

# Valspar Terms and Conditions

VALSPAR PAINT (AUSTRALIA) PTY LTD (ABN 40 000 035 914) - VALSPAR PAINT (NZ) LIMITED TERMS AND CONDITIONS OF PURCHASE

## 1. INTERPRETATION

1.1. For the purpose of these Terms and Conditions and unless the context otherwise requires:

"Blanket Order" means the document by that name committing to purchase goods and/or services of a stipulated value over an agreed period

"Blanket Order Release" means an authority to supply goods or services against a Blanket Order

"Confidential Information" means any ideas, methods, mathematical formulas, trade secrets, know-how and other intellectual property included in written or machine-readable information (or oral information reduced to writing), furnished to Seller by Valspar, its agents or contractors, but does not include information which is:

- i. Publicly known at the time of disclosure;
- ii. Known to Seller at the time of disclosure through no wrongful act of Seller;
- iii. Received by seller from a third party without restrictions similar to those in the Contract, or
- iv. Independently developed by Seller.

"Contract" means the contract formed in accordance with Clause 2.1 and consisting of the Order, the Blanket Order Release, these terms and conditions and the Conditions of the Sub-Contract together with all documents attached or incorporated by reference with the written approval of Valspar;

"EFT" means Electronic Funds Transfer;

"Goods or Services" means any goods or services supplied or provided by the Seller;

"Valspar" means Valspar Paint (Australia) Pty Ltd (ABN 40 000 035 914), Valspar Paint (NZ) Limited and/or its subsidiaries as set out in the relevant Order;

"Order" means this document of which these terms and conditions are a part and bearing an order number or blanket order number; and

"Seller" means the person so described in the Order and includes sub-contractors and all other classes of persons performing any type of work under the Order.

1.2. To the extent that the provisions of the Conditions of Sub-Contract are inconsistent with these terms and conditions, the Conditions of Sub-Contract prevail except for any inconsistency relating to payment terms and method in which case these terms and conditions prevail.

## 2. ACCEPTANCE OF ORDER

2.1. Upon acceptance by the Seller of an Order the Contract shall take effect and shall form the entire agreement between the parties with respect to the Goods and/or Services referred to in the Order, to the exclusion of any conditions of sale appearing on any document of Seller. Any document of Seller which purports to modify the Contract does not apply unless expressly accepted in writing by Valspar.

2.2. An order and, where applicable, a Blanket Order Release shall be deemed to have been accepted by the Seller upon written acceptance or in the absence of written acceptance upon part performance of the Order by the Seller.

2.3. No Goods or Services may be supplied against a Blanket Order without the Seller first receiving a Blanket Order Release.

2.4. Despite clause 2.2, Valspar may cancel an Order or Blanket Order Release within a reasonable time prior to scheduled delivery without further liability to the Seller.

## 3. PRICES AND TERMS OF PAYMENT

3.1. No extra charges of any kind including but not limited to packing, boxing, crating, delivery freight or insurance will be paid for by Valspar unless so provided in the Order or Blanket Order Release.

3.2. Prices shown on an Order are not subject to escalation or variation for any reason whatsoever unless agreed to in writing by Valspar's relevant branch or administration manager (or equivalent). Period price increases agreed to by Valspar must be notified to Valspar at least 30 days prior to the effective date of the increase.

3.3. Seller represents and warrants that the prices quoted in an Order (including cash or credit discounts or rebate) shall not be:

- a) in excess of Seller's list, catalogue or published prices; or
- b) materially higher than prices quoted or currently being charged by the Seller to any other purchaser for similar goods or services in similar circumstances.

3.4. Invoices for Goods are to be issued and mailed to the address set out in the Order the day Goods are dispatched or collected, unless otherwise agreed in writing. Subject to clause 5.1, accounts will be settled by cheque or EFT on 70 days end of the month from the Seller's Invoice date. Valspar shall not be responsible for delay in receipt of the Seller's invoice.

3.5. In the case of Services, progress claims are to be submitted monthly or as otherwise provided in the Contract and may be subject to statutory withholdings and/or appropriate retention until expiration of the warranty period relating to the supply.

3.6. Valspar need not pay for Services performed or Goods supplied by the Seller beyond the requirements of the Contract. Excess Goods will be returned at the Seller's expense.

3.7. Valspar will not be responsible for any delay in payment due to Seller failing to quote the relevant Order or where appropriate, Blanket Order Release on all invoices, packing notes and other correspondence or in the event of any disagreement between an invoice and an Order or Blanket Order Release.

3.8. Except as otherwise specified in an Order, the price includes all federal, state, local or foreign taxes (including any goods and service tax), stamp duties and other governmental charges upon the manufacture, sale or transportation of the goods or on the provision of services. Any invoice for goods must include a tax invoice complying with the legislation under which goods and services tax is imposed. The provision of a tax invoice is a precondition to payment of any invoice.

