

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 **“Contractor”** means Barneveld Construction Limited, its successors and assigns.
- 1.3 **“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 Customer does not wish to allow Cookies to operate in the background when using the Contractor’s website, then the Customer 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.**
- 1.4 **“Customer”** means the person/s, entities or any person acting on behalf of and with the authority of the Customer requesting the Contractor to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
(a) if there is more than one Customer, is a reference to each Customer jointly and severally; and
(b) if the Customer is a partnership, it shall bind each partner jointly and severally; and
(c) if the Customer is a part of a Trust, shall be bound in their capacity as a trustee; and
(d) includes the Customer’s executors, administrators, successors and permitted assigns.
- 1.5 **“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.
- 1.6 **“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.
- 1.7 **“Price”** means the Price payable (plus any Goods and Services Tax (“GST”) where applicable) for the Works as agreed between the Contractor and the Customer in accordance with clause 6 below.
- 1.8 **“Works”** means all Works (including consultation, manufacturing and/or installation services) or Materials supplied by the Contractor to the Customer at the Customer’s request from time to time (where the context so permits the terms ‘Works’ or ‘Materials’ shall be interchangeable for the other).
- 1.9 **“Worksite”** means the address nominated by the Customer to which the Materials/Works are to be supplied by the Contractor.

2. Acceptance

- 2.1 The parties acknowledge and agree that:
(a) they have read and understood the terms and conditions contained in this Contract; and
(b) the parties are taken to have exclusively accepted and are immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of any Works.
- 2.2 These terms and conditions may be meant to be read in conjunction with the Contractor’s Hire Form, and where the context so permits, the terms ‘Works’ or ‘Materials’ shall include any supply of Equipment, as defined therein. 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 Customer acknowledges and accepts that the supply of:
(a) Works on credit shall not take effect until the Customer has completed a credit application with the Contractor and it has been approved with a credit limit established for the account. In the event that the supply of Works requested exceeds the Customer’s credit limit and/or the account exceeds the payment terms, the Contractor reserves the right to refuse delivery; and
(b) Materials for accepted orders may be subject to availability and if, for any reason, Materials are not or cease to be available, the Contractor reserves the right to substitute comparable Materials (or components of the Materials) and vary the Price as per clause 6.2. In all such cases the Contractor will notify the Customer in advance of any such substitution, and also reserves the right to place the Customer’s order and/or Works on hold, as per clause 7.2 until such time as the Contractor and the Customer agree to such changes.
- 2.5 In the event that the Customer requests the Contractor to provide the Works urgently, that may require the Contractor’s staff to work outside normal business hours (including but not limited to working, through lunch breaks, weekends and/or Public Holidays) then the Contractor reserves the right to charge the Customer additional labour costs (penalty rates will apply at time and a half normal rates), unless otherwise agreed between the Contractor and the Customer.
- 2.6 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 The Customer acknowledges that the Contractor shall (for the duration of the Works) liaise directly with one (1) authorised representative, and that once introduced as such to the Contractor, that person shall have the full authority of the Customer to order any Materials, Works and/or to request any variation thereto on the Customer’s behalf. The Customer accepts that they will be solely liable to the Contractor for all additional costs incurred by the Contractor (including the Contractor’s profit margin) in providing any Materials, Works or variation/s requested thereto by the Customer’s duly authorised representative.

4. Errors and Omissions

- 4.1 The Customer acknowledges and accepts that the Contractor 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 Contractor 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 Contractor in respect of the Works.

