

1. Application

- 1.1 These Terms, and no terms and conditions of the Customer, will apply to any order for and any supply of Goods or Services by the Supplier to the Customer.
- 1.2 If these Terms are to be modified or are not being used, they must be explicitly varied or excluded by the terms of another Contract or agreement in writing between the parties.

2. Order for Goods / Services

- 2.1 Any quotation or estimate by the Supplier does not constitute an offer to supply.
- 2.2 Unless otherwise stated by the Supplier, any quotation or estimate by the Supplier will remain valid for 30 days from the date of the quotation provided that the Supplier may withdraw or vary a quotation at any time prior to the Supplier's acceptance of an Order.
- 2.3 Any Order by the Customer to the Supplier or any acceptance of any Goods or Services by the Customer will constitute agreement to these Terms by the Customer.
- 2.4 No Order by the Customer will be binding on the Supplier unless the Supplier accepts the Order.
- 2.5 If the Supplier accepts an Order, the parties will have created a binding Contract and the Supplier will supply the Goods or Services to the Customer, and the Customer will pay the Price to the Supplier in accordance with the terms of the Contract (which will include these Terms), but the Contract will be subject to the availability of the materials necessary to supply the Goods.
- 2.6 The Customer is not entitled to cancel any Order or Contract and must pay to the Supplier any costs, loss or expense, including for loss of income or profits, incurred by the Supplier associated with the Customer purporting to cancel any Order or Contract.
- 2.7 The Customer must provide to the Supplier all information, instructions, reports, drawings, plans, specifications, properties and facts relevant to the Goods or Services and performance of the Supplier's obligations, at the time the Customer requests any quotation from the Supplier and prior to providing any Order to the Supplier.
- 2.8 If at any time the Supplier considers that any information, instructions, reports, drawings, plans, specifications, properties or facts provided by the Customer to the Supplier are not sufficient to enable the Supplier to supply the Goods or Services to the Customer in accordance with the Contract, the Customer must, at the Customer's cost, provide such further information, documents or assistance as the Supplier considers reasonably necessary.
- 2.9 The Supplier will be entitled to rely on the accuracy of any information, instructions, reports, drawings,

plans, specifications, properties and facts provided by the Customer.

- 2.10 If there are any errors in any information, instructions, reports, drawings, plans, specifications, properties or facts provided by the Customer to the Supplier, the Supplier will, in addition to the Supplier's other rights under these Terms or at law, be entitled to vary the Price.
- 2.11 The Customer must ensure the specifications and properties of Goods or Services stated in any Order by the Customer will be fit for the intended purpose of the Goods or Services.
- 2.12 The Customer will be responsible for the quantity of any Goods or Services in any Order and the Supplier will not have any liability to the Customer if there is any excess or shortfall of the Goods or Services for the intended purpose.
- 2.13 The Supplier may cancel any Contract at any time prior to delivery of the Goods or Services with no liability other than to repay any amount of the Price paid in advance of the cancellation.

3. Price

- 3.1 If not specifically stipulated in the Contract,
 - (a) the Price will be the Supplier's list price on the date of despatch of the Goods or Services and is subject to variation (whether before or after the acceptance of an Order or before or after the formation of a Contract or during the term of a Contract).
 - (b) the Supplier may invoice the Customer for Goods or Services before the Supplier supplies the Goods or Services.
 - (c) the Price is exclusive of any delivery charges and exclusive of GST.
- 3.2 If the Customer attempts to vary the Goods or Services to be provided under a Contract, and the Supplier agrees to such variation prior to the provision of the Goods or Services, the Supplier reserves the right to vary the Price.
- 3.3 The Customer must not withhold, make deductions from, or set-off, payment of any money owed to the Supplier for any reason.
- 3.4 The Supplier may charge, in addition to the Price, any other fees, charges and surcharges that the Supplier incurs or notifies to the Customer from time to time.

4. Delivery of Goods

- 4.1 If the Supplier agrees to deliver Goods, the Supplier:
 - (a) will charge delivery charges, demurrage, waiting time and other charges in the Supplier's price list or otherwise nominated by the Supplier from time to time;