3.9. Valspar is entitled to set off any amount owing at any time by Seller or any of its affiliates. Without limitation, credits due to rejection or discrepancies will be set off from the amount on the invoice or will be deducted from subsequent payments.

## 4. PACKING AND DELIVERY

4.1. The seller shall, subject to clause 3.1, at its own expense, crate, package or otherwise prepare goods for shipment in accordance with Valspar's instructions and otherwise in a fashion which will ensure safe and secure delivery to Valspar.

4.2. The time for delivery specified in the Contract shall be of the essence. Valspar reserves the right to alter the delivery schedule at any time without liability. If for any reason the Seller does not comply with Valspar's delivery schedule, Valspar may cancel the Order or Blanket Order release without further liability.

## 5. INSPECTION AND ACCEPTANCE

5.1. Goods shall be deemed not to have been accepted until Valspar has inspected the Goods, conducted acceptance test and signified its acceptance.

5.2. If Valspar in its sole discretion determines that Goods or Services in whole or in part do not conform to the requirements of the Contract it may (at its election) and without prejudice to any other remedies available to it:

- a) Return (at the Seller's expense) the whole or any part of the Goods for repair or replacement within the time specified by Valspar or for credit or refund;
- b) Repair the Goods with all costs to be borne by the Seller; or
- c) Require the Seller to carry out defect rectification as provided for under the Conditions of Sub-Contract.

5.3. Where the Seller is supplying Goods to specifications, Valspar reserves the right to inspect these items at Seller's plant facilities at reasonable times during any stage of manufacturing.

## 6. TITLE AND RISK

Risk of loss for Goods shall pass to Valspar at the delivery point specified in the Order. Title to the Goods shall pass to Valspar when full payment has been made effective by Valspar.

## 7. TERMINATION

7.1. This Contract may be terminated immediately by either party by written notice if the other party:

- a) Breaches a provision of this Contract and in the case of a breach capable of remedy the other party fails to remedy such breach within a period of seven days after having been given written notice to that effect;
- b) Passes a resolution for its winding up or a receiver or manager or official manager is appointed over the whole or any part of its assets or a liquidator or provisional liquidator is appointed; or
- c) Enters into a scheme of arrangement with its creditors or has a judgment entered against it or is declared a bankrupt.

7.2. Upon termination Seller shall deliver at its sole expense all Goods which have been paid by Valspar (whether wholly or partially manufactured) and then in its possession to such person or persons as Valspar may direct.

7.3. If notice is given to Seller to terminate the Contract, Valspar (without limiting the remedies available to it):

- a) May recover any sums paid to Seller on any account or for Services which have not been performed together with interest at the rate of 2% per annum above Valspar's average cost of funds from the date the sums were paid to the Seller to the date of refund;
- b) Recover from the Seller the amount of any direct loss or damage sustained as a result of the termination; and
- c) Be regarded as being discharged from any further obligations under this Contract.

## 8. WARRANTY

8.1. The Seller warrants that the Goods are, or will be at the time property therein is to pass, free and clear of all liens, charges and encumbrances and that the Seller has a good and marketable title to the same, and

**Enter this order in accordance with the prices, terms, delivery method, and specifications listed above.**

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- a) All Goods (including repaired or replacement items):
- i) Shall be free from defects in materials and workmanship and be of merchantable quality and fit for the purpose contemplated by Valspar;
- ii) Shall strictly conform to the Contract; and
- iii) Shall, in the case of designs for which the Seller is responsible, be free from defects in design;
- b) All materials used and labour performed with respect to Services shall:
  - i) Conform with current Australia or New Zealand (as the case may be) Standard Specifications and Codes unless otherwise specified;
  - ii) Comply with all applicable laws;
  - iii) Strictly conform with the Contract; and
  - iv) In the case of materials be fit for the purpose intended and in the case of labour be rendered with due care and skill.

#### **9. PROPRIETARY RIGHTS, CONFIDENTIALITY**

9.1. All Confidential information furnished to the Seller for the purposes of this Contract and all properly rights embodied therein, remain the property of Valspar, shall be treated by Seller as confidential and shall not in whole or in part be used, communicated, copied, disclosed, sold or reproduced for any purpose whatsoever, except in the performance of the Contract, or with the express written permission of Valspar.

9.2. On completion, cancellation or termination of the Contract, or any time if Valspar so requests in writing, Seller shall immediately return to Valspar all documents, and any other material supplied by Valspar to the Seller for purposes of the performance of the Contract embodying Confidential Information.

9.3. Section 9 shall survive the termination of the Contract.

#### **10. PATENT, TRADEMARK & COPYRIGHT INDEMNITY**

The Seller shall indemnify and forever hold Valspar harmless from action, claim or demand, costs or expenses, arising from or incurred by reason of any infringement or alleged infringement of letters patent, design, trademark, copyright, trade secret or other protected rights in respect of any of Goods supplied by Seller, except where infringement or alleged infringement is directly caused by designs originally furnished with appropriate written authority to Seller by Valspar.

