

1. Definitions

- 1.1. **Agreement** means any contract or agreement between the Parties that arises in relation to these terms and conditions or the Quotation.
- 1.2. **Client** shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described in the Quotation, work authorisation or other form as provided by the Contractor to the Client.
- 1.3. **Completion Date** means the date for completion of the Works specified on any Quotation provided by the Contractor to the Client as amended or varied in accordance with these terms and conditions.
- 1.4. **Confidential Information** means confidential information which relates to the subject matter of these terms and conditions, the Works and the Materials and includes any design specifications, intellectual property, software, source code, trade secrets, know how, computer records and disc, technique, client information, formulae, designs, plans and models relating to the Works.
- 1.5. **Contractor** mean **Daniel Chrisp Pty Ltd** (ACN 162 558 161) trading as Watercon, its successors and assigns or any person acting on behalf of and with the authority of the Contractor.
- 1.6. **Contract Documents** include all drawings, plans and specifications and all other information provided by the Client to the Contractor.
- 1.7. **GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) as amended from time to time;
- 1.8. **GST** has the meaning given to this term by the GST Act.
- 1.9. **Guarantor** means that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.10. **Intellectual Property** means all copyright, trade-marks, designs, patents, methodology, concepts, models, business and domain names, inventions and confidential information, and other results of intellectual activity in the industrial, commercial, literary or artistic fields whether or not registrable, registered or patentable.
- 1.11. **Loss** means loss including but not limited to direct loss, consequential loss, special loss, loss of anticipated profits, loss of business opportunity, liability, damage including but not limited to any punitive damages or compensation, any damage to reputation, cost or expense including legal costs on a full indemnity basis.
- 1.12. **Materials** means all the goods, plant and equipment which form part of the Works.
- 1.13. **Party(ies)** means a party or parties to the Agreement.
- 1.14. **PPSA** means the *Personal Property Securities Act 2009* (Cth), as amended from time to time.
- 1.15. **PPSR** means the Personal Property Securities Register established and maintained under the PPSA.
- 1.16. **Price** shall mean the price payable for the Works determined in accordance with clause 5.
- 1.17. **Quotation** means the Quotation provided by the Contractor to the Client which incorporates these terms and conditions.
- 1.18. **Security Agreement, Financing Statement, Financing Change Statement, Purchase Money Security Interest, Security Interest and Verification Statement** have the meanings given to them in the PPSA
- 1.19. **Servants** means and includes servants, employees, agents, contractors and sub-contractors.
- 1.20. **Site** means the location at which the Works are undertaken.
- 1.21. **Stand Down Rates** means the rates as specified in the Quotation.
- 1.22. **Variation** means to vary the Works by:
 - (a) carrying out additional Work;
 - (b) omitting any part of the Works; or
 - (c) changing the scope of the Works.
- 1.23. **Works** means the work (including any Variations) to be carried out under the Agreement and includes any goods, plant, equipment or materials supplied or installed by the Contractor as specified on the Quotation, invoices, work authorisation or any other documentation provided by the Contractor to the Client.
- 1.24. **Works Conditions** means the conditions of works and supply of materials set out in the appendix to these terms and conditions.

2. Acceptance

- 2.1. The Contractor will provide a Quotation within a reasonable time of the Client's request and the Quotation shall remain open for acceptance in writing by the Client for thirty (30) days of the date of the Quotation unless withdrawn by the Contractor prior to such date.

- 2.2. Any order received by the Contractor from the Client for the Works by the Contractor and or receipt by the Contractor of a duly signed Quotation or purchase order shall constitute approval of the Quotation and these terms and conditions and an offer by the Client.
- 2.3. The Agreement is formed upon the Contractor confirming acceptance of the Client's offer following which the Quotation and these terms and conditions can only be amended with the written consent of the Contractor.
- 2.4. All Works and Materials supplied by the Contractor shall be subject to the Quotation and these terms and conditions only and no other terms or conditions shall apply without the specific approval of the Contractor. In no case shall the supply of Materials be deemed a sale by sample.