- (b) will endeavour to deliver the Goods to the Delivery Address on the Delivery Date;
 - (c) may leave the Goods at the Delivery Address whether or not any person is present to accept delivery; and
 - (d) may charge further delivery charges if the Customer is unable to receive delivery of the Goods at the Delivery Address or on the Delivery Date or in accordance with any other delivery arrangements.
- 4.2 The Supplier will only deliver Goods during the Supplier's usual business hours unless the Supplier agrees otherwise in writing.
- 4.3 The Supplier may deliver Goods in separate instalments.
- 4.4 The Customer will ensure a member of the Customer's Personnel will be at the Delivery Address on the Delivery Date to sign the delivery docket on the Customer's behalf. The Supplier shall not be obliged to obtain a signed receipt or other acknowledgment from any person at the Delivery Address.
- 4.5 The Supplier may deliver Goods to the Delivery Address regardless of whether there is anyone at the Delivery Address at the time of delivery. The Supplier shall not be liable on any basis whatsoever for loss suffered by the Customer after delivery to the Delivery Address.
- 4.6 The Customer agrees:
- (a) the Supplier's responsibility for delivery of Goods will cease at the threshold of the Delivery Address;
 - (b) the Customer must provide safe access for delivery of Goods; and
 - (c) the Supplier may refuse to deliver Goods, and return the Goods at the Customer's cost, if the Supplier or a member of the Supplier's Personnel considers it would be unsafe to deliver the Goods.
- 4.7 The signature of a member of the Customer's Personnel or from someone believed by the Supplier to be authorised by the Customer on the delivery docket will represent the Customer's acknowledgement that the Goods comply with the Contract and these Terms.
- 4.8 A certificate signed by the Supplier in relation to delivery of the Goods will be prima facie evidence of the fact and the Customer will not object to the admissibility of such a certificate in any legal proceedings.
- 4.9 The Customer must inspect any Goods immediately on collection or delivery of the Goods.
- 4.10 The Supplier shall not be liable for any failure to deliver or for delay in delivery of Goods occasioned by any strike, lockout, shortage of stock, shortage of labour, lack of skilled labour, delays in transit, fire,

flood, hostility, civil commotion or other causes whatsoever whether or not beyond the control of the Supplier.

5. Risk

- 5.1 The risk in any Goods and Services supplied to the Customer will pass to the Customer, and the Customer will be deemed to have accepted the Goods and Services, immediately when the Goods and Services are delivered or supplied to, or performed at the Delivery Address.
- 5.2 If the Customer agrees to collect any Goods, the risk in the Goods will pass to the Customer, and the Customer will be deemed to have accepted the Goods, immediately when the Goods are placed on any vehicle or means of conveyance.

6. Title

- 6.1 The Supplier may withhold any Goods or Services until the Customer makes full payment of the Price and any other amounts payable to the Supplier. However, if the Supplier supplies the Goods, the Customer will not receive title to the Goods until the Customer makes full payment of the Price and any other amounts payable to the Supplier.
- 6.2 Until title in the Goods passes to the Customer in accordance with these Terms, the Customer will:
- (a) be only a fiduciary bailee of the Goods;
 - (b) ensure the Goods are kept separate and identifiable from other goods;
 - (c) not grant any charge over, or interest in, the Goods to any third party;
 - (d) return any Goods to the Supplier immediately on request;
 - (e) authorise the Supplier or any agent of the Supplier to enter any land and premises owned, occupied or controlled by the Customer where the Goods are located and take possession of the Goods; and
 - (f) hold the proceeds from any sale or disposal of the Goods on trust for the Supplier,
- and the Supplier may repossess, retain, deal with or sell the Goods as the Supplier determines in the Supplier's absolute discretion.
- 6.3 The Supplier may, for the purposes of exercising the Supplier's rights under **clause 6.2** of these Terms, enter any premises owned, occupied or controlled by the Customer and remove the Goods including but not limited to by detaching or unfixing the Goods from any goods or land to which the Goods are attached or fixed. The Customer shall indemnify the Supplier from any loss or damage suffered by the Supplier or claims brought against the Supplier arising out of the Supplier retaking possession of the Goods.

