

**1. Definitions**

- 1.1 **“Contract”** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.2 **“Seller”** means Thermo Tech Limited, its successors and assigns or any person acting on behalf of and with the authority of Thermo Tech Limited.
- 1.3 **“Client”** means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting the Seller to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
- (a) if there is more than one Client, is a reference to each Client jointly and severally; and
  - (b) if the Client is a partnership, it shall bind each partner jointly and severally; and
  - (c) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
  - (d) includes the Client’s executors, administrators, successors and permitted assigns.
- 1.4 **“Works”** means all Works (including consultation, repairs, maintenance and/or installation services) or Materials supplied by the Seller 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).
- 1.5 **“Maintenance Contract”** means all Materials including any accessories supplied by the Seller to the Client (and where the context so permits shall include any supply of Works). The Maintenance Contract shall be as described on the invoices, quotation, maintenance form, or any other work authorisation form provided by the Seller to the Client.
- 1.6 **“Worksite”** means the address nominated by the Client to which the Works are to be supplied by the Seller.
- 1.7 **“Intended Use”** means a product and the use thereof, for which the product is intended to be, or is reasonably likely to be, associated with the Works.
- 1.8 **“Non-Conforming Building Product”** means building products that are regarded as Non-Conforming for an Intended Use if, when associated with a building:
- (a) the product is not, or will not be, safe; or
  - (b) does not, or will not, comply with the relevant regulatory provisions; or
  - (c) the product does not perform, or is not capable of performing, for the use to the standard it is represented to conform by or for a person in the chain of responsibility for the product.
- 1.9 **“Confidential Information”** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party’s intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, contracts, client information (including but not limited to, **“Personal Information”** such as: name, address, D.O.B, occupation, driver’s license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
- 1.10 **“Cookies”** means small files which are stored on a user’s computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website, and can be accessed either by the web server or the client’s computer. **If the Client does not wish to allow Cookies to operate in the background when using the Seller’s website, then the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**
- 1.11 **“Price”** means the Price payable (plus any Goods and Services Tax (“GST”) where applicable) for the Works as agreed between the Seller and the Client in accordance with clause 7 below.

**2. Acceptance**

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of any Works.
- 2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- 2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.4 The Client acknowledges that the supply of Works on credit shall not take effect until the Client has completed a credit application with the Seller and it has been approved with a credit limit established for the account.
- 2.5 In the event that the supply of Works request exceeds the Client’s credit limit and/or the account exceeds the payment terms, the Seller reserves the right to refuse delivery.
- 2.6 Where the Seller gives any advice, recommendation, information, assistance or service provided by the Seller in relation to Works supplied is given in good faith to the Client or the Client’s agent and is based on the Seller’s own knowledge and experience and shall be accepted without liability on the part of the Seller. Where such advice or recommendations is not acted upon then the Seller shall require the Client or their agent to authorise commencement of the Works in writing. The Seller shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Works.
- 2.7 In the event that the Seller is required to provide the Works urgently, that may require the Seller’s staff to work outside normal business hours (including but not limited to working through lunch breaks, weekends and/or Public Holidays) then the Seller reserves the right to charge the Client additional labour costs (penalty rates will apply), unless otherwise agreed between the Seller and the Client.
- 2.8 These terms and conditions may be meant to be read in conjunction with the Seller’s Maintenance Contract Form and/or Terms and Conditions posted on the Seller’s website, and:
- (a) where the context so permits, the terms ‘Works’ or ‘Materials’ shall include any supply of repairs and maintenance, as defined therein; and
  - (b) if there are any inconsistencies between the two documents then the terms and conditions contained therein shall prevail.
- 2.9 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 226 of the Contract and Commercial Law Act 2017 or any other applicable provisions of that Act or any Regulations referred to in that Act.

**3. Authorised Representatives**

- 3.1 Unless otherwise limited as per clause 3.2 the Client agrees that should the Client introduce any third party to the Seller as the Client's duly authorised representative, that once introduced that person shall have the full authority of the Client to order any Materials or Works on the Client's behalf and/or to request any variation to the Works on the Client's behalf (such authority to continue until all requested Works have been completed or the Client otherwise notifies the Seller in writing that said person is no longer the Client's duly authorised representative).
- 3.2 In the event that the Client's duly authorised representative as per clause 3.1 is to have only limited authority to act on the Client's behalf then the Client must specifically and clearly advise the Seller in writing of the parameters of the limited authority granted to their representative.
- 3.3 The Client specifically acknowledges and accepts that they will be solely liable to the Seller for all additional costs incurred by the Seller (including the Seller's profit margin) in providing any Works, Materials, services or variation/s requested by the Client's duly authorised representative (subject always to the limitations imposed under clause 3.2 (if any)).