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- 4.2 If such an error and/or omission occurs in accordance with clause 4.1, and is not attributable to the negligence and/or wilful misconduct of the Contractor; the Customer:
- (a) shall not be entitled to treat this Contract as repudiated nor render it invalid; but
 - (b) shall not be responsible for any additional costs incurred by the Contractor arising from the error or omission.
- 5. Change in Control**
- 5.1 The Customer shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer and/or any other change in the Customer's details (including but not limited to, changes in the Customer's name, address, contact phone or fax number/s, change of trustees, or business practice). The Customer shall be liable for any loss incurred by the Contractor as a result of the Customer's failure to comply with this clause.
- 6. Price and Payment**
- 6.1 At the Contractor's sole discretion, the Price shall be either:
- (a) as indicated on invoices provided by the Contractor to the Customer in respect of Works performed or Materials supplied; or
 - (b) the Contractor's quoted Price (subject to clause 6.2) which shall be binding upon the Contractor provided that the Customer shall accept the Contractor's quotation in writing within thirty (30) days.
- 6.2 The Contractor 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 or specifications) 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, limitations to accessing the Worksite, obscured building/Worksite defects, moisture content of the soil, incorrect measurements, plans and/or specifications provided by the Customer, as a result of delays from third-party suppliers, safety considerations (discovery of asbestos or synthetic mineral fibres, etc.), prerequisite work by any third-party not being completed, lack of required utilities, remedial work required due to existing workmanship being of a poor quality or non-compliant to the building code, hard rock barriers below the surface, iron reinforcing rods in concrete or hidden pipes and wiring in walls, etc.) which are only discovered on commencement of the Works; or
 - (d) in the event of increases to the Contractor in the cost of labour or Materials which are beyond the Contractor's control.
- 6.3 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 Customer 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.
- 6.4 At the Contractor's sole discretion, a reasonable non-refundable deposit may be required.
- 6.5 Time for payment for the Works being of the essence, the Price will be payable by the Customer on the date/s determined by the Contractor, which may be:
- (a) before delivery of the Materials;
 - (b) on completion of the Works;
 - (c) by way of progress payments in accordance with the Contractor'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;
 - (d) for certain approved Customers, due twenty (20) days following the end of the month in which a statement is posted to the Customer's address or address for notices;
 - (e) the date specified on any invoice or other form as being the date for payment; or
 - (f) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by the Contractor.
- 6.6 Payment of the Price shall be subject to retention by the Customer of an amount (hereafter called the "Retention Money"), being a set amount or equal to a percentage of the Price. The Retention Money must be held on trust by the Customer, as trustee, for the benefit of the Contractor and the Customer 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 with the provisions of the Constructions Contracts (Retention Money) Amendment Act 2023 and as such no Retention Money shall be used other than to remedy defects in the performance of the Contractor's obligations under the Contract.
- 6.7 Payment may be made by electronic/on-line banking, or by any other method as agreed to between the Customer and the Contractor.
- 6.8 The Contractor may in its discretion allocate any payment received from the Customer towards any invoice that the Contractor determines and may do so at the time of receipt or at any time afterwards. On any default by the Customer the Contractor may re-allocate any payments previously received and allocated. In the absence of any payment allocation by the Contractor, payment will be deemed to be allocated in such manner as preserves the maximum value of the Contractor's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 6.9 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by the Contractor nor to withhold payment of any invoice because part of that invoice is in dispute, unless the request for payment by the Contractor is a claim made under the Construction Contracts Act 2002. Nothing in this clause 6.9 prevents the Customer from the ability to dispute any invoice.
- 6.10 Unless otherwise stated the Price does not include GST. In addition to the Price, the Customer 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 Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition, the Customer 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.
- 7. Provision of the Works**
- 7.1 Subject to clause 7.2 it is the Contractor's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 7.2 The Works' commencement date will be put back and the completion date extended by whatever time is reasonable in the event that the Contractor claims an extension of time (by giving the Customer written notice) where completion is delayed by an event beyond the Contractor's control, including but not limited to any failure by the Customer to:

