purchaser, the Purchaser shall forthwith pay BGC the amount claimed by BGC, to be held by BGC until determination of the dispute.
- (c) A statement signed by BGC's authorised representative, certifying the amount of any increased cost or other claim by BGC shall in the absence of manifest error be prima facie evidence of its contents.
- (d) These Terms do not create or evidence a partnership or joint venture between the parties.
- (e) These Terms are governed by and are to be construed according to the laws of Western Australia and the parties submit to the exclusive jurisdiction of the courts of Western Australia.

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- (f) If any part of these Terms is, or becomes, void or unenforceable, that part is, or will be, severed from these Terms so that all parts that are not, or do not become, void or unenforceable remain in full force and effect and are unaffected by that severance.
- (g) A failure to exercise or delay in exercising any right, power or privilege by any party will not operate as a waiver of that right, power or privilege. A single or partial exercise of any right, power or privilege will not preclude any other or further exercise of that right, power or privilege, or the exercise of any right, power or privilege. A purported modification, variation or amendment of these Terms or any waiver of any rights of any party shall not have any force or effect unless and until the same is in writing, executed by the parties or, in the case of a waiver, is executed by the party whose rights are thereby waived.
- (h) These Terms constitute the entire agreement between the parties with respect to the subject matter of these Terms and contains all of the representations, warranties, covenants and agreements of the parties in relation to the subject matter of these Terms as at the date of these Terms. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by these Terms and has no further effect.
- (i) BGC may collect the Purchaser's personal information for the purpose of supplying concrete and keeping a record of transactions on BGC's file. Personal information can include sensitive health information as required by BGC from time to time. BGC's Privacy Policy can be found at www.bgc.com.au/.