

THE DRAINAGE DEPARTMENT LIMITED - TERMS AND CONDITIONS

1. Definitions

In these Terms the defined terms have the following meanings:

"Contractor" means the Drainage Department Limited, its successors and assigns or any person acting on behalf of and with the authority of the Drainage Department Limited"

"Customer" means the person, company or entity purchasing the Services and/or Materials supplied by the Contractor to the Customer.

"Materials" means goods that are sold by the Contractor to the Customer in the course of providing the Services.

"PPSA" means the Personal Property Securities Act 1999.

"Services" means all drainage and earthworks services and any required Materials to complete the Services provided by the Contractor to the Customer.

"Terms" means these terms and conditions.

"Works" means the work to be undertaken by the Contractor in the course of providing the Services to the Customer.

2. Terms

2.1 These Terms (together with any collateral written agreement entered into by the parties) shall apply to and govern the supply of all Materials and Services by the Contractor to the Customer.

2.2 These Terms may only be varied in writing signed by a duly authorised signatory of the Contractor and no other employee, agent or representative of the Contractor shall have any authority to amend, modify or add to these Terms.

2.3 The Contractor reserves the right at any time and from time to time to amend, vary or add to these Terms in the manner set out in clause 2.2 with effect from the date of notification to the Customer.

3. Acceptance

3.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of any Works.

3.2 After acceptance by the Contractor no order may be cancelled or amended without the prior approval of the Contractor and then only on the terms specified by the Contractor.

3.3 Subject to clause 10.4, the Customer accepts that where required, any specific site conditions or work practices requested by local iwi shall be observed.

3.4 The Customer acknowledges and agrees that it is their sole responsibility to obtain the required approvals and permits from local council or Government for the Contractor to provide the Services. The Contractor will not be liable for the Customer's failure to comply with this clause 3.4.

4. Provision of the Services

4.1 Subject to clause 4.2, the Contractor will endeavour to deliver the Services within the timeframes requested by the Customer, but delivery time shall not be of the essence. The time specified by the Contractor for delivery of the Services is an estimate only and the Contractor will not be liable for any loss or damages incurred by the Customer as a result of the delivery being late.

4.2 The Services' 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 where completion is delayed by an event beyond the Contractor's control, including but not limited to any failure by the Customer to:

- (a) have the site ready for the Services; or
- (b) notify the Contractor that the site is ready.

4.3 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. The Contractor shall be entitled to, in its sole discretion, charge for the entire quoted Services even if the Services have not been completed in full

4.4 Subject to clause 4.1, both parties agree that they shall make every endeavour to enable the Services 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 Services 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 Services at a later time and date, and/or for storage of the Materials.

4.5 The Customer will ensure that the Contractor has clear and free access to the site at all times to enable the Contractor to undertake the Services. The Contractor shall not be liable for any damage to the site unless due to the Contractor's negligence.

4.6 It shall be the Customer's responsibility (where applicable) to ensure that, prior to commencement of the Services by the Contractor:

- (a) all gas and electricity are cancelled and disconnected (from the main supply at the street); and
- (b) a safety fence is erected around the perimeter of the site to ensure public safety; and
- (c) investigate local laws in relation to the pruning and/or removal of trees, and (where necessary) obtain (at the expense of the Customer) all permits, licenses and approvals that may be required for the Services. Temporary fences may need to be erected around the circumference of the tree, and if so, the Customer shall arrange the erection in conjunction with the Contractor; and
- (d) the Customer will supply temporary lighting, telecommunications, compressed air, lighting, toilet, waste disposal amenities, eating and first aid facilities if required.

4.7 Notwithstanding clause 4.7(c) the Customer acknowledges and agrees to advise the Contractor prior to commencement of any Services where the removal of any trees

5. Price

5.1 The Contractor may charge the Customer by any of the following three means:

- (a) based on an hourly rate (as disclosed to the Customer prior to the commencement of the Services);
- (b) in accordance with a quote provided to the Customer prior to the commencement of the Services;
- (c) in accordance with an estimate provided to the Customer prior to the commencement of the Services. Such estimate differs from quoted work as it is more likely to fluctuate.