- (a) make a selection; or
 - (b) have the Worksite ready for the Works; or
 - (c) notify the Contractor that the Worksite is ready.
- 7.3 The Contractor may deliver the Works by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 7.4 Any time specified by the Contractor for delivery of the Works is an estimate only and the Contractor will not be liable for any loss or damage incurred by the Customer 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. In the event that the Contractor is unable to supply the Works as agreed solely due to any action or inaction of the Customer, then the Contractor shall be entitled to charge a reasonable fee for re-supplying the Works at a later time and date, and/or for storage of the Materials.
- 8. Risk**
- 8.1 If the Contractor retains ownership of the Materials under clause 13 then:
- (a) where the Contractor is supplying Materials only, all risk for the Materials shall immediately pass to the Customer on delivery and the Customer must insure the Materials on or before delivery. The cost of delivery is either included in the Price or is in addition to the Price as agreed between the parties. Delivery of the Materials shall be deemed to have taken place immediately at the time that the Materials are delivered by the Contractor or the Contractor's nominated carrier to the Customer's nominated delivery address (even if the Customer is not present at the address); and
 - (b) unless otherwise agreed, 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 Customer.
- 8.2 Notwithstanding the provisions of clause 8.1 if the Customer specifically requests 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 sole risk of the Customer and it shall be the Customer'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 Customer's expense.
- 8.3 Any advice, recommendation, information, assistance or service provided by the Contractor in relation to Materials or Works supplied is given in good faith to the Customer, or the Customer's agent and is based on the Contractor's own knowledge and experience and shall be accepted without liability on the part of the Contractor. Where such advice or recommendations are not acted upon then the Contractor shall require the Customer or their agent to authorise commencement of the Works in writing. The Contractor shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Works. Accordingly, the Contractor offers no warranty in regard to the aforementioned.
- 8.4 The Contractor shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Customer. The Customer acknowledges and agrees that in the event that any of this information provided by the Customer is inaccurate, the Contractor accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 8.5 The Customer warrants that any structures or land to which the Materials are to be affixed are able to withstand the installation of the Materials and are of suitable capacity to handle the Materials once installed. If, for any reason (including, but not limited to, soil erosion, the discovery of asbestos, fossils, or artefacts, dangerous access etc.) the Contractor reasonably forms the opinion that the Customer's property is not safe for the installation of Materials to proceed then the Contractor shall be entitled to delay installation of the Materials (in accordance with clause 7.2) until the Contractor is satisfied that it is safe for the installation to proceed. The Contractor may in agreement with the Customer bring the property up to a standard suitable for installation to proceed but all such Works undertaken, and any additional Materials supplied shall be treated as a variation and be charged for in addition to the Price.
- 8.6 Where the Customer has provided instructions or specifications for the Contractor to complete the Works (including, but not limited to, any requested variation to the original design), then the Contractor shall accept no liability whatsoever for the finished Works being deemed as unsatisfactory to the Customer.
- 8.7 The Customer acknowledges and accepts that:
- (a) where an anodised surface finish has been selected, slight colour variation may occur between the main unit frame and any installation trims used due to the difference in aluminium alloys available and manufacturing standards and tolerances shall not be deemed to be a defect in the Materials;
 - (b) timber is a:
 - (i) natural product and as such may exhibit variations in texture, shade, colour, surface, finish, markings, veining, and contain natural fissures, occlusions, and indentations. Whilst the Contractor will make every effort to match sales samples to the finished Materials the Contractor accepts no liability whatsoever where such samples differ to the finished Materials supplied; and
 - (ii) hygroscopic material subject to expansion and contraction, therefore the Contractor will accept no responsibility for gaps that may appear during prolonged dry periods.
 - (c) Materials (including, but not limited to, paint, timber, steel, etc.) supplied may:
 - (i) exhibit variations in shade, colour, texture, surface and finish, and may fade or change colour over time. The Contractor will make every effort to match batches of product supplied in order to minimise such variations but shall not be liable in any way whatsoever where such variations occur;
 - (ii) expand, contract or distort as a result of exposure to heat, cold, weather;
 - (iii) mark or stain if exposed to certain substances; and
 - (iv) be damaged or disfigured by impact or scratching.
 - (d) under no circumstances, will the Contractor handle removal of asbestos product. In the event asbestos (or other hazardous material) is discovered on the Worksite:
 - (i) the Contractor shall suspend the Works;
 - (ii) the Customer 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 6.2.
- 8.8 The Contractor accepts no responsibility for any damage or:

