

Terms & Conditions of Trade

(Effective 14 August 2019)

A LARGER PRINT SIZE VERSION OF THESE TERMS & CONDITIONS IS AVAILABLE ON REQUEST

The **Contractor** agrees to perform the **Works** and/or supply the **Goods** requested by the **Client** on the terms and conditions set out below. Words in **ITALICS** are defined at clause 33.1 below.

1. Quotations, Orders, Acceptance & Contracts

- 1.1 Clauses 2.3, 7.2, 7.8, 11.6, 15.4, 20.4, 24.3(c), 26.4, 28.1, 30.1 and 31.1 shall apply to the *Agreement* unless or to the extent the *Quotation* or *Order* expressly specifies otherwise.
- 1.2 The *Client* acknowledges that the submission of a *Quotation* by the *Contractor* is not an offer the acceptance of which will give rise to a contract.
- 1.3 An *Order* in relation to a *Quotation* or offer to enter into an *Agreement* may be made by the *Client* verbally or in writing.
- 1.4 An *Order* or offer is accepted when the *Client* receives from the *Contractor* an acceptance of the *Order* in writing, or if no written acceptance of the *Order* is received, verbal acceptance or delivery of the *Works* or the *Goods*, whichever occurs first (**"the Order Acceptance"**).
- 1.5 When an *Order* or offer is accepted by an *Order Acceptance* an *Agreement* will be made and wholly documented by (in descending *Order* of precedence) the *Quotation*, any specific terms agreed in writing and set out in the *Order* and these terms and conditions, which documents shall constitute the entire *Agreement* and will supersede all prior negotiations, proposals and correspondence between the parties.
- 1.6 Despite the *Client* at any time providing, referring to, submitting or otherwise using or purporting to use any standard form terms and conditions other than these terms and conditions, such terms and conditions will not form part of, or be incorporated into, the *Agreement*.

2. Performance of Works & Supply of Goods

- 2.1 The *Contractor* shall carry out and complete the *Works* and/or supply the *Goods* in accordance with the *Agreement*. The *Client* and the *Contractor* agree that the items referred to as *Exclusions* in the *Quotation*, if any, are excluded from the *Agreement*.
- 2.2 The *Contractor* warrants that:
- (a) it holds all licenses, if any, required to carry out the *Works*, and
- (b) the *Works* will be carried out in a proper and workmanlike manner and in accordance with the *Contract Documents*.
- 2.3 The *Client* warrants that:
- (a) it has obtained and holds any building approvals necessary for the *Works*, and
- (b) the *Site* will comply with any occupational health and safety laws relating to building and construction sites of the kind at which with the *Works* are to be performed and any other relevant safety standards or legislation.
- 2.4 The *Contractor* shall not be required to commence the *Works* or supply the *Goods* until the *Client*:
- (a) if required by the *Contractor*, provides evidence that it is the owner of the *Site* or contracted builder of the *Works* to be carried out on the *Site* and a copy of any Development Approval required in respect of *Works*, and
- (b) has paid the *Deposit*, if any, in accordance with clause 3.2.
- 2.5 Subject to clauses 2.4 and 12, the *Contractor* shall carry out the *Works* within a reasonable time and as far as reasonably possible by the date for completion specified in the *Quotation*, if any.
- 2.6 In carrying out the *Works* the *Contractor* and its agents and employees shall observe all relevant occupational health and safety law and shall comply with all obligations under workers compensation legislation.

3. Contract Price & Deposit

- 3.1 The *Client* shall pay to the *Contractor* the *Contract Price* and other money that becomes payable under the *Agreement* (without any set off) in the manner and at the times stated in the *Agreement*.
- 3.2 The *Client* shall pay to the *Contractor* the deposit specified in the *Quotation*, if any, within seven (7) days of the *Order Acceptance*.

4. Onsite Works

- 4.1 This clause applies where the *Contract Price* is to be determined pursuant to an hourly rate or schedule of rates and the *Works* are required to be performed at the *Site*.
- 4.2 The *Works* shall include the *Contractor's* reasonable travel time to and from the *Site*.
- 4.3 Notwithstanding any other clause, the *Contract Price* shall not be less than the amount equal to two (2) hours calculated at the rate or rates specified in the *Quotation*, or if no rates are specified, at the *Contractor's* reasonable rates.

5. Site Possession, Access, Services & Materials

- 5.1 The *Client* warrants that it has exclusive possession of the *Site* to carry out work including the *Works*. The *Client* must provide clear and free all weather access to the *Site* for delivery of materials and performance of the *Works*. If the *Client* does not provide all weather access, the *Contractor* may carry out any work required to achieve such access and that work is deemed to be a *Variation*. The *Contractor* shall not be liable for any loss or damage to the *Site* including, without limitation damage to pathways, driveways and concrete, paved or grassed areas unless such damage was reasonably avoidable and caused by the *Contractors'* negligence.
- 5.2 The *Client* must not:
- (a) hinder the *Contractor's* access or possession of the *Site* for the purposes of carrying out the *Works*,
- (b) hinder the progress of the *Works*, or
- (c) make inquiry of, issue directions to, or give instructions to, the *Contractor's* workers or subcontractors. Communications must only be with the *Contractor's* nominated person.
- 5.3 The *Client* may only have access to the *Works* at reasonable times and after giving reasonable prior notice for the purposes of inspecting the progress of the *Works*.
- 5.4 The *Client* must supply electricity and water, at its expense, for the *Contractor* to use in carrying out the *Works*.
- 5.5 All materials delivered to *Site* by the *Contractor* and not required for the *Works* will remain the property of the *Contractor*.