**4. Maintenance**

- 4.1 The commencement date shall be the date of the first delivery of the Works, or from the date of signing, whichever, is the earlier. The Maintenance Contract shall be for the period ("initial term") as agreed between both parties and shall revert to a monthly roll over basis automatically, thereafter, unless agreed otherwise until terminated by either party by giving at least thirty (30) days required notice as defined in the Maintenance Contract prior to the expiration date of the initial term or any additional term.
- 4.2 The Client acknowledges and accepts that the Price stated will remain fixed for an initial period of twelve (12) months from the date of the Maintenance Contract and will then be subject to revision on the basis of the movement in the Consumer Price Index (CPI).

**5. Errors and Omissions**

- 5.1 The Client acknowledges and accepts that the Seller shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by the Seller in the formation and/or administration of this Contract; and/or
  - (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by the Seller in respect of the Works.
- 5.2 In the event such an error and/or omission occurs in accordance with clause 5.1, and is not attributable to the negligence and/or wilful misconduct of the Seller; the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.

**6. Change in Control**

- 6.1 The Client shall give the Seller 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 Seller as a result of the Client's failure to comply with this clause.

**7. Price and Payment**

- 7.1 At the Seller's sole discretion the Price shall be either:
- (a) as indicated on invoices provided by the Seller to the Client in respect of Works performed or Materials supplied; or
  - (b) the Seller's Price at the date of delivery of the Works according to the Seller's current pricelist; or
  - (c) the Seller's estimated Price (subject to clause 7.2). No allowances shall be made for Worksite preparation unless specified in the estimate. The final Price can only be ascertained upon completion of the Works. Variances in the estimated Price of more than 10% will be subject to Client approval before proceeding with the Works; or
  - (d) the Seller's quoted Price (subject to clause 7.2) which shall be binding upon the Seller provided that the Client shall accept the Seller's quotation in writing within thirty (30) days.
- 7.2 The Seller reserves the right to change the Price:
- (a) if a variation to the Materials which are to be supplied is requested; or
  - (b) if a variation to the Works originally scheduled (including any applicable plans, specifications or maintenance) is requested; or
  - (c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather conditions, limitations to accessing the Worksite and/or crawl spaces, availability of machinery, safety considerations including the discovery of asbestos or synthetic mineral fibres, pre-existing structural integrity, prerequisite work by any third party not being completed, hard rock barriers below the surface or iron reinforcing rods in concrete, other obscured Worksite defects or obstructions, or the Client's supply of product/s that are deemed to be Non-Conforming Product/s etc.) which are only discovered on commencement of the Works; or
  - (d) in the event of increases to the Seller in the cost of labour or materials which are beyond the Seller's control.
- 7.3 Variations will be charged for on the basis of the Seller's quotation, and will be detailed in writing, and shown as variations on the Seller's invoice. The Client shall be required to respond to any variation submitted by the Seller within ten (10) working days. Failure to do so will entitle the Seller 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.
- 7.4 At the Seller's sole discretion a non-refundable deposit may be required and the following conditions may apply:
- (a) fifty percent (50%) of the contract Price is payable up front; and
  - (b) the balance payable on completion of the project.
- 7.5 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 Seller, which may be:
- (a) on completion of the Works; or
  - (b) by way of progress payments in accordance with the Seller's specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the Worksite but not yet installed;
  - (c) the date specified on any invoice or other form as being the date for payment; or
  - (d) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by the Seller.