3. Duties of the Contractor

- 3.1. The Price is based on a continuous work programme, unless otherwise stated by the Contractor or agreed between the Parties.
- 3.2. The Contractor must carry out the Works in accordance with the Works Conditions, good trade practice, in a competent manner and in compliance with the Quotation and these terms and conditions and use commercially reasonable efforts to complete the Works on or before the Completion Date.
- 3.3. The Contractor may at its sole discretion and without notice to the Client utilise its Servants or any third party for the purpose of completing the Works provided such person(s) are skilled and experienced in their respective trades or occupations. The Contractor shall be solely responsible for any and all payments to any Servant or third party for that part of the Works performed by such Servant or third party.
- 3.4. The Contractor will maintain sufficient insurances to cover the scope of, and for the duration of, the Works.
- 3.5. Where the Agreement is for the supply of Materials only, delivery will be effected by and at the cost and risk of the Client. Where the Quotation provides for delivery by the Contractor, the Contractor shall make all reasonable efforts to deliver the Materials in accordance with the agreed timeframe however in no circumstances will the Contractor be liable for any delay in delivery or any damage to the Materials.

4. Duties of the Client

- 4.1. The Client **shall** pay the Price in accordance with clause 5.
- 4.2. The Client will expeditiously provide the Contractor with instructions, information and other documentation that are reasonably necessary to allow the Contractor to supply the Materials and carry out the Works together with its other obligations under this Agreement.
- 4.3. The Client shall ensure that the Works Conditions are provided for the Contractor where applicable.
- 4.4. The Client shall take out and maintain all insurances that it is required by law to hold or any additional insurances set out in the Quotation for the duration of the Works.
- 4.5. The Client shall be liable to pay the Contractor immediately upon demand for any costs related to its non-compliance with clause 4.2 that causes delay to the Contractor in providing the Works or Materials.
- 4.6. The Client warrants that, where the Quotation does not specifically include the procurement of approvals by the Contractor, the Client has obtained all the necessary approvals for the Works prior to the engagement of the Contractor for the Works and shall indemnify the Contractor against any Loss related to the approvals or any associated delay.
- 4.7. At the request of the Contractor, the Client shall within a reasonable time, provide to the Contractor all approvals, certificates, licences or other relevant documentation in relation to the Works or Materials. Where procuring approvals is the responsibility of the Contractor, the Client shall provide all assistance required promptly and at no cost to the Contractor.
- 4.8. The Client shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any Loss incurred by the Contractor as a result of the Client's failure to comply with this clause.

5. Price and Payment

- 5.1. At the Contractor's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by the Contractor to the Client in respect of the Works to be carried out and the Materials to be supplied by the Contractor; or
 - (b) as indicated in the Quotation.
- 5.2. The Contractor may change either or both of the Price and the Completion Date in the event of:
 - (a) a Variation;
 - (b) change to Works feasibility; or

- (c) changes to the costs, including by way of exchange rate fluctuation, or specifications of the Materials.
- 5.3. The Contractor shall, where practicable, provide to the Client reasonable notice of the change in the Price or Completion Date.
- 5.4. Where more than one Client has approved these terms and conditions, the Client(s) shall be jointly and severally liable for all payments of the Price and any other amounts due.
- 5.5. The Client shall pay a deposit to the Contractor before the Contractor commences Work if required by the Contractor. The deposit will be a minimum of 40% of the value of Materials.
- 5.6. Where the Quotation so provides, the Contractor may submit to the Client invoices for progress payments upon completion of each stage of the Works which shall be in the form of a proper and valid tax invoice in accordance with the GST Act and shall consist of:
 - (a) the percentage or amount of the Price applicable to that stage; and
 - (b) any other amounts then payable to the Contractor under these terms and conditions and the Agreement.
- 5.7. The Client will pay the Contractor progress payments in accordance with the invoices supplied by the Contractor.
- 5.8. Notwithstanding clause 5.1, if the Contractor's costs in connection with the Agreement are increased as a result of the introduction of new, or changes to existing, government taxes or charges or increases in the cost of Materials, then the Price shall be increased to reflect such changes and the Client shall pay the increased Price to the Contractor in accordance with clause 8 of these terms and conditions.
- 5.9. Time for payment for the Works and all other amounts due shall be of the essence and shall be stated on the invoice or the Quotation. If no time is stated then payment shall be due one (1) day following the date of the invoice. Where progress payments are required payment shall be due on the day on which the Contractor notifies the Client of completion of the relevant stage.
- 5.10. Payment shall be made by cash or EFT to the Contractor's bank account as advised or by any other method as agreed to between the Client and the Contractor. Payment is deemed to be received when funds are cleared. The Contractor may apply or reapply any amount received to any outstanding amount at its sole discretion.
- 5.11. Payment of the Price or final progress payment shall be deemed acceptance of the Works and Materials notwithstanding any defects period.
- 5.12. Where an amount of the Price is agreed between the Parties to be held by the Client as a retention amount such amount must be:
 - (a) deducted from the final progress payment amount only;
 - (b) held by the Client on trust and in a separate account from other amounts; and
 - (c) released within 30 days of the Completion Date unless a valid defect claim has been made and such defect remains unremedied.
- 5.13. The Client and its directors acknowledge and agree that the Client and its directors, jointly and severally, hold any retention sum on trust for the Contractor, that the retention sum will be kept separate to and not be intermingled with the ordinary operating account of the Client, and that the Client and its directors have individual obligations and owe fiduciary duties to the Contractor to ensure that any retention sum is held on trust and paid to the Contractor when due.
- 5.14. GST and other taxes, duties and charges that may be applicable shall be added to the Price except when they are expressly included in the Price.
- 5.15. Where the Client is a trustee:
 - (a) the Client warrants that it has full power and authority for the benefit purposes and objects of the trust to accept the Quotation on behalf of the trust and that it shall be bound by these terms and conditions both personally and as trustee; and
 - (b) the Client confirms that the Client in its capacity as trustee shall be liable for the account and that in addition the assets of the trust shall be available to meet payment of the account.

