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*Terms & Conditions of Trade*

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## 1. Definitions

1. "Contractor" shall mean Evans Building Services Limited, its successors and assigns or any person acting on behalf of and with the authority of Evans Building Services Limited.
2. "Client" means the person/s or any person acting on behalf of and with the authority of the Client requesting the Contractor to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
  - i. if there is more than one client, is a reference to each Client jointly and severally; and
  - ii. if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
  - iii. includes the Client's executors, administrators, successors and permitted assigns.
3. "Works" means all Works or Materials provided by the Contractor to the Client, at the Client's request from time to time (where the context so permits the terms 'Works' or 'Materials' shall be interchangeable for the other).
4. "Price" means the Price payable for the Works, as agreed between the Contractor and the Client in accordance with clause 8
5. "Site" indicates the address nominated by the Client at which the Works are to be undertaken by the Contractor.

## 2. Acceptance

1. The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions once the Client provides a purchase order, or electronically request works to proceed.
2. These terms and conditions may only be amended with both Party's consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and the Contractor.

## 3. Electronic Transactions Act 2002

Electronic signatures shall be deemed to be accepted by either Party providing that the parties have complied with Section 22 of the Electronic Transactions Act 2002 or any other applicable provisions of that Act or any Regulations referred to in that Act.

## 4. The Client acknowledges and agrees;

1. that any meetings called for discussion (including but not limited to, email, text, or by mobile phone) with the Contractor regarding the Works is subject to an additional cost for the time involved. Billing is at the discretion of the Contractor and if implemented will be chargeable time will be included in the weekly invoicing as a variation in accordance with clause 7;
2. the Contractor's employees may take business calls and/or texts while on Site. The mobile phone policy for personal use is limited as agreed with employees to designated break times unless deemed an emergency;
3. where parking is at a premium, any costs associated with parking incurred by the Contractor may be passed on to the Client for payment and will be subject to the Contractor's margin;
4. travel time for offsite pick-ups (including but not limited to, additional Material purchases) required for the Works are subject to chargeable hours by the Contractor.

5. It is the intention of the Contractor and agreed by the client that: in the event the Contractor requires access, to undertake the Works, to an adjoining or adjacent property or land to the nominated job site, the Client does not own that. It is the Client's responsibility to gain permission from the landowner to use the property as mentioned above throughout the process or delivering the Works. In the event the landowner denies access or use of the land or property, the Client shall be liable for all costs incurred by the Contractor in gaining permission to access and use the premises through any legal process that may be deemed necessary;
6. the Contractor shall only be responsible for their performance to the Party that contracts them to undertake the Works and shall not be liable to any third party irrespective of their relationship to the Client;
7. although all care and skill will be taken by the Contractor's during the preparation of the Site by using conventional excavation, compaction and construction methods and equipment. The Contractor will not be liable for any loss or damage to any nearby fencing; in the event of soil movement beyond the control of the Contractor, unless deemed to be due to negligence by the Contractor.
8. Where the Client engages their Contractor to provide the goods or Works, the Client will be liable for those third parties payments, health and safety and conduct on Site.
9. During the provision of the Works that it shall be the Client's responsibility to ensure that Following clause 11, both parties agree to comply with the HSW Act 2015. Where necessary a temporary security fence shall be erected for the safety of the general public, such costs incurred by the Contractor shall be borne by the Client.
10. The Client shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, change of trustees or business practice). The Client shall be liable for any loss incurred by the Contractor as a result of the Client's failure to comply with this clause.

## 5. Errors and Omissions

1. The Client acknowledges and accepts that the Contractor shall, without prejudice, accept no liability in respect of any alleged or actual error(s) or omission(s):
  - i. resulting from an inadvertent mistake made by the Contractor in the formation or administration of this Contract; or
  - ii. contained in/omitted from any literature (hard copy or electronic) supplied by the Contractor in respect of the Works.
2. In the event such an error or omission occurs in accordance with clause 1 and is not attributable to the negligence or wilful misconduct of the Contractor; the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.

