



## 1. TERMS AND CONDITIONS

1.1 These Terms and Conditions govern the BUILDSAFE Security of Payment Scheme (the **Scheme**) provided by BUILDSAFE and set out the terms of our agreement with you (the **Agreement**).

1.2 By Applying to Register to Use the Scheme:

- (a) You are deemed to have read, understood and accepted these Terms and Conditions and you are bound by them;
- (b) You warrant that you are authorised by the Applicant to make an Application to use the Scheme and that all information that you provide to BUILDSAFE for or on behalf of that Applicant, is and, save to the extent updated, remains in every respect true, correct, and complete;
- (c) You warrant that you have contract works and/or public liability insurance (as applicable) in place for the Construction Works; and
- (d) You warrant that either:
  - (i) There is a formal written Construction Contract governing the relationship between the Owner/Principal and the Contractor and, where applicable, the Contractor and Subcontractor; or
  - (ii) The Parties agree that the relevant BUILDRIGHT™ Conditions of Contract shall be incorporated into this Agreement and be binding on the Parties.

1.3 Evidence of the insurance and Construction Contract referred to in clause 1.2 may be requested at any time by BUILDSAFE.

1.4 Where there is no formal written Construction Contract the relevant BUILDRIGHT™ Conditions of Contract will be deemed to be incorporated into this Agreement and form part of this Agreement.

## 2. DEFINITIONS AND INTERPRETATION

2.1 Unless the context otherwise requires, the following words and expressions shall have the said meanings ascribed to them for the purpose of the Scheme:

**Adjudication** means adjudication under the Construction Contracts Act 2002.

**Adjudicator** means an individual who is appointed in accordance with the Construction Contracts Act 2002 to determine a Dispute that has been referred to Adjudication.

**Application** means the application form which is set out on the Website to Register to use the Scheme in relation to the Construction Contract specified therein. Cognate expressions shall be construed accordingly.

**BUILDRIGHT™ Conditions of Contract** means the suite of BUILDRIGHT™ Conditions of Contract as detailed and set out on the BUILDSAFE website ([www.buildsafesecurity.co.nz](http://www.buildsafesecurity.co.nz)) as at the date of this Agreement.

**BUILDSAFE** means Buildsafe Security of Payment Trustee Company Limited (company number 2229987) whose registered office is at 101 Wairau Road, Glenfield, North Shore City, Auckland.

**BUILDSAFE Trust Account** means the bank account in the name of BUILDSAFE where the Security Amount paid by a Owner/Principal is held in escrow until it is released by the Custodian in accordance with clauses 5.1(f) and (h).

**Certificate of Practical Completion** means the certificate in the form set out on the Website by which the Owner/Principal certifies acceptance and possession of the Contract Works save for Minor Outstanding Works, sets out any such Minor Outstanding Works and agrees to the release by BUILDSAFE of 90% of the Security Amount.

**Certificate of Completion** means the certificate in the form set out on the Website by which the Owner/Principal certifies that the Contract Works are complete in all respects following the expiry of the Defects Liability Period and agrees to the release by BUILDSAFE of the final 10% of the Security Amount.

**Claimant** means a Party who refers a Dispute to Adjudication.

**Claimed Amount** means the amount of a Progress Payment specified in a Payment Claim that the Payee claims to be due for Construction Work carried out for the Payer under a Construction Contract.

**Completion** means the time following the expiry of the Defects Liability Period when the Contract Works and any Minor Outstanding Works and any defects identified by the Owner/Principal before the end of the Defects Liability Period have been completed and rectified by the Contractor. Cognate expressions shall be construed accordingly.

**Construction Contract** means a commercial or residential construction contract and includes any variation to the construction contract, but does not include a lease or licence under which a party undertakes to fit out, alter, repair, or reinstate the leased or licenced premises unless the principal purpose of the lease or licence is the carrying out of Construction Work.

**Contract Price** means the total amount payable under the relevant Construction Contract for carrying out the Contract Works as may be adjusted, varied or updated by the Parties from time to time in accordance with the terms of the Construction Contract.

**Contractor** means the person who is authorised and employed by the Owner/Principal to undertake the relevant Contract Works.

**Contract Works** means the Construction Works, and any ancillary works and services, to be undertaken by the Contractor under a Construction Contract.

