

Brownmore Construction Limited – Terms & Conditions of Trade

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 Brownmore Construction Limited, its successors and assigns or any person acting on behalf of and with the authority of Brownmore Construction Limited.
 - 1.3 **"Client"** means the persons, entities or any person acting on behalf of and with the authority of the Client 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 Client, is a reference to each Client jointly and severally; and
 - (b) if the Client is a partnership, it shall bind each partner jointly and severally; and
 - (c) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
 - (d) includes the Client's executors, administrators, successors and permitted assigns.
 - 1.4 **"Works"** means all building consultation, manufacturing and/or installation services or Materials supplied by the Contractor to the Client at the Client's request from time to time (where the context so permits the terms "Works" or "Materials" shall be interchangeable for the other).
 - 1.5 **"Worksite"** means the address nominated by the Client to which the Materials are to be supplied by the Contractor.
 - 1.6 **"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.
 - 1.7 **"Non-Conforming Building Product"** means building material, product, or component that is not 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.
 - 1.8 **"Confidential Information"** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party's intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, contracts, client information (including but not limited to "Personal Information" such as name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
 - 1.9 **"Cookies"** means small files which are stored on a user's computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website, and can be accessed either by the web server or the client's computer. **If the Client does not wish to allow Cookies to operate in their browser, the Client must adjust their browser's settings. In this case, the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**
 - 1.10 **"Price"** means the Price payable (plus any Goods and Services Tax ("GST") where applicable) for the Works as agreed between the Contractor and the Client in accordance with clause 5 below.
2. **Acceptance**
 - 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of any Works.
 - 2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
 - 2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
 - 2.4 The Client acknowledges and accepts that the supply of:
 - (a) Works on credit shall not take effect until the Client 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 Client'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 vary the Price with alternative Materials as per clause 5.2. The Contractor reserves the right to halt all Works until such time as the Contractor and the Client agree to such changes. The Contractor shall not be liable to the Client for any loss or damage the Client suffers due to the Contractor exercising their rights under this clause.
 - 2.5 Where the Contractor gives 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 Client, or the Client'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 Client 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.
 - 2.6 Either party 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. **Errors and Omissions**
 - 3.1 The Client 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.
 - 3.2 In the event such an error and/or omission occurs in accordance with clause 3.1, and is not attributable to the negligence and/or willful misconduct of the Contractor, the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.
4. **Change in Control**

The Client shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, change of trustees, or business practice). The Client shall be liable for any loss incurred by the Contractor as a result of the Client's failure to comply with this clause.
5. **Price and Payment**

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 Works performed or Materials supplied; or
 - (b) the Contractor's quoted Price (subject to clause 5.2) which shall be binding upon the Contractor provided that the Client shall accept the Contractor's quotation in writing within thirty (30) days.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 conditions, limitations to the Worksite access, inaccurate measurements, plans or specifications supplied by the Client, safety considerations, availability of equipment, additional excavation required work prior to pouring, additional labour when concrete is required to be manually wheel barrowed from the delivery vehicle, ground conditions are unsuitable or reactive, hard rock or other barriers below the surface 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.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 Client 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. At the Contractor's sole discretion, a non-refundable deposit may be required. Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by the Contractor, which may be:
 - (a) on completion of the Works;
 - (b) for certain approved Clients, due twenty (20) days following the end of the month in which a statement is posted to the Client's address or address for notices;
 - (c) a date specified on any invoice or other form as being the date for payment; or
 - (d) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by the Contractor.At the agreement of both parties, payment of the Price may be subject to retention by the Client of an amount (hereafter called the "Retention Money"), being a set amount or equal to a percentage of the Price. The Client shall hold the Retention Money for the agreed period following completion of the Works during which time all Works are to be completed and/or all defects are to be remedied. Any Retention Money applicable to this Contract is to be dealt with in accordance with Subpart 2A - sections 18(a) to 18(i) of the Construction Contracts Amendment Act 2015.
 - 8.1 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, or by any other method as agreed to between the Client and the Contractor. The Contractor may in its discretion allocate any payment received from the Client 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 Client 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 that it reserves the maximum value of the Contractor's Purchase Money Security Interest (as defined in the PPSA) in the Materials. The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the 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.
 - 8.2 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to the Contractor an amount equal to any GST the Contractor must pay for any supply under this Contract or for any other agreement for the supply of the Materials. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
6. **Provision of the Works**