6. Delay and Extension of Time

- 6.1. The Contractor shall not be liable for any delay or failure to perform its obligations under the Agreement including where such failure or delay results directly or indirectly from any cause, matter or thing beyond the reasonable control of the Contractor such as the following:
 - (a) any act, default or omission on the part of the Client or its Servants; or
 - (b) any events occurring on or before Completion Date including but not limited to:

- (i) damage by fire, explosion, earthquake, lightning, storm, flood, acts of God, civil or military authority, public enemy, war, civil commotion, strikes, labour disputes or industrial conditions;
- (ii) electric power supply failure;
- (iii) inclement weather;
- (iv) unavailability of suitable Materials;
- (v) failure of transportation affecting the Contractor, its supplier or any other person company or firm;
- (vi) latent conditions;
- (vii) Variations;
- (viii) changes in the law; or
- (ix) directions or delays by municipal, public or statutory authorities.

6.2. Where delays are caused by any of the events set out in sub-clause 6.1, the performance of the Contractor's obligations under these terms and conditions shall be automatically suspended for the period of such delay and the Completion Date shall be extended accordingly.

7. Risk and Ownership

7.1. The Contractor and the Client agree that:

- (a) all title in the Works and Materials remains with the Contractor until the Contractor has received payment in full of the Price and any other monies due to the Contractor under the Agreement;
- (b) where the Works include design, the provisions of clause 16 will be applicable;
- (c) the Client is a bailee of the Works and Materials until such time as title in them passes to the Client and that such bailment continues until the Price has been paid in full; and
- (d) pending payment in full of the Price under the Contract, the Client:
 - (i) may not take possession of the Works or allow or facilitate the possession of any third party without the express written consent of the Contractor;
 - (ii) must not supply the Works or Materials to any person or otherwise deal with any of the Works or Materials;
 - (iii) must not allow any person to have or acquire any security interest or other interest in the Materials;
 - (iv) must insure the Materials for their full insurable or replacement value (whichever is the higher) with any insurer licenced or authorised to conduct the business of insurance in the place where the Client carries on business; and
 - (v) must not remove, deface or otherwise interfere or deal with any of the Materials.

8. Variations

- 8.1. If the Client requires a Variation, it shall notify the Contractor in writing, setting out in full the details of the required Variation.
- 8.2. No Variation shall be performed by the Contractor until written authorisation has been received from the Client and the variation to the Price has been agreed. If the Parties cannot agree to the variation to the Price the Contractor may charge the Client at an hourly rate specified in the Quotation or as commonly charged by the Contractor for similar works or materials together with all costs, expense or loss related to of such Variation including restocking and cancellation fees.

