
Jolly Earthworks 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 **“Jolly”** means Jolly Earthworks Limited, its successors and assigns or any person acting on behalf of and with the authority of Jolly Earthworks Limited.
- 1.3 **“Customer”** means the person/s, entities or any person acting on behalf of and with the authority of the Customer requesting Jolly to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
- (a) if there is more than one Customer, is a reference to each Customer jointly and severally; and
 - (b) if the Customer is a partnership, it shall bind each partner jointly and severally; and
 - (c) if the Customer is a part of a Trust, shall be bound in their capacity as a trustee; and
 - (d) includes the Customer’s executors, administrators, successors and permitted assigns.
- 1.4 **“Works”** means all Works (including consultation or installation services) or Materials supplied by Jolly to the Customer at the Customer’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 Customer to which the Materials are to be supplied by Jolly.
- 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 any associated building products that are regarded as Non-Conforming for an Intended Use if, when associated with the Works:
- (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 Customer does not wish to allow Cookies to operate in the background when using Jolly’s website, then the Customer 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 Jolly and the Customer in accordance with clause 6 below.

2. Acceptance

- 2.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of any Works.
- 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 Customer acknowledges and accepts that the supply of:
- (a) Works on credit shall not take effect until the Customer has completed a credit application with Jolly and it has been approved with a credit limit established for the account. In the event that the supply of Works requested exceeds the Customer’s credit limit and/or the account exceeds the payment terms, Jolly 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 6.2. Jolly reserves the right to halt all Works until such time as Jolly and the Customer agree to such changes. Jolly shall not be liable to the Customer for any loss or damage the Customer suffers due to Jolly exercising their rights under this clause.
- 2.5 Any advice, recommendation, information, assistance or service provided by Jolly in relation to Materials or Works (including the laying of concrete slabs, foundations or similar Works) supplied is given in good faith to the Customer, or the Customer’s agent, and is based on Jolly’s own knowledge and experience and shall be accepted without liability on the part of Jolly. Where such advice or recommendations are not acted upon then Jolly shall require the Customer or their agent to authorise commencement of the Works in writing. Jolly shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Works.
- 2.6 These terms and conditions may be meant to be read in conjunction with Jolly’s Hire Form, and where the context so permits, the terms ‘Works’ or ‘Materials’ shall include any supply of Equipment, as defined therein.
- 2.7 Electronic signatures 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. Authorised Representatives

- 3.1 The Customer acknowledges that Jolly shall (for the duration of the Works) liaise directly with one (1) authorised representative, and that once introduced as such to Jolly, that person shall have the full authority of the Customer to order any Works and/or to request any variation thereto on the Customer’s behalf. The Customer accepts that they will be solely liable to Jolly for all additional costs incurred by Jolly (including Jolly’s profit margin) in providing any Works or variation/s requested thereto by the Customer’s duly authorised representative.

4. Errors and Omissions

- 4.1 The Customer acknowledges and accepts that Jolly 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 Jolly 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 Jolly in respect of the Works.
- 4.2 In the event such an error and/or omission occurs in accordance with clause 4.1, and is not attributable to the negligence and/or wilful misconduct of Jolly; the Customer shall not be entitled to treat this Contract as repudiated nor render it invalid.