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- (a) performance related problems with any Materials where they have not been used and/or maintained in accordance with the Contractor's and/or the manufacturers' recommendations;
- (b) defects in any Materials caused by movement and/or interference of the said Materials.
- 8.9 It is the Customer's responsibility to ensure that no other tradesmen interfere with any Works and/or Materials supplied under this Contract. The Contractor shall not be liable for any costs, damages or loss however arising from the Customer's failure to comply with this clause.
- Excavation Risk**
- 8.10 In the event that during the course of the Works the Contractor discovers any fossils, artefacts or any other remains of geological or archaeological interest are discovered the Contractor reserves the right to halt all Works, remove any of their equipment from the Worksite and immediately notify the Customer. Unless subject to clause 26.9, the Customer accepts and agrees that all additional costs that may be incurred by the Contractor as a result of any such delays (including, but not limited to, in the event the Contractor is unable to remove their equipment from the Worksite, etc.) shall be borne by the Customer and shall be treated as a variation in accordance with clause 6.2.
- 8.11 The Customer accepts that where required and subject to clause 8.10, any specific Worksite conditions or work practices requested by local iwi shall be observed where possible.
- Fencing Risk**
- 8.12 The Customer acknowledges and accepts that:
- (a) the Customer is responsible for the supply of survey drawings and pegs, and must be on the Worksite to supervise the marking out of the fence line, placement of boundary pegs and during the installation of the fence. If the Customer fails to comply with this clause, then the Contractor accepts no responsibility for installation decisions that need to be made by the Contractor in the Customer's absence;
- (b) it is the Customer's responsibility to remove any:
- (i) existing fence (including existing footings), trees, vines, shrubs, vegetation, obstructions and other hindrances in order to allow the Contractor clear access along the proposed fence line, prior to commencement of the Works by the Contractor. The quoted Price does not allow for the clearing or grading along the fence line nor removal of soil, trees, dirt piles, rubbish and rocks etc. from the Worksite unless otherwise agreed; and
- (ii) important objects (including, but not limited to, sprinkler systems, signs etc) from the fence line where the Works are to be undertaken. Whilst the Contractor will take all due care during installation the Contractor will not accept any responsibility for tiles or pavers etc. damaged during installation unless due to the negligence of the Contractor.
- (c) the baseline of fencing or retaining walls shall be at the Contractor's discretion, as a rule it will follow the land flow unless otherwise stated in the quotation. Where the Customer has requested that gaps be covered or filled this will be invoiced as an extra;
- (d) where trees are causing an obstruction or interfering with the fence line and the Contractor has had to execute a stop and start fence around the tree or cut palings to fit around the tree limbs an additional fee will apply and will be treated as a variation as per clause 6.2. It is further agreed that it is the Customer's responsibility to arrange for the tree or tree stump to be removed unless otherwise agreed;
- (e) the re-attachment of intersecting fences or screens will incur an additional fee and shall be treated as a variation as per clause 6.2;
- (f) all fence heights shall be nominal (as fences are constructed from standard components). Where land undulations exist, fence heights along the fence line may vary and shall be measured from the bottom to the top of the fence. Whilst the Contractor shall endeavour to eliminate gaps under the fence line, the Customer accepts that such gaps may be apparent;
- (g) where fencing is installed on a retaining wall the Contractor shall not be liable for any movement in the fence due to consolidation, or the movement of soil or any other component of the retaining wall; and
- (h) the Contractor reserves the right to touch-up all products supplied and installed on the Worksite to rectify minor blemishes or damage to paintwork.
- 8.13 Upon completion of the Works and where applicable, it shall be the Customer's responsibility to arrange for a qualified electrician to connect any electrical wiring and cabling that may be required in respect of the gates being installed unless otherwise agreed and included in the original quote.
- 9. Worksite Access and Condition**
- 9.1 The Contractor is not responsible for the removal of rubbish from or clean-up of the building/construction Worksite/s. All rubbish generated by the Contractor will be placed in a designated area appointed by the Customer but the responsibility of removal of same is the Customer or the Customer's agent, unless otherwise agreed.
- 9.2 It is the intention of the Contractor and agreed by the Customer that:
- (a) it shall be the Customer's responsibility to ensure that, where applicable, prior to commencement of the Works that:
- (i) all gas and electricity are cancelled and disconnected (from the main supply at the street); and
- (ii) a safety fence is erected around the perimeter of the Worksite to ensure public safety.
- (b) the Customer shall ensure that the Contractor 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 Contractor 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 Contractor;
- (c) it is the responsibility of the Customer to ensure that access is suitable to accept the weight of laden trucks, front end loaders or other earth moving equipment as may be deemed necessary by the Contractor;
- (d) the Customer shall remove any items from the vicinity of the Works, and agrees that the Contractor shall not be liable for any damage caused to those items through the Customer's failure to comply with this clause; and
- (e) it is the Customer's responsibility to provide the Contractor, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities, where required.
- 9.3 If the Works are interrupted by the failure of the Customer to adhere to the work schedule agreed to between the Contractor and the Customer or if the Contractor is denied access to the Worksite on the agreed start date, then the Contractor reserves the right to charge the Customer additional costs (including, but not limited to, any loss of profits, employee wages, mileage, etc.) which will be invoiced to the Customer as a variation in accordance with clause 6.2.