7. Payments and Personal Property Securities

- 7.1 The Customer must make full payment of the Price and any other amounts payable to the Supplier on the date specified in the Contract or, if no date is specified in the Contract, within seven days of invoice, even where the invoice is issued before the Supplier supplies Goods or Services to the Customer (the “**Due Date**”).
- 7.2 If the Customer does not pay the Supplier by the Due Date, the Supplier shall be entitled to:
- (a) charge the Customer interest on the monies due on a daily basis at the rate of 5% above the Reserve Bank of Australia Cash Rate calculated daily and compounded monthly from the Due Date for payment until the actual date of payment; and
 - (b) suspend the supply of Goods or Services under a Contract.
- 7.3 To secure the punctual payment of all amounts owed by the Customer to the Supplier, the Customer hereby grants to the Supplier:
- (a) a purchase money security interest (as defined under the PPSA) over all present and after-acquired Goods that are subject to the retention of title arrangement described under **clause 6** of these Terms;
 - (b) a security interest (as defined under the PPSA) over all present and after-acquired property of the Customer in relation to which the Customer can be a grantor of a security interest under the PPSA, whether or not the Customer has title to the property, including but not limited to all PPSA retention of title property (as defined under section 51F of the Corporations Act); and
 - (c) a fixed charge over all present and after-acquired property of the Customer in relation to which the Customer cannot be a grantor of a security interest under the PPSA, including real property.
- 7.4 The Customer agrees and acknowledges the Supplier may (without limiting the Supplier’s other rights under these Terms, at law or otherwise) lodge caveats over the Customer’s property, register the Supplier’s security interests, and take any other action to secure and enforce the Supplier’s security under **clause 7.3** of these Terms.
- 7.5 The Customer must immediately, if requested by the Supplier, sign any documents, provide all necessary information and do anything else required by the Supplier to ensure that the Supplier’s purchase money security interest or other security interest is a perfected security.
- 7.6 The Customer must reimburse the Supplier for the full amount of any bank or other fees associated with any dishonoured payments or cheques and any legal, debt recovery, agent or other expenses incurred by the Supplier on a full indemnity basis

associated with any action taken by the Supplier to enforce a security interest or recover money from the Customer.

- 7.7 The Customer:
- (a) agrees with the Supplier that neither the Customer, nor the Supplier, will disclose information of the kind specified in section 275(1) of the PPSA (except in the circumstances required by sections 275(7)(b) to (e) of the PPSA);
 - (b) agrees that, to the extent permitted under section 115(1) of the PPSA, the following provisions of the PPSA do not apply: sections 95, 118, 121(4), 125, 130, 132(3)(d), 135, 138B(4), 142 and 143;
 - (c) agrees that, to the extent permitted under section 115(7) of the PPSA, the following provisions of the PPSA do not apply: sections 127, 129(2), 129(3), 132, 134(2), 135, 136(5) and 137;
 - (d) acknowledges that the Supplier may, at the Customer’s cost, register one or more financing statements in relation to any security;
 - (e) waives, if permitted under the PPSA, the Customer’s right under section 157 of the PPSA to receive notice of any verification statement relating to the registration of any financing statement or any related financing change statement; and
 - (f) will not, without prior written notice to the Supplier, change the Customer’s name or initiate any change to any documentation registered under the PPSA.
- 7.8 The Customer acknowledges and agrees that the Supplier accepting payment of any sum after the Due Date does not constitute a waiver of any of the Supplier’s rights as provided for in these Terms and in the Contract.

8. Force Majeure

The Supplier will not be liable to the Customer for any failure to perform, or delay in performing, the Supplier’s obligations under these Terms or a Contract if the failure or delay is due to any cause beyond the Supplier’s reasonable control. If any such failure or delay continues for a period of 14 days the Supplier may terminate any affected Contract.

9. Confidential Information and Intellectual Property

- 9.1 The Customer will not use, or disclose, any Confidential Information disclosed to the Customer or to the Customer’s Personnel.
- 9.2 All Intellectual Property Rights in all designs, drawings, technical information and documents

created by the Supplier in relation to the Goods or Services will remain with the Supplier and will not be assigned to the Customer and no supply of Goods or Services to the Customer will grant to the Customer any Intellectual Property Rights in respect of the Goods or Services or such designs, drawings, technical information or documents.

9.3 If the Supplier supplies any designs, drawings, technical information or documents to the Customer as part of the Goods or Services, the Supplier grants the Customer a non-exclusive, non-transferrable, right to use the designs, drawings, technical information and documents strictly and only for the purposes of the Customer's use of the Goods or Services.

9.4 The Customer warrants that the Supplier's use of any designs, instructions or documents provided by the Customer to the Supplier will not infringe the Intellectual Property Rights of any other party.

10. Approvals

If any Approval is required, the Customer must, at the Customer's expense, obtain all Approvals necessary for and incidental to the supply of the Goods or Services.

11. Security

The Supplier will not be required to provide a bank guarantee or any other form of security and the Customer will not be entitled to retain any retention money from the Price for any reason.

12. Warranties

12.1 The Supplier does not warrant the Goods or Services are fit for any purpose whether or not made known to the Supplier or any member of the Supplier's Personnel.

12.2 The Supplier excludes all express and implied conditions and warranties in relation to the Goods or Services except those conditions or warranties that cannot be excluded by law and the Supplier's liability under any such conditions or warranties is limited to, at the Supplier's option, arranging to replace or repair the Goods or the outcome of the Services or resupplying the Goods or Services.