5. Change in Control

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

6. Price and Payment

- 6.1 At Jolly's sole discretion the Price shall be either:
- (a) as indicated on invoices provided by Jolly to the Customer in respect of Works performed or Materials supplied; or
 - (b) Jolly's Price at the date of delivery of the Works according to Jolly's current pricelist; or
 - (c) Jolly's quoted Price (subject to clause 6.2) which shall be binding upon Jolly provided that the Customer shall accept Jolly's quotation in writing within thirty (30) days.
- 6.2 Jolly 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 Customer, safety considerations, availability of equipment, additional excavation required work prior to pouring, additional labour where 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.
- 6.3 Variations will be charged for on the basis of Jolly's quotation, and will be detailed in writing, and shown as variations on Jolly's invoice. The Customer shall be required to respond to any variation submitted by Jolly within ten (10) working days. Failure to do so will entitle Jolly to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.4 At Jolly's sole discretion a deposit may be required.
- 6.5 Time for payment for the Works being of the essence, the Price will be payable by the Customer on the date/s determined by Jolly, which may be:
- (a) for certain approved Customer's, due twenty (20) days following the end of the month in which a statement is posted to the Customer's address or address for notices;
 - (b) the date specified on any invoice or other form as being the date for payment; or
 - (c) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by Jolly.
- 6.6 At the agreement of both parties, payment of the Price may be subject to retention by the Customer of an amount (hereafter called the "Retention Money"), being a set amount or equal to a percentage of the Price. The Customer 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 and as such no Retention Money shall be use other than to remedy defects in the performance of Jolly's obligations under the Contract.
- 6.7 Payment may be made by electronic/on-line banking, or by any other method as agreed to between the Customer and Jolly.
- 6.8 Jolly may in its discretion allocate any payment received from the Customer towards any invoice that Jolly determines and may do so at the time of receipt or at any time afterwards. On any default by the Customer Jolly may re-allocate any payments previously received and allocated. In the absence of any payment allocation by Jolly, payment will be deemed to be allocated in such manner as preserves the maximum value of Jolly's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 6.9 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by Jolly nor to withhold payment of any invoice because part of that invoice is in dispute, unless the request for payment by Jolly is a claim made under the Construction Contracts Act 2002. Nothing in this clause 6.9 prevents the Customer from the ability to dispute any invoice.
- 6.10 Unless otherwise stated the Price does not include GST. In addition to the Price, the Customer must pay to Jolly an amount equal to any GST Jolly must pay for any supply by Jolly under this or any other agreement for the sale of the Materials. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition, the Customer 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.

7. Delivery of the Materials

- 7.1 It is the intention of Jolly, and agreed by the Customer, that it is the responsibility of the Customer to:
- (a) ensure that Jolly has clear and free access to the Worksite at all times to deliver the Materials and/or undertake the Works. Jolly 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 Jolly; and
 - (b) ensure that access is suitable to accept the weight of laden trucks, front end loaders or other earth moving equipment as may be deemed necessary by Jolly.
- 7.2 The Customer agrees to indemnify Jolly against all costs incurred by Jolly in recovering any of Jolly's vehicles and/or equipment in the event they become bogged or otherwise immovable.

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- 7.3 At Jolly's sole discretion, the cost of delivery is in addition to the Price.
- 7.4 It is the intention of Jolly and agreed by the Customer that:
- (a) Jolly will deliver the Materials at the kerb alignment;
 - (b) if the discharge of the Materials is not completed within forty-five (45) minutes after arrival on the Worksite, stand down time in excess thereof shall be charged at Jolly's normal hourly rate; and
 - (c) the Customer shall be responsible for:
 - (i) maintenance, cleaning and the repair of entry and exit points from the Worksite, over any third-party property or public roadway. Jolly will accept no liability for any maintenance, cleaning or repair of entry and exit points from the Worksite, including any local or government charges or fines relating to mud or debris on the roadway; and
 - (ii) any parking fees, penalties, fines or infringements (whether imposed by Police, Council Traffic Officers or any Court) incurred by Jolly as a result of the Customer's failure to receive delivery of the Materials at the kerb alignment.
- 7.5 The Customer shall take delivery of the Materials tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:
- (a) such discrepancy in quantity shall not exceed five percent (5%); and
 - (b) the Price shall be adjusted pro rata to the discrepancy or to the value that has been delivered.

8. Provision of the Works

- 8.1 Subject to clause 8.2 it is Jolly's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 8.2 The Works' commencement date will be put back and the completion date extended by whatever time is reasonable in the event that Jolly claims an extension of time (by giving the Customer written notice) where completion is delayed by an event beyond Jolly's control, including but not limited to any failure by the Customer to:
- (a) make a selection; or
 - (b) have the Worksite ready for the Works; or
 - (c) notify Jolly that the Worksite is ready.
- 8.3 Jolly 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.
- 8.4 Any time specified by Jolly for delivery of the Works is an estimate only and Jolly will not be liable for any loss or damage incurred by the Customer 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 Jolly is unable to supply the Works as agreed solely due to any action or inaction of the Customer, then Jolly 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.

