

Auckland Civil Earthworks (2016) Limited
Terms of Trade



1. Definitions

1.1 In these Terms, the following words have the meanings given below unless the context requires otherwise.

“Act” means the Construction Contracts Act 2002 and any legislation amending or replacing that act.

“Agreement” means the contractual relationship between You and Us comprised of these terms, any Proposal, variation, order forms and each invoice or other document evidencing or describing the Works.

“Building Act” means the Building Act 2004 and any legislation amending or replacing that act.

“Equipment” means all machinery, tools and equipment used by Us in the provision of the Works.

“Guarantor” means the person(s) (if any) who have signed the Proposal as such.

“Goods” means materials and equipment, consumables and other tangible items supplied or to be supplied by us as part of the Works.

“Proposal” means our quotation, estimate or other offer for the provision of the Works to you.

“Site” means any location or premises under your control where we are to deliver the whole or any part of the Works.

“We”, “Us” and “Our” means Auckland Civil Earthworks (2016) Limited and our officers, agents and employees.

“Works” means all earthworks and drainage services and related Goods and services we provide to you or otherwise carry out on your instruction.

“You” and “Your” means you, the customer purchasing the Works from Us.

2. Terms Apply

2.1 These terms apply to all Works we provide to you.

2.2 In the case of any conflict between these terms and the provisions of any other agreements or documents relating to the Works, unless we have expressly stated in writing that these terms of trade do not apply, these terms shall apply and shall prevail to the extent of any conflict or inconsistency.

3. Proposals & Acceptance

3.1 Our Proposal is based on the information you have provided to us. You must ensure that the information you provide is accurate and that you brief us on all material matters relating to the Site and the Works. If you do not, delivery or completion of the Works may be delayed and the price may change.

3.2 Unless otherwise specified, any Proposal given by us for Works shall be valid for 30 days from the date of issue. We reserve the right however, to withdraw or alter the Proposal prior to acceptance by you because of circumstances beyond our reasonable control. For example, if a supplier alters the prices it charges to us for Goods to be supplied or Equipment to be used as part of the Works.

3.3 An instruction from you, your agents or employees, verbally or in writing to proceed with the Works shall be a binding instruction for us to proceed with the instructed Works and shall mean you have accepted the Proposal and agree to pay us for the Works in accordance with these terms.

3.4 By accepting a Proposal, you warrant that: you have the power to enter into the Agreement and you have obtained all necessary authorisations to allow you to do so; you are not insolvent; and the Agreement creates binding and valid legal obligations on you.

4. Variations

- 4.1 Sometimes the Works may require changes that were not expected at the outset or you may request changes. If this happens we will try to agree on a variation to the Proposal with you (“Variation”). This may include a variation to the cost of the Works. Any agreed Variation (whether written or oral) will amend and become part of the Proposal.
- 4.2 We may consider in good faith that a Variation to the Proposal is necessary for us to provide or continue providing the Works because of:
- (a) some hidden or obscured problem or other difficulty in relation to the Site that was unknown to Us at the time you accepted Our Proposal, including (without limitation), the discovery of contaminants or hazardous materials at the Site or other health and safety concerns, restrictions on access to the Site, hidden or unknown infrastructure or services (such as pipes or cables below the surface), the presence of reinforced concrete or hard rock barriers below the surface; or
 - (b) poor weather conditions or pre-requisite work by any third party not being properly completed or the Site otherwise not being ready for us to commence the Works; or
 - (c) delays in commencing or completing the Works which are attributable to you; or
 - (d) approvals or consents necessary for the Works are subject to conditions that require changes to the Works or the way the Works can be carried out;
 - (e) approvals or consents necessary for the Works are not available by the agreed commencement date; or
 - (f) the unavailability of or increases in the cost of labour, Goods or hired Equipment beyond our reasonable control,

in each case, (“Defects”). Where Defects exist, if You are unwilling to agree to a Variation to the Proposal to remedy or mitigate such Defects, either you or we are entitled to terminate the Proposal and cease delivery of the Works. In that event you will immediately pay us for the Works provided to the date of termination.

