

BGC ASPHALT – TERMS AND CONDITIONS OF SALE

In these terms and conditions (**Terms**):

Chain of Responsibility means the road transport laws contained in the *Road Traffic (Administration) Act 2008 (WA)* and the *Road Traffic (Vehicles) Act 2012 (WA)* and associated regulations, as amended from time to time, or any equivalent laws in other States.

Company means BGC (Australia) Pty Ltd (ACN 005 736 005) trading as BGC Asphalt.

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).

Insolvency Event means the happening of any of these events in relation to the Defaulting Party (as that term is defined in clause I):

- (a) the Defaulting Party enters into a compromise or arrangement (or announces one) under section 411 of the *Corporations Act 2001 (Cth)*;
- (b) a managing controller is appointed over the whole (or substantially the whole) of the Defaulting Party's property; or
- (c) the Defaulting Party enters into voluntary administration.

Purchaser means the entity placing an order for the material referred to on the Quote.

Quote means the quotation form issued by the Company to the Purchaser, and if more than one such form is issued, means the latest such form. If an order is placed over the telephone, and a written Quote is not issued prior to acceptance of the order, the Quote and the Company's delivery docket shall be prima facie evidence of the phone order.

A. Quotes & Orders

A.1 The price of asphalt specified by the Company in any Quote will remain valid for acceptance within 30 days of the Quote for delivery/collection within 90 days of the Quote, unless otherwise specified or agreed.

A.2. The asphalt shall contain materials of the Company's choice unless otherwise stated in the Quote. The characteristics of the asphalt shall be those shown on the face of the Quote. Purchasers should ensure that the characteristics shown on the Quote are in accordance with their requirements and any required specification.

A.3 Quotes are given on square metre (m²) rate. If there are any variations in the area or quantities affecting the Quote (including changes to the required depth of asphalt), the Purchaser must inform the Company immediately of the variation, and the Company shall amend the Quote. Every purchase order issued by the Purchaser must state a current Quote number.

A.4 Any regional works must be subject to a Quote specifically referring to the remote nature of those works and additional conditions notified to the Purchaser will apply by reason of that fact.

A.5 The Company reserves the right to accept or decline, in whole or in part, any order placed by the Purchaser.

B. Quality of Asphalt

B.1 The Purchaser warrants to the Company that all specifications and other information (**Specifications**) provided to the Company for the selection, manufacture, supply and/or installation of asphalt are accurate and correct and suitable in all respects for the Purchaser's intended use for the asphalt.

B.2 Unless otherwise agreed in writing, the Company when giving the Quote or supplying any asphalt will not be taken to have approved any Specification as being suitable for any particular purpose, and will not be liable for any loss, delay or damage resulting from any defects in or unsuitability of the Specifications. The Purchaser shall be liable to the Company for any costs arising from the Specification as shown on the order or Quote being changed to that shown on the delivery docket.

B.3 Unless otherwise stated in writing ex-plant asphalt and/or supply -lay asphalt delivered by the Company will comply with the relevant AS, AAPA, IPWEA or MRWA specifications referred to in the Quote, as applied to the relevant mix type and/or asphalt contract. If no standard is specified, the Company shall supply to the minimum applicable specification out of AS, AAPA, IPWEA and MRWA specifications.

B.4 Testing will not automatically be carried out unless specified under the Quote. The BGC Quality Management System provides for the

Company to undertake tests of its systems at regular intervals, but not necessarily at NATA or AS frequency and may not include testing of the batch supplied to the Purchaser. Testing reports (NATA endorsed) will be arranged if requested by the Purchaser and will be charged at the rates specified in the Company's price list or as notified to the Purchaser from time to time. The Company does not recognise and will not be bound by test results by others unless the asphalt is sampled correctly and tested strictly in accordance with AAPA or MRWA specifications.