9. Dimensions, Plans and Specifications

- 9.1 Jolly shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Customer. The Customer acknowledges and agrees that in the event that any of this information provided by the Customer is inaccurate, Jolly accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 9.2 All customary building industry tolerances shall apply to the dimensions and measurements of the Works unless Jolly and the Customer agree otherwise in writing.
- 9.3 Where the Customer is to supply Jolly with any design specifications (including, but not limited to CAD drawings) the Customer shall be responsible for providing accurate data. Jolly shall not be liable whatsoever for any errors in the Works that are caused by incorrect or inaccurate data being supplied by the Customer.
- 9.4 In the event the Customer gives information relating to measurements and quantities of Materials required in completing the Works, it is the Customer's responsibility to verify the accuracy of the measurements and quantities, before the Customer or Jolly places an order based on these measurements and quantities. Jolly accepts no responsibility for any loss, damages, or costs however resulting from the Customer's failure to comply with this clause.

10. Risk

- 10.1 If Jolly retains ownership of the Materials under clause 13 then:
- (a) where Jolly is supplying Materials only, all risk for the Materials shall immediately pass to the Customer on delivery and the Customer 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 Customer or the Customer's nominated carrier takes possession of the Materials at Jolly's address; or
 - (ii) the Materials are delivered by Jolly or Jolly's nominated carrier to the Customer's nominated delivery address (even if the Customer is not present at the address).
 - (b) where Jolly is to both supply and install Materials then Jolly 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 Customer.
- 10.2 Notwithstanding the provisions of clause 10.1 if the Customer specifically requests Jolly to leave Materials outside Jolly'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 Customer and it shall be the Customer'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 Customer's expense.
- 10.3 Detailed drawings of any services that will be embedded in the concrete are to be provided to Jolly prior to commencement of any Works. Whilst all due care will be taken no liability will be accepted by Jolly for damage to the services or any other element embedded in the concrete.
- 10.4 Jolly gives no guarantee (expressed or implied) as to the length of time the curing process will take and/or against cracking of concrete that may occur naturally in the Works such as:
- (a) hairline cracking of paving and grout; or
 - (b) damage caused by contact with chemicals, solvents, oils or any other substances; or

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- (c) the effects by elements such as heat exposure or wet weather conditions that prolong the curing process.
- 10.5 Jolly shall not be liable for any defect in the Works if the Customer does not follow Jolly's recommendations, including:
- (a) to water the concrete periodically to limit the risk of possible cracking due to weather conditions;
 - (b) that no foot traffic and/or any vehicles on the concrete for a minimum of forty-eight (48) hours but preferably seven (7) days; and
 - (c) that no heavy items (including but not limited to, pots, furniture etc.) is placed on the concrete area for a minimum of twenty-four (24) hours.
- 10.6 The Customer acknowledges and accepts that:
- (a) variations of colour and texture are inherent in concrete. Jolly 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;
 - (b) concrete is a porous material and as a consequence Jolly cannot be held responsible for holes and pinholes, however numerous, that appear on the surface after completion of the Works;
 - (c) Jolly 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 Jolly 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.
- 10.7 In the event that:
- (a) during the course of the Works Jolly discovers any fossils, artefacts or any other remains of geological or archaeological interest are discovered Jolly reserves the right to halt all Works, remove any of their equipment from the Worksite and immediately notify the Customer. Unless subject to clause 27.8, the Customer accepts and agrees that all additional costs that may be incurred by Jolly as a result of any such delays (including but not limited to in the event Jolly is unable to remove their equipment from the Worksite, etc.) shall be borne by the Customer and shall be treated as a variation in accordance with clause 6.2; and/or
 - (b) Jolly discovers any undisclosed waste and/or hazardous materials then Jolly reserves the right to halt all Works and immediately notify the Customer. It shall be the responsibility of the Customer to arrange the removal of all such materials. In the event that Jolly agrees to remove such materials for the Customer then this shall be treated as a variation in accordance with clause 6.2 and shall be in addition to the Price.
- 10.8 The final location of the exact drilling or excavation site must be determined on site by the Customer and is the Customer's sole responsibility.
- 10.9 If during the drilling operation, and as a result of extraordinary down hole issues, Jolly decides (based on industry experience) that the risk is too great to continue the hole, Jolly shall advise the Customer, or the Customer's agent, regarding the risk of continuing. Where such advice is not acted on, and Jolly is requested to continue, then Jolly shall require the Customer or their agent to authorise the continuance of the Works in writing. Jolly shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent continuance of the Works, and the Customer shall reimburse Jolly for any equipment lost at the landed, new cost price of the replacement equipment.
- 10.10 Jolly will take all reasonable precautions against fire during site gas cutting, welding, and other installation procedures. Insurance of buildings and contents etc., and any items installed during installation shall be the responsibility of the Customer.