9. Defects

- 9.1. The Client shall notify the Contractor of any alleged defect in any workmanship, damage or failure of the Works or Materials to comply with any description or Quotation within ten (10) days of the Completion Date unless the Quotation provides otherwise.
- 9.2. If the Client fails to give notice within ten (10) days, the Works and Materials shall be presumed to be free from any defect.
- 9.3. The Contractor shall, within a reasonable period, remedy any defect in the Works or Materials.
- 9.4. In the case of defective Works, the Contractor's liability is limited to rectification of the Works or the cost thereof provided such cost does not exceed the Price. Any defect occurring after ten (10) days shall be deemed fair wear and tear.
- 9.5. In the case of defective Materials, the Contractor shall, at its sole discretion;

- (a) repair such Materials;
- (b) replace the Materials with like or equivalent Materials; or
- (c) where the Materials are chattels, remove the Materials and refund the Client the cost in relation to those specific Materials.

9.6. Where any Materials are subject to a manufacturer's warranty, the Client will make any defect claim against the manufacturer direct and the Contractor will provide reasonable assistance in relation to any such claim.

10. The Competition and Consumer Act 2010 (Cth) ("CCA"), the Fair Trading Act ("FTA")

10.1. Nothing in these terms and conditions is intended to have the effect of contracting out of any applicable provisions of the CCA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

10.2. The Contractor's liability for a breach of any term of these terms and conditions is limited to the following:

- (a) the supplying of either or both of the Works and Materials again; or
- (b) the payment of the cost of having either or both of the Works and Materials supplied again.

11. Default & Consequences of Default

11.1. Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of 3% per month compounded monthly both before and after any judgment.

11.2. If the Client defaults in payment of any invoice when due, the Client shall indemnify the Contractor from and against all costs and disbursements incurred by the Contractor in pursuing the debt including legal costs on a solicitor and own client basis and the Contractor's collection agency costs.

11.3. Without prejudice to any other remedies the Contractor may have, if at any time the Client is in breach of any obligation (including those relating to payment) the Contractor may immediately suspend or terminate the Works and any of its other obligations under these terms and conditions. The Contractor shall not be liable to the Client for any Loss the Client suffers because the Contractor has exercised its rights under this clause.

11.4. Without prejudice to the Contractor's other remedies at law the Contractor shall be entitled to immediately suspend or terminate all or any part of the Works which remains unfulfilled and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable in the event that:

- (a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Client shall be unable to meet its payments as they fall due; or
- (b) the Client becomes bankrupt, insolvent, 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 the Contractor reasonably believes such situation is likely of notification; or
- (c) a receiver, manager, liquidator (provisional or otherwise), trustee in bankruptcy or similar person is appointed in respect of the Client or any asset of the Client.

11.5. If the Contractor breaches its obligations under these terms and conditions and fails to remedy the breach within twenty (20) days of receiving written notice from the Client of the breach, the Client may terminate the agreement. All amounts due up to the date of termination shall be immediately payable.

12. Security and Charge

12.1. Despite anything to the contrary contained in these terms and conditions or any other rights which the Contractor may have:

- (a) where the either or both of the Client and the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and the Guarantor agree to mortgage or charge all of their joint or several interest in the said land, realty or any other asset to the Contractor or the Contractor's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. Both the Client and the Guarantor acknowledge and agree that the Contractor (or the Contractor's nominee) shall be entitled to lodge an absolute caveat, which caveat shall be withdrawn once all payments and other amounts due hereunder have been met;
- (b) should the Contractor elect to proceed in any manner in accordance with this clause 12, the Client and Guarantor shall indemnify the Contractor from and against all the Contractor's costs and disbursements including legal costs on a solicitor and own client basis; and
- (c) the Client and the Guarantor irrevocably nominate, constitute and appoint the Contractor or the Contractor's nominee as the Client's and Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 12.1.