5. Availability of Credit

- 5.1 If you require credit, we may require you to satisfy any reasonable credit criteria we have prior to the delivery of the Works. If you are a company or other non-individual, this may include the provision of a personal guarantee.
- 5.2 We reserve the right to:
- (a) require payment or part-payment for the Works prior to commencement;
 - (b) refuse to give you credit; and
 - (c) amend or withdraw any credit terms or limit previously given to you where you are in breach of the Agreement or where we believe on reasonable grounds you are likely to breach the Agreement.

6. Delivery of the Works

- 6.1 Unless otherwise specified in the Proposal, you will be responsible (at your cost) for obtaining all approvals and consents necessary for the Works.
- 6.2 Prior to the commencement of the Works, you must notify to us and clearly identify and mark the precise location of all underground services and facilities on the Site, including (but not limited to), electrical cables, water, irrigation, sewerage, drainage and gas pipes, telephone, data and fibre optic cables and related infrastructure. We will take all reasonable care to avoid any damage to underground services and facilities but you indemnify us for all liability, claims, costs, damages and fines we may incur as a consequence of damage to services or facilities not precisely located and notified to us prior to the commencement of the Works.
- 6.3 You will ensure we have access to the Site at all reasonable times from the agreed commencement date for the purpose of carrying out the Works and recovering our Equipment. Access must be safe and suitable for the size and weight of our Equipment.
- 6.4 You acknowledge that our Equipment may include heavy and/or tracked vehicles which may cause cracking, subsidence or other damage to the Site. We will take reasonable care to minimise any such damage but we shall not be responsible for any damage to the Site or the access to the Site (including to any concreted, paved, sealed or grassed areas) unless such damage is caused by our negligence.

- 6.5 We will use reasonable endeavours to ensure the Works commence on, or as soon as possible after, any agreed commencement date and are carried out with all reasonable diligence in order to meet any estimated completion date. We may delay the commencement date and/or the expected completion date by a reasonable time for events beyond our reasonable control. This may include (but is not limited to), poor weather conditions, failure by you or third parties to have the Site ready for the Works or suitable access to the Site available by the commencement date, the discovery of unexpected conditions or hazards at the Site or where we are unable to provide the Works due to any action or inaction by you. We are not responsible for any costs, loss of profits or damage incurred by you as a consequence of any delay. Where any delay has been caused by you or third parties engaged by you, you agree to pay for our reasonable costs associated with providing the Works at a later time.
- 6.6 We may engage subcontractors nominated by us to undertake any portion of the Works. We shall be responsible for all work of any subcontractor engaged by us in the Works.

7. Price and Payment

- 7.1 Unless otherwise stated, our prices do not include goods and services tax ("GST"). You are required to pay GST in addition to the price.
- 7.2 You will pay for the Works as set out in our Proposal. Unless otherwise specified in our Proposal:
- (a) 50% of the price is payable on acceptance of the Proposal; and
 - (b) Where the Works are:
 - (i) completed within a week, the balance of the price will be invoiced on completion of the Works; and
 - (ii) not completed within a week, a progress claim invoice for the value of the Works completed during each week will be sent at the end of that week.
- 7.3 We will provide you with an invoice (payment claim) for each progress payment. Payment for the Works is due by the date shown on our invoice. If no date is shown, then payment is due within 7 days of the date of invoice.
- 7.4 You may not deduct, set-off or withhold any amount from any money owing by you to us other than any amount you are entitled to withhold as specified in the Act. No allowance is provided in our prices for retentions. In the event you retain any portion of the price for the Works, we may treat that as a payment default.
- 7.5 If you believe we have made an error in an invoice or if you have a genuine dispute in relation to an invoice, you must notify us of that prior to the due date of the invoice. If you do not notify us prior to the due date (time being of the essence) you are deemed to have accepted the charges shown in the invoice as being correct and payable.