6. Accuracy of Contract Documents

- 6.1 The party responsible for the preparation of a *Contract Document* warrants that it is accurate and correct.
- 6.2 In the event of any inconsistency between the *Contract Documents*, or any detail not being given, the *Contractor* shall give notice to the *Client* detailing the problem. The *Client* must within two (2) *Business Days* of receiving such notice give written instructions as to how the *Contractor* is to proceed with the *Works*.
- 6.3 In the event that the *Client* refuses or fails to give written instructions to the *Contractor* within two (2) *Business Days* of a notice pursuant to Clause 6.2, the *Client* authorises the *Contractor* to determine the required detail necessary to resolve the error, ambiguity or inconsistency, however, the *Contractor* shall not be obliged to act under that authority.
- 6.4 If the required detail, as determined by the *Client* or the *Contractor* necessitates a change to the scope of the *Works*, that work is deemed to be a *Variation*.

7. Delivery & Inspection of Goods

- 7.1 Delivery of the *Goods* is taken to occur when:
- (a) the *Contractor* or the *Contractor's* nominated carrier delivers the *Goods* to the *Site* or address or third party nominated by the *Client* even if the *Client* is not present at the address, or
- (b) the *Client* or its nominated carrier takes possession of the *Goods*.
- 7.2 The cost of delivery is payable by the *Client* in addition to the *Contract Price*.
- 7.3 The *Contractor* shall make reasonable efforts to deliver the *Goods* to the *Client* or its designated agent in accordance with any agreement between the parties, or in the absence of any specific agreement, within a reasonable time, but shall not be liable for:
- (a) any failure to deliver or delay in delivering the *Goods* for any reason,
- (b) any damage or loss due to unloading or packaging (unless risk in the *Goods* had not passed to the *Client* at the relevant time),
- (c) any damage to property caused upon entering premises to deliver the *Goods*, unless caused by the *Contractor's* negligent act or omission.
- 7.4 The *Client* shall accept delivery of the *Goods* even if late. In the event that the *Client* fails to take delivery of the *Goods* at the time of delivery the *Client* shall reimburse the *Contractor* for any costs incurred by the failure and the *Contractor* shall be entitled to charge a reasonable fee for redelivery and/or storage of the *Goods*.
- 7.5 The *Client* must inspect the *Goods* on delivery. The *Client* must notify the *Contractor* in writing within seven (7) days of delivery and setting out full details of all relevant matters if:
- (a) the *Goods* are damaged, faulty or defective in any,
- (b) the *Goods* do not comply with any description by which they were sold and/or specified to in the *Quotation*, or
- (c) there is any discrepancy in quantity.
- 7.6 The *Client* must notify the *Contractor* in writing of any other defect in the *Goods* as soon as reasonably possible after any such defect becomes apparent.
- 7.7 Where a notice is given under clauses 7.5 or 7.6 the *Client* shall allow the *Contractor* to inspect the *Goods*.
- 7.8 Notwithstanding any other clause, where the *Goods* or any part of the *Goods* are second hand, the *Contractor* makes no warranty in relation to the quality or suitability of the second hand *Goods* for any purpose and the *Client*:

- (a) acknowledges that it has had a reasonable opportunity to inspect the second hand *Goods* prior to delivery, and
- (b) accepts the second hand *Goods* with any faults, damage and/or missing parts or components.

8. Passing of Risk

- 8.1 The risk in the *Goods* will pass to the *Client*:
- (a) where the *Works* include the installation of the *Goods* or any particular *Goods*, upon completion of that part of the *Works* that relates to the installation or each installation, and
- (b) in all other cases, upon the earlier of: (i) the delivery of the *Goods* to the *Client* or its agent (including all risks associated with unloading), and (ii) the passing of title to the *Goods* to the *Client*.
- 8.2 Notwithstanding clause 8.1(a), if the *Client* directs the *Contractor* to deliver the *Goods* to an unattended location the *Goods* shall be left at the *Client's* sole risk and responsibility. In the event that such *Goods* are lost, damaged or destroyed the replacement of the *Goods* shall be at the *Client's* expense.
- 8.3 Where the *Contractor* retains ownership pursuant to clause 9 of *Goods* in respect of which risk has passed to the *Client*, the *Client* must maintain adequate insurance in relation to the *Goods* and provide evidence of such insurance to the *Contractor* on request.

9. Retention of Title

- 9.1 Notwithstanding the delivery of *Goods*, until the *Client* has paid all monies payable to the *Contractor* under the *Agreement* in cleared funds:
- (a) the legal and equitable title to the *Goods* will remain with the *Contractor*;
- (b) a fiduciary relationship will exist between the *Client* and the *Contractor*; and
- (c) the *Client* agrees to hold the *Goods* as bailee for the *Contractor* and keep the *Goods* separate and in good condition.
- 9.2 Unless the *Goods* have become fixtures, until ownership of the *Goods* passes to the *Client*:
- (a) the *Client* shall not charge or grant any encumbrance over the *Goods*,
- (b) the *Client* must return the *Goods* to the *Contractor* on request, and
- (c) the *Contractor* may without demand retake possession of the *Goods*.
- 9.3 For the purposes of recovering possession of the *Goods* and without limiting the generality of this clause 9, the *Client* irrevocably authorises and licenses the *Contractor* and its servants and agents to enter any premises where the *Contractor* believes the *Goods* may be stored and to take possession of the *Goods*.