- 12.2. In addition to clause 12.1, the Client and the Guarantor (collectively “**the Grantor**”) grant to the Contractor (the “**Secured Party**”) a general Security Interest in all of the Grantor’s present and after acquired property and a Purchase Money Security Interest in all Materials for the purpose of securing the Grantor’s payments to the Secured Party pursuant to the Agreement.
- 12.3. The Secured Party may at any time register a Financing Statement or Financing Change Statement in respect of a Security Interest and the Grantor waives the right to receive notice or a Verification Statement in relation to any registration on the register of a Security Interest.
- 12.4. The Grantor undertakes to:
- (a) do anything (in each case, including executing any new document or providing any information) that is required by the Secured Party for the purposes of perfecting and maintaining the Secured Party’s perfected Security Interests on the PPSR; and
 - (b) not register a Financing Change Statement in respect of a Security Interest contemplated or constituted by these terms and conditions in its own favour or that of a third party without the Secured Party’s prior written consent.
- 12.5. If Chapter 4 of the PPSA would otherwise apply to the enforcement of a Security Interest arising in connection with the Agreement, the Grantor agrees that the following provisions of the PPSA shall not apply to the enforcement of the Agreement:
- (i) Section 95 (notice of removal of accession), to the extent that it requires the Secured Party to give a notice to the Grantor;
 - (ii) Section 96 (when a person with an interest in the whole may retain an accession);
 - (iii) Subsection 121(4) (enforcement of liquid assets – notice to grantor);
 - (iv) Section 125 (obligation to dispose of or retain collateral);
 - (v) Section 130 (notice of disposal of collateral), to the extent that it requires the Secured Party to give a notice to the Grantor;
 - (vi) Section 132(3)(d) (contents of statement of account after disposal);
 - (vii) Section 132(4) (statement of account if no disposal);
 - (viii) Section 135 (notice of retention of collateral);
 - (ix) Section 142 (redemption of collateral); and
 - (x) Section 143 (reinstatement of Security Agreement).

13. Termination

- 13.1. The Contractor may terminate the Agreement by giving written notice to the Client. On giving such notice the Contractor shall repay to the Client any sums received in respect of the Price for any portion of the Works not completed or Materials not supplied. The Contractor shall not be liable for any Loss whatever arising from such termination.
- 13.2. The Client may not terminate any part of the Works or Materials without the express written consent of the Contractor and shall be liable for all costs of such cancellation. This clause shall not apply to a material and substantial default by the Contractor under its obligations in these terms and conditions.

14. Privacy Act 1988 (Cth)

- 14.1. The Client and the Guarantor/s agrees to the Contractor obtaining from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by the Contractor.
- 14.2. Either or both of the Client and the Guarantor/s agrees that the Contractor may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for any or all of the following purposes:
- (a) to assess an application by Client;
 - (b) to notify other credit providers of a default by the Client;
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and
 - (d) to assess the credit worthiness of either or both of the Client and Guarantor/s.
- 14.3. The Client consents to the Contractor, as a credit provider, being given credit eligibility information in accordance with section 21G(3)(c)(i) of the *Privacy Act 1988*.

- 14.4. The Client agrees that personal credit information provided may be used and retained by the Contractor for any or all of the following purposes and for other purposes as is agreed between the Client and Contractor or required by law from time to time:
- (a) provision of services to the Client;
 - (b) analysing, verifying or checking the Client's credit, payment/or status in relation to provision of goods;
 - (c) processing of any payment instructions, direct debit facilities or credit facilities requested by Client; and
 - (d) enabling the daily operation of Client's account or the collection of amounts outstanding in the Client's account in relation to the provision of any services to the Client.

15. Confidential Information

- 15.1. A Party ("the Receiving Party") shall not, without the prior written approval of the other Party, disclose the other Party's ("the Disclosing Party") Confidential Information.
- 15.2. The Receiving Party shall not be in breach of clause 15.1 in circumstances where it is legally compelled to disclose the Disclosing Party's Confidential Information.
- 15.3. The Receiving Party shall ensure that its employees, agents, and any sub-contractors engaged for the purposes of this Agreement, do not make public or disclose the Disclosing Party's Confidential Information.
- 15.4. Notwithstanding any other provision of this clause 15, the Parties may disclose the terms of this Agreement to its employees, related companies, solicitors, auditors, insurers or accountants, and shall ensure that every person to whom that disclosure is made uses that information solely for purposes relating to this Agreement.