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- 9.4 Where the Contractor requires that Materials, tools etc. required for the Works be stored at the Worksite, the Customer shall supply the Contractor a safe area for storage and shall take all reasonable efforts to protect all items from destruction, theft or damage. In the event that any of the stored items are destroyed, stolen or damaged, then the cost of repair or replacement shall be the Customer's responsibility.
- 9.5 The Customer agrees to be present at the Worksite when and as reasonably requested by the Contractor and its employees, contractors and/or agents.
- 9.6 *Worksite Inductions*
- (a) in the event the Customer requires an employee or sub-contractor of the Contractor to undertake a Worksite induction during working hours, the Customer will be liable to pay the hourly charges for that period. If any induction needs to be undertaken prior to the commencement date then the Customer shall be liable to pay the Contractor's standard (and/or overtime, if applicable) hourly labour rate; or
- (b) where the Contractor is in control of the Worksite, the Customer and/or the Customer's third-party contractors must initially carry out the Contractor's Health & Safety induction course before access to the Worksite will be granted. Inspection of the Worksite during the course of the Works will be by **appointment only** and unless otherwise agreed, in such an event the Customer and/or third-party acting on behalf of the Customer must at all times be accompanied by the Contractor.
- 10. Underground Locations**
- 10.1 Prior to the Contractor commencing any work the Customer must advise the Contractor of the precise location of any geographical features and all underground services on the Worksite and clearly mark the same. The geographical features (including, but not limited to, sinkholes, irrigation ditches, fencing materials, irrigation lines, stumps and any other object that may cause damage to the equipment used in relation to the Works), or underground mains and services the Customer 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.
- 10.2 Whilst the Contractor will take all care to avoid damage to any geographical features or underground services the Customer agrees to indemnify the Contractor in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to geographical features or underground services not precisely located and notified as per clause 10.1.
- 11. Insurance**
- 11.1 The Contractor shall have public liability insurance of at least five million dollars (\$5m). It is the Customer's responsibility to ensure that they are similarly insured.
- 12. Compliance with Laws**
- 12.1 The Customer 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 Materials/Works, including any WorkSafe health and safety laws relating or any other relevant safety standards or legislation pertaining to the Materials/Works.
- 12.2 Both parties acknowledge and agree:
- (a) to comply with the Building Act 2004 (including any subsequent Amendments) and Code of Ethics, in respect of all workmanship and building products to be supplied during the course of the Works; and
- (b) that Works will be provided in accordance with any current relevant Australian/New Zealand Standards applicable.
- 12.3 Notwithstanding clause 12.1 and pursuant to the Health & Safety at Work Act 2015 (the "HSW Act"), the Contractor agrees at all times to 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 Customer who has engaged a third-party head contractor.
- 12.4 Where the Customer has supplied products for the Contractor to complete the Works, the Customer acknowledges that it accepts responsibility for the suitability of purpose and use for their products and the Intended Use and any faults inherent in those products. However, if in the Contractor's opinion, it is believed that the materials supplied are Non-Conforming products and will not conform with New Zealand regulations, then the Contractor 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 6.2.
- 12.5 The Customer shall obtain (at the expense of the Customer) all licenses and approvals that may be required for the Works.
- 13. Title**
- 13.1 The Contractor and the Customer agree that ownership of the Materials shall not pass until:
- (a) the Customer has paid the Contractor all amounts owing to the Contractor; and
- (b) the Customer has met all of its other obligations to the Contractor.
- 13.2 Receipt by the Contractor 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.
- 13.3 It is further agreed that:
- (a) until ownership of the Materials passes to the Customer in accordance with clause 13.1 that the Customer is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to the Contractor on request;
- (b) the Customer holds the benefit of the Customer's insurance of the Materials on trust for the Contractor and must pay to the Contractor 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 Contractor shall be sufficient evidence of the Contractor's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with the Contractor to make further enquiries;
- (d) the Customer 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 Customer sells, disposes or parts with possession of the Materials then the Customer must hold the proceeds of any such act on trust for the Contractor and must pay or deliver the proceeds to the Contractor on demand;