8. Risk & Returns

- 8.1 Goods remain at our risk until delivery to you. Delivery of Goods shall be deemed completed when we or our carrier gives possession of the Goods to you or any agent, employee or contractor or yours.
- 8.2 Any Goods we purchase specifically for the Works and held by us pending delivery to you will be invoiced to you at the time of purchase. Such Goods shall be stored separately, identified as belonging to you and insured under our insurance policy.
- 8.3 We reserve the right to decline to accept the return of Goods for credit that we have purchased specifically for you where our supplier shall not allow us to return them for credit. If we do accept Goods returned for credit we may retain a reasonable fee not exceeding 15% of the value of the returned Goods as a handling charge.

9. Title and Security

- 8.1 Title in any Goods supplied by us passes to you only when you have made payment in full for the Works and all other sums payable by you to us. To secure payment for the Goods and any other monies owed by you to us, you grant us:

- (a) a purchase monies security interest in the Goods, any structure or product into which the Goods are incorporated or comingled and in any proceeds derived from any sale or other commercial exploitation of the Goods and the products into which the Goods have been incorporated or comingled; and
 - (b) a security interest in all your present and after acquired property.
- 8.3 Sections 114(1)(a), 133 and 134 of the Personal Property Securities Act 1999 (“PPSA”) shall not apply to the securities granted under these terms and you waive all rights under sections 121, 125, 129, 131, 132 and 148 of the PPSA.
- 8.4 You irrevocably authorise us to enter the Site and any other premises you occupy or on which Goods are situated at any reasonable time after default by you or before default if we believe a default is likely and to remove and repossess any Goods and any other property to which Goods are attached or in which Goods are incorporated. We shall not be liable for any costs, damages, expenses or losses incurred by you or any third party as a result of this action, nor liable in contract or in tort or otherwise in any way whatsoever unless by statute such liability cannot be excluded. We may either resell any repossessed Goods and credit your account with the net proceeds of sale (after deduction of all repossession, storage, selling and other costs) or may retain any repossessed Goods and credit your account with the invoice value thereof less such sum as we reasonably determine on account of wear and tear, depreciation, obsolescence and costs.

10. Warranties & Liability

- 10.1 We will carry out the Works with reasonable expedition, to the standard of a competent earthworks contractor and in compliance with the building and/or resource consents issued and other statutory requirements that apply in respect of the Works.
- 10.2 You will inspect the Works on completion and notify us, within one month of the completion date (time being of the essence), of any problem or defect with the Works, damage to the Site or other failure by us to carry out the Works in accordance with the Proposal. We warrant the labour component of the Works for a period of 12 months from completion. This warranty does not apply however, to:
- (a) Any claim notified to us later than 12 months from the completion of the relevant Works or more than one month after the alleged defect became apparent; and
 - (b) the extent any failure or defect is caused by:
 - (i) an act outside of human control;
 - (ii) an act or omission (whether accidental or intentional) by you or any third party;
 - (iii) your failure to carry out normal maintenance; or
 - (iv) any alteration or attempted repair of the Works by any person other than us or if the Works are subject to abnormal or excessive stress, wear or tear or improper or abnormal use.
- 10.3 We will pass on to you the benefit of any manufacturer’s warranties for Goods where we are able to do so.
- 10.4 Where we agree the Works fail to meet any warranty set out in clause 10.1 or 10.2, our liability for such failure shall be limited, at our option, to:
- (a) Re-performing or repairing any part(s) of the defective Works; or
 - (b) Refunding to you the charges for the defective Works.
- 10.5 If the Agreement is a ‘Residential Building Contract’ for the purposes of the Building Act, the warranties set out above are in addition to the warranties set out in section 362(l) of the Building Act.
- 10.6 The Building Act, Fair Trading Act 1986 and the Consumer Guarantees Act 1993 may imply warranties or impose obligations on us which cannot by law be excluded or modified or which can only to a limited extent be so excluded or modified. In respect of such implied warranties, conditions or terms imposed by law, our liability shall be excluded where allowable or, if not able to be excluded, shall apply only to the minimum extent required by the relevant law. Subject to the preceding parts of this clause 10, all terms, conditions, warranties, descriptions, representations, conditions as to fitness or suitability for any purpose, tolerance to any conditions, merchantability or otherwise (whether of a like nature or not) and whether express or implied by law, trade custom or otherwise which are not expressly included in writing in the Agreement (including without limitation, those implied pursuant to the Sale of Goods Act 1908) are expressly excluded to the full extent permitted by law.