- 7.6 At the agreement of both parties, payment of the Price may be subject to retention by the Client of an amount (hereafter called the "Retention Money"), being a set amount or equal to a percentage of the Price. The Client shall hold the Retention Money for the agreed period following completion of the Works during which time all Works are to be completed and/or all defects are to be remedied. Any Retention Money applicable to this Contract is to be dealt with in accordance Subpart 2A - sections 18(a) to 18(i) of the Construction Contracts Amendment Act 2015.
- 7.7 Payment may be made by cash, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Client and the Seller.
- 7.8 The Seller may in its discretion allocate any payment received from the Client towards any invoice that the Seller determines and may do so at the time of receipt or at any time afterwards. On any default by the Client the Seller may re-allocate any payments previously received and allocated. In the absence of any payment allocation by the Seller, payment will be deemed to be allocated in such manner as preserves the maximum value of the Seller's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 7.9 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 Seller nor to withhold payment of any invoice because part of that invoice is in dispute, unless the request for payment by the Seller is a claim made under the Construction Contracts Act 2002.
- 7.10 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to the Seller an amount equal to any GST the Seller must pay for any supply by the Seller 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 other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

## **8. Provision of the Works**

- 8.1 Subject to clause 8.2 it is the Seller's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 8.2 The Works' commencement date will be put back and the completion date extended by whatever time is reasonable in the event that the Seller claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond the Seller's control, including but not limited to any failure by the Client to:
- (a) make a selection; or
  - (b) have the Worksite ready for the Works; or
  - (c) notify the Seller that the Worksite is ready.
- 8.3 At the Seller's sole discretion the cost of delivery is included in the Price.
- 8.4 The Client shall take delivery of the Materials tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:
- (a) such discrepancy in quantity shall not exceed five percent (5%); and
  - (b) the Price shall be adjusted pro rata to the discrepancy.
- 8.5 Any time specified by the Seller for delivery of the Works is an estimate only and the Seller will not be liable for any loss or damage incurred by the Client as a result of delivery being late. However both parties agree that they shall make every endeavour to enable the Works to be supplied at the time and place as was arranged between both parties.

## **9. Worksite Access and Condition**

- 9.1 The Seller is not responsible for the removal of rubbish from or clean-up of the building/construction Worksite/s. All rubbish generated by the Seller will be placed in a designated areas appointed by the Client but the responsibility of removal of same is the Client or the Client's agent, unless otherwise agreed.
- 9.2 It is the intention of the Seller and agreed by the Client that:
- (a) the Client shall ensure that the Seller has clear and free access to the Worksite at all times to enable them to undertake the Works (including carrying out Worksite inspections, gain signatures for required documents, and for the delivery and installation of the Materials). The Seller shall not be liable for any loss or damage to the Worksite (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of the Seller; and
  - (b) it is the Client's responsibility to provide the Seller, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities; and
- 9.3 The Client agrees to be present at the Worksite when and as reasonably requested by the Seller and its employees, contractors and/or agents.

## **10. Risk**

- 10.1 If the Seller retains ownership of the Materials under clause 13 then:
- (a) where the Seller 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 the Materials are delivered by the Seller or the Seller's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address); or
  - (b) where the Seller is to both supply and install Materials then the Seller 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.
- 10.2 Notwithstanding the provisions of clause 10.1 if the Client specifically requests the Seller to leave Materials outside the Seller's premises for collection or to deliver the Materials to an unattended location then such materials shall always be left at sole risk of the Client and it shall be the Client's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Client's expense.
- 10.3 Where the Client is to supply the Seller with any plans and/or design specifications (including, but not limited to CAD drawings) the Client shall be responsible for providing accurate data. The Seller shall not be liable whatsoever for any errors in the Materials that are caused by incorrect or inaccurate data being supplied by the Client.