5.2 The Contractor reserves the right to decide on which basis it will invoice the Customer for the provision of Services.

5.3 For avoidance of doubt, any increases in the cost of supply of the Materials (including without limitation increases in the price of Materials not held in stock by the Contractor

or due to variations in exchange rates, the cost of labour, freight, handling or insurance or any duties or taxes) between the date of acceptance of the order and the date of delivery of the Materials shall be borne by the Customer.

5.4 Any discounts or rebates on the price offered by the Contractor are conditional on payment being made on or before due date. If the Customer fails to comply with that condition, payment of the full amount of the price shall become immediately due and payable.

5.5 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 Services originally scheduled (including any applicable plans or specifications) is requested; or
- (c) where additional Services are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, inclement weather, limitations to accessing the site, availability of machinery, safety considerations, prerequisite work by a third party not being completed, hard rock or other barriers below the surface, latent soil conditions, iron reinforcing rods in concrete, or hidden underground services, etc.) which are only discovered on commencement of the Services.

5.6 In conjunction with clause 5.2, the Contractor reserves the right to treat as a variation any additional Services required, or delay to the Works, due to circumstance outside the Contractor's control.

6. Variations

6.1 In the first instance, the Contractor will charge for variations based on the Contractor's hourly rate.

6.2 Where the Contractor considers, in its sole discretion, that time permits 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 five (5) 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.

6.3 In the event that the Contractor is required by the Customer to provide the Services urgently, that may require the Contractor and/or its employees 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 Client additional labour costs (penalty rates will apply), unless otherwise agreed between the Contractor and the Customer.

6.4 No allowance has been made in the Price for the deduction of retentions. In the event that retentions are made, the Contractor reserves the right to treat all retentions as placing the Customer's account into default.

7. Payment

7.1 At its sole discretion, the Contractor may require payment of a non-refundable deposit prior to commencement of the Services. If a deposit is payable the deposit percentage required will be noted on the Contractor's invoice provided to the Customer.

7.2 At its discretion the Contractor may require payment for the Materials and Services by any of the following three means:

- (a) payment on arrival of the Contractor's invoice.
- (b) payment within 7 days of receipt of the Contractor's invoice.
- (c) payment of the Contractor's invoice on the 20th day of the month following the date of invoice.
- (d) The date specified on the invoice or other form as being the date for payment.

7.3 In the case of the Customer tendering payment by a cheque, payment shall not have been made until the cheque is honoured on presentment and the moneys payable under it are received in the Contractor's bank account in cleared funds. Until such time receipt of the cheque shall not prejudice or affect the Contractor's rights or remedies against the Customer or the Materials.

7.4 Time is of the essence of the payment obligations of the Customer. Subject to clause 7.2, the Contractor may require payment on completion of the Services; or by way of progress payments. If payment is overdue that shall constitute a breach of these Terms and the Customer will upon demand pay to the Contractor interest on any overdue payment at the rate of 12% per annum from the date that payment was due until payment in full is received by the Contractor.

7.5 If payment is overdue the Contractor may, in addition to its other remedies, require payment in cash on or before the performance of any Services ordered by the Customer under any contract, or withhold the performance of any such Services until the Customer has paid or discharged all sums owing to the Contractor.

7.6 The Contractor at its discretion may apply any payments it receives from the Customer in and towards the satisfaction of any indebtedness of the Customer and it shall not be bound by any terms or qualifications that the Customer may make in relation to payments made under this or any other contract with the Contractor.

8. Guarantee

The Customer shall, if required by the Contractor, arrange for the Customer's liability to be guaranteed by third persons or secured by securities on terms satisfactory to the Contractor. This requirement may be imposed by the Contractor at any time and the Contractor may withhold the delivery of any Services under any contract pending its fulfillment to the satisfaction of the Contractor.

9. Underground Locations

9.1 Prior to the Contractor commencing any of the work the Customer must advise the Contractor of the precise location of all underground services on the site and have these underground services clearly marked for the Contractor at the time of the commencement of the Services. The required underground mains and services that 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 and any other services that may be on site.

9.2 While the Contractor will take due care to avoid damage to any of the underground services on site, the Customer agrees that the Contractor will not be held liable and will indemnify the Contractor in respect of all claims, liability, loss, damage, costs and fines as a result of damage to services on the site.