B.5 The Company shall not be liable for and is hereby released from and indemnified by the Purchaser in respect of any claims made by the Purchaser or any third party which arise out of any defects which may develop in the asphalt, or any other claims due to:

- (a) faulty handling or placement of the asphalt by the Purchaser or any person other than the Company;
- (b) the addition of any material to the ex-plant asphalt (after the vehicle has been loaded and sent);
- (c) the addition of any material to the supply and lay asphalt (after the vehicle has been loaded and sent) without the written authority of an authorised representative of the Company;
- (d) the incorrect selection of, or Specifications for the asphalt and any additives for the required use, situation and conditions, except to the extent that the Company has made such selection (in which case, this indemnity and release applies to the extent that any information supplied by the Purchaser as to the use, situation and conditions is incorrect);
- (e) any traffic (other than the Company's) passing over the asphalt prior to full curing of the asphalt;
- (f) the base on which the asphalt is laid being unsuitable or defective in any way or impacting on the quantity of asphalt required for a specified average or minimum thickness;
- (g) any vehicle (other than the Company's) not being suitable to carry and maintain the asphalt in good condition (and including the vehicle being unable to properly and safely carry the asphalt);
- (h) the Purchaser ordering an amount of asphalt that is not sufficient for proper coverage (at a proper or specified thickness) of the area to be covered; or
- (i) traffic management at the site to which the asphalt is to be delivered (**Site**).

C. Delivery, Collection and Site

C.1 Delivery

The Company's standard trading hours are Monday to Friday from 7am to 4pm inclusive. Any requested delivery times must allow for the preparation of asphalt, delivery, laying (where relevant) and travel time (to and from the Site) within those periods. For deliveries which require work outside these hours and on public holidays, surcharges (including an opening fee) may apply in accordance with the Company's schedule of rates for the time being in force specified in the Company's price list, or as notified to the Purchaser from time to time.

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 asphalt is unloaded.

The Purchaser must:

- (a) provide safe, suitable and unrestricted access for delivery of ex-plant and/or supply-lay asphalt; and
- (b) release and indemnify the Company against any loss, damage, cost or liability arising from events occurring while gaining or caused by such access to the Site unless solely caused by the Company's negligent act or omission.

While the Company uses reasonable endeavours to achieve delivery times, the Purchaser acknowledges that all times quoted for delivery are estimates only, and the Company will not be liable for any failure to deliver or for delay in delivery of asphalt 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 the Company.

The Purchaser shall not be relieved of any obligation to accept or pay for asphalt by reason of any delay in delivery.

Any claim that product specified in the delivery docket is not in accordance with the Quote must be made within 24 hours of delivery and be confirmed in writing to the Company within 7 days. The Company will not be liable for any such claims not so made and confirmed.

C.2 Collection

Asphalt may be collected by the Purchaser's carriers if specified in the Quote.

The Purchaser will:

- (a) ensure that the Purchaser's vehicle used to collect and transport the asphalt is maintained in a mechanically sound condition that is fit for the purpose of collecting and transporting the asphalt; and
- (b) comply with all relevant laws, including without limitation, all safety laws applicable to the supply of asphalt and Chain of Responsibility obligations with respect to the collection and transportation of the asphalt.

The Company may refuse to release the asphalt to the Purchaser where the Company has reasonable grounds to believe that the Purchaser's vehicle is not fit for the purpose of collecting and transporting the asphalt.

C.3 Site

The Purchaser:

- (a) is responsible for all traffic management at the Site, and shall ensure that the Company is not impeded in its delivery or laying of the asphalt by those arrangements; and
- (b) must ensure that the base on which the asphalt is to be laid is in good condition, properly compacted and graded, and suitable to receive the asphalt as at the time of delivery, and suitable for the anticipated traffic loading after laying of the asphalt.

D. Installation

D.1 Where the Company is required to install asphalt on site:

- (a) the Company will do so in accordance with the Specifications and industry standards, and warrants that it will perform its services in a proper and workman-like manner; and
- (b) the Purchaser must:
 - (i) provide safe, suitable and adequate access to the Site for delivery;
 - (ii) comply with all instructions and recommendations given by the Company regarding the delivery and/or installation of any asphalt;
 - (iii) 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;
 - (iv) 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; and
 - (v) 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.

D.2 The Company may subcontract its obligation to install in its absolute discretion. The Company will be responsible for its obligations under these Terms notwithstanding that subcontracting.