Subject to clause 6.2 it is the Contractor's responsibility to ensure that the Works start as soon as it is reasonably possible. The Works' commencement date will be put back and the completion date extended by a number of days, if reasonable in the event that the Contractor claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond the Contractor's control, including but not limited to any failure by the Client to:
 - (a) make a selection; or
 - (b) have the Worksite ready for the Works; or
 - (c) notify the Contractor that the Worksite is ready.At the Contractor's sole discretion, the cost of delivery is either included in the Price or is in addition to the Price. 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. 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 Client as a result of delivery being late. However, both parties agree that they shall make every endeavour to enable the Works to be supplied at the time and place as was arranged between both parties. In the event that the
7. **Worksite Access and Condition**

The Contractor is not responsible for the removal of rubbish from clean-up of the building construction Worksite. All rubbish generated by the Contractor will be placed in a designated area appointed by the Client but the responsibility of removal of same is the Client or the Client's agent, unless otherwise agreed. It is the intention of the Contractor and agreed by the Client that:
 - (a) the Client 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;
 - (b) it is the Client's responsibility to provide the Contractor, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities; and
 - (c) the Client shall contact adjoining neighbours and gain their permission to remove any walls or fences on boundaries and unless otherwise agreed, it shall be the Client's responsibility to organise either temporary fencing and/or security guards to secure the Worksite during the performance of the Works by the Contractor and shall be liable for all costs associated in taking all reasonable precautions to protect against destruction or damage by way of vandalism or theft. Failure to comply with this clause 7.2(c) in the event that the Worksite is destroyed or damaged due to vandalism then the cost of repair or replacement shall be borne by the Client.The Client agrees to be present at the Worksite when and as reasonably requested by the Contractor and its employees, contractors and/or agents. The Client acknowledges and accepts that they shall:
 - (a) remove any tangible items susceptible to damage from the vicinity of the Works (and provide protection where necessary), and agrees that the Contractor shall not be liable for any damage caused to those items through the Client's failure to comply with this clause; and
 - (b) be wholly responsible for animals and/or minors on the Worksite;
 - (c) supply an area suitable for washing out the Contractor's equipment and for depositing all unused concrete and slurry.
9. **Worksite Inductions**
 - (a) in the event the Client requires an employee or sub-contractor of the Contractor to undertake a Worksite induction during working hours, the Client will be liable to pay the hourly charges for that period. If any induction is to be undertaken prior to the commencement date then the Client 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 Client and/or the Client'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 Client and/or third party acting on behalf of the Client must at all times be accompanied by the Contractor.
10. **Measurement of Concreting Works**
 - 10.1 At the completion of the Works the Client or the representative of the Client shall be in attendance and the Works shall then be duly measured. In the absence of either the Client or their representative the Contractor shall carry out the necessary measurements and forward to the Client their calculations. If the Client does not object to the calculations within seven (7) days of receipt of the same then it shall be deemed acceptance of the same and the Works completed.
11. **Underground Locations**

Prior to the Contractor commencing any work the Client must advise the Contractor of the precise location of all underground services on the Worksite and clearly mark the same. The underground mains and services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on the Worksite. Whist the Contractor will take care to avoid damage to any underground services the Client agrees to indemnify the Contractor in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 11.1.
12. **Insurance**

The Contractor shall have public liability insurance of at least ten million dollars (\$10m). It is the Client's responsibility to ensure that they are similarly insured.
13. **Compliance with Laws**

The Client 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 Works, including any WorkSafe health and safety laws relating or any other relevant safety standards or legislation pertaining to the Works. The Client acknowledges and agrees:
 - (a) to comply with the Building Act 2004 (including any subsequent Amendments) 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.Where the Client has supplied products for the Contractor to complete the Works, the Client 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 5.2.
14. **Damage to Works**

