

Acon Industries 2015 Limited T/A Acon Industries – Terms & Conditions of Trade

1. Definitions
1.1 'Acon' means Acon Industries 2015 Limited T/A Acon Industries, its successors and assigns or any person acting on behalf of and with the authority of Acon Industries 2015 Limited T/A Acon Industries.
1.2 Client means the persons or any person acting on behalf of and with the authority of the Client requesting Acon to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
(a) if there is more than one Client, it is a reference to each Client jointly and severally; and
(b) if the Client is a partnership, it is a reference to the partnership as a whole and includes the Client's executors, administrators, successors and permitted assigns.
1.3 'Works' means all Works or Materials supplied by Acon to the Client at the Client's request from time to time (in whatever context so permits the terms 'Works' or 'Materials' shall be interchangeable for the other).
1.4 'Price' means the Price payable (plus any Goods and Services Tax ("GST") where applicable) for the Works as agreed between Acon and the Client in accordance with clause 5 below.

inherent in the materials. Acon shall not be responsible for any defects in the Works, any loss or damage to the Materials (or any part thereof), however arising from the use of materials supplied by the Client.
18.2 Acon gives no guarantee (expressed or implied) as to the length of time the curing process will take and/or the curing process may be affected by the use of concrete products such as:
(a) hairline cracking of paving and grout; or
(b) damage caused by contact with chemicals, solvents, oils or any other substances; or
(c) effects by elements such as heat exposure or wet weather conditions that prolong the curing process.
18.3 The Client acknowledges and accepts that the finish Works shall have a minimum grade/crossfall of one percent (1%) to prevent pooling, and shall not be deemed to be a level surface.
18.4 The Client acknowledges and agrees that it is its responsibility to organise and be liable for all costs associated with protecting the surface and shall take all reasonable precautions to protect against destruction or damage by vandals. In the event that the surface is destroyed or damaged due to vandalism then the cost of repair or replacement shall be borne by the Client.
18.5 The Client accepts that where earthmoving or excavation work has been provided by a third party engaged by the Client and such work found to be defective or not up to standard, then Acon reserves the right to charge a variation to remedy such work.
19. The Client acknowledges that where Acon is engaged to repair and/or replace a damaged asphalt or concrete surface that Acon is only responsible for that portion of Works. Acon and the Client shall not be liable for any liability in respect of previous Works carried out by any other third party that subsequently fail and found to be the source of the failure. The Client agrees to indemnify Acon against any loss or damage to the Materials, or caused by the Client or any part thereof however arising from the use of the Materials.
20. Acon shall not be held liable for the shrinkage of asphalt on any ground works not prepared by Acon.
21. The Client acknowledges and accepts that Acon shall be entitled to suspend the Works where forecasted wind speeds from the New Zealand Met Service confirms with the definition of gale force winds, being winds of up to 63-75kph.
22. Measurement of Bitumen Based Products and Concrete
At the completion of the Works the Client or the representative of the Client shall be in attendance and the Works shall then be duly measured. In the absence of either the Client or the representative of the Client, Acon shall be deemed to have taken the necessary measurements and forward to the Client their calculations. If the Client does not object to the calculations within seven (7) days of receipt of the same then it shall be deemed acceptance of the same and the works completed.
23. Access of Client's Plans
The Client warrants that the plans, specifications (including CAD plans, geotech reports etc.) and other information provided by the Client to Acon are accurate. The Client acknowledges and agrees that in the event that any plans, specifications (including CAD plans) or other information provided by the Client to Acon are inaccurate, Acon shall not be held responsible for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
24. Acon shall not be held liable for any loss or damage to the Client if there is a material change to the scope of Works as a result of inaccurate plans, specifications or other information.
25. The Client shall be liable for Acon's costs of de-mobilisation or re-mobilisation of any plant, materials, equipment or staff from the worksite, upon the re-commencement of the Works at the worksite, if applicable, and Acon will not be liable to the Client for any loss or damage the Client suffers because Acon has exercised its rights under this clause.
26. The Client shall ensure that Acon has clear and free access to the worksite (including, but not limited to traffic control) within the vicinity of the Works, if so required shall be the Client's responsibility and shall be deemed to have been accepted by the Client. Acon shall not be liable for any loss or damage to the site unless due to the negligence of Acon.