## 6. Authorised Representatives

1. Unless otherwise limited as per clause 2, the Client agrees that should the Client introduce any third party to the Contractor as the Client's duly authorised representative, that person will have full authority to act on behalf of the Client. Their administration will continue until all requested Works have been completed, or the Client notifies in writing.
2. The Client expressly acknowledges and accepts that they will be solely liable to the Contractor for all additional costs incurred by the Contractor in providing any Works, or variation/s there to, requested by the Client's or duly authorised representative (subject always to the limitations imposed under clause 2 (if any)).

## 7. Variations

1. The Contractor reserves the right to change the Price:
2. if a change order to the Works originally scheduled (including any Materials, applicable plans or specifications) is requested; or
  - i. where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather, limitations to accessing the Site, obscured building defects, changes to building plans by Client and/or the Client's Architects or Engineers, the discovery of

- hidden structural faults, incorrect measurements provided by the Client, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, remedial action required due to existing workmanship being of substandard quality or non-compliant to the building code, hard rock barriers below the surface or iron reinforcing rods in concrete or hidden pipes and wiring in walls, etc.) which are only discovered on commencement of the Works; or
- ii. additional meetings with the Client to discuss the Site project; or
- iii. All variations shall be made in writing. If the Contractor believes the change will not require modification to any permit and will not cause any delay, and will not add more than two percent (2%) to the Price, then the Contractor may carry out the variation, and the Client agrees to pay any modification to the Price. Notwithstanding the Contractor will give the Client a written variation document detailing the Works, amended Price, and the estimated time to undertake the variation, any potential delay, and will require written acceptance of the change by the Client before commencement.

## 8. Price and Payment

1. At the Contractor's sole discretion, the Price shall be either:
  - i. As indicated on invoices provided by the Contractor to the Client in respect of Works performed or Materials supplied; or
  - ii. The Contractor's quoted Price (subject to clause 6) which shall be binding upon the Contractor provided that the Client shall accept the Contractor's quotation in writing within thirty (30) days.
2. The Contractor reserves the right to change the Price:
  - i. if a variation to the Materials which are to be supplied is requested; or
  - ii. where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather, limitations to accessing the site, availability of machinery including crane, hoist or other lifting equipment, obscured building defects, incorrect measurements provided by the Client, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, remedial work required due to existing workmanship being of poor quality or non-compliant to the building code, latent soil conditions, hard rock barriers below the surface or iron reinforcing rods in concrete or hidden pipes and wiring in walls, etc.) which are only discovered on commencement of the Works; or
  - iii. in the event of increases to the Contractor in the cost of labour or Materials, which are beyond the Contractor's control.
3. Variations will be charged for on the basis of the Contractor's quotation, and will be detailed in writing, and shown as variations on the Contractor's invoice. The Client shall be required to respond to any variation submitted by the Contractor within ten (10) working days. Failure to do so will entitle the Contractor to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
4. At the Contractor's sole discretion, a deposit may be required.
5. Payment for the Building Work shall be made in full on or before
  - i. the [20] day of the month following the month in which the invoice is issued, or
  - ii. within seven (7) days of the date of the invoice whichever is agreed.
6. All invoices for progress payments will be prepared to meet the provisions of the Construction Contracts Act 2002. All invoices issued pursuant to the contract shall be in the form of a payment claim

within the meaning of the Construction Contracts Act 2002. The Customer is hereby put on notice of the requirements of the Construction Contracts Act 2002 in terms of the issuing of payment schedules.

7. Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by the Contractor, which may be:
    - i. generally on the installation of the Materials, or Delivery of the Materials, if the agreed order was a supply only order;
    - ii. by way of instalments/progress payments in accordance with the Contractor's standard payment schedule, which is:
      - a. thirty-five percent (35%) deposit due upon acceptance of the quotation. The Works will not commence until the Contractor receives this payment; and
      - b. a further payment of thirty-five percent (35%) shall be due upon fifty percent practical completion based on EBSL estimation, or at the six (6) week stage, whichever falls first; and
      - c. the final thirty percent (30%) is due on practical completion and/or handover of the Worksite to the Client and payment shall be due within seven (20) days from the date of invoice.
  8. Payment may be made by bank cheque, electronic/on-line banking, or by any other method as agreed to between the Client and the Contractor.
  9. The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Contractor nor to withhold payment of any invoice because part of that invoice is in dispute.
  10. Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to the Contractor an amount equal to any GST the Contractor must pay for any supply by the Contractor under this or any other agreement for the sale of the Materials. The Client must pay GST, without deduction or set-off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client must pay any additional taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
- ## 9. Provision of the Works
1. Subject to clause 2, it is the Contractor's responsibility to ensure that the Works start as soon as it is reasonably possible.
  2. The Works commencement date will be put back and the contract period extended by whatever time is reasonable in the event that the Contractor claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond the Contractor's control, including but not limited to any failure by the Client to:
    - i. make a selection; or
    - ii. have the Site ready for installation; or
    - iii. delays due to adverse weather conditions making the Site an unsafe workplace in respect of the HSW Act; or
    - iv. notify the Contractor that the Site is ready.
    - v. natural disaster
    - vi. epidemic or pandemic (e.g. COVID-19)
  3. The Contractor may provide the Works by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
  4. The Works shall be deemed to be completed when:
    - i. the Works carried out under this Contract have been completed in accordance with the plans and specifications set out in this Contract; and
    - ii. the Client either:

- iii. receives a certificate of acceptance where the Works were urgent and completed without a consent; or
  - iv. in any other case, upon the issuance of a Notice of Practical Completion (where applicable).
5. Any time specified by the Contractor for the provision of the Works is an estimate only, and the Contractor will not be liable for any loss or damage incurred by the Client as a result of any delay. However, both parties agree that they shall make every endeavour to enable the Works to be provided at the time and place as was arranged between both parties. In the event that the Contractor is unable to provide the Works as agreed solely due to any action or inaction of the Client then the Contractor shall be entitled to charge a reasonable fee for re-providing the Works at a later time and date, and/or storage of Materials.

#### 10. Site Access and Condition

1. It is the intention of the Contractor and agreed by the client that:
  - i. the Client shall ensure that the Contractor always has clear and free access to the worksite to enable them to undertake the Works. the Contractor shall not be liable for any loss or damage to the Site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of the Contractor; and
  - ii. it is the Client's responsibility to provide the Contractor, while at the Site, with adequate access to available water, electricity, toilet and washing facilities;
  - iii. the Client is responsible for removing all furniture from the contracted working area, the Contractor or the Contractor's employees are not contracted to move office items unless otherwise agreed. If the Contractor is requested by the Client on Site to remove any obstacles from the designated work area, this will be subject to additional cost for the time involved and invoiced in accordance with clause 5.
2. Site Inductions
  - i. in the event the Client requires an employee or sub-contractor of the Contractor to undertake a Site induction during working hours, the Client will be liable to pay the hourly charges for that period. If any induction needs to be conducted prior to the commencement date, then the Client shall be liable to pay the Contractor's standard (and/or overtime, if applicable) hourly labour rate; or
  - ii. where the Contractor is in control of the Site, the Client and/or the Client's third party contractors must initially carry out the Contractor's Health & Safety induction course before access to the Site will be granted. Inspection of the Site during the course of the Works will be by appointment only and unless otherwise agreed, in such an event the Client and/or third Party acting on behalf of the Client must at all times be accompanied by the Contractor.

#### 11. Compliance with Laws

1. The Client and the Contractor shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works, including any WorkSafe guidelines regarding health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.
2. The Contractor reserves the right to refuse to continue to complete the Works in the event that the Contractor believes the Site to be unsafe to the Contractor or the Contractor's employees and/or the Client's property. In this event, the Client accepts the Contractor's right to make safe the Site (including, but not limited to, the hire of specialist equipment) before the Contractor will continue the Works. The Client agrees to indemnify the Contractor against all additional costs incurred in such an event; all additional costs shall be detailed separately at the time of invoicing in accordance with

clause 6. The Contractor shall not be liable for any delays caused, loss, damages, or costs, however resulting from an unsafe Site.