- 10.4 The Client warrants that any existing plumbing, gas fitting and/or associated services in or upon the Worksite that is subject to the Materials and/or Works is in compliance with regulations. The Seller reserves the right to halt all Works (in accordance with the provisions of clause 8.2 above) if in their opinion the Worksite is unsafe and/or the current positioning of the unit is illegal due to not meeting the required clearances then the Client will be informed of this and will be given a revised quotation or estimate to install the new equipment in a safe and legal position. Should the Client not wish to proceed the Seller will charge a standard fee for the time spent on the Worksite based on the Seller's quotation.
- 10.5 The Seller shall upon installation ensure that all installed Materials meet current industry standards applicable to noise levels, however the Seller cannot guarantee that noise levels will remain constant post installation as the Materials may be impacted by many factors such as the weather, lack of maintenance, tampering etc.
- 10.6 In the event that any of the equipment needs to be relocated due to complaints from neighbours or local authorities, then the Client shall be responsible for any and all costs involved.
- 10.7 The Client acknowledges and agrees that it is their responsibility to insure any equipment partly or completely installed on the Worksite, against theft or damage.
- 10.8 In the event that the electrical wiring is required to be re-positioned at the request of any third party contracted by the Client then the Client agrees to notify the Seller immediately upon any proposed changes. The Client agrees to indemnify the Seller against any additional costs incurred with such a relocation of electrical wiring. All such variances shall be invoiced in accordance with clause 7.2.
- 10.9 All work will be tested to ensure that it is electrically safe and is in accordance with the wiring rules and other standards applying to the electrical installation under the Electrical Safety Act, Regulations and Codes of Practice. All of the cabling work will comply with the Australian and New Zealand Wiring standards.
- 10.10 The Client warrants that any structures to which the Materials are to be affixed are able to withstand the installation of the Materials and that any electrical connections (including, but not limited to, meter boxes, main switches, circuit breakers, and electrical cable) are of suitable capacity to handle the Materials once installed. If, for any reason (including the discovery of asbestos, defective or unsafe wiring, or dangerous access to roofing or crawl spaces), the Seller reasonably forms the opinion that the Client's premises is not safe for the installation of Materials to proceed then the Seller shall be entitled to delay installation of the Materials (in accordance with the provisions of clause 8.2 above) until the Seller is satisfied that it is safe for the installation to proceed.
- 10.11 The Client acknowledges that the Seller is only responsible for parts that are replaced by the Seller, and in the event that other parts/goods, subsequently fail, the Client agrees to indemnify the Seller against any loss or damage to the Materials, or caused by the goods, or any part thereof howsoever arising (including, but not limited to, loss of perishables, flooding and/or damage to clothing).
- 10.12 The Client acknowledges and agree that where the Seller has performed temporary repairs on the unit that:
- the Seller offers no guarantee against the reoccurrence of the initial fault, or any further damage caused; and
  - the Seller will immediately advise the Client of the fault and shall provide the Client with an estimate for the full repair of the damaged unit.
- 10.13 The Client accepts that damage resulting from exposure to sulphur or other abrasive or corrosive elements or from insect infestation may void any warranty claim.
- 10.14 The Client acknowledges that Materials supplied may:
- fade or change colour over time; and
  - expand, contract or distort as a result of exposure to heat, cold, weather, corrosive or abrasive elements; and
  - mark or stain if exposed to certain substances; and
  - be damaged or disfigured by impact or scratching.

## **11. Specifications**

- 11.1 The Client acknowledges that:
- all descriptive specifications, illustrations, drawings, data, dimensions, ratings and weights stated in the Seller's or the manufacturer's fact sheets, price lists or advertising material, are approximate only and are given by way of identification only. The Client shall not be entitled to rely on such information, and any use of such does not constitute a sale by description, and does not form part of the Contract, unless expressly stated as such in writing by the Seller;
  - while the Seller may have provided information or figures to the Client regarding the performance of the Materials and equipment, the Client acknowledges that the Seller has given these in good faith, and are estimates based on Clean Energy Council (CEC) or industry prescribed estimates.

## **12. Other Tradesmen**

- 12.1 It shall be the Client's responsibility to arrange for all other licenced tradesmen as required (including Builder, Plumbers, Gas Fitters) unless otherwise agreed between the Seller and the Client at that time of the quotation.
- 12.2 All quotations for services in respect of other tradesmen will be treated strictly between the tradesmen and the Client. The Client agrees to indemnify the Seller from any damage caused by any other tradesmen during and after the completion of the Works.

## **13. Underground Locations**

- 13.1 Prior to the Seller commencing any work the Client must advise the Seller of the precise location of all underground services on the Worksite and clearly mark the same. The underground mains and services 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 the Worksite.
- 13.2 Whilst the Seller will take all care to avoid damage to any underground services the Client agrees to indemnify the Seller 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 13.1.