- 10.7 Neither you nor us shall be liable for any consequential or indirect loss nor any loss of profits, revenue, business opportunity, goodwill and/or anticipated savings of any kind whatsoever, arising from the supply of the Works, whether suffered or incurred by us, by you or another person and whether in contract or tort (including negligence) or otherwise.
- 10.8 If despite clauses 10.4-10.6, we are found liable to pay compensation or damages to You (whether by a court of law, arbitrator or otherwise) then our total and aggregate liability (whether in contract, tort (including negligence) or otherwise) to you under, or related to or arising from, the Works or the Agreement in any way, shall in no circumstances exceed our charges for those Works.
- 10.9 To the extent you are acquiring the Works for the purpose of a business, the provisions of the Consumer Guarantees Act 1993 and sections 9, 12A and 13 of the Fair Trading Act 1986 do not apply.

11. Health & Safety

- 11.1 You will notify our representative(s) as soon as practicable and, in any event, no later than on arrival on Site about any known health and safety issues present at the Site.
- 11.2 We reserve the right to suspend delivery of the Works and withdraw our employees, agents and contractors from the Site if we have concerns about health and safety conditions at the Site.
- 11.3 You shall observe our reasonable health and safety requirements while the Works are in progress. You shall not access any part of the Site where we are performing the Works except at reasonable times by prior arrangement with us.

12. Facilities

- 11.1 Unless otherwise agreed, you will make available for our use on Site the following facilities:
- (a) Toilet facilities;
 - (b) On-site parking for our Equipment; and
 - (c) Any other facilities or equipment specified in the Proposal to be provided by you.
- 11.2 In the event you are unable or fail to provide these facilities and any agreed equipment, we may elect to provide them and invoice you for the costs.

13. Intellectual Property

- 12.1 Copyright in any drawings, specifications and designs and other written materials we create for you as part of the Works belongs to us. Subject to your payment of all the charges for the Works, you are granted an irrevocable, royalty-free, non-transferable licence to use those materials for the purpose intended in the Proposal.

14. Collection & Use of Information

- 14.1 In this clause 14, 'You' shall be deemed to include each Guarantor.
- 14.2 You authorise Us to collect, retain and use any information about You, for the purpose of assessing Your credit worthiness, enforcing our rights under this Agreement, or marketing any services provided by Us to any other party.
- 14.3 You authorise Us to disclose any information obtained to any person for the purposes set out in clause 14.2, including to credit provider or credit rating agency.
- 14.4 Where You are a natural person the authorities under clauses 14.2 and 14.3 are authorities or consents for the purposes of the Privacy Act 1993.

15. Default & Termination

- 15.1 The following shall constitute defaults by you:

- (a) Non-payment of any sum or other amounts payable by the due date or if you intimate that you will not pay any sum by the due date;
- (b) You fail to fulfil any of your other obligations under the Agreement or any obligation in any other contract between you and us.
- (c) Any Goods are seized by any other of your other creditors or any other creditor intimates that it intends to seize Goods.
- (d) You are bankrupted or put into liquidation or a receiver is appointed to any of your assets.
- (e) A Court judgment is entered against you and remains unsatisfied for seven days.
- (f) In our reasonable opinion, there is a material adverse change in your financial position.