**Construction Work** has the same meaning as in the Construction Contracts Act 2002.

**Custodian** means Perpetual Trust Limited (company number 142894) of 233 Cambridge Terrace, Christchurch.

**Defects Liability Period** means the period of 20 Working Days after the date of Practical Completion when the Contractor is responsible for completing the Minor Outstanding Works and rectifying defects arising from defective workmanship or materials notified by the Owner/Principal during that period.

**Dispute** means a dispute or difference that arises under a Construction Contract.

**Fees** means the upfront registration and administration fee and any fees and expenses incurred in relation to any Adjudication as such fees are set out on the Website at the time of Application by a Party.

**Force Majeure Event** means any act or event beyond the reasonable control or foresight of BUILDSAFE including without limitation any industrial disputes, strike, go-slow, failures of any utility service or provider, act of God, war, riot, civil commotion, compliance with law, change in law, breakdown of plant or machinery, fire, explosion,

flood, storm, default of any supplier or subcontractor acting independently of BUILDSAFE, terrorism and any similar or analogous event or act.

**Liability** means any cost, expense (on a full indemnity basis), claim, proceeding, loss, demand and/or other liability, whether arising out of negligence, breach of contract, breach of fiduciary duty, breach of statutory duty or otherwise.

**Minor Outstanding Works** means minor items of work and/or defects which the Owner/Principal accepts will not prevent the convenient use and enjoyment of the Contract Works for their intended purpose.

**Notice of Acceptance** means, depending on the context, one or more of:

- (a) the notice issued by BUILDSAFE confirming the Registration of an Owner/Principal to use the Scheme and fixing the due date for payment by the Owner/Principal of the relevant Fees and the Security Amount into the BUILDSAFE Trust Account in relation to the relevant Construction Contract;
- (b) the notice issued by BUILDSAFE confirming the Registration of a Contractor to use the Scheme and fixing the due date for payment by the Contractor of the relevant Fees in relation to the relevant Construction Contract; and
- (c) the notice issued by BUILDSAFE confirming the Registration of a Subcontractor to use the Scheme and fixing the due date for payment by the Subcontractor of the relevant Fees in relation to the relevant Construction Contract.

**Notice of Adjudication** means the notice in the form set out on the Website to be completed by a Claimant and sent to all relevant Parties for the purpose of initiating an Adjudication.

**Notice of Completion** means the notice in the form set out on the Website to be completed by the Contractor at such time as the Contractor considers the Contract Works, any Minor Outstanding Works and any defects notified in a Notice of Defects to be Complete.

**Notice of Defects** means the notice in the form set out on the Website to be completed and sent to the Contractor by the Owner/Principal prior to the expiry of the Defects Liability Period specifying the defects in workmanship and/or materials that have become apparent and that require rectification by the Contractor.

**Notice of Dispute** means the notice in the form set out on the Website to be completed by any Party giving Notice to any other Party of a Dispute which must be resolved by the Parties within 2 Working Days of receipt of the notice or the Party giving notice will refer the Dispute to Adjudication.

**Notice of Incomplete Work** means the notice in the form set out on the Website to be completed by the Owner/Principal following receipt of the Notice of Practical Completion or the Notice of Completion (as the case may be) if the Owner/Principal does not accept that the Contract Works have reached Practical Completion or Completion (as the case may be) and sets out any items of outstanding work.

**Notice of Initiation** means the notice issued by BUILDSAFE confirming that the Owner/Principal has paid the Security Amount and that the Scheme in relation to the subject building project is effective and unconditional.

**Notice of Practical Completion** means the notice in the form set out on the Website to be completed by the Contractor at such time as it considers the Contract Works to be Practically Complete.

**Notice of Request for Adjudication** means the notice in the form set out on the Website to be completed by a Claimant requesting BUILDSAFE to secure the appointment of an Adjudicator as agent of that Party for the purpose of referring the Dispute to Adjudication and the Claimant shall attach a copy of the relevant Notice of Adjudication to the Notice of Request for Adjudication.

**Owner/Principal** means the person who authorises and employs the Contractor to undertake the relevant Contract Works.

**Parties** means the parties to the Scheme in relation to a specific building project including the Owner/Principal, the Contractor and/or any Registered Subcontractors, but excluding BUILDSAFE.