3. The Contractor has not and will not at any time assume any obligation as the Client's agent or otherwise which may be imposed upon the Client from time to time pursuant to the Health & Safety at Work Act 2015, including any subsequent regulations (the "HSW Act") arising from the engagement of Services under this Contract. Unless otherwise stated, the parties agree that for the purposes of the HSW Act, the Contractor shall not be the person who controls the place of work in terms of the HSW Act.
4. The Client shall obtain (at the expense of the Client) all licenses, approvals (including (where necessary) the service of a fencing notice and consent before the commencement of Works), applications and permits that may be required for the Works.

#### 12. Risk

1. If the Contractor retains ownership of the Materials under clause 17 then;
  2. where the Contractor is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery, and the Client must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that either;
    - iii. the Client or the Client's nominated carrier takes possession of the Materials at the Contractor's address, or
    - iv. the Materials are delivered by the Contractor or the Contractor's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address).
  3. where the Contractor is to both supply and install Materials, then the Contractor shall maintain a contract works insurance policy until the Works are completed. Upon completion of the Works, all risk for the Works shall immediately pass to the Client.
  4. Notwithstanding the provisions of clause 1 if the Client requests explicitly for the Contractor to leave Materials outside the Contractor's premises for collection or to deliver the Materials to an unattended location, then such materials shall always be left at the sole risk of the Client, and it shall be the Client's responsibility to ensure the Materials are insured adequately or at all. If such Materials are lost, damaged or destroyed, then replacement of the Materials shall be at the Client's expense.
  5. Any advice, recommendation, information, assistance or service provided by the Contractor in relation to Works offered is given in good faith, is based on the Contractor's knowledge and experience and shall be accepted without liability on the part of the Contractor, and shall be the responsibility of the Client to confirm the accuracy and reliability of the same in light of the use to which the Client makes or intends to make of the Works.
  6. The Client acknowledges that the Materials may exhibit variations in texture, shade, colour, surface, finish, markings, graining, veining, and contain natural fissures, occlusions, and indentations. While the Contractor will make every effort to match batches and/or sales samples to the finished Materials, the Contractor shall not be liable for any loss, damages or costs whatsoever arising resulting from any variation.
  7. The Contractor gives no guarantee (expressed or implied) against, cracking, chipping or scratching that may occur that is beyond the Contractor's control due to the nature of the Materials at the time of installation; therefore it is recommended that, where the Client is responsible for ordering the Materials, they allow for extra Materials for such breakages.
  8. Where the Client has supplied products for the Contractor to complete the Works, the Client acknowledges that they accept responsibility for the suitability of purpose, quality and any faults inherent in those products.
  9. The Contractor shall not be responsible for any defects in the Works, any loss or damage to the products and/or Materials (or any part thereof), arising from the use of products or trades supplied by the Client.
  10. Where the Contractor is required to install the Materials, the Client warrants that the structure of the premises or equipment in or upon which these Materials are to be installed or erected is sound and will sustain the installation and work incidental thereto and the Contractor shall not be liable for any claims, demands, losses,

damages, costs and expenses howsoever caused or arising should the premises or equipment be unable to accommodate the installation.

1. The Client acknowledges that, under no circumstances, will the Contractor handle removal of asbestos product. In the event asbestos (or other hazardous material) is discovered on Site:
  - i. the Contractor shall suspend the Works as per clause 2; and
  - ii. the Client shall be fully responsible for the resolution of any resulting problems; and
  - iii. any additional cost incurred by the Contractor shall be added to the Price under clause 1(ii).
2. The Client acknowledges that the Materials supplied may:
  - i. fade or change colour over time; and
  - ii. expand, contract or distort as a result of exposure to heat, cold, weather. the Contractor will accept no responsibility for gaps that may appear during prolonged dry periods; and
  - iii. mark or stain if exposed to certain substances; and
  - iv. be damaged or disfigured by impact or scratching.