The Contractor will take reasonable measures to ensure that the drying of concrete occurs naturally and will form expansion cuts where specified or where this is not specified but are considered necessary. It is the Client's responsibility to organise and be liable for all costs associated with protecting the concrete and shall take all reasonable precautions to protect against destruction or damage by way of vandalism. In the event that the concrete is destroyed or damaged due to vandalism then the cost of repair or replacement shall be borne by the Client. The Contractor shall not be liable for any defect in the Works if the Client does not follow the Contractor's recommendation to:
 - (a) water the concrete for a periodically to limit the risk of possible cracking due to weather conditions;
 - (b) no foot traffic and/or any vehicles on the concrete for a minimum of forty-eight (48) hours but preferably seven (7) days;
 - (c) no heavy furniture to be placed on the concrete area for a minimum of twenty-four (24) hours.The Client acknowledges and accepts that:
 - (a) concrete is a natural product and variations of colour and texture are therefore inherent. The Contractor shall not be liable for any loss, damages or costs howsoever arising resulting from any variation of the colour or texture between different batches of product. The Contractor does not and cannot guarantee the finish, colour or texture of concrete including coloured, exposed aggregate or polished concrete finishes;
 - (b) concrete is a porous material and as a consequence the Contractor cannot be held responsible for holes and pinholes, however numerous, that appear on the surface after completion of the Works;
 - (c) the Contractor can only visually check the concrete and cannot guarantee the mix is free of foreign objects. If the concrete is divided into more than one truck the Contractor cannot guarantee the texture is consistent between trucks; and
 - (d) Materials supplied may:
 - (i) expand, contract or distort as a result of exposure to heat, cold, weather;
 - (ii) mark or stain if exposed to certain substances; and
 - (iii) be damaged or disfigured by impact or scratching.
15. **Accuracy of Client's Plans and Measurements**

The Contractor shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, the Contractor accepts no responsibility for any loss, damages, or costs howsoever resulting from these inaccurate plans, specifications or other information.
16. **Client's Responsibility**

In the event the Client gives information relating to measurements and quantities of the Materials required to complete the Works, it is the Client's responsibility to verify the accuracy of the measurements and quantities, before the Client or Contractor places an order based on these measurements and quantities. The Contractor accepts no responsibility for any loss, damages, or costs howsoever resulting from the Client's failure to comply with this clause.
17. **Contractor's Responsibility**

The Contractor is unable to supply the Works as agreed solely due to any action or inaction of the Client, 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.
18. **Worksite Access and Condition**

The Contractor is not responsible for the removal of rubbish from clean-up of the building construction Worksite. All rubbish generated by the Contractor will be placed in a designated area appointed by the Client but the responsibility of removal of same is the Client or the Client's agent, unless otherwise agreed. It is the intention of the Contractor and agreed by the Client that:
 - (a) the Client 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;
 - (b) it is the Client's responsibility to provide the Contractor, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities; and
 - (c) the Client shall contact adjoining neighbours and gain their permission to remove any walls or fences on boundaries and unless otherwise agreed, it shall be the Client's responsibility to organise either temporary fencing and/or security guards to secure the Worksite during the performance of the Works by the Contractor and shall be liable for all costs associated in taking all reasonable precautions to protect against destruction or damage by way of vandalism or theft. Failure to comply with this clause 7.2(c) in the event that the Worksite is destroyed or damaged due to vandalism then the cost of repair or replacement shall be borne by the Client.The Client agrees to be present at the Worksite when and as reasonably requested by the Contractor and its employees, contractors and/or agents. The Client acknowledges and accepts that they shall:
 - (a) remove any tangible items susceptible to damage from the vicinity of the Works (and provide protection where necessary), and agrees that the Contractor shall not be liable for any damage caused to those items through the Client's failure to comply with this clause; and
 - (b) be wholly responsible for animals and/or minors on the Worksite;
 - (c) supply an area suitable for washing out the Contractor's equipment and for depositing all unused concrete and slurry.
19. **Worksite Inductions**
 - (a) in the event the Client requires an employee or sub-contractor of the Contractor to undertake a Worksite induction during working hours, the Client will be liable to pay the hourly charges for that period. If any induction is to be undertaken prior to the commencement date then the Client 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 Client and/or the Client'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 Client and/or third party acting on behalf of the Client must at all times be accompanied by the Contractor.
20. **Measurement of Concreting Works**
 - 20.1 At the completion of the Works the Client or the representative of the Client shall be in attendance and the Works shall then be duly measured. In the absence of either the Client or their representative the Contractor shall carry out the necessary measurements and forward to the Client their calculations. If the Client does not object to the calculations within seven (7) days of receipt of the same then it shall be deemed acceptance of the same and the Works completed.
21. **Underground Locations**

Prior to the Contractor commencing any work the Client must advise the Contractor of the precise location of all underground services on the Worksite and clearly mark the same. The underground mains and services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on the Worksite. Whist the Contractor will take care to avoid damage to any underground services the Client agrees to indemnify the Contractor in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 11.1.
22. **Insurance**