16. Intellectual Property

- 16.1. The Client acknowledges that, unless and the extent stipulated to the contrary in the Agreement, the Contractor retains all Intellectual Property rights including but not limited to, all Intellectual Property rights associated with the Works and any Material(s) or Confidential Information supplied by the Contractor to the Client.
- 16.2. All right and title to any Intellectual Property (including any improvements and advancements to any Intellectual Property) made, developed, created, formed, established, manufactured, derived, attained or improved by the Client for the purposes of this Agreement, shall remain the property of the Contractor.
- 16.3. The Client must not use or obtain any benefit from the Contractor's Intellectual Property unless such use is consented by the Contractor for the purposes of this Agreement.
- 16.4. The Contractor may take photographs of the Works and Materials and the Client unconditionally and irrevocably licences the Contractor to use these photographs together with the Client corporate logo's or insignia in any Contractor media or marketing material. The Client will provide reasonable access to the Site post Completion Date for the Client to take photographs.

17. Limitation of Liability and Indemnity

- 17.1. The Client agrees that the maximum liability in any circumstance is an amount equal to the Price and the Contractor and its Servants shall not be liable to the Client for any actions, claims, or loss in any way arising out of or relating to the Works or Materials for an aggregate amount greater than the Price.
- 17.2. In no event shall the Contractor or its Servants be liable for special, incidental, indirect, consequential or punitive damages, costs expenses or losses of any kind, lost profits, lost revenue, loss of management time, opportunity costs or failure to realise anticipated savings.
- 17.3. The Contractor shall take due care with all of the Client's goods and equipment at the Site however in no case shall the Contractor be liable for any Loss, action or claim in relation to such goods and equipment.
- 17.4. The provisions of this clause 17 shall apply regardless of the form of any Loss, action or claim whether in contract, statute or tort (including, without limitation, negligence) or otherwise. To the extent that the provisions of this clause 17 refer to persons other than the Contractor, the Contractor holds the benefit of this clause 17 on trust for them.
- 17.5. The Client continually indemnifies the Contractor and it's Servants against any claim or proceeding that is made, threatened or commenced, and against any liability, Loss, damage or expense (including legal costs on a full indemnity basis) any of them incurs or suffers, as a direct or indirect result of any of the following:
- (a) a breach of this Agreement including any warranty by the Client;
 - (b) a wilful, unlawful or negligent act or omission by the Client or a Servant of the Client;
 - (c) damage to or loss of any of the Contractor's property.

18. Client's Waiver

- 18.1. The Client warrants that it has not relied on any representation made by the Contractor in any form (including but not limited to the Contractor's design, annotations, brochures, website, any descriptions, illustrations or specification or any other documentation provided by the Contractor) or upon any descriptions, illustrations or specifications or any other documentation provided by the Contractor which has not been stated expressly in these terms and conditions or the Quotation.
- 18.2. The Client acknowledges and agrees that, to the extent the Contractor has made any representation which is not otherwise expressly stated in these terms and conditions, the Agreement or in any other document, the Client has been provided with an opportunity to independently verify the accuracy of that representation.
- 18.3. The Client waives any right to rescind, terminate or cancel the this Agreement with the Contractor or to sue for damages or to claim restitution arising out of any misrepresentation made to the Client by the Contractor and the Client acknowledges that it is relying on its own skill and judgment when ordering the Works.

19. Dispute Resolution

19.1. Disputes Unrelated to Payment

- (a) If any dispute arises out of or in connection with these terms and conditions or the interpretation of its provisions ("**Dispute**"), a Party cannot commence any court proceedings relating to a dispute unless this clause has first been complied with, except where that Party seeks urgent interlocutory relief.
- (b) A Party claiming that a Dispute has arisen under or in relation to the Agreement must give notice in writing to the other party specifying the nature of the Dispute.
- (c) On receipt of that notice by the other Party, all of the Parties must use all reasonable efforts to expeditiously resolve the Dispute.
- (d) If the Parties have not resolved the dispute within ten (10) days of receipt of the notice referred to in clause 19.1(b), or further period as is agreed in writing by them, the Dispute must (at the instigation of any Party) go to arbitration in accordance with the *Commercial Arbitration Act 2012* and clauses 19.1(e) and (f).
- (e) The arbitrator appointed to resolve the dispute shall be:
- (i) either as agreed in writing by the Parties; or
 - (ii) failing agreement within seven (7) days of a request by any Party to do so, then as appointed by the President for the time being of the Law Society of Western Australia, or his nominee.
- (f) The costs of the arbitrator shall be borne equally by the parties to the Dispute and each Party must bear its own legal costs.