10. Progress Claims

- 10.1 The *Contractor* may issue a *Progress Claim* in respect of work carried out or related goods or services supplied by the *Contractor* on or after:
- (a) the dates, periods or milestones specified in the *Quotation*, if any,
- (b) the date of delivery of the *Goods* or any part of the *Goods*,
- (c) the 14th and 28th days of each calendar month in which any work or related goods or services were supplied, and
- (d) when in the *Contractor's* opinion the *Works* have reached the stage of *Practical Completion*.
- 10.2 The *Contractor* may serve a *Progress Claim* on the *Client* by any method that it is entitled to give notice under the *Agreement*.
- 10.3 The *Client* must pay the *Contract Price* progressively as claimed by the *Contractor* within seven (7) days, or such other period as specified in the *Quotation*, of service of a *Progress Claim* on the *Client*.
- 10.4 The *Client* may only provide the *Contractor* with a *Payment Schedule* in relation to *Progress Claim* within seven (7) days of the date of service of the *Progress Claim*.

11. Variations

- 11.1 A *Variation* occurs if:
- (a) the *Agreement* deems a *Variation*,
- (b) the *Client* requests the *Contractor* to perform a *Variation* and subsequently the *Contractor* performs the *Variation* in accordance with the *Client's* direction, or
- (c) the *Client* and the *Contractor* agree in writing to a *Variation*, including *Agreement* as to the price of the *Variation*.
- 11.2 The price of a *Variation* is payable progressively as the *Variation* is performed and is due at the same time as the next *Progress Claim* after it is carried out unless a different time is agreed.
- 11.3 If the *Client* has requested the *Contractor* to perform a *Variation* and the *Contractor* has provided the *Client* with a cost proposal in respect of the *Variation*, unless the cost proposal is rejected by the *Client* in writing within two (2) *Business Days* the amount of the cost proposal is deemed to be the price of the *Variation* for the purposes of clause 11.1(b).
- 11.4 If there is insufficient time to calculate the price of a *Variation*, or this *Contract* deems a *Variation*, the price of the *Variation* will be charged to the *Client* at the *Contractor's* reasonable cost plus a *Profit Margin*.
- 11.5 There shall be a deemed *Variation* if:
- (a) the requirements of any statutory or other *Authority* necessitate a change to the *Works*, such *Variation* being that work required to effect that change,
- (b) additional work is required, or the work is required to be performed in a manner or using equipment not anticipated, due to the discovery of latent deficiencies in the performance of the *Works* (including, without limitation, unknown subsurface conditions, poor weather conditions, poor access to the *Site*, iron reinforcing rods in concrete, hidden pipes in walls, safety risks, works by a third party not being completed where necessary for the *Works* to be performed),
- (c) after the *Agreement* is made; (i) a statutory or other *Authority* introduces or increases any tax, charge, levy or other regulation or any requirement that affects the *Works* that causes any increase in the costs of the *Works*, or (ii) the *Contractor's* wages is affected by a change to an *Industry Award*.
- 11.6 The *Client* acknowledges that the *Contract Price* has been agreed on the basis of the *Contractor* performing the *Works* during the *Contractor's* ordinary operating hours. Where no construction program was provided to the *Contractor* prior to the date of the *Quotation*, the *Contractor* will be entitled to a *Variation* if the *Works* are required to be carried out outside the aforementioned working hours to comply with any subsequent construction program.
- 11.7 Where extra cost in materials, labour and overhead is occasioned to the *Contractor* by virtue of the acceleration of an agreed work schedule or of the presence of obstructions or conditions which could not reasonably have been anticipated by the *Contractor* the *Agreement* is deemed to have been varied and the *Contract Price* shall be adjusted accordingly.
- 11.8 Notwithstanding any other clause herein, the *Contractor* is under no obligation to carry out any deemed *Variation* or *Variation* requested by the *Client*.

12. Stand Down Time

- 12.1 There shall be a deemed *Variation* should the performance of the *Works* and/or supply the *Goods* be affected by any *Stand Down Time*.
- 12.2 Unless the parties agree otherwise, the price of the *Variation* shall be calculated at the *Standby Rates* for *Stand Down Time*.

13. Acknowledgement of Possible Delays

- 13.1 The *Client* acknowledges that completion of the *Works* may be suspended by the *Contractor* pursuant to clause 14 or delayed by any cause beyond the control of the *Contractor* including; (a) a *Variation* or a request by the *Client* for a *Variation*; (b) an act of God, fire, explosion, earthquake or civil commotion; (c) any weather condition that, in the reasonable opinion of the *Contractor*, prevents work from being carried out in the usual manner; (d) an industrial dispute; (e) anything done or not done by the *Client*; (f) delays in getting any approvals; (g) the delay in the supply of materials; (h) the period known as "Building Industry Shutdown" being a five (5) week period commencing on or about 22 December in each year; and (i) the *Contract Documents* not being fully completed or made available to the *Contractor* by the date of the *Agreement*.
- 13.2 The *Contractor* shall not be liable for the failure to perform the *Works* or the *Agreement* to the extent and for so long as its performance is prevented or delayed without substantial fault or negligence by the *Contractor* because of a circumstance referred to in clause 13.1.
- 13.3 Where the costs of the *Works* has increased due to any delay beyond the control of the *Contractor*, there shall be a deemed *Variation* and the *Contractor* shall be entitled to a reasonable increase in the *Contract Price*.

14. Suspension

- 14.1 If the *Client* is in breach of the *Agreement* the *Contractor* may suspend the carrying out of the *Works* and must promptly give to the *Client* written notice of the suspension and details of the breach.
- 14.2 The *Contractor* must recommence the carrying out of the *Works* within a reasonable time after the *Client* remedies the breach and gives the *Contractor* written notice of that fact.