E. Price / Payments

E.1 Prices stated are based on the current costs for labour, materials, transport and other charges affecting the cost of production. If the product is not delivered or collected within 150 days of the Quote, BGC may vary the price to its then current rates to account for any variation to these costs (subject to any specific provision otherwise in the Quote). Evidence of BGC's then current rates will be provided to the Purchaser upon request.

E.2 Unless specified in the Quote, asphalt rates exclude inductions, medicals, police clearances, protection of kerbing and existing structures, pre-wetting and pavement preparation, traffic control management, profiling, bob-cats, suction brooms, sweeping, asphalt trials, preparation, stockpile sites (including their preparation and rehabilitation) and other matters which are to be undertaken by the Purchaser.

E.3 The Purchaser must pay the agreed price (without set-off or deduction), or where no price is agreed, the reasonable costs of all variations to any orders in addition to the price quoted where variations are received or required after the Purchaser's order has been processed and the Company incurs costs as a result. The reasonable costs of a variation will be calculated by the Company at reasonable rates for labour and materials and will include a reasonable administration charge, allowance for overheads and profit and other costs incurred by the Company as a result of the variation. The Company will take reasonable steps to limit these costs once informed of the variation. Any difference in the measurements, quantities or conditions from those advised by the Purchaser shall constitute a

variation

E.4 For any asphalt order and later cancelled the Purchaser shall pay the Company (on demand) all expenses incurred up to the time of cancellation and any costs of disposal of any waste material and asphalt, except to the extent those expenses are recouped by use of the materials for an alternative supply. The Company will use reasonable endeavours to mitigate loss suffered due to delay or cancellation of asphalt ordered.

E.5 The terms of payment are cash with order, except for trade customers that have entered into a Credit Agreement prior to acceptance of the Quote, in which case the terms of that Credit Agreement will apply.

E.6 The Purchaser will be invoiced for the quantity of material supplied as per delivery docket or dockets.

E.7 In the event of any dispute arising between the parties, the Purchaser shall pay all undisputed amounts to the Company.

F. Risk & Title

F.1 Risk in any products supplied by the Company passes to the Purchaser upon delivery to the Site, whether or not the asphalt has been paid for in full

F.2 Nothing in any Quote or purchase order gives the Purchaser any lease or right to use the Company's plant and equipment (**Equipment**) used to provide the services under these Terms. Title in and possession of the Equipment remains with the Company at all times.

G. GST

G.1 Any expression used in this clause G and which is defined in the *A New Tax System (Goods and Services Tax) Act 1999* has the same meaning in this clause G.

G.2 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.

H. Liability

H.1 In the event of any goods or services supplied by the Company under these Terms being defective, the liability of the Company (if any) under any condition or warranty which cannot be legally excluded is limited to:

- (a) in the case of goods;
 - (i) the replacement of the asphalt;
 - (ii) the repair of the asphalt (if applicable);
 - (iii) the payment of the cost of replacing the asphalt; or
 - (iv) the payment of the cost of having the asphalt repaired (if applicable);

in the discretion of BGC acting reasonably; and

- (b) in the case of services:
 - (i) supplying the services again; or
 - (ii) paying the cost of having the services supplied again.

H.2 Where the Company is unable to replace the goods or resupply the services, the Company's liability shall be limited to the price paid by the Purchaser in respect of the Quote. All other guarantees, warranties, undertakings or representations expressed or implied and whether arising by statute or otherwise are hereby expressly excluded (except to the extent only that such exclusion is prohibited by statute). To the extent permitted by statute, the Company and the Purchaser shall not be liable to the other for any consequential loss of any nature whatsoever.

If any asphalt supplied by the Company under these Terms fails to conform in a material respect with the Specifications then:

- (a) the Company is not liable unless the Purchaser notifies the Company of the failure within 10 days of the occurrence of the act, omission or event giving rise to the claim; and
- (b) the liability of the Company is in any case limited as set out in clause H.1(a) and (b) above.

H.3 The Company does not allow any retentions, and liquidated damages are not applicable under these Terms.