19.2. Dispute Relating to Payment

- (a) For the purpose of this clause 19.2 "**Security of Payment Act**" means legislation applying in the jurisdiction where the Works take place, that has amongst its objectives the creation of a statutory entitlement to progress payments for the performance of construction work or provides procedures for determining or securing payment of that entitlement, pending any final assessment under the relevant construction contract.
- (b) Where a Dispute relates to payment:
- (i) any amount, whether partial or otherwise that is not disputed must be paid strictly in accordance with the terms of payment set out in the Agreement; and
 - (ii) the provisions of the *Construction Contracts Act 2004 (WA)* and any other relevant Security of Payment Act relating to disputes and adjudication shall apply.
- (c) The Client must ensure that the Contractor immediately receives a copy of any written (including electronic) communication the Client receives from any other party in relation to the Security of Payment Act.
- (d) If the Contractor makes an application under the Security of Payment Act for any form of adjudication and the parties are permitted to agree under their contract:
- (i) on the identity of the person or organisation to carry out or to nominate to carry out the adjudication, it is hereby agreed that such adjudicator or nominating person shall be the person nominated by the President for the time being of the Law Society of Western Australia or his nominee; and
 - (ii) on the type of security to be given by a respondent to secure payment of a determination by an adjudicator in lieu of direct payment, it is hereby agreed that such security shall be in the form of an unconditional undertaking given by a bank.

- (e) Where the Contractor suspends the Works pursuant to the Security of Payment Act such suspension shall not be deemed to be an act or omission of the Contractor and the Client shall indemnify the Contractor accordingly.
- (f) In the event the Contractor refers any invoices or claims for payment to adjudication under the Security of Payment Act, then the amount of any determination by an adjudicator appointed under the relevant Act in respect of that invoice or claim shall not limit the rights of the Contractor to claim further amounts due in respect of such claim or invoice
- (g) Nothing in the Agreement is intended to have the effect of contracting out of any provisions of any Security for Payment Act except to the extent permitted by law.

20. Order of Precedence

- 20.1. The Client agrees that, notwithstanding any terms and conditions of any document provided by the Client to the Contractor purportedly regulating the legal relations between them, the Quotation and these terms and conditions shall prevail and the Contractor shall only be bound by the terms and conditions of such documents to the extent, not inconsistent with the Quotation and these terms and conditions, that the Contractor agrees with the Client in writing to be so bound.
- 20.2. The documents comprising the Agreement shall be read in the following order of precedence:
 - (a) the Quotation; and
 - (b) these terms and conditions.

21. General

- 21.1. 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.
- 21.2. The words "including" and "include" shall be construed as being without limitation.
- 21.3. These terms and conditions and the Agreement shall be governed by the laws of Western Australia and are subject to the jurisdiction of the courts of Western Australia.
- 21.4. The Contractor reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change shall take effect from the date on which the Contractor notifies the Client of such change.
- 21.5. Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 21.6. The failure by the Contractor to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Contractor's right to subsequently enforce that provision.
- 21.7. The covenants, agreements and obligations contained in these terms and conditions shall not merge or terminate upon the termination of the terms and conditions and to the extent that they have not been fulfilled or satisfied or are continuing obligations they shall remain in force and effect.

Appendix – Conditions of Works and Supply of Materials

All Works and Materials provided by the Contractor to the Client are subject to the following conditions unless otherwise agreed in writing:

- (a) the Contractor being given clear, continuous and unimpeded access to the Site for the duration of the Works;
- (b) all building and structural requirements including penetrations, patching and fireproofing being met by the Client unless agreed otherwise;
- (c) secure storage facilities for Materials delivered to Site prior to installation being provided by the Client at no cost to the Contractor;
- (d) where excavation is required the following works being excluded:
 - (i) removal of rocks, stumps or other foreign materials;
 - (ii) shoring and dewatering for any reason;
 - (iii) repairs to any existing services including through ground compaction; and
 - (iv) repair or replacement of existing ground surfaces,
- (e) work hours for performance of the Works being 8.30 am to 5.30 pm on normal business days in the state in which the Works are being performed; and
- (f) all amenities including toilets, break rooms, safety officers, pen men, rubbish bins and site cleaning to be provided by the Client at no cost to the Contractor.