15. Practical Completion

- 15.1 The Contractor will give notice to the Client of Practical Completion of the Works within five (5) Business Days of Practical Completion. A Progress Claim claiming the total Contract Price or the unclaimed balance of the Contract Price shall be deemed to be notice of Practical Completion of the Works.
- 15.2 If the Client disagrees that the Works have reached the stage of Practical Completion the Client must notify the Contractor in writing within five (5) Business Days of the notice of Practical Completion stating the reasons why the Works are not practically complete. The Contractor shall as soon as practicable after receipt of such notice:
- complete those things as may be necessary to bring the Works to the stage of Practical Completion and give the Client a further notice of Practical Completion, or
 - reject the Client's notice and/or initiate dispute resolution procedures.
- 15.3 If the Client fails to give a notice pursuant to Clause 15.2, the Client is deemed to have acknowledged that the Works have reached the stage of Practical Completion.
- 15.4 The Contractor is not required to obtain any Certificate of Occupancy or Construction Certificate relating to the Works.

16. Hire of Equipment

- 16.1 This clause applies if the Agreement includes the hire of equipment to the Client.
- 16.2 In this clause:
- "Equipment" means the equipment specified in the Quotation to be hired to the Client;
 - "Hire Fee" means the fee specified in the Quotation for the hire of the Equipment;
 - "Hire Start Date" and "Hire End Date" mean the dates so specified in the Quotation or such other date as the parties agree in writing;
 - "Hire Period" means the period commencing on the Hire Start Date and ending on the Hire End Date.
- 16.3 Subject to clause 16.9, the Contractor shall provide and the Client shall take on hire the Equipment for the Hire Period
- 16.4 The Client shall pay, at the same times as Progress Claims are due and payable under the Agreement:
- the Hire Fee to the Contractor progressively during the Hire Period,
 - the Contractor's costs of delivering and/or collecting the Equipment to or from any site,
 - the Contractor's costs of repairing any damage to the Equipment for which the Client is responsible, and
 - the full replacement cost of the Equipment where the Client fails or refuses to return the Equipment or make the Equipment available for collection.
- 16.5 The Client warrants that it:
- has inspected or had a reasonable opportunity to inspect the Equipment prior to placing the Order,
 - has not relied on any representation by the Contractor in relation to the suitability of the Equipment for any purpose,
 - will only use the Equipment in accordance with the recognized methods and use for equipment of the type, and
 - will keep the Equipment clean and in good working order and repair and will comply with any maintenance schedules referred to in the Quotation.
- 16.6 Except with the Contractor's prior written consent, the Client shall:
- keep Equipment at the location at which it was delivered or at which its intended use was disclosed to the Contractor prior to collection and not remove the Equipment from that location,
 - not make any replacement, alteration or addition to the Equipment, and
 - keep the equipment in the Client's sole possession and control.
- 16.7 The Client agrees to use, operate and possess the Equipment at the Client's risk. The Client shall be fully responsible for and liable to the Contractor for any loss or damage to the Equipment howsoever occasioned, except fair wear and tear. The Client shall notify the Contractor in writing as soon as practicable upon it becoming aware of any loss or damage to the Equipment in excess of fair wear and tear.
- 16.8 Title to the Equipment shall at all times vest in the Contractor. The Contractor shall be entitled to inspect the Equipment at any time on reasonable notice.
- 16.9 In the event of any default or termination of the Agreement the Client shall return the Equipment to Contractor on demand.

17. Defects Liability Period

- 17.1 This clause applies if the Quotation specifies a defects liability period in relation to the Works.
- 17.2 The defects liability period shall commence on the date of Practical Completion.
- 17.3 The Client may, before the end of the defects liability period, give the Contractor one (1) list of defects in the Works that appear after the date of Practical Completion.
- 17.4 The Contractor must rectify defects that are the Contractor's responsibility and which are notified to the Contractor during the defects liability period within a reasonable time.
- 17.5 Notwithstanding 10.3, if the Quotation specifies a Retention Amount, the Client may retain from each Progress Claim an amount equal to the percentage that the Retention Amount represents of the Contract Price and the Client must pay to the Contractor:
- 50% of such retained amounts when the Contractor gives notice of Practical Completion of the Works, and
 - the balance of the retained amount upon the expiration of the defects liability period.

18. Dispute Resolution

- 18.1 The parties must attempt to resolve any dispute or claim arising out of or under the Agreement by negotiation in good faith before either party commences any litigation in relation to the dispute or claim. Accordingly, if a party considers that a dispute or claim has arisen under the Agreement they must give written notice to the other party adequately setting out and providing details of the dispute.
- 18.2 The Contractor and the Client must meet within ten (10) Business Days of the giving of a notice pursuant to clause 18.1 to attempt to resolve the dispute or claim or to agree on methods of doing so. The parties must be represented at the meeting by a person with authority to agree to a resolution of the dispute.
- 18.3 If the dispute is resolved the parties must write down the resolution and sign it.
- 18.4 The parties agree that anything done or said in the negotiations can not be revealed in any other proceedings.
- 18.5 Nothing in this clause affects the rights of the parties pursuant to the Security of Payment Law or prevents either party from commencing urgent injunctive or interlocutory proceedings in a competent Court.