**14. Compliance with Laws**

- 14.1 The Client and the Seller 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 health and safety laws relating or any other relevant safety standards or legislation pertaining to the Works.
- 14.2 Both parties acknowledge and agree to comply with the Building Amendment Act 2013, in respect of all building products to be supplied during the course of the Works.
- 14.3 Where the Client has supplied products for the Seller to complete the Works, the Client acknowledges that it accepts responsibility for the suitability of purpose and are for their Intended Use and any faults inherent in those products. However, if in the Seller's opinion, it is believed that the materials supplied are Non-Conforming products and will not conform with New Zealand regulations, then the Seller shall be entitled, without prejudice, to halt the Works until the appropriate conforming products are sourced and all costs associated with such a change to the plans and design will be invoiced in accordance with clause 7.2.
- 14.4 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.
- 14.5 The Seller shall comply with the terms and conditions of all such consents and approvals in so far as such consents and approvals relate to the carrying out of the Works.
- 14.6 Notwithstanding clause 14.1 and pursuant to the Health & Safety at Work Act 2015 (the "HSW Act") the Seller agrees at all times comply with sections 28 and 34 of the "HSW Act" with meeting their obligations for health and safety laws in the workplace regardless of whether they may be the party in control of the Worksite or where they may be acting as a sub-contractor for the Client who has engaged a third party head contractor.

**15. Title**

- 15.1 The Seller and the Client agree that ownership of the Materials shall not pass until:
- (a) the Client has paid the Seller all amounts owing to the Seller; and
  - (b) the Client has met all of its other obligations to the Seller.
- 15.2 Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- 15.3 It is further agreed that:
- (a) until ownership of the Materials passes to the Client in accordance with clause 15.1 that the Client is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to the Seller on request;
  - (b) the Client holds the benefit of the Client's insurance of the Materials on trust for the Seller and must pay to the Seller the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed;
  - (c) the production of these terms and conditions by the Seller shall be sufficient evidence of the Seller's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with the Seller to make further enquiries;
  - (d) the Client must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Materials then the Client must hold the proceeds of any such act on trust for the Seller and must pay or deliver the proceeds to the Seller on demand;
  - (e) the Client should not convert or process the Materials or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of the Seller and must sell, dispose of or return the resulting product to the Seller as it so directs;
  - (f) unless the Materials have become fixtures the Client irrevocably authorises the Seller to enter any premises where the Seller believes the Materials are kept and recover possession of the Materials;
  - (g) the Seller may recover possession of any Materials in transit whether or not delivery has occurred;
  - (h) the Client shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of the Seller;
  - (i) the Seller may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Client.

**16. Personal Property Securities Act 1999 ("PPSA")**

- 16.1 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:
- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
  - (b) a security interest is taken in all Materials and/or collateral (account) – being a monetary obligation of the Client to the Seller for Works – that have previously been supplied and that will be supplied in the future by the Seller to the Client.
- 16.2 The Client undertakes to:
- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Seller may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
  - (b) indemnify, and upon demand reimburse, the Seller for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Materials charged thereby;
  - (c) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials and/or collateral (account) in favour of a third party without the prior written consent of the Seller; and
  - (d) immediately advise the Seller of any material change in its business practices of selling Materials which would result in a change in the nature of proceeds derived from such sales.
- 16.3 The Seller and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 16.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA.
- 16.5 Unless otherwise agreed to in writing by the Seller, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 16.6 The Client shall unconditionally ratify any actions taken by the Seller under clauses 16.1 to 16.5.

16.7 Subject to any express provisions to the contrary (including those contained in this clause 16), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

**17. Security and Charge**

17.1 In consideration of the Seller agreeing to supply the 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).

17.2 The Client indemnifies the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Seller's rights under this clause.

17.3 The Client irrevocably appoints the Seller and each director of the Seller as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 17 including, but not limited to, signing any document on the Client's behalf.

**18. Defects**

18.1 The Client shall inspect the Works on delivery and shall within seven (7) days of delivery notify the Seller of any alleged defect, shortage in quantity, errors, omissions or failure to comply with the description or quote. The Client shall afford the Seller an opportunity to inspect the Works within a reasonable time following delivery if the Client believes the Works are defective in any way. If the Client shall fail to comply with these provisions, the Works shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.

18.2 For defective Works, which the Seller has agreed in writing that the Client is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Works or rectifying the Works provided that the Client has complied with the provisions of clause 18.1.

**19. Warranties**

19.1 Subject to the conditions of warranty set out in clause 19.2 the Seller warrants that if any defect in any workmanship of the Seller becomes apparent and is reported to the Seller within three (3) months of the date of delivery (time being of the essence) then the Seller will either (at the Seller's sole discretion) replace or remedy the workmanship.