15.2 Following an event of default, all monies owing by you to us shall be immediately due and payable notwithstanding that the time(s) for payment is yet to arrive and we may (without prejudice to any of our other rights and remedies) do any or all of the following:

- (a) Suspend delivery of the Works;
- (b) Charge you default interest from the date when payment became due, until the actual date of payment of all amounts owing (including default interest), at a rate of two percent (2%) per calendar month (which shall at our sole discretion compound monthly at such a rate) after as well as before any judgment;
- (c) Refer your account to our debt collection agency;
- (d) Charge you all collection costs incurred by us, and you agree to indemnify us from and against all costs and disbursements incurred by us in recovering the unpaid Charges (including but not limited to legal costs on a solicitor and own client basis, our collection agency costs, and bank dishonour fees);
- (e) Set-off any amounts due from you against any moneys due from us or held in our account to your credit; and
- (f) Terminate the Proposal, in which case we shall be released from any further obligation to perform the Works. As such termination shall not however, affect any accrued rights or obligations of the parties or our right to take any other action in relation to your default including the actions set out above.

16. Guarantee

16.1 In consideration of us entering into this Agreement at the Guarantor's request, the Guarantor:

- (a) Unconditionally guarantees the payment by you of all amounts payable by you under this Agreement and the due and punctual performance by you of all your other obligations in this Agreement;
- (b) indemnifies us against any loss we might suffer should this Agreement be lawfully disclaimed or abandoned by any liquidator, receiver or other person;
- (c) agrees that this guarantee and indemnity extends to and includes any variations to the Agreement as may be agreed by you and us;
- (d) agrees that no release, delay or other indulgence given by us to you or to your successors or assigns or any other thing whereby the Guarantor would have been released had the Guarantor been merely a surety shall release, prejudice or affect the liability of the Guarantor as a Guarantor or as indemnifier;
- (e) agrees that as between the Guarantor and us, the Guarantor may for all purposes be treated as you, the customer under this Agreement, and we shall be under no obligation to take proceedings against you before taking proceedings against the Guarantor;
- (f) agrees that any assignment of this Agreement shall not release the Guarantor from liability;
- (g) agrees that this guarantee is unconditional and that no representations have been made to the Guarantor affecting his/her or its liability under this guarantee;
- (h) agrees that should there be more than one Guarantor their liability under this guarantee shall be joint and several; and
- (i) agrees that this guarantee and indemnity will remain in full force and effect until all payments now or at any time hereafter payable by you to us under this Agreement have been paid in full, including payments which are subsequently avoided or affected in any way, whether under any statutory provision or otherwise, so as to deprive us of the full benefit of such payment.

17. Dispute Resolution

17.1 All disputes and differences concerning this Agreement which you and we are unable to resolve by ourselves within a period of 21 days from the date the dispute is raised, will be referred to arbitration by a single arbitrator agreed on by both of us or, failing agreement within 7 days, by an arbitrator appointed by the

President of the New Zealand Law Society or his or her nominee. Arbitration shall be carried out in accordance with the provisions of the Arbitration Act 1996 and shall be held in Auckland, New Zealand.

17.2 Clause 17.1 shall not prevent either of us from applying to the Court for urgent interlocutory relief.

18. Miscellaneous

18.1 Except in respect of your obligation to pay the price for the Works and other monies due under the Agreement, neither party shall be liable for delay or failure to perform its obligations if the cause of the delay or failure is beyond that party's reasonable control.

18.2 Unless otherwise requested in writing, you consent to receiving e-mails and other communications from us providing you with information about us and goods and services that may be of interest to you.

18.3 If any of your contact details change, you will shall promptly provide us with your new contact details. We will send you notices and other communications to the last known contact details you have provided. Notices under the Agreement shall be given and received as provided in clause 7 of Schedule 3 of the Building (Residential Consumer Rights and Remedies) Regulations 2014.

18.4 Failure by us to enforce any of the terms and conditions contained in the Agreement shall not be deemed to be a waiver of any of the rights or obligations we have.

18.5 If any provision of the Agreement shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

18.6 The Agreement comprises the entire agreement between you and us in respect of the Works and, unless expressly stated otherwise in any Proposal, all prior agreements, warranties, representations, written, verbal or otherwise, are excluded and superseded.

18.7 The Agreement shall be governed by the laws of New Zealand and are subject to the exclusive jurisdiction of the Courts of New Zealand.