27. It is the responsibility of the Client to ensure that access is suitable to accept the weight of any plant or heavy equipment that may be deemed necessary by Acon. The Client agrees to indemnify Acon against all costs incurred by Acon in recovering such vehicles in the event they become bogged or otherwise immovable.
28. Prior to Acon commencing any work the Client must advise Acon of the precise location of all underground services on the site and clearly mark the same. The underground mains and services the Client must identify include, but are not limited to, electrical services, gas (including low and high pressure), underground services and foreign materials (as per clause 11), safety considerations, prerequisite work by any third party not being completed, hard rock or other barriers below the surface, latent soil conditions, or hidden pipes, and wiring etc.) which are only discovered on commencement of the Works; or
(b) in the event of no work on the cost of labour or materials (including, but not limited to, currency exchange rates or increases to Acon in the cost of taxes, levies) which are beyond Acon's control.
29. Variations shall be charged for on the basis of Acon's quotation, and will be detailed in writing, and shown as variations on Acon's invoice. The Client shall be required to respond to any variation submitted by Acon within ten (10) working days. Failure to do so will entitle Acon to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
30. At Acon's sole discretion a deposit may be required.
31. Time for payment for the Works being of the essence, the Price will be payable by the Client on the date specified in the invoice. Acon will not be responsible for any delay in payment by way of progress payments in accordance with Acon's specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the worksite but not yet installed.
32. For certain approved variations, Acon will invoice the Client at the end of the month in which a statement is posted to the Client's address or address for notices,
33. the date specified on any invoice or other form as being the date for payment; or
34. failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client.
35. At the agreement of both parties, payment of the Price may be subject to retention by the Client of an amount (hereafter called the "Retention Money"), being a set amount or equal to a percentage of the Price. The Client shall retain the Retention Money until the completion of the Works, during which time all Works are to be completed and/or all defects are to be remedied. Any Retention Money applicable to this contract are to be dealt with in accordance with section 18 of the Construction Contracts Act 2002.
36. Payment may be made by cheque, by electronic on-line banking, or by any other method as agreed to between the Client and Acon.
37. The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by Acon nor to withhold payment of any invoice because part of that invoice is disputed.
38. Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to Acon an amount equal to any GST Acon must pay for any supply by Acon under this contract or any other contract between the Client and Acon. Acon shall not be liable for any deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
39. Subject to clause 6.2 it is Acon's responsibility to ensure that the Works start as soon as it is reasonably possible.
40. The Works commencement date will be put back and the completion date extended by whatever time is reasonable in the event that Acon claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond Acon's control, including but not limited to any failure by the Client to:
(a) make a selection of a material; or
(b) have the site ready for the Works; or
(c) notify Acon that the site is ready.
41. At Acon's sole discretion, delivery is in addition to the Price.
42. Acon may deliver the Works in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
43. Any time specified by Acon for delivery of the Works is an estimate only and Acon will not be liable for any delay in delivery of the Works by Acon. However, if either party agrees that they shall make every endeavour to enable the Works to be supplied (a) at the time and place as was arranged between both parties. In the event that Acon is unable (b) to supply the Works as agreed solely due to any action or inaction of the Client, then Acon shall be entitled to charge the Client a reasonable fee for re-supplying the Works at a later time and date, and/or for storage of the Materials.
44. Risk
45. If Acon retains ownership of the Materials under clause 15 then
(a) where Acon is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery and the Client must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that either:
(i) the Client or the Client's nominated carrier takes possession of the Materials at Acon's address; or
(ii) the Materials are delivered by Acon or Acon's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address).
46. Where Acon is to both supply and install Materials then Acon shall maintain a contract works insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Client.
47. In the event that the Client specifically requests Acon to leave Materials outside Acon's premises for collection or to deliver the Materials to an unattended (b) location then such materials shall always be left at the site of the Client and it shall be the Client's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Client's expense.
48. In the event that during the course of the Works Acon discovers any undisclosed waste and/or hazardous materials then Acon reserves the right to halt all Works and immediately notify the Client. It is the Client's responsibility to ensure that any such waste and/or hazardous materials. In the event that Acon agrees to remove such materials for the Client then such work shall be treated as a variation in accordance with clause 5 and shall be in addition to the Price. Acon shall be entitled to charge the Client a reasonable fee for the removal of such materials.
49. The Client acknowledges that the presence of plant or tree root growth and/or other blockages may indicate damaged pipe work and therefore where Acon is requested to merely clear such blockages, Acon can offer no guarantee against recurrence or further damage. Acon shall be liable for any damage to the Client's property or other equipment or other damage of the same and shall provide the Client with an estimate for the full repair of the damaged pipe work.