19. Default & Termination of Contract

- 19.1 Without limiting clause 19.2, a party may terminate the Agreement if:
- the other party is in default of the Agreement,
 - the non-defaulting party has served notice in writing on the party setting out details of the default and stating that the party will be entitled to terminate the Agreement unless the default is remedied within a specified time of not less than 14 days,
 - the party fails to remedy the default within 14 days of receiving a notice under clause 19.1(b), or such longer period as may be specified in the notice, and
 - the non-defaulting party serves written notice of termination whilst the default remains unsatisfied.
- 19.2 If the Client fails to pay any money under the Agreement within seven (7) days of the due date for payment:
- the Contractor may terminate the Agreement by notice in writing to the Client,
 - the Contractor shall be entitled to interest on the outstanding amount at the rate of 2.5% per calendar month calculated daily from the due date for payment and compounding monthly on the first day of each month until payment is received,
 - may without notice sell any Goods that the Contractor has recovered pursuant to clause 9 on such terms and in such manner as it determines and, after deducting all expenses incurred, shall offset such proceeds from the balance owing from the Contractor,
 - the Client shall indemnify the Contractor from and against all costs and disbursements incurred or payable by the Contractor in connection with the recovery of monies owing by the Contractor (including, without limitation, legal fees on an indemnity basis, collection agency costs and bank dishonour fees), and
 - the Contractor may cancel all or any part of the Works or works in connection with any other contract or contracts made with the Client to which these terms and conditions apply whereafter all amounts payable by the Client to the Contractor shall become payable immediately.
- 19.3 The Client agrees to pay to the Contractor, as genuine pre-estimate of the Contractor's costs:
- a processing and handling fee of \$20.00 in respect of each payment made under the Agreement that is not in satisfaction, or in satisfaction of the balance, of a Progress Claim, and
 - a default fee of \$50.00 in respect of any failure by the Client to pay a Progress Claim by the due date for payment or by the corresponding day of each subsequent calendar month until the Progress Claim is paid in full.

20. Warranties & Representations

- 20.1 The Client warrants that the Works and/or Goods relate to 'construction work' or 'related goods and services' within the meaning of the Security of Payment Law and that the Security of Payment Law will apply to the Agreement unless the Client has specified otherwise in writing in the Order.
- 20.2 Subject to clause 2.2 and except as expressly provided to the contrary in the Contract Documents, all representations, warranties, guarantees and conditions in relation to the Works or the Goods (whether implied or otherwise) are hereby excluded to the maximum extent permitted by law.
- 20.3 If the Client is aware (or should be aware) that the Works or the Goods are for a particular purpose or are required to possess particular or uniform characteristics, the Client agrees to clearly specify that purpose or those characteristics in writing in the Order.

- 20.4 If the Quotation and/or Order does not specify a particular purpose or characteristic in relation to the Works and/or supply the Goods, the Contractor provides no guarantees or warranties that the Works and/or supply the Goods will have any such characteristics.
- 20.5 The Client warrants that it has made its own enquiries in relation to the suitability of the Works and the Goods and has not relied on any representation made by the Contractor in relation to their suitability for any particular purpose.

21. Return of Goods

- 21.1 Subject to any applicable statute, unless the Contractor agrees otherwise in writing, the Contractor will only accept a return of the Goods if:
- the Client has complied with clauses 7.5 and 7.6,
 - the Contractor acting reasonably has agreed that the Goods are defective and not reasonably capable of repair,
 - the Goods are returned at the Client's expense and within a reasonable time, and
 - the Goods are returned, as far as possible, in the same condition as the Goods were delivered.
- 21.2 If the Contractor agrees in its absolute discretion to accept the return of any non-defective Goods, the Client shall:
- indemnify the Contractor in relation to any freight expense, and
 - if required by the Contractor, pay handling fees of up to 10% of the price of the Goods returned.

22. Limitation of Liability

- 22.1 The Contractor's liability to the Client (and any party claiming through the Client against the Contractor) for any claim for loss or damage (including legal expenses), whether arising in contract, tort or otherwise, in connection with the Agreement shall be as follows:
- where the liability relates to the supply of services, the Contractor's liability shall be limited to the lesser of the costs of: (i) supplying the services again, or (ii) payment of the costs of having the services supplied again, or
 - where the liability relates to the supply of goods, the Contractor's liability shall be limited to the lesser of the cost of: (i) replacement of the goods or the supply of equivalent goods, (ii) repair of the goods, (iii) payment of the costs of replacing the goods or acquiring equivalent goods, or (iv) payment of the costs of having the goods repaired.
- 22.2 Notwithstanding any other term of the Agreement but subject to any applicable statute, the Contractor shall not be liable for any defect, fault or damage to the Goods of any nature whatsoever:
- in respect of which notice was not provided in accordance with clauses 7.5 or 7.6, or
 - resulting from or caused or contributed to in any way by: (i) the Client failing to properly maintain or store the Goods after delivery, (ii) the Client using the Goods for any purpose other than that for which the Goods were designed, (iii) the Client continuing to use the Goods after any defect became apparent or ought reasonably to have become apparent, (iv) the Client failing to follow any instructions or guidelines provided by the Contractor or the manufacturer of the Goods, or (v) fair wear and tear or any accident or act of God.
- 22.3 If the Contractor did not manufacture the Goods, the Contractor's liability shall be limited to the lesser of the liability of the manufacturer of the Goods to the Contractor and the liability determined under clause 22.1(b).
- 22.4 The Contractor will not be held liable in connection with the Works and/or supply the Goods where the Works and/or supply the Goods have been modified or altered by anyone other than the Contractor
- 22.5 Unless the Quotation contains an express warranty, the Client acknowledges that the Goods supplied may exhibit variations in shade, colour, texture, surface and finish and may fade or change colour over time. The Contractor shall make reasonable efforts to match batches of products supplied and minimise such variations but shall not be liable in any way whatsoever where such variations occur.
- 22.6 The Contractor shall not be liable for any indirect, special or consequential loss or damage of any nature whatsoever resulting from or caused in any way by the carrying out of the Works or supply of the Goods.