10. Risk

10.1 The Contractor shall be entitled to rely on the accuracy of any plans, specifications, geotechnical reports 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 will accept no responsibility of any loss, damages, or costs however resulting from the inaccurate information provided.

- 10.2 The Customer acknowledges that the Contractor will not be held liable for small amounts of rubbish, and the like, remaining at the site.
- 10.3 The final location for drilling or excavation must be determined on site by the Customer and is the Customer's sole responsibility. If during the drilling operation, and as a result of extraordinary down hole issues, the Contractor decides (based on industry experience) that the risk is too great to continue the hole, the Contractor shall advise the Customer of the risks of continuing. Where such advice is not acted on and the Contractor is required to continue, the Contractor will request for written confirmation from the Customer. The Contractor shall not be liable in any way for any damages or losses that occur after any continuance of the Services, and the Contractor shall be reimbursed for any equipment lost at landed, new cost price of the replacement equipment.
- 10.4 In the event that during the course of the Services the Contractor discovers any fossils, artefacts or any other remains of cultural, geological or archaeological interest then the Contractor reserves the right to halt all Services and immediately notify the Customer. The Customer accepts and agrees that all additional costs that may be incurred by the Contractor as a result of any such delays shall be borne by the Customer and shall be treated as a variation in accordance with clause 6 above.
- 10.5 In the event that during the course of the Services the Contractor discovers any undisclosed waste and/or hazardous materials then the Contractor reserves the right to halt all Services and immediately notify the Customer. It shall be the responsibility of the Customer to arrange the removal of all such materials. In the event that the Contractor agrees to remove such materials for the Customer then this shall be treated as a variation in accordance with clause 6 and shall be in addition to the Price.
- 10.6 The Customer agrees to indemnify the Contractor from any damage caused by any other tradesman during and after the completion of the Services. If the Customer instructs the Contractor to rectify any damage caused by any other tradesman, this will become a variation to the original quotation and will be charged at the Contractor's normal hourly rate.
- 10.7 The Contractor will take all reasonable precautions against fire during site gas cutting, welding, and other installation procedures. Insurance of buildings and contents etc., and any items installed during installation shall be the responsibility of the Customer.
11. **Title**
- 11.1 Property in all Materials shall pass to the Customer when the Materials are paid for in cleared funds and all risk of any loss or damage or deterioration in respect of the Materials shall pass to the Customer upon delivery to the Customer.
- 11.2 The Customer grants a security interest over all present and after-acquired Materials supplied by the Contractor and their proceeds as security for payment of the price of those Materials and Services.
12. **Repossession**
- 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 where any event of default specified in clause 15 occurs or the Materials are at risk (as defined by section 109 of the PPSA and for that purpose it shall have the irrevocable right or licence by its agents servants and employees to enter the premises of the Customer or any other premises where the goods are situated (including any premises, land and buildings that the Customer may enter upon) without being liable in any way to the Customer, and the Customer shall indemnify the Contractor upon demand for all claims by any third party for any losses resulting from the Contractor effecting repossession.
13. **Enforcement Costs**
- The Customer will upon demand pay all the Contractor's expenses and legal costs (on a solicitor/agent/client basis) in or in connection with the registration of a financing statement or financing change statement relating to the security interest created by these terms or obtaining an order under section 167 of the PPSA or the collection of overdue moneys or the exercise, enforcement or preservation of any right or interest under these terms or any other contract with the Customer.
14. **Demand and Notices**
- Demand may be made of, or notice given to, the Customer by the Contractor posting, or emailing a letter or invoice to the Customer at the Customer's last known postal or email address, which shall be deemed to be received by the Customer two days after the date of posting of the letter or invoice, and in the case of an email, provided that the Contractor receives no notification that the email address is invalid.
15. **Default**
- 15.1 The Contractor shall be entitled to suspend or cancel all or any part of the contract recorded in these Terms and/or any other contract or contracts with the Customer, in addition to its other remedies, upon the happening of any of the following events of default:
- if any amounts payable by the Customer to the Contractor are overdue; or
 - if the Customer fails to meet any obligation under these Terms or any other contract with the Contractor; or
 - if the Customer becomes insolvent; or
 - if a receiver or Official Assignee is appointed in respect of the assets of the Customer; or
 - if an arrangement with the Customer's creditors is made or likely to be made; or
 - if the Customer ceases or threatens to cease carrying on business; or
 - if the ownership or effective control of the Customer is transferred, or the nature of the Customer's business is materially altered.
- 15.2 Upon cancellation of the contract recorded in these Terms all sums owing by the Customer to the Contractor shall become immediately due and payable.
- 15.3 Where any event of default occurs, the Contractor may appoint a receiver in respect of all Materials (including their proceeds) supplied to the Customer and any such receiver may take possession of the Materials and sell them and otherwise exercise all rights and powers conferred on a receiver by law.
16. **Claims**
- Where the Consumer Guarantees Act 1993 ("CGA") applies, the Customer shall have the benefit of all the guarantees and rights and remedies provided under the CGA, but no others. Where the Customer acquires, or holds themselves out as acquiring, the Materials or Services for business purposes, the CGA shall not apply.
17. **Warranties**
- 17.1 No guarantee or warranty is given, and no obligation incurred, by the Contractor in respect of Materials or components not manufactured by the Contractor, in respect of which the Customer shall only be entitled to the benefit of any guarantee or warranty given to the Contractor by the manufacturer or supplier provided the Contractor shall not be required to pay or incur any cost in relation thereto.
- 17.2 All Services are provided in good faith on the basis of the information provided by the Customer. Where the Contractor is requested by the Customer to provide casual advice about the Materials or Services not used in conjunction with the Services and not constituting the formal provision by the Contractor of the Services then the Contractor shall have no liability whatsoever in relation to any such advice given and the Customer shall rely solely on its own judgment in connection with all such matters.
- 17.3 If the Customer alleges defects in the Contractor's workmanship then the Customer shall forthwith after becoming aware of the same notify the Contractor in writing. Failure to so notify the Contractor in writing shall constitute a waiver by the Customer of its rights against the Contractor in respect of any such alleged defect.
- 17.4 The Contractor shall have no liability where any Services performed or Materials supplied have been re-installed, modified, not maintained or improperly maintained or improperly used. Any rectification work required to be carried out by the Contractor shall be carried out at a place and at a time stipulated by the Contractor and the Customer shall be responsible for delivering the Materials, as the case may be, to that place by that time.
- 17.5 No guarantee, warranty, representation or statement shall be binding on the Contractor unless made in writing by a director or senior officer of the Contractor. Except as expressly set forth in these Terms, all warranties and conditions, whether implied by law or otherwise, are excluded and the Contractor shall have no liability whatsoever to the Customer. The Contractor shall not be liable to the Customer for any indirect, special or consequential loss or damage (whether for loss of profit or otherwise) even if such loss were reasonably foreseeable or the Contractor had been advised of the possibility of the Customer incurring the same.
18. **Liability**
- 18.1 The Contractor shall have no liability to the Customer in respect of any defect arising from misuse, wilful damage, negligence, failure to follow instructions, unauthorised alteration or modification, abnormal working conditions or fair wear and tear.
- 18.2 The Contractor shall have sole right to decide whether Materials are capable of repair and the Contractor's liability (if any) in respect of Materials shall be limited as follows:
- where Materials are capable of repair, to the repair of the Materials or the payment of the cost of having the Materials repaired; or
 - where Materials are incapable of repair, to the replacement of the Materials or supply of equivalent goods or the payment of the cost of replacing the Materials or acquiring equivalent Materials.
- 18.3 If it shall be held that the Contractor has any liability to the Customer then the liability of the Contractor to the Customer shall not exceed the value of invoice provided to the Customer by the Contractor in relation to the specific Materials and Services provided to the Customer in question.
- 18.4 The Contractor shall have no liability arising from, and may correct at any time, any typographical, clerical or other error or omission in any sales literature, price list, quotation, invoice, communication or other document or information issued by it.