**Payee** means the party to a Construction Contract who is entitled to a Progress Payment under that Construction Contract.

**Payer** means the party to a Construction Contract who is liable to make a Progress Payment under that Construction Contract.

**Payment Claim** has the same meaning as in the Construction Contracts Act 2002.

**Payment Regime** means the regime set out in the schedule.

**Payment Schedule** has the same meaning as in the Construction Contracts Act 2002.

**Practical Completion** means the time when the Contract Works are complete save for Minor Outstanding Works.

**Progress Payment** means a payment for Construction Work carried out under a Construction Contract that is in the nature of an installment of the Contract Price and includes any final payment under that Construction Contract.

**Registered** means an Owner/Principal, Contractor or Subcontractor who has applied to use the Scheme and has been accepted by BUILDSAFE and cognate terms shall be construed accordingly.

**Registered User** means any Owner/Principal, Contractor or Subcontractor who is Registered to participate in the Scheme.

**Security Amount** means the amount that is payable by the Owner/Principal into the BUILDSAFE Trust Account to initiate the Scheme. The Security Amount may be either, the amount recommended by BUILDSAFE as set out on the Website or any other amount that is agreed by the parties.

**Scheduled Amount** means a Progress Payment specified in a Payment Schedule that a Payer proposes to pay to the Payee in response to a Payment Claim.

**Scheme** means the escrow and administration and management services provided by BUILDSAFE under the name "BUILDSAFE Security of Payment Scheme" in accordance with these Terms and Conditions as referred to in clause 1.

**Services** means the escrow and administration and management services provided by BUILDSAFE as described in clause 5.1 in accordance with these Terms and Conditions.

**Subcontractor** means any person who contracts with the Contractor to carry out any part of the relevant Contract Works on behalf of the Contractor.

**Terms and Conditions** means the terms and conditions set out in this document as updated in accordance with clause 12.5.

**User** means any Owner/Principal, Contractor or Subcontractor who is Registered to participate in the Scheme.

**Website** means the website for the Scheme which can be found at [www.buildsafesecurity.co.nz](http://www.buildsafesecurity.co.nz)

**Working Day** means a day of the week (irrespective of whether or not work is actually carried out on that day) other than:

- (a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, Labour Day, and Waitangi Day; and
- (b) the day observed in the appropriate area as the anniversary of the province of which the area forms a part; and
- (c) a day in the period commencing on 24 December in any year and ending with the close of 5 January in the following year.

2.2 Unless the context otherwise requires, in these Terms and Conditions:

- (a) Words in the singular shall include the plural and vice versa; words importing a gender include every gender.
- (b) References to persons include corporations, partnerships, government and local authorities and agencies, and any unincorporated associations or bodies of persons.
- (c) References to "include" or "including" are to be construed without limitation.
- (d) A reference to "we", "our" or "us" means BUILDSAFE.
- (e) A reference to "he", "she", "it", "you", "your" or "yourself" means the relevant User of the Scheme.
- (f) A reference to a Party includes its employees, agents, executors, administrators, successors and permitted assigns.
- (g) All fees are payable in New Zealand Dollars only.

2.3 Insofar as these Terms and Conditions are inconsistent with the terms and conditions in any Construction Contract, these Terms and Conditions will take precedence over and replace any such inconsistent terms and conditions in any Construction Contract.

### **3. CONDITIONAL CONTRACT**

- 3.1 Notwithstanding receipt of any Notice of Acceptance, the Parties acknowledge and agree that these Terms and Conditions are conditional and are not binding or enforceable against BUILDSAFE unless and until the Security Amount has been paid in clear funds into the BUILDSAFE Trust Account and a Notice of Initiation has been served by BUILDSAFE on all relevant Parties.
- 3.2 Where the conditions in clause 3.1 are not satisfied within 5 working days after the date of the Notice of Acceptance, this Agreement shall automatically terminate.