19.2 The conditions applicable to the warranty given by clause 19.1 are:

(a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:

(i) failure on the part of the Client to properly maintain any Materials; or

(ii) failure on the part of the Client to follow any instructions or guidelines provided by the Seller; or

(iii) any use of any Materials otherwise than for any application specified on a quote or order form; or

(iv) the continued use of any Materials after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or

(v) fair wear and tear, any accident or act of God.

(b) the warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Seller's consent.

(c) in respect of all claims the Seller shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.

19.3 For Materials not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Materials. The Seller 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 Materials.

**20. Consumer Guarantees Act 1993**

20.1 If the Client is acquiring Materials 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 supply of Materials by the Seller to the Client.

**21. Intellectual Property**

21.1 Where the Seller has designed, drawn, written plans or a schedule of Works, or created any products for the Client, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in the Seller, and shall only be used by the Client at the Seller's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of the Seller.

21.2 The Client warrants that all designs, specifications or instructions given to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Seller against any action taken by a third party against the Seller in respect of any such infringement.

21.3 The Client agrees that the Seller may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which the Seller has created for the Client.

**22. Default and Consequences of Default**

22.1 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 Seller's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

22.2 If the Client owes the Seller any money the Client shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Seller's collection agency costs, and bank dishonour fees).

22.3 Further to any other rights or remedies the Seller may have under this Contract, if a Client has made payment to the Seller, 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 Seller under this clause 22, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- 22.4 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Client will be unable to make a payment when it falls due;
  - (b) the Client has exceeded any applicable credit limit provided by the Seller;
  - (c) the Client becomes insolvent or bankrupt, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 23. Cancellation**
- 23.1 Either party may, without liability, cancel these terms and conditions or cancel provision of the Works:
- (a) if there is no Maintenance Contract specified, at any time by giving fourteen (14) days' notice to the other party;
  - (b) if a Maintenance Contract is specified, at any time after the end of the Maintenance Contract by giving thirty (30) days' notice to the other party; and
  - (c) failure to give notice of intention to cancel at least thirty (30) days prior to the expiration date of the Maintenance Contract, the Maintenance Contract shall automatically renew on a monthly basis, unless cancelled by way of the Client providing the Seller within thirty (30) days' notice.
- 23.2 The Seller may, in addition to their right to cancel under clause 23.1:
- (a) do so at any time:
    - (i) prior to the commencement of the Works, by giving notice to the Client. On giving such notice the Seller shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to the Seller for Works already performed. The Seller shall not be liable for any loss or damage whatsoever arising from such cancellation; or
    - (ii) in the event the Client materially breaches these terms and conditions, and such breach is not capable of remedy;
- 23.3 In the event of the premature termination of this Contract (including by notification from the Client, (at least thirty (30) days prior to the expiration date of the Maintenance Contract ), or as a result of Default, but excluding any breach or termination of this Contract by the Seller):
- (a) the Client shall be responsible for the immediate payment of the following sums:
    - (i) all monies due and payable up to the date of termination, noting applicable rates may change if the Maintenance Contract is shorter than that noted in the Quotation; and
    - (ii) all other sums owing by the Client under this Contract (or any other contract with the Client) as a result of the Default and termination of this Contract, including consequential damages and any and all loss of profits, costs, charges and expenses incurred by the Seller in connection with (and resulting from) the premature termination of this Contract, which shall be calculated at a minimum of thirty percent (30%) of the remainder of the Price under this Contract where a Maintenance Contract applies.
- 23.4 Cancellation of orders for Materials made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 24. Privacy Policy**
- 24.1 All emails, documents, images or other recorded information held or used by the Seller is Personal Information as defined and referred to in clause 24.3 and therefore considered confidential. The Seller acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1993 ("the Act") including Part II of the OECD Guidelines and as set out in Schedule 5A of the Act and any statutory requirements where relevant in a European Economic Area "EEA" then the EU Data Privacy Laws (including the General Data Protection Regulation "GDPR") (collectively, "EU Data Privacy Laws"). The Seller acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by the Seller that may result in serious harm to the Client, the Seller will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client by written consent, unless subject to an operation of law.
- 24.2 Notwithstanding clause 24.1, privacy limitations will extend to the Seller in respect of Cookies where the Client utilises the Seller's website to make enquiries. The Seller agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Client's:
- (a) IP address, browser, email client type and other similar details;
  - (b) tracking website usage and traffic; and
  - (c) reports are available to the Seller when the Seller sends an email to the Client, so the Seller may collect and review that information ("collectively Personal Information")
- If the Client consents to the Seller's use of Cookies on the Seller's website and later wish to withdraw that consent, the Client may manage and control the Seller's privacy controls via the Client's web browser, including removing Cookies by deleting them from the browser history when existing the site.
- 24.3 The Client authorises the Seller or the Seller's agent to:
- (a) access, collect, retain and use any information about the Client;
    - (i) (including, name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history or any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Client's creditworthiness; or
    - (ii) for the purpose of marketing products and services to the Client.

