



## RETENTION TRUST FUND

### 1. TERMS AND CONDITIONS

1.1 These Terms and Conditions govern the BuildSafe<sup>®</sup> Retention Trust Fund Scheme (the **Scheme**) provided by BuildSafe<sup>®</sup> and set out the terms of our agreement with you (the **Agreement**).

1.2 By applying 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<sup>®</sup> for or on behalf of that Applicant, is and, save to the extent updated, remains in every respect true, correct, and complete.

### 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.

**Applicant** means a person applying to BuildSafe to register to use the Scheme.

**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.

**BuildSafe** means BuildSafe<sup>®</sup> Security of Payment Trustee Company Limited (company number 2229987) whose registered office is at 9 Anzac Street, Takapuna, Auckland.

**BuildSafe Trust Account** means the bank account in the name of BuildSafe® where the Retention Money withheld by a Payer is held in escrow until it is released in accordance with clause 5.1(g).

**Construction Contract** means a contract for any Construction Work and includes any variation to the Construction Contract.

**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.

**Contract Works** means the Construction Work and any ancillary works and services, to be undertaken by the Payee for the Payer under a Construction Contract.

**Construction Work** means the work defined in section 6(1) of the Construction Contracts Act 2002 and includes the work otherwise excluded by section 6(2) of the Act.

**Fees** means the upfront registration and administration fee and transaction fees 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.

**Notice of Acceptance** means the notice issued by BuildSafe confirming the Registration of Parties to use the Scheme and fixing the due date for payment by the Payer of the upfront registration and administration fee.

**Notice of Initiation** means the notice issued by BuildSafe confirming that the Payer has paid the upfront registration and administration fee and that the Scheme in relation to the subject building project is effective and unconditional.

**Parties** means the parties to the Scheme in relation to a specific building project including the Payer and the Payee, but excluding BuildSafe.

**Payee** means the party to a Construction Contract who is authorised and employed by the Payer to undertake the relevant Contract Works and entitled to a Progress Payment under that Construction Contract from the Payer.

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

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

**Registered** means a Payer or Payee who has applied to use the Scheme and has been accepted by BuildSafe and cognate terms shall be construed accordingly.

**Registered User** means any Payer or Payee who is Registered to participate in the Scheme.

**Retention Money** means an amount of money withheld by a Payer from an amount payable to a Payee as security for performance of the Payee's obligations under the Construction Contract that is paid into a designated BuildSafe Retention Trust Account.

**Scheme** means the escrow and administration and management services provided by BuildSafe under the name 'BuildSafe® Retention Trust Fund 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.

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

**User** means any Payer or Payee who is Registered to participate in the Scheme.

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

- (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 Party.
- (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 upfront registration and administration fee has been paid in clear funds 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 five Working Days after the date of the Notice of Acceptance, this Agreement shall automatically terminate.

## **4. USER OBLIGATIONS**

4.1 Each of the Payer and Payee Registered or wanting to be Registered shall:

- (a) Submit or arrange for the submission of the properly completed Application to BuildSafe.
- (b) Pay or arrange for payment of the relevant Fees on or before the due date for payment.
- (c) Irrevocably authorise BuildSafe:
  - (i) to receive and act upon any document made for the purpose of the Scheme;
  - (ii) to disclose any information it has received in respect of the Scheme or a Construction Contract to the other relevant Parties; and
  - (iii) to release the Retention Money to the Parties in the proportions and at the time set out in these Terms and Conditions.
- (d) Notify BuildSafe in writing no later than two Working Days after becoming aware of any error in relation to any payment made in relation to the Scheme.
- (e) 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.
- (f) Give and consent to being given any notice, communication, or document required to be served under these Terms and Conditions by email.

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

5.1 BuildSafe shall:

- (a) Issue a Notice of Acceptance in respect of each Application which is approved.
- (b) Issue a Notice of Initiation following receipt of the upfront registration and administration fee in clear funds.
- (c) Maintain and manage the Website.
- (d) Administer and manage the Scheme.

- (e) Maintain and manage the BuildSafe Retention Trust Accounts with a bank registered in New Zealand and ensure that the funds in the Trust Accounts are not co-mingled and remain at all times free and clear of any interests, charges, claims or encumbrances other than those of BuildSafe and Parties to the Scheme.
- (f) Deposit all Retention Money into the BuildSafe Trust Account as soon as practicable after receipt from the Payer where not directly paid into such account by the Payer.
- (g) Release the Retention Money on the following basis:
  - (i) within three Working Days following receipt of a written instruction from either Party to release any proportion of the Retention Money to the other Party;
  - (ii) in the event of frustration or cancellation of the Construction Contract, make such payments as agreed by the Parties in writing within five Working Days following receipt of such agreement between the Parties, or failing such agreement, within 10 Working Days following any Adjudicator's determination or any judgment or order of any Court of competent jurisdiction in respect of such Dispute;
  - (iii) in the event of the Payer becoming insolvent, within 10 Working Days following any order or instruction from an insolvency practitioner or trust administrator appointed in relation to that insolvency, or any judgment or order of any Court of competent jurisdiction; or
  - (iv) in the event of a dispute arising in relation to the release of the Retention Money, within five Working Days following receipt of a written agreement between the Parties, or failing such agreement, within 10 Working Days following receipt of any Adjudicator's determination or any judgment or order of any Court of competent jurisdiction in respect of such Dispute.
- (h) 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.

## **6. PAYMENT**

6.1 Each Payer will pay BuildSafe's upfront registration and administration fee on or before the due date for payment set out in the Notice of Acceptance.

6.2 Each Party to whom Retention Money is to be paid by BuildSafe under the Scheme, will pay BuildSafe's then current unpaid transaction fees up to and including the transaction fee for the release of Retention Money defined in clause 5.1(g)(i) to (iv) above; such payment to be made by way of deduction by BuildSafe from the Retention Money otherwise authorised to be released.

6.3 Each User of the Scheme will pay any additional costs howsoever incurred by BuildSafe on a full indemnity basis in recovering any overdue payment from such User of the Scheme

6.4 Once paid, BuildSafe's Fees and expenses are non-refundable.

6.5 If any Party fails to pay any Fees or additional costs by the due date for payment, BuildSafe may deduct such Fees from the Retention Money, whereupon BuildSafe shall notify all Parties affected by the reduced Retention Money of such deduction and the identity of the Party who failed to pay the Fees.

## **7. INTEREST**

7.1 Each User of the Scheme authorises BuildSafe to retain, in addition to its Fees, any interest which accrues on the Retention Money as its property.

## **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 User and to confirm that User'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 User 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 User for any purpose relating to the Scheme, including but not limited to, 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 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.
- (d) BuildSafe has no liability to any Registered User under any circumstances for any act or omission by any third-party service provider.
- (e) 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 Retention Money 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.
- (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 Retention Money upon payment of the Retention Money 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 by email or other means of electronic communication or in such manner as BuildSafe may prescribe from time to time.

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 at its sole discretion, from time to time without prior notice, but no such update, amendment or modification will have any effect 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.