23. Guarantee

- 23.1 In consideration for the Contractor entering into the Agreement, the Guarantor guarantees to the Contractor the performance by the Client of all of the Client's obligations under the Agreement including any Variation.
- 23.2 If the Client does not pay any money due under the Agreement the Guarantor must pay that money to the Contractor on demand without deduction, set-off or counterclaim even if the Contractor has not tried to recover payment from the Client.
- 23.3 Even if the Contractor gives the Client extra time to comply with an obligation under the Agreement or does not insist on strict compliance with the terms of the Agreement the Guarantor's obligations will not be affected.
- 23.4 Where a payment made by the Client or the Guarantor to the Contractor is set aside by law, the parties are restored to their respective positions prior to the payment being made and are entitled to exercise all rights which they had under the Agreement.
- 23.5 If there is more than one (1) Guarantor:
- this guarantee shall be binding on each of them jointly and severally, and
 - the release by the Contractor of any Guarantor from this guarantee does not affect the liability of any other Guarantor.
- 23.6 The Guarantor's liability under this clause is continuing and unlimited.

24. Personal Property Security

- 24.1 In this clause 'amendment demand', 'attaches', 'financing statement', 'financing change statement', 'security agreement', 'security interest' and 'verification statement' have the meanings given to them by the PPSA.
- 24.2 The Client and the Guarantor, if any, hereby charge the Goods and all of their respective personal property as security for the performance by the Client of the Client's obligations under the Agreement.
- 24.3 The Client acknowledges and agrees that:
- the Agreement constitutes a security agreement for the purposes of the PPSA, and
 - a security interest exists in all goods (and their proceeds) previously supplied by the Contractor to the Client (if any) and in all future goods supplied (and their proceeds),
 - the Client has received or will receive value as at the date of first delivery of the Goods (or any part of the Goods) and that the Contractor has not agreed to postpone the time the security interest attaches to the Goods, and
 - where the Contractor has rights in addition to those under Chapter 4 of the PPSA, those rights will continue to apply.
- 24.4 The Client shall:
- promptly sign all documents and provide any further information that the Contractor may reasonably require to register a financing statement or financing change statement in relation to a security interest granted to the Contractor under the Agreement or any other document required to be registered under the PPSA,
 - notify the Contractor in writing of any intention to change the Client's business practices to include the sale or leasing of goods of like kind to the Goods (or any part thereof) in the ordinary course of the Client's business, and
 - on demand reimburse the Contractor for all costs and expenses incurred in registering a financing statement or financing change statement.
- 24.5 The Client must not, without the Contractor's prior written consent:
- register or permit to be registered a financing statement or financing change statement in relation to the Goods in favour of a third party, or
 - register or cause to be registered a financing change statement in respect of a security interest granted under the Agreement,
 - issue or permit any other person to issue an amendment demand to the Contractor unless all monies payable by the Client under the Agreement have been received by the Contractor in cleared funds.
- 24.6 Any requirement under the PPSA on the part of the Contractor to give a notice to the Client or any Guarantor shall not, to the extent that the requirement may be contracted out of (including, without limitation, under Section 115(1) of the PPSA), apply to the Agreement. Further, to the extent that the Client and/or the Guarantor may waive the right to receive a notice under the PPSA (including, without limitation, notice in relation to a verification statement under Section 157(1) of the PPSA), the Client and the Guarantor waives that right.
- 24.7 The Client irrevocably authorises and licenses the Contractor to enter upon the Client's property or premises, without notice, and without being in any way liable to the Client, if the Contractor has cause to exercise any of the Contractor's rights under Section 123 of the PPSA, and the Client shall indemnify the Contractor from any claims made by any third party as a result of such exercise.
- 24.8 The Contractor and the Client agree to treat information of the kind referred to in Section 275(1) of the PPSA as confidential. Neither the Contractor or the Client will disclose, send or make available any of the information referred to in Section 275(1) of the PPSA to any person except as required by law or the Agreement.
- 24.9 The Contractor and the Client acknowledge and agree that clause 24.8 constitutes a confidentiality agreement pursuant to Section 275(6) of the PPSA.

25. Real Property Security

- 25.1 The Client and the Guarantor, if any, hereby charges all their right, title and interest in any real property or other assets capable of being charged that they, or any of them, own or hereafter own either solely or jointly, in favour of the Contractor as security for the performance of the Client's obligations pursuant to the Agreement and authorises the Contractor to register a Caveat over the title of any such property in the event of a default by the Client under the Agreement.
- 25.2 The Client shall indemnify the Contractor from and against all costs and disbursements incurred or payable by the Contractor in connection with exercise of the Contractor's rights under clause 25.1 (including, without limitation, legal fees on a solicitor-client basis, stamp duty and registration fees).

26. Intellectual Property

- 26.1 Where the *Contractor* has designed, drawn or developed unique and/or original designs or drawings in connection with the *Works* or any *Goods*, copyright in such designs or drawings shall vest in the *Contractor*.
- 26.2 The *Client* warrants that the *Contractor* is entitled to use all documents and drawings provided by the *Client* for the purposes of performing the *Works* and that such use will not infringe any third party's intellectual property rights.
- 26.3 The *Client* shall indemnify the *Contractor* from and against all claims and all losses and damages incurred by the *Contractor* as a consequence of any claim against the *Contractor* for infringement of a third party's intellectual property rights in connection with the carrying out of the *Works* or supply of the *Goods* in accordance with a document that is; supplied by, prepared under the instruction of, or prepared from sketches provided by, the *Client*.
- 26.4 The *Client* authorises the *Contractor* to use any documents, designs, drawings or goods that the *Contractor* has created for the *Client* including photographs thereof for the purposes of marketing the *Contractor's* business or entry into any competition.