- 18.5 The Customer agrees to indemnify and hold harmless the Contractor, its directors and employees, from and against any claims, damages, cost and liabilities and expenses (including but not limited to reasonable lawyers' fees) and liability asserted against the Contractor.
19. **Product Disclaimer**
- 19.1 The Contractor takes no responsibility for the warranty, repair, and replacement or any problem resulting where by a product is supplied by the Customer. Such product may be installed by the Contractor as per the manufacturer's instruction, but any fault, malfunction or manufacturer's warranty issue is the sole responsibility of the Customer. Any labour and/or materials required in any rectification work will be charged to the Customer as an extra. Should the Customer wish to claim the costs, the Customer must first pay the Contractor's invoice, following which the Customer can claim reimbursement from the importer, wholesaler or other third party as the case may be.
20. **PPSA**
- 20.1 The Customer will provide such information and do such acts and execute such further documents as in the opinion of the Contractor may be necessary or desirable to enable the Contractor to perfect under the PPSA the security interest created by these Terms (and in particular clause 11) as a first priority interest or with such other priority as the Contractor may agree in writing.
- 20.2 The Contractor may do all things which it thinks desirable to remedy any default by the Customer or otherwise protect the Materials or the security interest created by these Terms.
- 20.3 The Customer irrevocably appoints the Contractor to be the Customer's attorney to do anything which the Customer agrees to do under these Terms and anything which the attorney thinks desirable to protect the Contractor's interests under these Terms and the Customer ratifies anything done by an attorney under this clause 20. The Customer agrees sections 114 (1) (a), 133 and 134 of the PPSA shall not apply to these Terms or the security under these Terms.
- 20.4 The Customer waives the Customer's right to receive a copy of the verification statement confirming registration of a financing statement or a financing change statement relating to the security interest created by these terms.
- 20.5 The Customer agrees that none of the Customer's rights as debtor under sections 114(1)(a), 116, 117(1)(c), 119, 120(2), 121, 125, 126, 127, 129, 131, 132 and 133 of the PPSA shall apply to these Terms.
- 20.6 The Customer also agrees, where the Contractor has rights in addition to those in Part 9 of the PPSA, those rights will continue to apply.
- 20.7 The Customer must not change the Customer's name without first notifying the Contractor of the new name not less than 7 days before the change takes effect.
- 20.8 The Customer must not allow or permit the creation of a lien over any of the Materials.
21. **Insurance**
- 21.1 Unless otherwise stated in writing, Contractor shall not be responsible for loss or damage that occurs due to burglary, fire, water accident or any other cause to the Customer's property when left in the Contractor's custody, and it shall not be obligatory on the part of the Contractor to ensure or exercise special care with the Customer's property.
- 21.2 The Contractor shall have public liability insurance. It is the Customer's responsibility to ensure that they are similarly insured during the course of the Works.
22. **Miscellaneous**
- 22.1 New Zealand law governs these Terms and New Zealand Courts have non-exclusive jurisdiction.
- 22.2 These Terms remain in force notwithstanding any neglect, forbearance or delay in enforcement. The Contractor shall not be deemed to have waived any term or condition unless such waiver shall be in writing and signed by a director of the Contractor and any such waiver shall apply only to the particular transaction to which it refers.
- 22.3 If any clause or provision of these Terms shall be held illegal or unenforceable by any judgment of any Court or Tribunal having competent jurisdiction, such judgment shall not affect the remaining provisions hereof which shall remain in full force and effect as if such clause or provision held to be illegal or unenforceable had not been included herein.
- 22.4 The Customer may not may assign or transfer any of its rights under these Terms without the prior written consent of the Contractor.
- 22.5 If either party is unable by reason of a force majeure event (being events or circumstance beyond that party's reasonable control) to carry out any obligation under these Terms, it shall promptly notify the other party and:
- 22.6 if no resolution can be found the obligation of the party claiming force majeure shall be suspended during the time and to the extent that the party is prevented from or delayed in complying with the obligation; and
- 22.7 the party claiming force majeure shall use reasonable endeavours to remove or mitigate such force majeure at the earliest possible time and shall notify the other party of the expiry of the period as soon as possible.
- 22.8 For avoidance of doubt, the Construction Contracts Act 2002 applies to the relationship between the Contractor and the Customer.