### **4. USER OBLIGATIONS**

- 4.1 Each of the Owner/Principal, Contractor and any Subcontractor Registered or wanting to be Registered shall:
- (a) Submit the properly completed Application to BUILDSAFE (copied to all other relevant Parties).
  - (b) Pay the relevant Fees on or before the due date for payment.
  - (c) Immediately on becoming aware of a Dispute serve the Notice of Dispute on the relevant Parties.
  - (d) Immediately on a Dispute which it has notified remaining unresolved after 2 Working Days, send a Notice of Request for Adjudication to BUILDSAFE and a Notice of Adjudication to all relevant Parties.
  - (e) Irrevocably authorise BUILDSAFE:
    - (i) to act as its agent in relation to securing the appointment of an Adjudicator in the event of a Dispute arising under the relevant Construction Contract;
    - (ii) to receive and act upon any document made for the purpose of the Adjudication;
    - (iii) to disclose any information it has received in respect of the Scheme or a Construction Contract with the other relevant Parties; and
    - (iv) to release the Security Amount at the time and in the proportions set out in these Terms and Conditions.

- (f) Comply with the Payment Regime.
- (g) Notify BUILDSAFE in writing no later than 2 Working days after becoming aware of any error in relation to any payment made in relation to the Scheme.
- (h) Notify BUILDSAFE in writing as soon as reasonably practicable if any of the details submitted on the Application need updating or amending with the updated or amended details.

4.2 In addition to the obligations set out in clause 4.1, the Owner/Principal shall:

- (a) Pay the Security Amount on or before the due date for payment in accordance with clause 6.
- (b) Promptly serve the Notice of Defects on the Contractor upon becoming aware of any defects in workmanship or materials during the Defects Liability Period.
- (c) Respond promptly and in any event within 2 Working Days of receipt of a Notice of Practical Completion by issuing a Certificate of Practical Completion or serving a Notice of Incomplete Work on the Contractor.
- (d) Respond promptly and in any event within 2 Working Days of receipt of a Notice of Completion by issuing a Certificate of Completion or serving a Notice of Incomplete Work on the Contractor.

4.3 In addition to the obligations set out in clause 4.1, the Contractor shall:

- (a) Apply to Register those Subcontractors whom the Contractor employs in relation to the Construction Works to be undertaken for the Owner/Principal.
- (b) Submit a completed Notice of Practical Completion to the Owner/Principal at such time as the Contractor considers the Contract Works to be Practically Complete and where the Owner/Principal serves a Notice of Incomplete Work, shall submit further Notices of Practical Completion where any works identified in any such Notice of Incomplete Work are Practically Complete until the Owner/Principal issues a Certificate of Practical Completion or the Contractor raises a Dispute.
- (c) Promptly remedy any defects in workmanship or materials that are notified by the Owner/Principal during the Defects Liability Period.
- (d) Submit a completed Notice of Completion to the Owner/Principal at such time as the Contractor considers the Contract Works to be Complete and where the

Owner/Principal serves a Notice of Incomplete Work, shall submit further Notices of Completion where any works identified in any such Notice of Incomplete Work are Complete until the Principal issues a Certificate of Completion or the Contractor raises a Dispute.

4.4 In addition to the obligations set out in clause 4.1, any Subcontractor which is Registered shall:

- (a) Submit a completed Notice of Completion to the Contractor at such time as the Subcontractor considers the relevant Subcontract Works to be Complete and, where the Contractor serves a Notice of Incomplete Work, shall submit further Notices of Completion where any works identified in any such Notice of Incomplete Work are Complete until the Contractor issues a Certificate of Completion or the Subcontractor raises a Dispute.
- (b) Promptly remedy any defects in workmanship or materials that are notified by the Contractor during the Defects Liability Period.

## **5. BUILDSAFE'S OBLIGATIONS**

5.1 BUILDSAFE shall:

- (a) Issue a Notice of Acceptance in respect of each Application which is approved and which provides all required or requested evidence of insurance in respect of the Construction Works and the relevant Construction Contract.
- (b) Issue a Notice of Initiation following receipt of the Security Amount in the BUILDSAFE Trust Account.
- (c) Maintain and manage the Website.
- (d) Administer and manage the Scheme.
- (e) Maintain and manage the BUILDSAFE Trust Accounts with a bank registered in New Zealand and ensure that the funds in the Trust Accounts remain at all times free and clear of any interests, charges, claims or encumbrances other than those of BUILDSAFE and Users of the Scheme.
- (f) Deposit all Security Amounts into the BUILDSAFE Trust Account as soon as practicable after receipt from the Owner/Principal where not directly paid into such account by the Owner/Principal.