27. Subcontracting & Assignment

- 27.1 The *Contractor* may subcontract the whole or any part of the *Works* but remains responsible for all of the *Works*.
- 27.2 The *Contractor* may assign the *Agreement* to any person. In the event of the assignment the *Client* may, if it has reasonable grounds to believe that the assignee will not comply with the *Agreement*, within seven (7) days of receiving notice of the assignment terminate the *Agreement* by 30 days written notice to the *Contractor* whereafter the termination will be effective unless the assignment is withdrawn.

28. Cancellation

- 28.1 Notwithstanding any other clause herein the *Contractor* may cancel any agreement to which these terms and conditions apply at any time before the *Works* are commenced or *Goods* delivered by giving written notice to the *Client* whereafter any deposit or other amount paid by the *Client* on account of the *Works* or the *Goods* shall become immediately repayable to the *Client*. The *Contractor* shall not be liable for any consequential loss or damage in relation to any such cancellation.
- 28.2 If the *Client* purports to cancel the *Agreement*, without limiting any other right available to the *Contractor*, the *Client* shall be liable to the *Contractor* for any and all loss or damage suffered by the *Contractor* in connection with the cancellation including, without limitation, loss of profit in respect of the *Works* and supply of the *Goods* and/or loss of profits in respect of orders and opportunities foregone as a result of the scheduling of the *Works*.

29. Privacy Act 1988 (Cth)

- 29.1 Despite clause 1.5, this clause applies upon the making of an *Order* before and after any *Order Acceptance*.
- 29.2 The *Client* and the *Guarantor*, if any, consent to the *Contractor* obtaining a Credit Report from a credit reporting agency in relation to the *Client* and the *Guarantor* respectively for the purpose of:
- assessing the creditworthiness of the *Client*, and
 - the collection of payments that are overdue in respect of commercial credit.
- 29.3 The *Client* and the *Guarantor*, if any, agree that the *Contractor* may exchange information about the *Client* and the *Guarantor* with those credit providers either named as trade referees by the *Client* or named in a Credit Report issued by a credit reporting agency for the following purposes:
- to assess an application for commercial credit by the *Client*,
 - to notify other credit providers of a default by the *Client*,
 - to exchange information with other credit providers, where the *Client* is in default with other credit providers, and
 - to assess the creditworthiness of the *Client*.
- 29.4 The *Client* and the *Guarantor*, if any, consent to the *Contractor* using any personal information collected by the *Contractor* for the following purposes or as required by law:
- the performance of the *Works* and/or supply of *Goods*,
 - the marketing of the supply of *Goods* or services by the *Contractor*,
 - the analysing, verifying and checking of the *Client's* credit and/or payment status in relation to the performance of the *Works* and/or supply of *Goods*,
 - the processing of any payment instructions, direct debit facilities and/or credit facilities requested by the *Client*, and
 - enabling the daily operation of the *Client's* account and/or the collection of amounts outstanding in the *Client's* account in relation to the performance of the *Works* and/or supply of *Goods*.
- 29.5 The *Contractor* may give information about the *Client* and the *Guarantor* to a credit reporting agency for the following purposes:
- to obtain a consumer credit report about the *Client* and/or the *Guarantor*, or
 - allow the credit reporting agency to create or maintain a credit information file containing information about the *Client* and/or the *Guarantor*.

30. GST

- 30.1 The *Contract Price* and all other monies payable by the *Client* pursuant to the *Agreement* are exclusive of *GST*.
- 30.2 If the *Contractor* incurs a liability to pay *GST* in connection with a supply to the *Client* pursuant to the *Agreement*, the consideration that the *Client* must pay to the *Contractor* for the supply is increased by an amount equal to the *GST* liability that the *Contractor* incurs in making the supply and the amount of the *GST* liability is payable at the same time and in the same manner as the consideration in respect of the supply is payable.
- 30.3 The *Contractor* shall provide the *Client* with a tax invoice for any *GST* included in any payment made pursuant to the *Agreement*.

31. Notices

- 31.1 The parties agree that email shall be the primary method of contact and communication in relation to any matters arising under the *Agreement*.
- 31.2 A notice is deemed to have been given or serviced if the notice is:
- delivered by hand to the other party,
 - posted by ordinary prepaid mail to the other party's address (including a Post Office Box) stated in the *Quotation* or *Order* on the second *Business Day* following the date of posting, or
 - sent by facsimile transmission to the parties' facsimile number stated in the *Quotation* or *Order* upon receiving confirmation of delivery of the transmission, or
 - sent by email to the parties' email address stated in the *Quotation* or *Order* upon receiving confirmation of delivery of the email without error.

32. General

- 32.1 Payments may only be made by cash, bank cheque, electronic funds transfer or credit card (unless the *Contractor* agrees otherwise in relation to a payment). The *Client* agrees to pay a surcharge equal to 2.5% in respect any payment made via credit card.
- 32.2 The *Client* may not; (a) set off against or deduct from any monies payable under the *Agreement* any sums owed or claimed to be owed by the *Contractor* to the *Client*, or (b) withhold payment of any *Progress Claim* because the *Progress Claim* or part of it is in dispute.
- 32.3 The *Agreement* embodies the whole agreement between the parties relating to the subject matter of the *Agreement* and supersedes any and all oral and written negotiations and communications by or on behalf of any of the parties.
- 32.4 The terms in the *Agreement* may not be varied, waived, discharged or released, except with the prior written consent of the parties.
- 32.5 No right under the *Agreement* is waived or deemed to have been waived in relation to any particular instance unless in writing and signed by the party waiving the right. A party does not waive its right under the *Agreement* by granting an extension of time or any other forbearance to another party.
- 32.6 The *Agreement* shall be governed by and constructed pursuant to the laws of the State or Territory in which the *Order* is received. The parties irrevocably submit to the jurisdiction of the Courts of that State or Territory in connection with any dispute relating to the *Agreement*. The parties further agree that the Court of competent jurisdiction located closest to the *Contractor's* principal place of business in the relevant State or Territory shall be the appropriate Court for the hearing of any claims in connection with this *Agreement*.
- 32.7 The parties agree that a construction of the *Agreement* that results in all provisions being enforceable is to be preferred to a construction that does not so result.
- 32.8 If, despite the application of clause 32.7, a provision of the *Agreement* is illegal or unenforceable:
- if the provision would not be illegal or unenforceable if a word or words were omitted, that word or those words are severed; and
 - in any other case, the whole provision is severed, and the remainder of the *Agreement* continues in force.