The Contractor shall have public liability insurance of at least ten million dollars (\$10m). It is the Client's responsibility to ensure that they are similarly insured.
23. **Compliance with Laws**

The Client 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 Works, including any WorkSafe health and safety laws relating or any other relevant safety standards or legislation pertaining to the Works. The Client acknowledges and agrees:
 - (a) to comply with the Building Act 2004 (including any subsequent Amendments) 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.Where the Client has supplied products for the Contractor to complete the Works, the Client 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 5.2.
24. **Damage to Works**

The Contractor will take reasonable measures to ensure that the drying of concrete occurs naturally and will form expansion cuts where specified or where this is not specified but are considered necessary. It is the Client's responsibility to organise and be liable for all costs associated with protecting the concrete and shall take all reasonable precautions to protect against destruction or damage by way of vandalism. In the event that the concrete is destroyed or damaged due to vandalism then the cost of repair or replacement shall be borne by the Client. The Contractor shall not be liable for any defect in the Works if the Client does not follow the Contractor's recommendation to:
 - (a) water the concrete for a periodically to limit the risk of possible cracking due to weather conditions;
 - (b) no foot traffic and/or any vehicles on the concrete for a minimum of forty-eight (48) hours but preferably seven (7) days;
 - (c) no heavy furniture to be placed on the concrete area for a minimum of twenty-four (24) hours.The Client acknowledges and accepts that:
 - (a) concrete is a natural product and variations of colour and texture are therefore inherent. The Contractor shall not be liable for any loss, damages or costs howsoever arising resulting from any variation of the colour or texture between different batches of product. The Contractor does not and cannot guarantee the finish, colour or texture of concrete including coloured, exposed aggregate or polished concrete finishes;
 - (b) concrete is a porous material and as a consequence the Contractor cannot be held responsible for holes and pinholes, however numerous, that appear on the surface after completion of the Works;
 - (c) the Contractor can only visually check the concrete and cannot guarantee the mix is free of foreign objects. If the concrete is divided into more than one truck the Contractor cannot guarantee the texture is consistent between trucks; and
 - (d) Materials supplied may:
 - (i) expand, contract or distort as a result of exposure to heat, cold, weather;
 - (ii) mark or stain if exposed to certain substances; and
 - (iii) be damaged or disfigured by impact or scratching.
25. **Accuracy of Client's Plans and Measurements**

The Contractor shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, the Contractor accepts no responsibility for any loss, damages, or costs howsoever resulting from these inaccurate plans, specifications or other information.
26. **Client's Responsibility**

In the event the Client gives information relating to measurements and quantities of the Materials required to complete the Works, it is the Client's responsibility to verify the accuracy of the measurements and quantities, before the Client or Contractor places an order based on these measurements and quantities. The Contractor accepts no responsibility for any loss, damages, or costs howsoever resulting from the Client's failure to comply with this clause.
27. **Contractor's Responsibility**

The Contractor is unable to supply the Works as agreed solely due to any action or inaction of the Client, 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.