12.3 Nothing in these Terms is intended to have the effect of contracting out of any applicable provisions of the *Competition and Consumer Act 2010* (Cth) or any *Fair Trading Act* except to the extent permitted by such Acts.

13. Liability

13.1 The Supplier's liability for any Liability or Claim in relation to these Terms, any Contract, and any supply of Goods or Services (whether under statute, contract, tort, negligence, equity, or otherwise) will be limited to the amount of the GST exclusive aggregate Price paid by the Customer to the

Supplier under the Contract(s) that gave rise to such liability.

13.2 The Supplier will not be liable to the Customer for any Liability or Claim of any kind arising directly or indirectly (whether under statute, contract, tort, negligence, equity, or otherwise) in relation to any indirect or consequential loss (including but not limited to any loss of actual or anticipated profits, revenue, savings, production, business, opportunity, access to markets, goodwill, reputation, publicity, or use) or any remote, abnormal or unforeseeable loss or any similar loss whether or not in the reasonable contemplation of the parties.

13.3 The limitations and exclusions in this **clause 13** do not apply to the extent that any loss is directly attributable to:

- (a) the personal injury or death caused by the Supplier's default, breach of these Terms or negligence; or
- (b) fraud by the Supplier.

13.4 Each party must take reasonable steps to mitigate any loss it suffers or incurs.

14. Release and Indemnity

The Customer indemnifies the Supplier and each member of the Supplier's Personnel from and against any Liability or Claim arising directly or indirectly in relation to:

- (a) the accuracy of all information provided by the Customer to the Supplier in relation to the Services, the Delivery Address or any other matters;
- (b) the Customer's breach of these Terms or any Contract;
- (c) the negligence or wilful misconduct of the Customer or any member of the Customer's Personnel;
- (d) the Supplier or any member of the Supplier's Personnel delivering the Goods in accordance with the Customer's instructions;
- (e) the Supplier or any member of the Supplier's Personnel entering the Delivery Address;
- (f) damage to the property of the Customer or any third party during any delivery of Goods or supply of Services;
- (g) any spillage, breakage or contamination of Goods during any transport or delivery;
- (h) the Goods or Services not being fit for any particular purpose;
- (i) any tests in relation to Goods or Services;
- (j) the Customer or any member of the Customer's Personnel directly or indirectly causing any delay in the supply of any Goods or Services;

- (k) the Supplier having to resupply the Goods or Services, or undertake any rework, as a result of the actions or omissions of the Customer or any third party;
- (l) the Customer or any member of the Customer's Personnel refusing to accept any delivery;
- (m) the Customer or any member of the Customer's Personnel purporting to cancel any Order or Contract; and
- (n) any proceedings, claims and demands in relation to any secured property.

15. Termination

15.1 The Supplier may immediately terminate, or suspend the performance of, any Contract and the Customer must immediately pay any money owed to the Supplier if:

- (a) the Customer breaches a term of these Terms or any Contract and does not remedy the breach within 7 days of receiving a notice from the Supplier requiring the Customer to do so;
- (b) the Customer breaches a term of these Terms or any Contract which is not capable of remedy;
- (c) there is any change in the Control of the Customer; or
- (d) an Insolvency Event arises in relation to the Customer.

16. Miscellaneous

16.1 The parties agree:

- (a) no Contract will create any partnership, joint venture, agency or relationship of employment between the parties;
- (b) these Terms or any Contract may only be amended with the Supplier's express written agreement;
- (c) any waiver by the Supplier must be express and in writing;
- (d) all notices between the Supplier and the Customer must be in writing;
- (e) the Supplier's rights under these Terms or any Contract do not exclude any other rights of the Supplier;
- (f) no Contract will be a sale by sample;
- (g) in the event of any dispute, the Supplier's records will be conclusive evidence;
- (h) the actions of any person claiming to have the Customer's authority will bind the Customer to the extent permitted by law;
- (i) if any provision of these Terms or any Contract is unenforceable, the provision will be severed and the remaining provisions will continue to apply;

- (j) the Customer must immediately provide written notice to the Supplier if there is any change in the Control of the Customer;
- (k) these Terms and all obligations hereunder shall be binding on the Customer's personal representatives, successors and permitted assigns and shall be for the benefit of the Supplier's successors and assigns;
- (l) the Supplier may assign any rights or benefits under any Contract or these Terms or any Contract to any third party;
- (m) the Customer may only assign any rights or benefits under any Contract or these Terms or any Contract with the Supplier's prior written consent; and
- (n) these Terms and any Contract will be governed by the laws of, and the parties submit to the jurisdiction of the courts of, the State of South Australia.

