

JP Finsbury Pty Ltd – Terms & Conditions of Trade

1. Definitions

1.1 “Contractor” means JP Finsbury Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of JP Finsbury Pty Ltd.

1.2 “Client” means the person/s ordering the Works as specified in any invoice, document or order, and if there is more than one Client is a reference to each Client jointly and severally.

1.3 “Works” means all Works 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).

1.4 “Price” means the Price payable for the Works as agreed between the Contractor and the Client in accordance with clause 4 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 These terms and conditions may only be amended with the Contractor’s consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and the Contractor.

3. Change in Control

3.1 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, 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.

4. Price and Payment

4.1 At the Contractor’s sole discretion the Price shall be either:

(a) as indicated on invoices provided by the Contractor to the Client in respect of Works performed or Materials supplied; or

(b) the Contractor’s Price at the date of delivery of the Works according to the Contractor’s current pricelist; or

(c) the Contractor’s quoted Price (subject to clause 4.2) which shall be binding upon the Contractor provided that the Client shall accept the Contractor’s quotation in writing within thirty (30) days.

4.2 The Contractor reserves the right to change the Price:

(a) if a variation to the Materials which are to be supplied is requested; or

(b) if a variation to the Works originally scheduled (including any applicable plans or specifications) is requested; or

(c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, building defects, safety considerations, discovery of asbestos, change of design, prerequisite work by any third party not being completed, poor weather conditions, limitations to accessing the site, hard rock barriers below the surface, iron reinforcing rods in concrete, or hidden pipes and wiring in walls etc) which are only discovered on commencement of the Works; or

(d) in the event of increases to the Contractor in the cost of labour or materials (including but not limited to overseas transactions that may increase as a consequence of variations in foreign currency rates of exchange and/or international freight and insurance charges) which are beyond the Contractor's control.

4.3 At the Contractor's sole discretion a non-refundable deposit may be required. The deposit amount or percentage of the Price due will be stipulated at the time of the order of the Materials/Works and shall become immediately due and payable.

4.4 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; or

(b) by way of progress payments in accordance with the Contractor's specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the site but not yet installed; or

(c) thirty (30) days following the date of the invoice which is posted to the Client's address or address for notices;

(d) the date specified on any invoice or other form as being the date for payment; or

(e) 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.

4.5 Payment may be made by cash, cheque, bank cheque, electronic/on-line banking, credit card (plus a surcharge of up to two and half percent (2.5%) of the Price), or by any other method as agreed to between the Client and the

Contractor.

4.6 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 by the Contractor under this or any other agreement for the sale 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.

5. Delivery of the Works

5.1 Subject to clause 5.2 it is the Contractor's responsibility to ensure that the Works start as soon as

it is reasonably possible.

5.2 The Works commencement date will be put back and/or the completion date extended by whatever time is 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 site ready for the Works (including but not limited any hidden services such as electrical and plumbing being in the correct location on site prior to commencement); or (c) notify the Contractor that the site is ready.

5.3 In the event the Contractor is requested by the Client to move any hidden services as per clause 5.2(b), this will be deemed a variation in accordance with clause 4.2 and the Price will be adjusted accordingly to include the Works at a rate of \$160.00 per hour plus any additional charges incurred due to the delay.

5.4 Delivery ("Delivery") of the Materials is taken to occur at the time that:

- (a) the Client or the Client's nominated carrier takes possession of the Materials at the Contractor's address; or
- (b) the Contractor (or the Contractor's nominated carrier) delivers the Materials to the Client's nominated address even if the Client is not present at the address.

5.5 At the Contractor's sole discretion the cost of delivery is included in the Price.

5.6 The Client must take delivery by receipt or collection of the Materials whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Materials as arranged then the Contractor shall be entitled to charge a reasonable fee for redelivery and/or storage.

5.7 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.

5.8 Any time or date given by the Contractor to the Client is an estimate only. The Contractor shall not be liable for any loss or damage whatsoever due to failure by the Contractor to deliver the Works (or any part of them) promptly or at all, where due to circumstances beyond the reasonable control of the Contractor.

6. Risk

6.1 If the Contractor retains ownership of the Materials under clause 11 then;

(a) where the Contractor is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery and the Client must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that either;

- (i) the Client or the Client's nominated carrier takes possession of the Materials at the Contractor's address; or (ii) the Materials are delivered by the Contractor or the

Contractor's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address).

