

## TERMS AND CONDITIONS 2018

### 1. DEFINITIONS

In these Terms, unless BGC otherwise specifies:

“**Agreement**” means the agreement between BGC and the Purchaser comprising the Quote, the Order and these terms and conditions.

“**BGC**” means BGC (Australia) Pty Ltd (ACN 005 736 005) T/A BGC Steel.

“**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.

“**Collection Date**” means the date the Goods are to be collected from BGC’s premises, as agreed between the parties.

“**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).

“**Credit Agreement**” means an agreement with BGC for the provision of credit to the Purchaser.

“**Defective**” means Good that do not match the Specification, or are not of merchantable quality or fit for any specified purpose.

“**Force Majeure Event**” means:

- (i) power, data or communication outages;
- (ii) acts of God or the public enemy, national emergencies, radioactive contamination, insurrection, riot, hostile or warlike action, vandalism or sabotage;
- (iii) a transaction embargo;
- (iv) strike, lockout, ban, limitation of work or other industrial disturbance; or
- (v) any legislation or regulation and any action or inaction of any government or government agency.

“**Goods**” means steel products and any associated accessories supplied by BGC in accordance with the Agreement.

“**Insolvency Event**” means the happening of any of these events in relation to the Defaulting Party:

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

“**Intellectual Property**” means all intellectual property rights including rights relating to know-how, copyright, inventions and patents, trademarks, registered designs, layouts and all other rights resulting from intellectual activity in industrial, scientific, literary or artistic fields.

“**Material**” includes property, information and the subject matter of any category of Intellectual Property rights.

“**Order**” means an order for the supply of Goods, whether made by the Purchaser accepting a Quote, or by BGC accepting a purchase order or similar document provided by the Purchaser to BGC.

“**Price**” means the price for the Goods as specified in any Quote or tax invoice supplied by BGC.

“**Purchaser**” means the person, firm, company or organisation to whom a Quote is submitted.

“**Purchaser’s Representatives**” means the Purchaser’s employees, contractors and agents, or anyone else under the control of the Purchaser.

“**Quote**” means a quote (or similar document) provided by BGC to

the Purchaser.

“**Site**” means the site to which the Goods are to be delivered.

“**Stock Items**” means Goods that are kept by BGC in stock in large quantities and are not ordered on a job by job basis.

“**Terms**” means these terms and conditions of supply.

“**Third Party Material**” means Material owned by a third party that is included, embodied in or attached to the Goods.

### 2. AGREEMENT TO BUY AND SELL

The parties acknowledge that BGC will sell and the Purchaser will purchase Goods from time to time pursuant to these Terms. These Terms will apply to all Quotes (including any Orders made by the Purchaser and accepted by BGC). The Purchaser’s terms and conditions do not form part of the Agreement (even if any representative of BGC signs those terms and conditions and/or they are annexed to these Terms or any Quote or 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 that are not authorised managers as referred to in this clause do not have the authority to vary these Terms, or to agree that these Terms do not apply to a supply to which these Terms would otherwise apply.

### 3. QUOTES AND PLACEMENT OF ORDERS

BGC may provide estimates based on information about the Site or the design of the building provided by the Purchaser (“**Specifications**”). BGC’s estimates are not Quotes and shall not constitute an offer to supply Goods. A Quote shall not constitute an offer to supply the Goods, and no contract for the supply of Goods shall exist between BGC and the Purchaser until the:

- (i) Purchaser enters into a Credit Agreement, if the supply is on credit;
- (ii) Purchaser places an Order with BGC (in which case it is deemed to have received or viewed a copy of these Terms on BGC’s website at <http://bgcsteel.com.au/>); and
- (iii) Order is accepted by BGC (either by communication to the Purchaser, or an overt act of acceptance such as accepting the Purchaser’s cash payment).

If the supply is to be on credit, the Purchaser must enter into a Credit Agreement, and if the Purchaser has not entered into that Credit Agreement then BGC may elect either:

- (i) not to proceed with the Order unless or until a Credit Agreement is entered into; or
- (ii) treat the Order as being on a cash basis.