#### **11. INSURANCE AND INDEMNITY**

11.1. Seller shall indemnify Valspar from and against any and all proceedings, claims, demands, losses, costs, damage and expenses arising out of or in respect of any act, omission or negligence of Seller or any of its officers, employees, agents or representatives in connection with the Goods or Services to be provided under this Contract or otherwise in connection with Seller's performance or breach of this Contract.

11.2. The Seller shall, if requested by Valspar, at its sole expense, effect proper insurance against all risks, including product liability and shall, if required by Valspar, produce evidence of the currency and validity of any such policy.

#### **12. SPECIAL TOOLING**

12.1. All tools, gauges, jigs, moulds, test equipment, manufacturing aids or other equipment whether furnished by Valspar to the Seller or manufactured by the Seller and paid in whole or in part by Valspar, or which are based upon any design or process confidential or proprietary to Valspar (hereafter called "Special Tooling") shall remain the sole property of Valspar and Valspar shall be entitled, upon demand, to sole and exclusive possession of any and all such Special Tooling, the cost of delivery thereof to Valspar to be borne by Seller.

12.2. Special Tooling, while in possession or control of Seller shall be kept in good working condition, and shall be insured by and at the sole expense of Seller against all risk of loss and damage with respect thereto, normal wear and tear exempted, in an amount equal to the full replacement value thereof. Special Tooling lost, partly damaged or destroyed while in the possession of the Seller shall be replaced by the Seller, free of charge, to Valspar's satisfaction.

12.3. Seller shall not dispose of, mortgage, pledge, sell, lease or otherwise encumber, Special Tooling.

12.4. Special Tooling must be returned to Valspar immediately upon cancellation, completion or termination of the Contract.

#### **13. WAIVER**

A waiver by Valspar of a breach or default of Seller under this Contract shall not be a waiver of any subsequent default and failure of Valspar to enforce compliance with any term or condition of this Contract shall not constitute a waiver of that term or condition.

#### **14. ASSIGNMENT**

The Seller shall not without the previous consent in writing of Valspar assign or transfer this Contract or sub-contract any part of the work required to be done under this Contract.

#### **15. DISPUTE RESOLUTION**

15.1. The parties agree that if a dispute arises out of or relates to this Contract, a party may not commence any court or arbitration proceedings relating to the dispute unless it has complied with the provisions of this clause 15, except to seek urgent interlocutory relief.

15.2. A party claiming that a dispute has arisen must give written notice to the other party specifying the nature of the dispute. On receipt by the other party of the notice, the matter must be referred to Seller's national sales manager and Valspar's National Procurement Manager for resolution. If the managers are unable to resolve the dispute within ten days the parties must refer the dispute to the Managing Director (or their nominee) of each party for resolution. If the Managing Directors (or their nominees) cannot resolve the dispute within five days, in case of a dispute in Australia the parties must mediate the dispute under the mediation rules of the Law Society of New South Wales and the President of the Law Society or the President's nominee will select the mediator and determine the mediator's compensation. In the case of a dispute in New Zealand, the parties will refer the dispute to a mediator jointly appointed by them or if they cannot agree, to a mediator appointed by the Chairperson of LEADR (New Zealand).

#### **16. FORCE MAJEURE**

Notwithstanding anything else contained in this Agreement neither party shall be liable for any delay in performing its obligations hereunder if such delay is caused by circumstances beyond its reasonable control.

#### **17. OCCUPATIONAL HEALTH & SAFETY**

17.1. The Seller warrants and covenants that in connection with the supply of Goods or Services under this Contract, the Seller will comply with any relevant occupational health and safety legislation applicable in the jurisdiction, and applicable in each and every location in which work is performed or Services provided under this Contract.

17.2. In addition, the Seller shall not detract in any way from enabling Valspar to comply with the relevant occupational health and safety legislation applicable in the jurisdiction and as such the Seller will comply with all Valspar's policies for occupational health and safety where Seller performs work or provides services at premises controlled by Valspar. Seller will also supply to Valspar all information relevant to the safe use of Goods or Services by Valspar, or any other person, whether formally requested by Valspar or not.

#### **18. AMENDMENT**

This Contract may only be amended in writing signed by both parties.

#### **19. SEVERABILITY**

If any part of this Contract or the application thereof to any person or circumstances shall become void, voidable or otherwise unenforceable, that part shall be severed and the balance of this Contract shall remain in full force and effect.

#### **20. GOVERNING LAW**

Where Valspar Paint (Australia) Pty Ltd (ABN 40 00 035 914) is a party to this Contract, the laws of New South Wales govern this Contract. Where Valspar Paint (NZ) Limited is a party to this Contract, the laws of New Zealand govern this Contract. Each party submits to the non-exclusive jurisdiction of the courts of the place whose law governs, and applicable appellate courts.

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