50. In the event that during the course of the Works Acon discovers any fossils, artefacts or any other remains of geological or archaeological interest then Acon reserves the right to halt all Works and immediately notify the Client. The Client accepts and agrees that all additional costs that may be incurred by Acon as a result of any such delays shall be borne by the Client and shall be treated as a variation in accordance with clause 5.
51. Where Acon gives advice or recommendations to the Client, or the Client's agent, regarding the suitability of the worksite for the laying of bitumen based products or profiling Works and such advice or recommendations are not acted upon then Acon shall provide the Client or their agent with an authority to proceed with the Works in writing. Acon shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Works.
52. The Client acknowledges that variations of colour and texture are inherent in all bitumen based products, concrete and natural stone. While every effort will be taken by Acon to match colour or texture of the product, Acon shall not be liable for any loss, damages or costs however arising resulting from any variation in colour or texture between batches of product or sale samples and the finished Works.
53. Where the Client has supplied materials for Acon to complete the Works, the Client acknowledges and accepts responsibility for the suitability of purpose, quality and any faults

which Acon has agreed in writing that the Client is entitled to reject. Acon's liability is limited to either (at Acon's discretion) replacing the Materials or repairing the Materials. Materials will not be accepted for return other than in accordance with 18.1 above.
19. Returns
19.1 Client will only be accepted provided that:
(a) the Client has complied with the provisions of clause 18.1; and
(b) Acon has agreed in writing to accept the return of the Materials; and
(c) the Materials are returned to the Client's cost within seven (7) days of the delivery date; and
(d) Acon will not be liable for Materials which have not been stored or used in a proper manner; and
(e) the Materials are returned in the condition in which they were delivered and with all packaging material, brooms and instruction material in new condition as is reasonably possible in the circumstances.
19.2 Acon may (in its discretion) accept the return of Materials for credit but this may incur a handling fee of twenty-five percent (25%) of the value of the returned Materials plus any freight charges.
19.3 Returned Materials may (at Acon's sole discretion), incur restocking and handling fees.
19.4 Non-stockist items or Materials made to the Client's specifications are under no circumstances acceptable for credit or return.
20. Warranties
For Materials not manufactured by Acon, the warranty shall be the current warranty provided by the manufacturer of the Materials. Acon shall not be bound by nor responsible for any terms, conditions, representation or warranty other than that which is given by the manufacturer of the Materials.
21. Consumer Guarantees Act 1993
If the Client is acquiring Materials for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Materials by Acon to the Client.
22. Default and Consequences of Default
Interest on overdue invoices shall accrue daily from the date when payment becomes due until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at Acon's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
23. If at any time the Client shall indemnify Acon from and against all costs and disbursements incurred by Acon in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, Acon's collection agency and all other reasonable costs).
24. Failure to pay any other rights or amounts Acon may have under this contract, if a Client has made payment to Acon, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by Acon in recovering the debt. It can be proven that the Client is found to be illegal, fraudulent or in contravention to the Client's obligations under this contract.
25. Without prejudice to Acon's other remedies at law Acon shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to Acon, shall be deemed to have been repaid to Acon.
26. If Acon has exercised any applicable credit limit provided by Acon, the Client will be unable to make a payment when it falls due.
27. If the Client has exercised any applicable credit limit provided by Acon, the Client becomes insolvent or bankrupt, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
28. Cancellation
29. Without prejudice to any other remedies Acon may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions Acon may suspend or terminate the supply of Works to the Client. Acon will not be liable to the Client for any loss or damage the Client suffers because Acon has exercised its rights under this clause.
30. Acon may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are commenced by giving written notice to the Client. On giving such notice Acon shall repay to the Client any sums paid in respect of the Price, less any amounts owing to the Client by Acon. Acon will not be liable for any loss or damage whatsoever arising from such cancellation.
31. In the event that the Client cancels the delivery of Works the Client shall be liable for any and all loss or damage (whether direct or indirect) by Acon as a direct result of the cancellation (including, but not limited to, any loss of profits).
32. Cancellation of orders for products made to the Client's specifications, or for non-stockist items, will definitely not be accepted once production has commenced, or an order has been placed.