If the Purchaser or the Purchaser’s builder has provided BGC with Specifications, BGC has relied upon those Specifications in making any recommendation. If any Specifications provided are incorrect or incomplete, BGC is not liable for any failure of the Goods to perform arising from incorrect selection of Goods. Unless otherwise agreed in writing, BGC when giving the Quote will not be taken to have approved any Specification as being suitable for any particular purpose.

The Quote:

- (i) is based on (among other things), the Specifications provided by the Purchaser;
- (ii) is based on (among other things), the cost of material current as at the date of the Quote. Any variations to the cost of the Goods either before or after acceptance of an order may be notified to the Purchaser and be payable in accordance with

these Terms. Evidence of any variation in the cost of the Goods can be provided to the Purchaser upon request; and  
(iii) will remain valid for 14 days from the date on the Quote, unless otherwise stated in the Quote. Any extension of this period is at the discretion of BGC.

The Purchaser:

- (i) must ensure that the characteristics of the Goods shown on the Quote are in accordance with their requirements and any Specifications provided; and
- (ii) warrants to BGC that all Specifications provided to BGC for the selection, manufacture and supply of the Goods are accurate and correct and suitable in all respects for the Purchaser's intended use for the Goods.

If there is any variation to the Specifications supplied by the Purchaser, the Purchaser must notify BGC as soon as possible. The Purchaser acknowledges that such variation may result in an increase to the Price quoted.

Orders may be in writing, by phone, email, facsimile or BGC-hosted on-line or web-based ordering (if applicable). BGC reserves the right to accept or decline, in whole or in part, any Order placed by the Purchaser.

#### 4. QUALITY OF GOODS

The Purchaser acknowledges that all Goods which are supplied as "Special" or "Second" grade Goods are sold "as is" at a lower price because they are imperfect or damaged and should be inspected before purchase. To the extent permitted by law, BGC will not be liable for any failure of any "Special" or "Second" grade Goods to perform or comply with industry standards.

BGC does not guarantee that the Goods will match the colour, size or texture of the Goods printed in BGC's catalogues, brochures, photographs or other advertising materials. The Goods supplied by BGC may be subject to minor colour, texture and size variations, which are caused by various factors beyond BGC's control such (e.g. sources of raw materials).

If BGC, on the request of the Purchaser, processes the Purchaser's materials in manufacturing the Goods, BGC will not warrant that the materials supplied by the Purchaser are suitable for such processing. BGC will not be liable for any:

- (i) failure of any Goods manufactured using the Purchaser's materials; or
- (ii) damage caused by or connected with the Purchaser's materials at any time during or after processing by BGC, unless (and then only to the extent) such failure or damage is caused by a negligent act or omission by BGC or its employees or contractors.

#### 5. DELIVERY AND COLLECTION OF ORDERS

##### a. Delivery

Deliveries shall be made during normal working hours (being Monday to Friday from 7am to 4pm) and at the Purchaser's cost. Delivery fees:

- (i) are published in BGC's price list which is available on BGC's website, or as notified to the Purchaser from time to time; and
- (ii) may vary depending on the size, weight and length of individual Orders.

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 Goods:

- (i) leave BGC's premises (where the Goods are collected); or
- (ii) are unloaded (where the Goods are delivered).

If collection or delivery of Goods 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 Goods not being as ordered.

In the event the Purchase or the Purchaser's agent is not on site to accept delivery, then the driver's signature denoting the time, date and place of delivery shall be deemed to be acceptance of the said delivery by the Purchaser in the absence of manifest error.

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 Site, the Purchaser shall:

- (i) ensure that the vehicle has a safe, suitable and unrestricted route between the kerbside nearest to the Site and the discharge or unloading location;
- (ii) comply with all occupational health and safety legislation; and
- (iii) release and indemnify BGC against any loss, damage, cost or liability arising from events occurring while gaining or caused by such access (including damage caused to the delivery vehicle) unless solely caused by BGC's negligent act or omission

If BGC (acting reasonably) considers the Site unsafe or inaccessible then BGC reserves the right not to make the delivery of the Goods until such time as the Site is safe or an alternative address supplied. If delivery is not completed within 1 hour after arrival on Site:

- (i) waiting time in excess thereof will be charged at the rates notified to the Purchaser from time to time, save and except delay caused by BGC; or
- (ii) the Goods may be taken back and stored at BGC's premises (at the Purchaser's cost) until such time as they are re-delivered or disposed of in accordance with clause 5b(iv).