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- (e) the Customer should not convert or process the Materials or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of the Contractor and must sell, dispose of or return the resulting product to the Contractor as it so directs;
- (f) unless the Materials have become fixtures the Customer irrevocably authorises the Contractor to enter any premises where the Contractor believes the Materials are kept and recover possession of the Materials;
- (g) the Contractor may recover possession of any Materials in transit whether or not delivery has occurred;
- (h) the Customer 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 Contractor; and
- (i) the Contractor may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Customer.

14. Personal Property Securities Act 1999 (“PPSA”)

- 14.1 Upon assenting to these terms and conditions in writing the Customer 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 that have previously been supplied and that will be supplied in the future by the Contractor to the Customer and the proceeds from such Materials as listed by the Contractor to the Customer in invoices rendered from time to time.
- 14.2 The Customer 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 Contractor 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 Contractor 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 or the proceeds of such Materials in favour of a third-party without the prior written consent of the Contractor; and
 - (d) immediately advise the Contractor 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.
- 14.3 Unless otherwise agreed to in writing by the Contractor, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 14.4 The Customer shall unconditionally ratify any actions taken by the Contractor under clauses 14.1 to 14.3.
- 14.5 Subject to any express provisions to the contrary (including those contained in this clause 14), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

15. Security and Charge

- 15.1 In consideration of the Contractor agreeing to supply the Works, the Customer 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 Customer either now or in the future, and the Customer grants a security interest in all of its present and after-acquired property, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money). The terms of the charge and security interest are the terms of Memorandum 2018/4344 registered pursuant to s.209 of the Land Transfer Act 2017.
- 15.2 The Customer 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.
- 15.3 The Customer irrevocably appoints the Contractor and each director of the Contractor as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 15 including, but not limited to, signing any document on the Customer's behalf.

16. Defects and Returns in Materials

- 16.1 The Customer 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 Customer shall afford the Contractor an opportunity to inspect the Materials within a reasonable time following delivery if the Customer believes the Materials are defective in any way. If the Customer shall fail 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 Customer is entitled to reject, the Contractor's liability is limited to either (at the Contractor's discretion) replacing the Materials or repairing the Materials.
- 16.2 Materials will not be accepted for return other than in accordance with 16.1 above.
- 16.3 Subject to clause 16.1, non-stocklist items or Materials made to the Customer's specifications are under no circumstances acceptable for credit or return.

17. Warranties

- 17.1 Subject to the conditions of warranty set out in clause 17.2 the Contractor warrants that if any defect in any Materials manufactured or Works provided by the Contractor becomes apparent and is reported to the Contractor within ten (10) years of the date of delivery (time being of the essence) then the Contractor will either (at the Contractor's sole discretion) replace or remedy the defect.
- 17.2 The conditions applicable to the warranty given by clause 17.1 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 Customer to properly maintain any Materials or serviced item; or
 - (ii) failure on the part of the Customer to follow any instructions or guidelines provided by the Contractor; or
 - (iii) any use of any Materials or serviced item otherwise than for any application specified on a quote or order form; or
 - (iv) the continued use of any Materials or serviced item 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.