Brownmore Construction Limited – Terms & Conditions of Trade

- 13.4 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.
- 13.5 Notwithstanding clause 13.1 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 Client who has engaged a third party head contractor.
14. **Title**
- 14.1 The Contractor and the Client agree that ownership of the Materials shall not pass until:
- (a) the Client has paid the Contractor all amounts owing to the Contractor; and
- (b) the Client has met all of its other obligations to the Contractor.
- 14.2 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 reconciled.
- 14.3 It is further agreed that:
- (a) until ownership of the Materials passes to the Client in accordance with clause 14.1 that the Client 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 Client holds the benefit of the Client'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 Client must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Materials then the Client must hold the proceeds of any such act on trust for the Contractor and must pay or deliver the proceeds to the Contractor on demand;
- (e) the Client shall not convert or process the Materials or intermix them with other goods unless if the Client does so then the Client 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 Client 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 Client shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of the 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 Client.
15. **Personal Property Securities Act 1999 ("PPSA")**
- 15.1 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:
- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
- (b) a security interest in all Materials and/or collateral (account) – being a monetary obligation of the Client to the Contractor for Works – that have previously been supplied and that will be supplied in the future by the Contractor to the Client.
- 15.2 The Client undertakes to:
- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the 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 and/or collateral (account) 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.
- 15.3 The Contractor and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 15.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA.
- 15.5 Unless otherwise agreed to in writing by the Contractor, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 15.6 The Client shall unconditionally ratify any actions taken by the Contractor under clauses 15.1 to 15.5.
- 15.7 Subject to any express provisions to the contrary (including those contained in this clause 15), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
16. **Security and Charge**
- 16.1 In consideration of the Contractor agreeing to supply the Works, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 16.2 The Client 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.
- 16.3 The Client irrevocably appoints the Contractor and each director of the Contractor as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 16 including, but not limited to, signing any document on the Client's behalf.
17. **Defects in Materials**
- 17.1 The Client 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 Client shall afford the Contractor an opportunity to inspect the Materials within a reasonable time following delivery if the Client believes the Materials are defective in any way. If the Client 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 Client is entitled to reject, the Contractor's liability is limited to either (at the Contractor's discretion) replacing the Materials or repairing the Materials.
- 17.2 Materials will not be accepted for return other than in accordance with 17.1 above.
18. **Warranties**
- 18.1 Subject to the conditions of warranty set out in clause 18.2 the Contractor warrants that if any defect in any workmanship of the Contractor becomes apparent and is reported to the Contractor within twelve (12) months 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 workmanship.
- 18.2 The conditions applicable to the warranty given by clause 18.1 are:
- (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
- (i) failure on the part of the Client to properly maintain any Materials; or
- (ii) failure on the part of the Client to follow any instructions or guidelines provided by the Contractor; or
- (iii) any use of any Materials otherwise than for any application specified on a quote or order form; or
- (iv) the continued use of any Materials after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
- (v) fair wear and tear, any accident or act of God.
- (b) the warranty shall cease and the 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 Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.
19. **Consumer Guarantees Act 1993**
- 19.1 If the Client is acquiring Materials for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 ("CGA") do not apply to the supply of Materials by the Contractor to the Client.
20. **Intellectual Property**
- 20.1 Where the Contractor has designed, drawn, written plans or a schedule of Works, or created any products for the Client, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in the Contractor, and shall only be used by the Client at the Contractor's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of the Contractor.
- 20.2 The Client 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 Client's order and the Client agrees to indemnify the Contractor against any claims taken by a third party against the Contractor in respect of any such infringement.
- 20.3 The Client 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 Client.
21. **Default and Consequences of Default**
- 21.1 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.
- 21.2 If the Client owes the Contractor any money the Client 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).
- 21.3 Further to any other rights or remedies the Contractor may have under this Contract, if a Client has made payment to the Contractor, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Contractor under this clause 21 where it can be proved that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- 21.4 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 Client 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 Client will be unable to make a payment when it falls due;
- (b) the Client has exceeded any applicable credit limit provided by the Contractor;
- (c) the Client becomes insolvent or bankrupt, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
22. **Cancellation**
- 22.1 Without prejudice to any other rights or remedies the Contractor may have, if at any time the Client is in breach of any obligation (including those relating to payment and/or failure to remedy any breach in respect of this Contract within ten (10) working days of receipt by the Client of such notice(s) then the Contractor may suspend or terminate the supply of the Works. The Contractor will not be liable to the Client for any loss or damage the Client suffers because the Contractor has exercised its rights under this clause.
- 22.2 The Contractor may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are commenced by giving written notice to the Client. On giving such notice the Contractor shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to the Contractor for Works already performed. The Contractor shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 22.3 In the event that the Client cancels the delivery of Works the Client shall be liable for any and all loss incurred (whether direct or indirect) by the Contractor as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 22.4 Cancellation of orders for products made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