33. Privacy Act 1993
The Client authorises Acon or Acon's agent to:
(a) access, collect, retain and use any information that the Client has provided to Acon;
(b) disclose any information (including information held by the Ministry of Justice) for the purpose of assessing the Client's creditworthiness; or
(c) for the purpose of marketing products and services to the Client;
(d) disclose any information to any other party directly or indirectly obtained by Acon from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.
34. The Client authorises the authorities under clause 24.1 are authorities or consents for the purposes of the Privacy Act 1993.
35. The Client shall have the right to request Acon to copy of the information about the Client retained by Acon and the right to request Acon to correct any incorrect information about the Client held by Acon.
36. Construction Contracts Act 2002
The Client hereby expressly acknowledges that the Client is giving five (5) working days of written notice of its intent to do so if a payment claim is served on the Client, and:
(i) the payment is not paid in full by the due date for payment and no payment schedule has been given by the Client; or
(ii) a scheduled amount is not paid in a payment schedule issued by the Client in relation to the payment claim is not paid in full by the due date for its payment; or
(iii) the Client has not complied with an adjudicator's notice that the Client must pay an amount to Acon by a certain date; or
(iv) Acon has given written notice to the Client of its intention to suspend the carrying out of construction work under the construction contract.
37. If Acon suspends work, it:
(a) is not in breach of contract; and
(b) is not liable for any loss or damage whatsoever suffered, or alleged to be suffered, by the Client or by any person claiming through the Client; and
(c) is entitled to an extension of time to complete the Works; and
(d) keeps its right to terminate the contract or to suspend the work, and may at any time lift the suspension, even if the amount has not been paid or an adjudicator's determination has not been completed with.
38. If Acon exercises its right to suspend or terminate the work, the exercise of that right does not:
(a) affect any rights that would otherwise have been available to Acon under the Construction Contracts Act 2002; or
(b) enable the Client to exercise any rights that may otherwise have been available to the Client under that Act as a direct consequence of Acon suspending work under this provision.
39. Service of Notices
Any notice given under this contract shall be deemed to have been given and received:
(a) by handing the notice to the other party, in person;
(b) by leaving it at the address of the other party as stated in this contract;
(c) by sending it by registered post to the address of the other party as stated in this contract; or
(d) if sent by facsimile transmission to the fax number of the other party as stated in this contract (if any), on receipt of confirmation of the transmission;
(e) by email to the other party's last known email address.
40. Any notice that is not served or not received as stated above shall not be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
41. Trusts
At any time upon or subsequent to entering into the contract is acting in the capacity of trustee of any trust ("Trust") then whether or not Acon may have notice of the Trust, the Client covenants with Acon as follows:
(a) the contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust or the trust fund;
(b) the Client has full and complete power and authority under the Trust to enter into the contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Client against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity.
42. The Client will not commit in writing or Acon (Acon will not unreasonably withhold consent), cause, permit or allow any person to happen under the following:
(a) the removal, replacement or retirement of the Client as trustee of the Trust;
(b) any alteration to or variation of the terms of the Trust;
(c) any advancement or distribution of capital of the Trust; or
(d) any settlement of the trust property.
43. General
Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter under this contract shall be referred to and settled by either adjudication under the Construction Contracts Act 2002 and/or by arbitration in accordance with the Arbitration Act 1996 or its replacement(s).
44. The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver or release of that provision, nor shall it affect that party's right to subsequent 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.
45. These terms and conditions shall apply to the extent that they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the Tauranga Courts of New Zealand.
46. Acon shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by Acon of these terms and conditions (alternatively Acon's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
47. Notwithstanding to whomsoever any actions taken by Acon under clauses 16.1 to 16.5.
28.5 Security and Charge
In consideration of Acon agreeing to supply the Works, the Client assigns all of its rights, title and interest in and to any material charge in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
28.6 The Client agrees to indemnify Acon from and against all Acon's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising Acon's rights under this clause.
28.7 The Client irrevocably appoints Acon as each director of Acon as the Client's true and lawful attorney to perform any necessary acts which give effect to the provisions of this clause 17.28.9 including, but not limited to, signing any document on the Client's behalf.
28.8 Defects in Materials
In the event that the Client supplies the Materials on delivery and shall within seven (7) days of delivery 28.10 (time being of the essence) notify Acon of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford Acon an opportunity to inspect the Materials within a reasonable time following delivery, if the Client believes the Materials to be defective, then the Client shall take such steps as are necessary to ensure that the Materials shall be presumed to be free from any defect or damage. For defective Materials,