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- (b) the warranty shall cease and the Contractor shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Contractor's consent.
- (c) in respect of all claims the Contractor shall not be liable to compensate the Customer for any delay in either replacing or remedying the workmanship or in properly assessing the Customer's claim.
- 17.3 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 Materials.
- 18. Consumer Guarantees Act 1993 and the Fair Trading Act 1986**
- 18.1 If the Customer is acquiring Materials for the purposes of a trade or business, the Customer acknowledges that the provisions of the Consumer Guarantees Act 1993 ("CGA") do not apply to the supply of Materials by the Contractor to the Customer.
- 18.2 The Contractor agrees to abide by the provisions of the Fair Trading Act 1986 ("FTA").
- 19. Intellectual Property**
- 19.1 Where the Contractor has designed, drawn, written plans or a schedule of Works, or created any products for the Customer, 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 Customer at the Contractor's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of the Contractor.
- 19.2 The Customer 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 Customer's order and the Customer agrees to indemnify the Contractor against any action taken by a third-party against the Contractor in respect of any such infringement.
- 19.3 The Customer 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 products which the Contractor has created for the Customer.
- 20. Default and Consequences of Default**
- 20.1 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.
- 20.2 If the Customer owes the Contractor any money the Customer 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).
- 20.3 Further to any other rights or remedies the Contractor may have under this Contract, if a Customer has made payment to the Contractor, and the transaction is subsequently reversed, the Customer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Contractor under this clause 20, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Customer's obligations under this Contract.
- 20.4 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 Customer which remains unfulfilled and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Customer will be unable to make a payment when it falls due;
 - (b) the Customer has exceeded any applicable credit limit provided by the Contractor;
 - (c) the Customer 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 Customer or any asset of the Customer.
- 21. Cancellation**
- 21.1 Without prejudice to any other remedies the parties may have, if at any time either party is in breach of any obligation (including those relating to payment) under these terms and conditions the other party may suspend or terminate the supply or purchase of Materials or Works to the other party. Neither party will be liable for any loss or damage the other party suffers because one of the parties has exercised its rights under this clause.
- 21.2 If the Contractor, due to reasons beyond the Contractor's reasonable control, is unable to deliver any Materials or Works to the Customer, the Contractor may cancel any contract to which these terms and conditions apply or cancel delivery of Materials or Works at any time before the Materials or Works are delivered by giving written notice to the Customer. On giving such notice the Contractor shall repay to the Customer any money paid by the Customer for the Materials or Works. The Contractor shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 21.3 The Customer may cancel delivery of the Materials and/or Works by written notice served within twenty-four (24) hours of placement of the order. Failure by the Customer to otherwise accept delivery of the Materials and/or Works shall place the Customer in breach of this Contract.
- 21.4 Cancellation of orders for products made to the Customer's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 22. Privacy Policy**
- 22.1 All emails, documents, images or other recorded information held or used by the Contractor is "Personal Information" as defined and referred to in clause 22.3 and therefore considered confidential. The Contractor acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 2020 ("the Act") including Part II of the OECD Guidelines and as set out in the Act. The Contractor acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Customer's Personal Information, held by the Contractor that may result in serious harm to the Customer, the Contractor will notify the Customer in accordance with

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- the Act. Any release of such Personal Information must be in accordance with the Act and must be approved by the Customer by written consent, unless subject to an operation of law.
- 22.2 Notwithstanding clause 22.1, privacy limitations will extend to the Contractor in respect of Cookies where the Customer utilises the Contractor's website to make enquiries. The Contractor 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 Customer'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 Contractor when the Contractor sends an email to the Customer, so the Contractor may collect and review that information ("collectively Personal Information").
- If the Customer consents to the Contractor's use of Cookies on the Contractor's website and later wishes to withdraw that consent, the Customer may manage and control the Contractor's privacy controls via the Customer's web browser, including removing Cookies by deleting them from the browser history when exiting the site.
- 22.3 The Customer authorises the Contractor or the Contractor's agent to:
- (a) access, collect, retain and use any information about the Customer;
 - (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 Customer's creditworthiness; or
 - (ii) for the purpose of marketing products and services to the Customer.
 - (b) disclose information about the Customer, whether collected by the Contractor from the Customer 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 Customer.
- 22.4 Where the Customer is an individual the authorities under clause 22.3 are authorities or consents for the purposes of the Privacy Act 2020.
- 22.5 The Customer shall have the right to request (by e-mail) from the Contractor, a copy of the Personal Information about the Customer retained by the Contractor and the right to request that the Contractor correct any incorrect Personal Information.
- 22.6 The Contractor will destroy Personal Information upon the Customer's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- 22.7 The Customer can make a privacy complaint by contacting the Contractor via e-mail. The Contractor will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within twenty (20) days of receipt of the complaint. In the event that the Customer is not satisfied with the resolution provided, the Customer can make a complaint to the Privacy Commissioner at <http://www.privacy.org.nz>.