33. Definitions & Interpretation

33.1 In these terms and conditions:

- "*Agreement*" means the agreement between the *Client* and the *Contractor* arising from the *Contractor's* acceptance of an *Order* from the *Client*;
- "*Authority*" means the Local Government, State or Federal Government, or any Government agency that has power to affect the *Works*;
- "*Business Day*" means any day other than Saturdays, Sundays or public holidays;
- "*Client*" means the party named as the *Client* or customer in the *Quotation*, or if there was no written *Quotation*, in the *Order*;
- "*Contract Documents*" means these terms and conditions, the *Order*, the *Quotation*, the *Order Acceptance* and the plans (or measurements) and specifications, if any, specified in the *Quotation*;

- "*Contract Price*" means the amount or rates stated as the price in the *Quotation*, or if there was no written *Quotation*, in the *Order*;
- "*Exclusions*" means the exclusions described in the *Quotation*;
- "*Goods*" means any equipment, goods and other parts and components to be supplied by the *Contractor* as part of or in connection with the *Works* or otherwise described in the *Contract Documents*;
- "*GST*" has the same meaning as given to it in the *A New Tax System (Goods and Services Tax) Act 1999*.
- "*Guarantor*" means the person or persons who have signed the *Order* as *Guarantor* and includes their executors, administrators, successors and assigns;
- "*Order*" means a work order or purchase order in writing issued by the *Contractor* in relation to a *Quotation*,
- "*Order Acceptance*" is defined in clause 1.4.
- "*Payment Schedule*" means a *Payment Schedule* as defined by the laws in the State or Territory applying to the *Agreement* governing the rights of parties in the building and construction industry to obtain security for payment and, in New South Wales being the *Building and Construction Industry Security of Payment Act 1999*;
- "*PPSA*" means the *Personal Property Securities Act 2009* (Cth);
- "*Practical Completion*" means when the *Works* are complete except for minor omissions and defects that do not prevent the *Works* from being reasonably capable of being used for their usual purpose;
- "*Profit Margin*" means a margin of 25% plus *GST* or such other margin specified in the *Quotation*.
- "*Progress Claim*" means both a tax invoice as defined in the *A New Tax System (Goods and Services Tax) Act 1999* and a *Payment Claim* in defined by the laws in the State or Territory applying to the *Agreement* governing the rights of parties in the building and construction industry to obtain security for payment and, in New South Wales being the *Building and Construction Industry Security of Payment Act 1999*;
- "*Quotation*" means the proposal, if any, provided by the *Contractor* to the *Client* in respect of the *Works* and/or the *Goods* to which the *Order* relates;
- "*Security of Payment Law*" means the laws in the State or Territory applying to the *Agreement* governing the rights of parties in the building and construction industry to obtain security for payment and, in New South Wales being the *Building and Construction Industry Security of Payment Act 1999*;
- "*Site*" means the address at which the *Works* are to be carried out as specified in the *Quotation* or if there was no written *Quotation*, in the *Order* or the *Order Acceptance*;
- "*Stand Down Time*" means anytime that the equipment and/or employees or contractors used by the *Contractor* or intended to be used in connection with the *Works* and/or supply the *Goods* are not able to be used to perform the *Works* and/or supply the *Goods* (and during which time the *Contractor* would otherwise have used the equipment or labour to perform the *Works* and/or supply the *Goods*) as a of any;
 - Variation*,
 - inclement weather,
 - requirement or direction by the *Client*,
 - valid suspension of the works, or
 - other delay beyond the *Contractor's* control
- "*Standby Rates*" means the rates specified in the *Quotation*, or if no rate is specified, a reasonable rate corresponding to the equipment and/or employees or contractors affected by the *Stand Down Time*.
- "*Contractor*" means AMJ Solutions Pty Limited ABN 77 634 986 306, its successors and assigns;
- "*Variation*" means to vary the *Works* by; carrying out additional work, omitting any part of the *Works* or changing the scope of the *Works*.
- "*Works*" means the work described in the *Contract Documents* and includes *Variations* but excludes the *Exclusions*.

33.2 In the *Agreement*, unless otherwise indicated by the context: (a) the singular includes the plural and vice versa; (b) a reference to one gender includes a reference to all other genders; (c) headings to clauses are included for the sake of convenience only and will not affect the interpretation of the clauses to which they relate; (d) references to any statute or statutory provision include that statute or statutory provision as amended, extended, consolidated or replaced by subsequent legislation and any *Orders*, regulations, instruments or other subordinate legislation made under the relevant statute; (e) the word person means and includes a natural person, a company, a firm or any other legal entity whether acting as a trustee or not; (f) the *Agreement* will bind each party's legal personal representatives, successors and assigns; and (g) where a party comprises two (2) or more persons the rights and obligations of such persons pursuant to the *Agreement* will ensue for the benefit of and bind each of them jointly and severally.