I. Termination

I.1 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:

- (a) 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;
- (b) a judgment, order or encumbrance is enforced, or becomes enforceable upon any of the Defaulting Party's property;
- (c) 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;
- (d) the Defaulting Party suspends or delays payment of its debts;
- (e) the Defaulting Party is unable to pay its debts as and when they fall due or goes into bankruptcy;
- (f) 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 Insolvency Event);
- (g) the Defaulting Party (being a corporation) is deregistered;
- (a) the Defaulting Party breaches any agreement with the Company for the provision of credit to the Purchaser (**Credit Agreement**); or
- (b) to the extent permitted by law, the Defaulting Party is subject to an Insolvency Event.

I.2 These Terms may be terminated by the Company at any time effective immediately upon giving notice if a change occurs in the Purchaser's circumstances which, in the Company'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):

- (a) a change in the Purchaser's financial position up and until an Insolvency Event occurring;
- (b) the Purchaser factoring its debts; or
- (c) the Purchaser becoming party to litigation, arbitration or any other administrative proceeding.

I.3 If the Purchaser is the Defaulting Party under these Terms (or where any of the events in clause I.2 occurs), the Company 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:

- (a) suspend deliveries of further asphalt to the Purchaser whether under these Terms or otherwise; and/or
- (b) withdraw any credit facilities which may have been extended to the Purchaser under any Credit Agreement, and require immediate payment of all moneys owed to the Company by the Purchaser.

I.4 The Defaulting Party (or in the case of an event under clause I.3, the Purchaser) will be responsible for, and will indemnify the Non-Defaulting Party (or the Company, 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 the Company, as applicable) as a result of the breach or event.

I.5 On termination of these Terms under this clause I, 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.

J. Force Majeure

J.1 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).

J.2 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 J.1 (**Event**).

J.3 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 J.2 and any such non-performance or delay in performance of this agreement will not be a breach of this agreement.

J.4 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.

J.5 If a party terminates this agreement under clause J.4, all money previously paid under for this Agreement which no goods, services or other consideration has been provided must be refunded.

K. Dispute Resolution

K.1 If a dispute or difference arises between the Company 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.

K.2 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. If, within 14 days of the meeting, the dispute is still not resolved, then, either party may proceed to litigation.

L. General

L.1 The actions or signatures of any person appearing to have the authority of the Purchaser to do so shall bind the Purchaser, including any person accepting delivery of the materials.

L.2 All Quotes and all orders for the supply and/or installation of asphalt are made and/or accepted by the Company on and subject to these Terms. The Purchaser's terms and conditions, howsoever provided, do not form part of these Terms (even if any representative of the Company 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 the Company), whether to apply to all subsequent orders, or any particular order, may only be made if it:

- (a) is in writing;
- (b) is signed by authorised managers of both parties; and
- (c) 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 L.2(b) above do not have the authority to vary these Terms.

L.3 Where the Purchaser has entered into a Credit Agreement, the terms of the Credit Agreement shall prevail over these Terms to the extent of any inconsistency.

L.4 If the Purchaser places an order with the Company after receiving these Terms, the Purchaser shall be deemed to have read and unconditionally agreed to these Terms.

L.5 A statement signed by the Company's authorised representative, certifying the amount of any increased cost or other claim by the Company shall in the absence of manifest error be prima facie evidence of its contents.

L.6 Where any obligation is placed on a party, it shall ensure that its employees, servants, contractors, agents and other persons acting on its behalf comply with that obligation.

L.7 Where an indemnity, release or right is given to a Party, that indemnity, release or right is also given to the Party any of its employees, servants, contractors and agents.

L.8 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.

L.9 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.

L.10 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 waiver of any rights of any party shall not have any force or effect unless and until the same is executed by the party whose rights are thereby waived.

L.11 The Purchaser agrees that the Company may use a tracking device or other surveillance device at the Company's premises or manufacturing sites and in its vehicles.

L.12 The Company may collect the Purchaser's personal information for the purpose of supplying asphalt and keeping a record of transactions on the Company's file. Personal information can include sensitive health information as required by the Company from time to time. The Company's Privacy Policy can be found at www.bgc.com.au/.