- (g) Following receipt of a Notice of Request for Adjudication, secure the appointment of an Adjudicator in respect of any Dispute arising between the Parties to the Construction Contract in relation to the Scheme as agent of any Claimant. Following the Adjudication, BUILDSAFE shall not release the Security Amount unless all relevant Parties confirm their agreement with the Adjudicator's decision or one Party otherwise obtains a judgment or order from a Court of competent jurisdiction.
- (h) Procure the counter-signature of the Custodian and release the Security Amount on the following basis:
  - (i) 90% within 5 Working Days following receipt of the Certificate of Practical Completion to the Contractor and any Registered Subcontractor in the relevant proportions; or
  - (ii) In the event of a Dispute arising in relation to Practical Completion, 90% within 5 Working Days of agreement between the Parties (whether before or after Adjudication), or failing such agreement, within 6 Working Days following any judgment or order of any Court of competent jurisdiction in respect of such Dispute.
  - (iii) The final 10% within 5 Working Days of receipt of the Certificate of Completion to the Contractor and any Registered Subcontractor in the relevant proportions; or,
  - (iv) In the event of a dispute arising in relation to Completion, the final 10% within 5 Working Days of agreement between the Parties (whether before or after Adjudication), or failing such agreement, within 6 Working Days following any judgment or order of any Court of competent jurisdiction in respect of such Dispute; or,
  - (v) In the event of frustration or cancellation of the Construction Contract, make such payments as agreed by all the Parties or as determined by any judgment or order of any Court of competent jurisdiction.
- (i) Where the Security Amount available for distribution to the Contractor is less than the aggregate entitlements of each of the relevant Subcontractors, distribute the Security Amount among the Subcontractors in the same proportions as each Subcontractor's individual entitlement is to the aggregate entitlements of all of the Subcontractors.

- (j) Give and consent to being given any notice, communication or document required to be served under these Terms and Conditions by email.

5.2 In performing the Services, BUILDSAFE may rely upon the information and documents provided, or purported to be provided, by or on behalf of any User of the Scheme in relation to the Scheme and shall be under no duty to investigate or validate the authenticity, completeness and/or accuracy of any such information or documents.

5.3 BUILDSAFE shall ensure that at all times payments out of the BUILDSAFE Trust Account can only be effected where approved and countersigned by the Custodian.

## **6. PAYMENT**

6.1 Each User of the Scheme will pay:

- (a) BUILDSAFE's Fees on or before the due date for payment set out in the Notice of Acceptance;
- (b) where the User of the Scheme is a party to an adjudication, within 2 Working Days of receipt of an invoice from or on behalf of BUILDSAFE, BUILDSAFE's Fees as agent for the Claimant in respect of the appointment of the Adjudicator;
- (c) any additional costs howsoever incurred by BUILDSAFE on a full indemnity basis in recovering any overdue payment from such User of the Scheme; and
- (d) the fees and expenses of an Adjudicator in relation to any Dispute.

6.2 Once paid, BUILDSAFE's fees and expenses are non-refundable.

6.3 If any Party (other than a Subcontractor) fails to pay any Fees by the due date for payment, BUILDSAFE may deduct such Fees from the Security Amount, whereupon BUILDSAFE shall notify all Parties affected by the reduced Security Amount of such deduction and the identity of the Party who failed to pay the Fees.

6.4 If a Subcontractor fails to pay any Fees in respect of its Registration, that Subcontractor shall not be Registered but the Scheme shall continue in respect of the Owner/Principal, the Contractor and any other Subcontractor which is Registered.