### 13. Surplus Materials

1. Unless otherwise stated elsewhere in this Contract:
  - i. only suitable new Materials will be used; and
  - ii. unless otherwise stated demolished materials remain the Client's property; and
  - iii. Materials that the Contractor brings to the Site which are related to the Works (including any tool accessories or sundry items required) will remain the property of the Contractor

### 14. Insurance

The Contractor shall have public liability insurance of at least \$5m. It is the Client's and/or the Client's third-party contractor's responsibility to ensure that they are similarly insured.

### 15. Dimensions, Plans and Specifications

1. building industry tolerances shall apply to the sizes and measurements of the Works unless the Contractor and the Client agree otherwise in writing.
2. The Contractor shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client or the Client's representative.
3. If the giving of a quotation for the provision of the Works involves the Contractor estimating measurements and quantities, it shall be the responsibility of the Client to verify the accuracy thereof before the Client accepts such quotation. Should the Client require any changes to the estimated measurements and quantities, the Client shall request such changes in writing before acceptance of the quote.

### 16. Underground Locations

1. While the Contractor will take all care to avoid damage to any underground services the Client agrees to indemnify the Contractor in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as **per clause 1**. Prior to the Contractor commencing the Works, the Client must advise the Contractor of the precise location of all underground services on the Site and clearly mark the same. If applicable, the Client must identify include but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on Site.

### 17. Title

1. It is the intention of the Contractor and agreed by the Client that ownership of Materials shall not pass until:
  - i. the Client has paid all amounts owing for the Materials; and

- ii. the Client has met all other obligations due by the Client to the Contractor in respect of all contracts between the Contractor and the Client.

2. It is further agreed that until such time as ownership of the Materials shall pass from the Contractor to the Client:

- i. where practicable the Materials shall be kept separate and identifiable until the Contractor shall have received payment and all other obligations of the Client are met; and
- ii. the Contractor may give notice in writing to the Client to return the Materials or any of them to the Contractor. Upon such notice, the rights of the Client to obtain ownership or any other interest in the Materials shall cease; and
- iii. the Contractor shall have the right of stopping the Materials in transit whether or not delivery has been made; and
- iv. if the Client fails to return the Materials to the Contractor, then the Contractor or the Contractor's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Materials are situated and take possession of the Materials.

### 18. Defects, Returns & Warranties

1. The Client shall inspect the Materials on delivery and shall within seven (7) days of delivery (time being of the essence) notify the Contractor of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall allow the Contractor to inspect the Materials within a reasonable time following delivery if the Client believes the Materials are defective in any way. If the Client fails to comply with these provisions, the Materials shall be presumed to be free from any defect or damage. For defective Materials, which the Contractor has agreed in writing that the Client is entitled to reject, the Contractor's liability is limited to either (at the Contractor's discretion) replacing the Materials or repairing the Materials.
2. Returns will only be accepted provided that:
  - iv. the Client has complied with the provisions of clause 1; and
  - v. the Contractor will not be liable for Materials which have not been stored or used properly; and
3. Subject to the conditions of warranty set out in **clause 4.10 the Contractor** warrants that if any defect in any workmanship of the Contractor becomes apparent and is reported to the Contractor within four months of the date of completion (time being of the essence), then the Contractor will either (at the Contractor's sole discretion) replace or remedy the workmanship.
4. The conditions applicable to the warranty **given by clause 5** are:
  - i. the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
    - a. failure on the part of the Client to properly maintain any Materials; or
    - b. failure on the part of the Client to follow any instructions or guidelines provided by the Contractor; or
    - c. any use of any Materials otherwise than for any application specified on a quote or order form; or
    - d. the continued use of any Materials after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
    - e. fair wear and tear, any accident or act of God.
  - ii. the warranty shall cease, and the Contractor shall after that in no circumstances be liable under the terms of the warranty if the workmanship is repaired,

altered or overhauled without the Contractor's consent.