(b) disclose information about the Client, whether collected by the Seller from the Client directly or obtained by the Seller 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.

24.4 Where the Client is an individual the authorities under clause 24.3 are authorities or consents for the purposes of the Privacy Act 1993.

24.5 The Client shall have the right to request the Seller for a copy of the Personal Information about the Client retained by the Seller and the right to request the Seller to correct any incorrect Personal Information about the Client held by the Seller.

## **25. Suspension of Works**

25.1 Where the Contract is subject to section 24A of the Construction Contracts Amendment Act 2015, the Client hereby expressly acknowledges that:

(a) the Seller has the right to suspend work within five (5) working days of written notice of its intent to do so if a payment claim is served on the Client, and:

(i) the payment is not paid in full by the due date for payment in accordance with clause 7.5 and/or any subsequent amendments or new legislation and no payment schedule has been given by the Client; or

(ii) 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

(iii) the Client has not complied with an adjudicator's notice that the Client must pay an amount to the Seller by a particular date; and

(iv) the Seller has given written notice to the Client of its intention to suspend the carrying out of construction work under the construction Contract.

(b) if the Seller suspends work, it:

(i) is not in breach of Contract; and

(ii) 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

(iii) is entitled to an extension of time to complete the Contract; and

(iv) 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.

(c) if the Seller exercises the right to suspend work, the exercise of that right does not:

(i) affect any rights that would otherwise have been available to the Seller under the Contract and Commercial Law Act 2017; or

(ii) 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 Seller suspending work under this provision;

(d) due to any act or omission by the Client, the Client effectively precludes the Seller from continuing the Works or performing or complying with the Seller's obligations under this Contract, then without prejudice to the Seller's other rights and remedies, the Seller may suspend the Works immediately after serving on the Client a written notice specifying the payment default or the act, omission or default upon which the suspension of the Works is based. All costs and expenses incurred by the Seller as a result of such suspension and recommencement shall be payable by the Client as if they were a variation.

25.2 If pursuant to any right conferred by this Contract, the Seller suspends the Works and the default that led to that suspension continues unremedied subject to clause 23.1 for at least ten (10) working days, the Seller shall be entitled to terminate the Contract, in accordance with clause 23.

## **26. Service of Notices**

26.1 Any written notice given under this Contract shall be deemed to have been given and received:

(a) by handing the notice to the other party, in person;

(b) by leaving it at the address of the other party as stated in this Contract;

(c) by sending it by registered post to the address of the other party as stated in this Contract;

(d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission;

(e) if sent by email to the other party's last known email address.

26.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.

## **27. Trusts**

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

(a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;

(b) 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;

(c) the Client will not without consent in writing of the Seller (the Seller will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:

(i) the removal, replacement or retirement of the Client as trustee of the Trust;

(ii) any alteration to or variation of the terms of the Trust;

(iii) any advancement or distribution of capital of the Trust; or

(iv) any resettlement of the trust property.



**28. General**

- 28.1 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, either adjudication in accordance with section 26 of the Construction Contracts Act 2002 and/or by arbitration in accordance with the Arbitration Act 1996 or its replacement(s).
- 28.2 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 subsequently enforce that provision. 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.
- 28.3 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 courts of Papakura, New Zealand.
- 28.4 The Seller 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 Seller of these terms and conditions (alternatively the Seller's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 28.5 The Seller may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.
- 28.6 The Client cannot licence or assign without the written approval of the Seller.
- 28.7 The Seller 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 Seller's sub-contractors without the authority of the Seller.
- 28.8 The Client agrees that the Seller may amend their general terms and conditions for subsequent future contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to 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 Seller to provide Works to the Client.
- 28.9 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 event beyond the reasonable control of either party.
- 28.10 Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.