If a date for delivery is nominated by the Purchaser, BGC will not be bound to deliver the Goods by that date unless it expressly agrees to do so in writing, signed by BGC, in which case it will be deemed to agree to use reasonable endeavours to deliver by the relevant date. BGC shall not be liable for any failure to deliver which is caused or contributed to by causes beyond its reasonable control, and the time specified for completion of delivery shall be extended commensurately. Delay in delivery or completion shall not constitute a breach of these Terms.

The Purchaser acknowledges that:

- (i) once Goods are delivered to a third party (such as a courier), they are outside BGC's control. BGC will not be liable for any loss, damage, delay or non-delivery of goods caused or contributed to by a third party, to the extent permitted by law; and
- (ii) the Purchaser shall not be relieved of any obligation to accept or pay for the Goods by reason of any delay in delivery.

##### b. Collection

If the Goods are to be collected from BGC's premises and are not collected by the Collection Date, then:

- (i) the Purchaser enters BGC's premises at its own risk. The Purchase indemnifies BGC from all loss and damage arising from the Purchaser's entry onto BGC's premises, except to the extent caused by BGC's own negligence;
- (ii) BGC will not be liable for any damaged caused to Goods after the Collection Date, save and except damage caused by a negligent act or omission of BGC or its employees or contractors;
- (iii) the Purchaser will be liable to pay to BGC a reasonable storage fee equivalent to 0.5% of the value of the Goods per month or part thereof; and
- (iv) after 3 months, dispose of the Goods and apply the proceeds of disposal to any sum due to BGC.

The Purchaser will ensure that the Purchaser's motor vehicle used to collect and transport the Goods is maintained in a mechanically sound condition that is fit for the purpose of collecting and transporting the Goods. The Purchaser acknowledges that BGC's premises is a working warehouse and the Purchaser is responsible for its own safety, and BGC may refuse to release the Goods to the Purchaser where BGC has reasonable grounds to believe that the Purchaser's motor vehicle is not fit for the purpose of collecting and transporting the Goods.

The Purchaser and the Purchaser's Representatives will comply with all relevant laws, including without limitation, all safety laws applicable to the supply of Goods and Chain of Responsibility obligations with respect to the collection and transportation of the Goods.

## 6. RESTOCKING FEE

All Stock Items that are not Defective as determined by BGC (acting reasonably), and are returned by the Purchaser shall incur a restocking fee of 15% of the Price plus any freight costs incurred by BGC.

Return of all non-Stock Items that are not Defective as determined by BGC (acting reasonably) will only be accepted for return in the absolute discretion of BGC. All non-Stock Items returned by the Purchaser under this clause shall incur:

- (i) a restocking fee for those non-Stock Items, to be set by BGC at the time of agreeing to the return of the Goods;
- (ii) any freight costs incurred by BGC; and
- (iii) any re-stocking fee payable by BGC to its supplier.

The Purchaser acknowledges that the restocking fees are a genuine pre-estimate of the additional costs and damage suffered by BGC in accepting returns on the conditions specified in this clause.

Subject to clause 9, BGC will under no circumstances be obliged to accept a return of Goods which:

- (i) are manufactured for a custom order or manufactured using the Specifications, unless the Goods are determined by BGC (acting reasonably) to be Defective; or
- (ii) have been damaged or otherwise rendered un-saleable by persons other than BGC or its employees and contractors.

## 7. PAYMENT AND PRICE

The Purchaser agrees to pay the amount(s) specified in any Quote accepted by the Purchaser before delivery/collection, or in any tax invoice issued to the Purchaser (for approved accounts only) without set-off or counter claim.