- iii. In respect of all claims, the Contractor shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or inaccurately assessing the Client's claim.
- iv. For Materials not manufactured by the Contractor, the warranty shall be the current warranty provided by the manufacturer of the Materials. The Contractor shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the product.
- v. In the case of second-hand Materials, the Client acknowledges that the Client has had full opportunity to inspect the same and that he accepts the same with all faults and that no warranty is given by the Contractor as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Contractor shall not be responsible for any loss or damage to the Materials or caused by the Materials, or any part thereof, however arising.

## 19. Construction Contracts Act 2002

1. In the event that the Client is a residential occupier as defined by the Construction Contracts Act 2002 the Client hereby expressly acknowledges that:
  - i. the Contractor has the right to suspend the Works within five (5) working days of written notice of its intent to do so if a payment claim is served on the Client; and
    1. the payment is not paid in full by the due date for payment, and no payment schedule has been given by the Client; or
    2. a scheduled amount stated in a payment schedule issued by the Client in relation to the payment claim is not paid in full by the due date for its payment; or
    3. the Client has not complied with an adjudicator's notice that the Client must pay an amount to the Contractor by a particular date; and
    4. the Contractor has given written notice to the Client of its intention to suspend the carrying out of construction work under the construction contract.
  - ii. if the Contractor suspends the Works it:
    1. is not in breach of Contract; and
    2. is not liable for any loss or damage whatsoever suffered, or alleged to be suffered, by the Client or by any person claiming through the Client; and
    3. is entitled to an extension of time to complete the Contract; and
  - iii. keeps its rights under the Contract including the right to terminate the Contract; and may at any time lift the suspension, even if the amount has not been paid or an adjudicator's determination has not been complied with.
  - vi. if the Contractor exercises the right to suspend the Works, the exercise of that right does not:
    1. affect any rights that would otherwise have been available to the Contractor under the Contractual Remedies Act 1979; or
    2. enable the Client to exercise any rights that may otherwise have been available to the Client under that Act as a direct consequence of the Contractor suspending the Works under this provision.

## 20. Intellectual Property

1. Where the Contractor has designed, drawn, written plans or a schedule of Works, or created any Materials for the Client, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in the Contractor, and shall only be used by the Client at the Contractor's discretion.
2. The Client warrants that all designs, specifications or instructions given to the Contractor will not cause the Contractor to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Contractor against any action taken by a third party against the Contractor in respect of any such infringement.
3. The Client agrees that the Contractor may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or Materials which the Contractor has created for, or any digital media of the Works which the Contractor has provided to, the Client.

## 21. Default and Consequences of Default

1. Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at the Contractor's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
2. If the Client owes the Contractor any money, the Client shall indemnify the Contractor from and against all costs and disbursements incurred by the Contractor in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Contractor's collection agency costs, and bank dishonour fees).
3. Further to any other rights or remedies the Contractor may have under this Contract, if a Client has made payment to the Contractor, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Contractor under **this clause 21** where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this agreement.
4. Without prejudice to any other remedies, the Contractor may have, if at any time the Client is in breach of any obligation (including those relating to payment) the Contractor may suspend or terminate the provision of Works to the Client under the Construction Contracts Act 2002. The Contractor will not be liable to the Client for any loss or damage the Client suffers because the Contractor exercised its rights under **this clause**.
5. Without prejudice to the Contractor's other remedies at law the Contractor shall be entitled to cancel all or any part of any order of the Client which remains unperformed and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable in the event that:
  - ii. any money owed to the Contractor becomes overdue, or in the Contractor's opinion the Client will be unable to meet its payments as they fall due; or
  - iii. the Client has exceeded any applicable credit limit provided by the Contractor;
  - iv. the Client becomes insolvent/bankrupt, convenes a meeting with its creditors or proposes or enters an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - v. a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

## 22. Cancellation

1. The Contractor may cancel any contract to which these terms and conditions apply or withdraw the provision of the Works at any time before the Works have commenced by giving written notice to the Client. On giving such notice, the Contractor shall repay to the Client any money paid by the Client for the Works. The Contractor shall not be liable for any loss or damage whatsoever arising from such cancellation.
2. In the event that the Client cancels provision of the Works the Client shall be liable for any and all loss incurred (whether direct or indirect) by the Contractor as a direct result of the cancellation (including, but not limited to, any loss of profits).