6.5 There is no additional fee payable if a User of the Scheme pays any Fees by credit card.

- 6.6 However, if an Owner/Principal wishes to pay the Security Amount by credit card, the credit card merchant's fees for such payment will be payable in addition to the Security Amount and BUILDSAFE shall be entitled either to charge the credit card for such additional amount or deduct it from the Security Amount.
- 6.7 Any User of the Scheme paying by credit card authorises BUILDSAFE:
- (a) to contact any person in respect of any credit card transaction for the purpose of verifying identification or obtaining further relevant information; and
  - (b) to charge the credit card in respect of all of BUILDSAFE's Fees owed from time to time by such User in respect of the Scheme.
- 6.8 Any User of the Scheme paying by credit card warrants that the credit card is issued in such User's name and that such User is responsible for all amounts credited to that credit card, whether solely or jointly and severally.
- 6.9 BUILDSAFE may at its sole discretion decline the use of a credit card by any User of the Scheme.

## **7. INTEREST**

- 7.1 Each User of the Scheme authorises BUILDSAFE to retain, in addition to its Fees, any interest which accrues on the Security Amounts.

## **8. INFORMATION SECURITY**

- 8.1 BUILDSAFE undertakes to use security protocols to ensure that data which Registered Users provide to BUILDSAFE for the purpose of the Scheme is appropriately encrypted and is held in confidence.
- 8.2 BUILDSAFE will provide each Registered User with a unique BUILDSAFE 'signature' to identify that Member and to confirm that Member's identity on any email or other electronic communication in relation to the Scheme.
- 8.3 Each Registered User hereby acknowledges and agrees that such a signature would constitute a valid electronic signature for the purposes of the Electronic Transactions Act 2002.

## **9. PERSONAL INFORMATION**

- 9.1 Subject to the terms of the Privacy Act 1993, each Member authorises BUILDSAFE:
- (a) to retain and record any personal information provided in connection with the Scheme; and
  - (b) to collect, store, use and disclose information about that Member for any purpose relating to the Scheme, including but not limited to, assessing your credit worthiness, enforcing these Terms and Conditions, marketing, research, and performing the Services and you authorise any other person to disclose information to BUILDSAFE for such purposes.
- 9.2 You have the right to access your personal information recorded by us and have it updated or corrected.

## **10. DISCLAIMERS, INDEMNITIES AND LIMITS OF LIABILITY**

- 10.1 The Registered Users of the Scheme acknowledge and agree that:
- (a) BUILDSAFE acts as an independent escrow agent.
  - (b) BUILDSAFE has no liability to any Registered User or to any third party save to the extent it acts fraudulently or in bad faith.
  - (c) BUILDSAFE has no liability to any Registered User for any act or omission of the Custodian.
  - (d) BUILDSAFE has no liability to any Registered User for a failure to provide the Services in accordance with these Terms and Conditions where such failure is due to the act or omission of any Registered User or to any Force Majeure Event.
  - (e) BUILDSAFE has no liability to any Registered User under any circumstances for any act or omission by any third party service provider.
  - (f) BUILDSAFE does not represent or warrant that the Website will be free of error, or operate without delay or interruption from time to time.
- 10.2 Without prejudice to clause 10.1 and to the extent permitted by law:

- (a) Subject to clause 10.2(b), BUILDSAFE's maximum liability to each Registered User in respect of a Scheme is an amount equivalent to the Fees paid or payable by such User.
- (b) BUILDSAFE's maximum liability to each Registered User arising out of any breach of fiduciary duty in respect of a Scheme is an amount equivalent to the Security Amount for such Scheme.
- (c) Each Registered User indemnifies and keeps BUILDSAFE indemnified against all Liabilities which may arise directly or indirectly in connection with or as a result of any act or omission of such User save to the extent caused by BUILDSAFE acting fraudulently and/or in bad faith; and
- (d) Each Registered User jointly and severally indemnifies and keeps BUILDSAFE indemnified against all Liabilities which may arise directly or indirectly in connection with or as a result of any act or omission of a third party save to the extent caused by BUILDSAFE acting fraudulently and/or in bad faith.

10.3 The Registered Users of the Scheme shall release BUILDSAFE from any further obligation and liability in respect of the Scheme and/or the Security Amount upon payment of the Security Amount in accordance with these Terms and Conditions.

## **11. SERVICE OF NOTICE**

11.1 Each Registered User shall give (and hereby consents to being given) all notices, communications and documents required to be served under these Terms and Conditions or the Construction Contracts Act 2002 (or any regulation made thereunder), by email or other means of electronic communication or in such manner as an Adjudicator may prescribe.