Terms of payment are cash before delivery or collection unless the Purchaser has entered into a Credit Agreement, in which case the terms of that Credit Agreement will apply.

If the Purchaser requests a variation to their Order, then BGC may confirm the variation in writing, including any price variation and associated delays. The Purchaser must pay the agreed price, or where no price is agreed then the reasonable costs of all variations to Orders in addition to the price quoted where variations are received after the Order has been processed. The reasonable costs of a variation will be calculated by BGC at reasonable rates for labour and materials and will include a reasonable administration charge, allowance for overheads and profit and other costs incurred by BGC as a result of the variation. BGC will take reasonable steps to limit these costs once informed of the variation.

BGC is not obliged to proceed with any variation requested by the Purchaser unless and until the Purchaser acknowledges and accepts in writing any changes to the price or delays associated with the variation.

In the event of any dispute between the parties over an Order or a variation to an Order:

- (i) BGC's written records shall be prima facie evidence of the terms of the Order; and
- (ii) the Purchaser shall pay all undisputed amounts to BGC.

## 8. PASSING OF TITLE AND RISK

Title in the Goods will not pass to the Purchaser until such time as the Goods are paid for in full. Subject to clause 5b, risk in the Goods passes to the Purchaser on delivery or collection (as the case may be).

## 9. WARRANTIES AND LIABILITY

If any Goods supplied by BGC under the Agreement are Defective, BGC's liability (if any) shall be limited to any manufacturer's warranty, and the Purchaser's rights under the Australian Consumer Law.

The content of any third party manufacturer's warranties may be provided to the Purchaser by BGC upon request. BGC will use reasonable endeavours to transfer warranties given by third party manufacturers of the Goods to the extent those warranties are transferrable. However, BGC will not be required to negotiate with

manufacturers on behalf of the Purchaser, nor will BGC be liable to provide warranties to the Purchaser in addition to those provided by the manufacturers or as prescribed by law.

The Purchaser acknowledges that a failure to:

- (i) store coloured, zincalume, galvanised and strip coated Goods off the ground;
- (ii) protect the Goods from all weather (including direct sunlight and moisture); and
- (iii) remove strip coating immediately after installation, may void the warranty over the Goods.

BGC's liability/obligation to honour any claim under or in connection with these Terms does not extend to rectification of defects, loss or damage to the Goods that is caused by:

- (i) fair wear and tear;
- (ii) the Purchaser's use, storage or operation of any part of the Goods other than in accordance with the manufacturer's guidelines or specifications or relevant building codes or Australian Standards;
- (iii) the misuse, neglect, or wilful destruction of all or any part of the Goods; or
- (iv) the continued use of any part of the Goods after a defect has been detected.

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 Goods;
- (ii) the repair of the Goods;
- (iii) the payment of the cost of replacing the Goods; or
- (iv) the payment of the cost of having the Goods repaired.

Where the Purchaser acquires Goods 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.

Nothing in these Terms operates to exclude or restrict any right the Purchaser has under any statute, including under the Australian Consumer Law, except to the extent permitted by that statute.

## 10. DEFAULT & TERMINATION

a. A party ("**Non-defaulting Party**") may terminate the Agreement 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 14 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 Insolvency Event);
- (vii) the Defaulting Party (being a corporation) is deregistered;
- (viii) the Defaulting Party breaches a Credit Agreement; or
- (ix) to the extent permitted by law, the Defaulting Party is subject to an Insolvency Event.

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.

If the Purchaser is the Defaulting Party under these Terms (or where any of the events in clause 10(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 Goods to the Purchaser whether under these Terms or otherwise; and/or
- (ii) withdraw any credit facilities which may have been extended to the Purchaser and/or require immediate payment of all moneys owed to BGC by the Purchaser.

The Defaulting Party (or in the case of an event under clause 10(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.

On termination of these Terms under this clause, 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.

#### 11. INTELLECTUAL PROPERTY

Any pre-existing Intellectual Property rights owned by:

- (i) BGC before the commencement of the Agreement, will remain vested in BGC; and
- (ii) the Purchaser before the commencement of the Agreement, will remain vested in the Purchaser.