23. Suspension of Works

- 23.1 Where the Contract is subject to section 24A of the Construction Contracts Act 2002, the Customer hereby expressly acknowledges that:
- (a) the Contractor 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 Customer, and:
 - (i) the payment is not paid in full by the due date for payment in accordance with clause 6.5 and/or any subsequent amendments or new legislation and no payment schedule has been given by the Customer; or
 - (ii) a scheduled amount stated in a payment schedule issued by the Customer in relation to the payment claim is not paid in full by the due date for its payment; or
 - (iii) the Customer has not complied with an adjudicator's notice that the Customer must pay an amount to the Contractor by a particular date; and
 - (iv) the Contractor has given written notice to the Customer of its intention to suspend the carrying out of construction work under the construction Contract.
 - (b) if the Contractor 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 Customer or by any person claiming through the Customer; 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 Contractor 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 Contractor under the Contract and Commercial Law Act 2017; or
 - (ii) enable the Customer to exercise any rights that may otherwise have been available to the Customer under that Act as a direct consequence of the Contractor suspending work under this provision;
 - (d) due to any act or omission by the Customer, the Customer effectively precludes the Contractor from continuing the Works or performing or complying with the Contractor's obligations under this Contract, then without prejudice to the Contractor's other rights and remedies, the Contractor may suspend the Works immediately after serving on the Customer 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 Contractor as a result of such suspension and recommencement shall be payable by the Customer as if they were a variation.
- 23.2 If pursuant to any right conferred by this Contract, the Contractor suspends the Works and the default that led to that suspension continues un-remedied subject to clause 21.1 for at least ten (10) working days, the Contractor shall be entitled to terminate the Contract, in accordance with clause 21.

24. Service of Notices

- 24.1 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;

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- (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; or
 - (e) if sent by email to the other party's last known email address.
- 24.2 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.

25. Trusts

- 25.1 If the Customer at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust or as an agent for a trust ("Trust") then whether or not the Contractor may have notice of the Trust, the Customer covenants with the Contractor as follows:
- (a) the Contract extends to all rights of indemnity which the Customer now or subsequently may have against the Trust, the trustees and the trust fund;
 - (b) the Customer has full and complete power and authority under the Trust or from the Trustees of the Trust as the case maybe 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 Customer against the Trust, the trustees and or the trust fund. The Customer 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 Customer will not during the term of the Contract 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:
 - (i) the removal, replacement or retirement of the Customer 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 fund or trust property.

26. General

- 26.1 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).
- 26.2 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.
- 26.3 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 North Shore Courts, Auckland, New Zealand.
- 26.4 Subject to the CGA, the liability of the Contractor and the Customer under this Contract shall be limited to the Price.
- 26.5 The Contractor may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Customer's consent provided the assignment does not cause detriment to the Customer.
- 26.6 The Customer cannot licence or assign without the written approval of the Contractor.
- 26.7 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 Customer agrees and understands that they have no authority to give any instruction to any of the Contractor's sub-contractors without the authority of the Contractor.
- 26.8 The Customer agrees that the Contractor may amend their general terms and conditions for subsequent future Contracts with the Customer by disclosing such to the Customer in writing. These changes shall be deemed to take effect from the date on which the Customer accepts such changes, or otherwise at such time as the Customer makes a further request for the Contractor to provide Works to the Customer.
- 26.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc, ("Force Majeure") or other event beyond the reasonable control of either party. This clause does not apply to a failure by the Customer to make any payment due to the Contractor, following cessation of a Force Majeure.
- 26.10 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.