23. **Privacy Policy**
- 23.1 All emails, documents, images or other recorded information held or used by the Contractor is Personal Information as defined and referred to in clause 23.3 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 1993 ("the Act") including Part II of the OECD Guidelines and as set out in Schedule 5A of the Act and any statutory requirements where relevant in a European Economic Area "EEA" under the EU Data Privacy Laws (including the General Data Protection Regulation "GDPR") (collectively, "EU Data Privacy Laws"). The Contractor acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by the Contractor that may result in serious harm to the Client, the Contractor will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client by written consent, unless subject to an operation of law.
- 23.2 Notwithstanding clause 23.1, privacy limitations will extend to the Contractor in respect of Cookies where the Client 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 Client's:
- (a) IP address, browser, email client type and other similar details;
- (b) tracking website usage and traffic; and
- (c) reports are available to the Contractor when the Contractor sends an email to the Client, so the Contractor may collect and review that information ("collectively Personal Information").
- 23.3 If the Client consents to the Contractor's use of Cookies on the Contractor's website and later wishes to withdraw that consent, the Client may manage and control the Contractor's privacy controls via the Client's web browser, including removing Cookies by deleting them from the browser history when exiting the site. The Client authorises the Contractor or the Contractor's agent to:
- (a) access, collect, retain and use any information about the Client;
- (i) (including, name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history or any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Client's creditworthiness; or
- (ii) for the purpose of marketing products and services to the Client.
- (b) disclose information about the Client, whether collected by the Contractor from the Client 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 Client.
- 23.4 Where the Client is an individual the authorities under clause 23.3 are authorities or consents for the purposes of the Privacy Act 1993.
- 23.5 The Client shall have the right to request (by e-mail) from the Contractor, a copy of the Personal Information about the Client retained by the Contractor and the right to request that the Contractor correct any incorrect Personal Information.
- 23.6 The Contractor will destroy Personal Information upon the Client'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.
- 23.7 The Client 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 Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at <http://www.privacy.org.nz/comply/comptop.html>
24. **Suspension of Works**
- 24.1 Where the Contract is subject to section 24A of the Construction Contracts Act 2002, the Client 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 Client; and
- (i) the payment is not paid in full by the due date for payment in accordance with clause 5.4 and/or any subsequent amendments or new legislation and no payment schedule has been given by the Client; or
- (ii) a scheduled amount stated in a payment schedule issued by the Client in relation to the payment claim is not paid in full by the due date for its payment; or
- (iii) the Client has not complied with an adjudicator's notice that the Client must pay an amount to the Contractor by a particular date; and
- (iv) the Contractor has given written notice to the Client of its intention to suspend the carrying out of construction work under the construction Contract.
- (b) if the 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 Client or by any person claiming through the Client; and
- (iii) is entitled to an extension of time to complete the Contract; and
- (iv) keeps its rights under the Contract including the right to terminate the Contract; and may at any time lift the suspension, even if the amount has not been paid or an adjudicator's determination has not been complied with.
- (c) if the 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 Client to exercise any rights that may otherwise have been available to the Client under that Act as a direct consequence of the Contractor suspending work under this provision;
- (d) due to any act or omission by the Client, the Client 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 Client a written notice specifying the payment default or the act, omission or default upon which the suspension of the Works is based. All costs and expenses incurred by the Contractor as a result of such suspension and commencement shall be payable by the Client as if they were a variation.
- 24.2 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 22.1 for at least ten (10) working days, the Contractor shall be entitled to terminate the Contract, in accordance with clause 22.
25. **Service of Notices**
- 25.1 Any written notice given under this Contract shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
- (b) by leaving it at the address of the other party as stated in this Contract;
- (c) by sending it by registered post to the address of the other party as stated in this Contract;
- (d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission; and
- (e) if sent by email to the other party's last known email address.
- 25.2 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.
26. **Trusts**
- 26.1 If the Client at any time upon or subsequent to entering into the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not the Contractor may have notice of the Trust, the Client covenants with the Contractor as follows:
- (a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
- (b) the Client has full and complete power and authority under the Trust to enter into the Contract and the provisions of the Trust do not purport to exclude or restrict the indemnity which the Client can claim against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
- (c) the Client will not without consent in writing of the 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 Client as trustee of the Trust;
- (ii) any alteration to or variation of the terms of the Trust;
- (iii) any advancement or distribution of capital of the Trust; or
- (iv) any resettlement of the trust property.
27. **General**
- 27.1 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 replacements).
- 27.2 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. 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 Tauranga Courts of New Zealand.
- 27.3 Except to the extent permitted by law "CGA", the Contractor shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Contractor of these terms and conditions (alternatively the Contractor's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 27.4 The Contractor may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.
- 27.5 The Client cannot licence or assign without the written approval of the Contractor.
- 27.6 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 Client agrees and understands that they have no authority to subcontract any part of the Works to any Contractor's sub-contractors without the authority of the Contractor.
- 27.7 The Client agrees that the Contractor may amend their general terms and conditions for subsequent future contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for the Contractor to provide Works to the Client. Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 27.8 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.