The Purchaser grants to BGC a non-exclusive, transferable, royalty free licence to use the Purchaser's pre-existing Intellectual Property rights to the extent that use relates to any Goods created or supplied by BGC pursuant to the Agreement.

Subject to any Intellectual Property rights existing in any Third Party Materials, all Intellectual Property rights created by BGC on or after the commencement of the Agreement will remain vested in BGC notwithstanding those rights were created pursuant to or for use in or with the Goods.

The Purchaser must obtain all necessary copyright and other Intellectual Property permissions before providing BGC with the Specifications. The Purchaser indemnifies BGC against all claims, expenses, losses, damages and costs (on a solicitor and own client basis and whether incurred by or awarded against BGC) that BGC may sustain or incur as a result, whether directly or indirectly, of any infringement of the Intellectual Property rights of any third party.

#### 12. FORCE MAJEURE

If a party is wholly or partially unable to perform its obligations (other than an obligation to pay money) because of a Force Majeure Event ("Affected Party"), then:

- (i) as soon as reasonably practicable after the Force Majeure Event arises, the Affected Party will notify the other party of the extent to which the Affected Party is unable to perform its obligations; and
- (ii) the Affected Party's obligation to perform will be suspended for the duration of the delay arising out of the Force Majeure Event.

Any party may terminate the Agreement at the expiration of not less than 7 days' notice to the other party if performance of an obligation is prevented by a Force Majeure Event, or a delay caused by the Force Majeure Event exceeds 60 days.

If a party terminates these Terms under this clause 12, all money previously paid under the Agreement for which no Goods or other consideration has been provided must be refunded.

#### 13. GOODS AND SERVICES TAX (GST)

Any expression used in this clause 13 and which is defined in the *A New Tax System (Goods and Services Tax) Act 1999* has the same meaning in this clause 13.

Unless otherwise expressly stated, all amounts stated to be payable by the Purchaser under the Agreement are exclusive of GST. If GST is imposed on any supply made under or in accordance with the Agreement, the recipient of the taxable supply must pay to

BGC 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 BGC to the recipient.

#### 14. SURVEILLANCE

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

#### 15. PRIVACY

BGC collects the Purchaser's personal information for the purpose of providing Goods 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 <http://bgcsteel.com.au/>.

#### 16. DISPUTE RESOLUTION

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.

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.

#### 17. PAYMENTS

The Purchaser must advise BGC in writing not later than 14 days before any change or alteration in the Purchaser's ability to pay amounts due under the Agreement or its debts generally (including any change in effective control of the Purchaser). BGC (upon receipt of such advice) is entitled, in its sole discretion, to terminate the Agreement upon 7 days written notice ("Notice Period") to the Purchaser. In such circumstances, BGC is entitled to payment by the Purchaser of the sum equal to the cost of the Goods provided and then unpaid by the Purchaser upon expiry of the Notice Period. If BGC has received monies under these Terms for which no Goods have been provided then such monies will be refunded to the Purchaser. The Purchaser shall indemnify BGC in respect of any loss arising from its failure to notify under this clause.

#### 18. GENERAL

The Agreement is governed by and is to be construed according to the laws of Western Australia and the parties submit to the exclusive jurisdiction of the courts of Western Australia.

If any part of the Agreement is, or becomes, void or unenforceable, that part is, or will be, severed from the Agreement 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.

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. BGC reserves the right to amend these Terms as they will apply to any Orders after the date of amendment. BGC shall give notice of such amendments to the Purchaser in writing (which notice may be given via BGC's website). If the Purchaser places an order with BGC after receiving the amended Terms or they are posted on BGC's website, the Purchaser shall be deemed to have read and unconditionally agreed to the amended Terms.

The Agreement constitute the entire agreement between the parties with respect to the subject matter of the Agreement and contains all of the representations, warranties, covenants and agreements of the parties in relation to the subject matter of the Agreement as at the date of the Agreement. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by the Agreement and has no further effect.