11.2 Where any notice, communication or document is given by email or other means of electronic communication, the sender shall retain evidence of the origin, destination and time of sending each email or electronic communication.

## **12. MISCELLANEOUS**

12.1 **Governing Law:** These Terms and Conditions shall be governed and construed in accordance with the laws of New Zealand and each Registered User agrees to submit to the non-exclusive jurisdiction of the New Zealand Courts.

- 12.2 **Entire Agreement:** These Terms and Conditions together with the relevant Applications in respect of the Scheme constitute the entire agreement between BUILDSAFE and the Registered Users in respect of the relevant Contract Works and supersede any advice, communications, or agreements whether previously provided or set out on the Website.
- 12.3 **Waiver:** BUILDSAFE's failure to enforce any right or provision of these Terms and Conditions will not constitute a waiver of such right or provision unless specifically agreed in writing by BUILDSAFE.
- 12.4 **Severance:** If any provision of these Terms and Conditions shall be unlawful, void or unenforceable for any reason, then that provision shall be deemed severed from these Terms and Conditions and shall not affect the existence, validity or enforceability of the remaining Terms and Conditions which shall not be affected, prejudiced or impaired but shall remain in full force and effect.
- 12.5 **Updates:** BUILDSAFE reserves the right to update, amend or modify these Terms and Conditions in its sole discretion, from time to time without prior notice, but no such update, amendment or modification will have any affect on a Scheme already in operation.
- 12.6 **Assignment:** Registered Users may not assign their rights under these Terms and Conditions without the prior written approval of BUILDSAFE.
- 12.7 **Subcontracting:** BUILDSAFE may subcontract, at its sole discretion, the whole or part of the Services.
- 12.8 **Consumer Guarantees Act 1993:** Nothing in these Terms and Conditions shall affect any rights you may have under the Consumer Guarantees Act 1993 where applicable.

## SCHEDULE

### PAYMENT REGIME

#### 1. PAYMENT REGIME

- 1.1 The Payer shall make payment to the Payee in respect of each and every Payment Claim made by the Payee without deduction of retention monies or any deduction on account of the Security Amount, save for in relation to when that stage of the Contract Works is reached where the aggregate amount of the Payee's Payment Claims exceeds, or would exceed if paid to the full extent claimed, the Contract Price less the Security Amount, at which time the Payer shall pay to the Payee in relation to that Payment Claim, the difference between the Contract Price less the Security Amount, and the aggregate amount of all previous payments made to the Payee at that date i.e. the Payee shall not be entitled to be paid the Security Amount, or any portion thereof until such time as the Contract Works as between the Owner/Principal and the Contractor reach Practical Completion.
- 1.2 When the Contract Works as between the Owner/Principal and the Contractor reach Practical Completion, the Contractor and any relevant Subcontractor(s) shall be entitled to be paid 90% of the Security Amount, which amount shall be distributed between them in the relevant proportions within 5 working days of receipt by BUILDSAFE of the Certificate of Practical Completion issued by the Owner/Principal.
- 1.3 On the expiry of the Defects Liability Period and Completion of the Contract Works as between the Owner/Principal and the Contractor, the Contractor and any relevant Subcontractor(s) shall be entitled to be paid the final 10% of the Security Amount, which amount shall be distributed between them in the relevant proportions within 5 working days of receipt by BUILDSAFE of the Completion Certificate issued by the Owner/Principal.
- 1.4 Where the Security Amount available for distribution to the Contractor and any relevant Subcontractors is less than the aggregate entitlements of each of the relevant Subcontractors, the Security Amount shall be distributed among the Subcontractors in the same proportions as each individual entitlement is to the aggregate entitlements of all of the Subcontractors.
- 1.5 The amount of a Progress Payment shall be calculated in accordance with section 17 of the Construction Contracts Act 2002 and the Parties to the Construction Contract shall

comply with the following procedures for making and responding to Payment Claims under the contract.