16.2 In these Terms:

- (a) the headings will not affect interpretation;
- (b) the singular includes the plural and vice versa;
- (c) any other grammatical form of a word or expression defined in these Terms has a corresponding meaning;
- (d) a reference to a document includes the document as novated, altered, supplemented or replaced;
- (e) a reference to a party includes the party's executors, administrators, heirs, successors in title, permitted assigns and substitutes;
- (f) a reference to a person includes a natural person, body corporate, partnership, trust, association or any other entity;
- (g) a reference to a statute, ordinance, code or law includes regulations, rules and other instruments under the statute, ordinance, code or law and any consolidations, amendments, re-enactments or replacements;
- (h) a word or expression defined in the Corporations Act has the meaning given to the word or expression in the Corporations Act;
- (i) the meaning of general words is not limited by specific examples introduced by "including", "for example" or similar expressions;
- (j) any agreement, representation, warranty or indemnity by two or more parties binds those parties jointly and severally;
- (k) any undertaking by a party not to do any act or thing will be deemed to include an undertaking not to permit or suffer the doing of that act or thing;

- (l) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of these Terms; and
- (m) if a day on or by which an obligation must be performed or an event must occur is not a business day, the obligation must be performed or the event must occur on or by the next business day.

17. Definitions

In these Terms:

“Approvals” means all approvals, authorisations, permits, consents, determinations and licences which are issued, or required to be issued, by any Authority to permit the full and proper performance of the Supplier’s obligations under these Terms.

“Authority” means any government or governmental, semi-governmental, administrative or judicial body, tribunal, department, commission, authority, agency, minister, statutory corporation, instrumentality or entity.

“Claim” means any actual, contingent, present or future claim, demand, action, suit or proceeding for any Liability, restitution, equitable compensation, account, injunctive relief, specific performance or any other remedy of whatever nature and however arising, whether direct or indirect, and whether in contract, tort (including but not limited to negligence), equity, or otherwise.

“Confidential Information” means information, whether in visual, oral, documentary, electronic, machine-readable, tangible, intangible or any other form, relating to the Supplier or any related entity of the Supplier including but not limited to any information relating to any business, products, markets, operations, processes, techniques, technology, forecasts, strategies, clients, contracting parties, or any other matter.

“Contract” means a contract formed as a result of the acceptance by the Supplier of an Order by the Customer.

“Control” has the meaning set out in the Corporations Act.

“Corporations Act” means the *Corporations Act 2001* (Cth).

“Customer” means the customer set out in any quotation, offer or other document provided by the Supplier (or, in the absence of such information, the customer who placed the Order).

“Delivery Address” means the address for the delivery and or provision of the Goods or Services in a Contract.

“Delivery Date” means the date or dates for the delivery and or provision of the Goods or Services in a Contract.

“Goods” means the goods in a Contract and includes; where any goods supplied are intermingled or combined with other goods, the end goods; and where the Supplier has supplied services relating to the goods or the Customer’s goods, those goods.

“Insolvency Event” means any of the following, or any analogous, events:

- (a) the Customer disposes of the whole or any part of the Customer’s assets, operations or business other than in the ordinary course of business;
- (b) the Customer ceases, or threatens to cease, carrying on business;
- (c) the Customer is unable to pay the Customer’s debts as the debts fall due;
- (d) any step is taken by a mortgagee to take possession or dispose of the whole or any part of the Customer’s assets, operations or business;
- (e) any step is taken for the Customer to enter into any arrangement or compromise with, or assignment for the benefit of, the Customer’s creditors or any class of the Customer’s creditors; or
- (f) any step is taken to appoint an administrator, receiver, receiver and manager, trustee, provisional liquidator or liquidator of the whole or any part of the Customer’s assets, operations or business.

“Intellectual Property Rights” means any present or future rights conferred by statute, common law or equity in any part of the world in relation to any confidential information, copyright, trade marks, service marks, designs, patents, circuit layouts, plant varieties, business names, domain names, inventions, trade secrets or other results of intellectual activity in any industrial, commercial, scientific, literary or artistic fields.

“Liability” means any loss, liability, cost, payment, damages, debt or expense (including but not limited to reasonable legal fees).

“Order” means any written or verbal order by the Customer to the Supplier for Goods or Services.

“Personnel” means any relative, employee, servant, contractor, subcontractor, agent, partner, director or officer of a party.

“PPSA” means the *Personal Property Securities Act 2009* (Cth).

“Price” means the price of the Goods or Services as nominated by the Supplier from time to time.

“Services” means the services in a Contract and any services associated with the Goods.

“Supplier” is Georgeson Earthmoving Pty Ltd ACN 608 162 518.

“Terms” means these Terms and Conditions.