3. Cancellation of orders for Materials made to the Client's specifications, or for non-stocklist items, will not be accepted once production has commenced, or an order has been placed.

### 23. Privacy Act 1993

1. The Client authorises the Contractor or the Contractor's agent to:
  - i. access, collect, retain and use any information about the Client;
    - a. (including any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Client's creditworthiness; or
    - b. for the use of marketing products and services to the Client.
2. disclose information about the Client, whether collected by the Contractor from the Client directly or obtained by the Contractor from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.
  - i. Where the Client is an individual, the **authorities under clause 1 are authorities** or consents for the purposes of the Privacy Act 1993.
  - ii. The Client shall have the right to request the Contractor for a copy of the information about the Client retained by the Contractor and the right to request the Contractor to correct any incorrect information about the Client held by the Contractor.

### 24. Personal Property Securities Act 1999 ("PPSA")

1. Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:
  - i. these terms and conditions constitute a security agreement for the purposes of the PPSA; and
  - ii. a security interest is taken in all Materials and collateral (account) – being a monetary obligation of the Client to the Contractor for Works – previously provided (if any) and that will be provided in the future by the Contractor to the Client.
2. The Client undertakes to:
  - i. sign any further documents and/or provide any additional information (such information to be complete, accurate and up to date in all respects) which the Contractor may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
  - ii. indemnify, and upon demand reimburse, the Contractor for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any registration made thereby.
  - iii. not register a financing or a change demand without the prior written consent of the Contractor.
3. The Contractor and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
4. The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
5. Unless otherwise agreed to in writing by the Contractor, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
6. The Client shall unconditionally ratify any actions taken by the Contractor under clauses 1 to 24.5.

### 25. Security and Charge

1. In consideration of the Contractor agrees to provide Works, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged,

owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).

2. The Client indemnifies the Contractor from and against all the Contractor's costs and disbursements, including legal costs on a solicitor and own client basis incurred in exercising the Contractor's rights under this clause.
3. The Client irrevocably appoints the Contractor and each director of the Contractor as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of **this clause 25 including, but not limited to, signing any document on the Client's behalf.**

### 26. Trusts

If the Client at any time upon or subsequent to entering into the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not the Contractor may have notice of the Trust, the Client covenants with the Contractor as follows:

- i. the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
- ii. the Client has full and complete power and authority under the Trust to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Client against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity.
- iii. The Client will not without consent in writing of the Contractor (the Contractor will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events;
  - a. the removal, replacement or retirement of the Client as trustee of the Trust;
  - b. any alteration to or variation of the terms of the Trust;
  - c. any advancement or distribution of capital of the Trust; or
  - d. any resettlement of the trust property.

### 27. Employees of the Contractor/Non-Solicitation

1. The Client agrees that during the term of the Contract and for a period of six (6) months following the termination of the Contract for any reason, the Client will not:
  - i. attempt to encourage or persuade any sub-contractor/s, employee or consultant of the Contractor to terminate their Contract or employment with the Contractor or utilise in any way an employee or past employee of the Contractor (other than through the Contractor); and
  - ii. at any time, approach any of the Contractor's sub-contractor/s, employee or consultant to carry out any Works outside of this Contract; or
  - iii. the Client acknowledges that the restraints are fair and reasonable for the proper preservation of the goodwill of the business of the Contractor.
2. The Client agrees that if **clause 1 is contravened** the Client agrees to pay a placement fee equal to fifteen percent (15%) of the employee's annual salary as a fee as agreed by the parties before the appointment of the candidate. The Client agrees that this placement fee is also applicable if the Client engages the Contractor's employees through a different labour-hire company.