(b) where the Contractor is to both supply and install Materials then the Contractor shall maintain a contract works insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Client.

6.2 Notwithstanding the provisions of clause 6.1 if the Client specifically requests the Contractor to leave Materials outside the Contractor's premises for collection or to deliver the Materials to an unattended location then such materials shall always be left at sole risk of the Client and it shall be

the Client's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Client's expense.

6.3 The Client acknowledges that Materials (including but not limited to paint, timber, granite, tiles & concrete) supplied may exhibit variations in shade tone, colour, texture, surface and finish, and may fade or change colour over time. The Contractor will make every effort to match batches of product supplied in order to minimise such variations but shall not be liable in any way whatsoever where such variations occur.

6.4 The Client acknowledges that Materials supplied may

- (a) fade or change colour over time; and
- (b) expand, contract or distort as a result of exposure to heat, cold, weather; and (c) mark or stain if exposed to certain substances; and
- (d) be damaged or disfigured by impact or scratching.

6.5 Where the Contractor is required to install the Materials the Client warrants that the structure of the premises or equipment in or upon which these Materials are to be installed or erected is sound and will sustain the installation and work incidental thereto and the Contractor shall not be liable for any claims, demands, losses, damages, costs and expenses howsoever caused or arising in connection with the installation and work incidental thereto.

6.6 Where the Client is to supply all plumbing and electrical appliances for installation, the Client agrees to ensure that all said items will be delivered on site and ready for the Contractor to install on the agreed schedule date. Failure to comply with this clause which results in the Contractor having to revisit the site, the Client agrees to indemnify the Contractor for all additional costs incurred for on-going labour and equipment at the rate of \$160.00 per hour.

6.7 Any advice, recommendation, information, assistance or service provided by the Contractor in relation to Materials or Works supplied is given in good faith, is based on the Contractor's own knowledge and experience and shall be accepted without liability on the part of the Contractor and:

7. Access

1. (a) it shall be the responsibility of the Client to confirm the accuracy and reliability of the same in light of the use to which the Client makes or intends to make of the Materials or Works; and
2. (b) 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.

7.1 The Client shall ensure that the Contractor has clear and free access to the work site at all times to enable them to undertake the Works. The Contractor shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of the Contractor.

8. Underground Locations

8.1 Prior to the Contractor commencing any work the Client must advise the Contractor of the precise location of all

underground services on the site and clearly mark the same. The underground mains & 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, Telstra cables, fibre optic cables, oil pumping mains, and any other services that may be on site.

8.2

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 8.1.

9. Dimensions, Plans and Specifications

9.1 All customary building industry tolerances shall apply to the dimensions and measurements

of the Materials unless the Contractor and the Client agree otherwise in writing.

9.2 The Contractor shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client

9.3 If the giving of an estimate or quotation for the supply of Materials involves the Contractor estimating measurements and quantities, it shall be the responsibility of the Client to verify the accuracy of the Contractor's estimated measurements and quantities, before the Client places an order based on such estimate or accepts such quotation.

9.4 Should the Client require any changes to the Contractor's estimated measurements and quantities, the Client shall request such changes in writing, in the case of an estimate before placing an order based on that estimate and in the case of a quotation before acceptance of that quotation.

10. Specifications

10.1 The Client acknowledges that where the Contractor prepares a template on their behalf for (client controlled) stone, solid surface, glass works, or any other special materials which are to be provided by a third party, that the template is designed to be a guide only and the Client needs to ensure that the third party correctly prepares those Materials to their specifications and requirements. The Contractor shall not accept any liability whatsoever for Materials prepared by a third party.

10.2 Where the Client does not provide specifications or plans then industry standards will be applied in regard to measurements, design and finish.

Whilst the Contractor will take all care to avoid damage to any underground services the

11. Title

11.1 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.

11.2 Receipt by the Contractor of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.

11.3 It is further agreed that:

- (a) until ownership of the Materials passes to the Client in accordance with clause 11.1 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 should not convert or process the Materials or intermix them with other goods but 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.

(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.

12. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)

12.1 The Client must inspect all Materials on delivery (or the Works on completion) with the Contractor present and must within seven (7) days of delivery notify the Contractor in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Materials/Works as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow the Contractor to inspect the Materials or to review the Works provided.

12.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (Non- Excluded Guarantees).

12.3 The Contractor acknowledges that nothing in these terms and conditions purports to modify or exclude the Non- Excluded Guarantees.

12.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, the Contractor makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works. The Contractor's liability in respect of these warranties is limited to the fullest extent permitted by law.

12.5 If the Client is a consumer within the meaning of the CCA, the Contractor's liability is limited to the extent permitted by section 64A of Schedule 2.

12.6 If the Contractor is required to replace any Materials under this clause or the CCA, but is unable to do so, the Contractor may refund any money the Client has paid for the Materials.

12.7 If the Contractor is required to rectify, re-supply, or pay the cost of re-supplying the Works under this clause or the CCA, but is unable to do so, then the Contractor may refund any money the Client

has paid for the Works but only to the extent that such refund shall take into account the value of Works and Materials which have been provided to the Client which were not defective.

12.8 If the Client is not a consumer within the meaning of the CCA, the Contractor's liability for any defect or damage in the Materials is:

- (a) limited to the value of any express warranty or warranty card provided to the Client by the Contractor at the Contractor's sole discretion;
- (b) limited to any warranty to which the Contractor is entitled, if the Contractor did not manufacture the Materials;
- (c) otherwise negated absolutely.

12.9 Subject to this clause 12, returns will only be accepted provided that:

- (a) the Client has complied with the provisions of clause 12.1; and
- (b) the Contractor has agreed that the Materials are defective; and
- (c) the Materials are returned within a reasonable time at the Client's cost (if that cost is not significant); and
- (d) the Materials are returned in as close a condition to that in which they were delivered as is possible.

12.10 Notwithstanding clauses 12.1 to 12.9 but subject to the CCA, the Contractor shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:

- (a) the Client failing to properly maintain or store any Materials;
- (b) the Client using the Materials for any purpose other than that for which they were designed;
- (c) the Client continuing to use any Materials after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
- (d) interference with the Works by the Client or any third party without the Contractor's prior approval;
- (e) the Client failing to follow any instructions or guidelines provided by the Contractor; (f) fair wear and tear, any accident, or act of God

12.11 In the case of second hand Materials, unless the Client is a consumer under the CCA, the Client acknowledges that it has had full opportunity to inspect the second hand Materials prior to delivery and accepts them with all faults and that to the extent permitted by law no warranty is given by the Contractor as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Client acknowledges and agrees that the Contractor has agreed to provide the Client with the second hand Materials and calculated the Price of the second hand Materials in reliance of this clause 12.11.

12.12 Notwithstanding anything contained in this clause if the Contractor is required by a law to accept a return then the Contractor will only accept a return on the conditions imposed by that law.

13. Default and Consequences of Default

13.1 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.

13.2 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 contract default fee, and bank dishonour fees).

13.3 Without prejudice to any other remedies the Contractor may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions the Contractor may suspend or terminate the supply of Works to the Client. 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.

13.4 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 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

(c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

14. Cancellation

14.1 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.

14.2 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).

14.3 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.

15. Building and Construction Industry Security of Payments Act 1999

15.1 At the Contractor's sole discretion, if there are any disputes or claims for unpaid Materials and/or Works then the provisions of the Building and Construction Industry Security of Payments Act 1999 may apply.

15.2 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payments Act 1999 of New South Wales, except to the extent permitted by the Act where applicable.

16. General

16.1 The failure by the Contractor to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Contractor's right to subsequently enforce that provision. 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.

16.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales in which the Contractor has its principal place of business, and are subject to the jurisdiction of the courts in New South Wales.

16.3 Subject to clause 14 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).

16.4 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.

16.5 The Contractor may license or sub-contract all or any part of its rights and obligations without the Client's consent.

16.6 The Client agrees that the Contractor may amend these terms and conditions at any time. If the Contractor makes a change to these terms and conditions, then that change will take effect from the date on which the Contractor notifies the Client of such change. The Client will be taken to have accepted such changes if the Client makes a further request for the Contractor to provide any Works to the Client.

16.7 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.

16.8 The Client warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.