## **2. PAYMENT CLAIMS**

- 2.1 The Payee may serve on the Payer a Payment Claim in respect of any costs and expenses incurred by the Payee in making an application for, and/or uplifting, any resource consent and/or building consent in relation to the relevant building project including but not limited to the costs of obtaining such approvals and professional advice and reports and plans and drawings as may be necessary in the circumstances, all fees expenses and levies charged by the local authority together with the Payee's associated administration and processing costs. The amounts claimed shall become due and payable by the Payer to the Payee on the date occurring 2 Working Days after any such Payment Claim is served on the Payer.
- 2.2 Thereafter, the Payee may serve on the Payer a Payment Claim for each Progress Payment under the Construction Contract in respect of all other work carried out during each monthly period commencing on the day of the month on which the Contract Works were first carried out and ending on the last day of that month, and each month after the first period.
- 2.3 The Payee's Payment Claims must:
- (a) Be in writing;
  - (b) Contain sufficient details to identify the Construction Contract to which the Progress Payment relates;
  - (c) Identify the Contract Works and the relevant period to which the Progress Payment relates;
  - (d) Indicate the Claimed Amount and the due date for payment;
  - (e) Indicate the manner in which the Payee calculated the Claimed Amount; and
  - (f) State that the Payment Claim is made under the Construction Contracts Act 2002.
  - (g) Be accompanied by Form 1 from the Schedule to the Construction Contracts Regulations 2003, being an outline of the process for responding to that Payment Claim and an explanation of the consequences of not responding to that Payment Claim, and not paying the Claimed Amount, or the Scheduled

Amount, in full (whichever is applicable), unless the Owner/Principal is not a Residential Occupier (as such term is defined in the Construction Contracts Act 2002).

- 2.4 The due date for payment of a Progress Claim other than a Progress Claim made under paragraph 2.1 above in relation to any resource consent and/or building consent is 10 Working Days after the relevant Payment Claim is served on the Payer as between an Owner/Principal and a Contractor and 15 Working Days as between A Contractor and a Subcontractor.

### **3. PAYMENT SCHEDULES**

- 3.1 The Payer may respond to a Payment Claim in respect of any costs and expenses claimed by the Payee in relation to making an application for, and/or uplifting, any resource consent and/or building consent in relation to the relevant building project by providing a Payment Schedule to the Payee within 2 Working Days after the date the relevant Payment Claim is served on the Payer.
- 3.2 An Owner/Principal may respond to a Payment Claim served by a Contractor by providing a Payment Schedule to the Contractor within 10 Working Days after the date the relevant Payment Claim is served on the Owner/Principal.
- 3.3 A Contractor may respond to a Payment Claim served by a Subcontractor by providing a Payment Schedule to the Subcontractor within 15 Working Days after the date the relevant Payment Claim is served on the Contractor.
- 3.4 A Payment Schedule must:
- (a) Be in writing; and
  - (b) Identify the Payment Claim to which it relates; and
  - (c) Indicate a Scheduled Amount.
- 3.5 If the Scheduled Amount is less than the Claimed Amount, the Payment Schedule must indicate:
- (a) The manner in which the Payer calculated the Scheduled Amount; and
  - (b) The Payer's reason or reasons for the difference between the Scheduled Amount and the Claimed Amount; and

- (c) In a case where the difference is because the Payer is withholding payment on any basis, the Payer's reason or reasons for withholding payment.

#### **4. LIABILITY FOR PAYING CLAIMED AMOUNT**

- 4.1 An Owner/Principal becomes liable to pay the Claimed Amount to which the Payment Claim relates if the Owner/Principal does not provide a Payment Schedule to the Contractor or pay the Claimed Amount within 10 Working Days after the date the Payment Claim is served on the Owner/Principal.
- 4.2 A Contractor becomes liable to pay the Claimed Amount to which the Payment Claim relates if the Contractor does not provide a Payment Schedule to the Subcontractor or pay the Claimed Amount within 15 Working Days after the date the Payment Claim is served on the Contractor.

#### **5. INTEREST**

- 5.1 The Payer shall pay the Payee interest compounding monthly on all monies due and payable and remaining unpaid after the expiry of the time provided for payment from and including the date immediately following the date upon which the payment was due, up to and including the date upon which payment is made in full.
- 5.2 The rate of interest shall be equal to 1.25 times the interest rate, as certified by a Chartered Accountant or Bank Officer, which was payable, or would have been payable by the Payee, for overdraft facilities with its bank, over the period of default.
- 5.3 The right to interest shall be in addition to any other remedy that the Payee may be entitled to at law.