### 28. Service of Notices

1. Any written notice given under this Contract shall be deemed to have been given and received:
  - i. by handing the notice to the other Party, in person;
  - ii. by leaving it at the address of the other Party as stated in this Contract;
  - iii. by sending it by registered post to the address of the other Party as stated in this Contract;

- iv. if sent by email and/or text message to the other Party's current email address or mobile number noted in this Contract, when the email or text message leaves the communications system of the sender, provided that the sender—
  - a. does not receive any error message relating to the sending of the email; and
  - b. receives confirmation that the email or text message was delivered (which evidence may include an automated delivery receipt from the communications system of the recipient or text response).
2. Notwithstanding clause 1, any notice received after 5 pm, or received on a day that is not a working day, is deemed not to have been accepted until 9 am on the next working day.

## 29. Force Majeure

In the event of **Force Majeure**, an occurrence of an event which materially interferes with the ability of the Contractor to perform their obligations or duties, which is not within the reasonable control of the Parties affected, or any of its Colleagues, and which could not with the exercise of Diligent Efforts have been avoided ("Force Majeure Event"), including, but not limited to, war, rebellion, earthquake, fire, accident, strike, riot, civil commotion, epidemics, pandemic, or act of God, inability to obtain raw materials, loss of staff, delay or errors by shipping companies, suppliers or change in Law, shall not excuse the Contractor from the performance of its obligations or duties under this Agreement. However, it shall allow for "Material and Labour Adverse Changes", increase in material costs and suspension of works due to the Force Majeure Event. The Contractor so affected shall use thorough attempts to avoid or remove such causes of non-performance as soon as is reasonably practicable. Upon termination of the Force Majeure Event, the performance of any suspended obligation or duty shall without delay recommence. The Contractor subject to the Force Majeure Event shall not be liable to the other Party for any damages arising out of or relating to the suspension or termination of any of its obligations or duties under this Agreement by reason of the occurrence of a Force Majeure Event.

## 30. The doctrine of Frustration.

If for any reason due to force majeure or circumstances beyond the control of the parties the Offered Interest cannot be transferred in accordance with this Agreement, the parties shall use reasonable efforts to agree to amend this Agreement as may be necessary to complete the transaction contemplated by this Agreement; provided, however, that if the parties cannot reach a mutual Agreement, this Agreement shall terminate without fault of either Contractor or Client.

## 31. General

1. Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising hereunder shall be submitted to, and settled by, arbitration in accordance with the Arbitration Act 1996 or its replacement(s).
2. The failure by either Party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that Party's right to enforce that provision subsequently. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
3. These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the Auckland Court of New Zealand.
4. The Contractor shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Contractor of these terms and conditions (alternatively the Contractor's liability shall be limited to damages which under no circumstances shall exceed the Price).
5. The Client hereby disclaims any right to rescind, or cancel any contract with the Contractor or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Client by the Contractor and the Client acknowledges that the Works are bought relying solely upon the Client's skill and judgment.

6. If the Client is acquiring Works for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the provision of Works by the Contractor to the Client.
7. The Contractor may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.
8. The Client cannot licence or assign without the written approval of the Contractor.
9. The Contractor may elect to subcontract out any part of the Works but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of the Contractor's sub-contractors without the authorisation of the Contractor.
10. The Client agrees that the Contractor may review this Contract by notifying the Client in writing. If following any such review, there is to be any change to this Contract, then that change will take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for the Contractor to provide Works to the Client.
11. Neither Party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other events beyond the reasonable control of either Party.
12. Both parties warrant that they have the power to enter into this agreement and have obtained all necessary authorisations to allow them to do so, they are not insolvent, and that this agreement creates binding and valid legal obligations on them.
13. This Contract, the plans and specifications have precedence in that order if there is any inconsistency between them.