11. Customer's Responsibilities

- 11.1 Prior to Jolly commencing any Works the Customer must advise Jolly of the precise location of all known asbestos/hazardous materials on the Worksite and clearly mark the same. Removal from the Worksite and the disposal of asbestos/hazardous materials shall at all times be the Customer's responsibility unless otherwise agreed in writing.
- 11.2 It is the intention of Jolly, and agreed by the Customer, that it is the responsibility of the Customer to:
- (a) 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 Customer;
 - (b) ensure that a safety fence is erected around the perimeter of the Worksite to ensure public safety;
 - (c) provide Jolly with facilities, as specified by Jolly for the duration of the Works; and
 - (d) supply an area suitable for washing out Jolly's equipment and for depositing all unused concrete and slurry.
- 11.3 Worksite Inductions
- (a) in the event the Customer requires an employee or sub-contractor of Jolly to undertake a Worksite induction during working hours, the Customer will be liable to pay the hourly charges for that period. If any induction needs to be undertaken prior to the commencement date then the Customer shall be liable to pay Jolly's standard (and/or overtime, if applicable) hourly labour rate; or
 - (b) where Jolly is in control of the Worksite, the Customer and/or the Customer's third party contractors must initially carry out Jolly'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 Customer and/or third party acting on behalf of the Customer must at all times be accompanied by Jolly.
- 11.4 Where Jolly requires that Materials, tools etc. required for the Works be stored at the Worksite, the Customer shall supply Jolly a safe area for storage and shall take all reasonable efforts to protect all items from destruction, theft or damage. In the event that any of the stored items are destroyed, stolen or damaged, then the cost of repair or replacement shall be the Customer's responsibility.

12. Measurement of Concreting Works

- 12.1 At the completion of the Works the Customer or the representative of the Customer shall be in attendance and the Works shall then be duly measured. In the absence of either the Customer or their representative Jolly shall carry out the necessary measurements and forward to the Customer their calculations. If the Customer 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.

13. Underground Locations/hidden Services

- 13.1 Prior to Jolly commencing any work the Customer must advise Jolly of the precise location of all underground/hidden services on the Worksite and clearly mark the same. The underground/hidden mains and services the Customer must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on the Worksite.
- 13.2 Whilst Jolly will take all care to avoid damage to any underground/hidden services the Customer agrees to indemnify Jolly 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 13.1.

14. Insurance

- 14.1 Jolly shall have public liability insurance of at least five million dollars (\$5m). It is the Customer's responsibility to ensure that they are similarly insured.

15. Compliance with Laws

- 15.1 The Customer and Jolly 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.
- 15.2 Both parties acknowledge and agree:
- (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.
- 15.3 Where the Customer has supplied products for Jolly to complete the Works, the Customer 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 Jolly's opinion, it is believed that the materials supplied are Non-Conforming products and will not conform with New Zealand regulations, then Jolly 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 6.2.
- 15.4 The Customer shall obtain (at the expense of the Customer) all licenses and approvals that may be required for the Works.
- 15.5 Notwithstanding clause 15.1 and pursuant to the Health & Safety at Work Act 2015 (the "HSW Act"), Jolly 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 Customer who has engaged a third party head contractor.

16. Title

- 16.1 Jolly and the Customer agree that ownership of the Materials shall not pass until:
- (a) the Customer has paid Jolly all amounts owing to Jolly; and
- (b) the Customer has met all of its other obligations to Jolly.
- 16.2 Receipt by Jolly 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.
- 16.3 It is further agreed that:
- (a) until ownership of the Materials passes to the Customer in accordance with clause 16.1 that the Customer is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to Jolly on request;
- (b) the Customer holds the benefit of the Customer's insurance of the Materials on trust for Jolly and must pay to Jolly 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 Jolly shall be sufficient evidence of Jolly's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with Jolly to make further enquiries;
- (d) the Customer 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 Customer sells, disposes or parts with possession of the Materials then the Customer must hold the proceeds of any such act on trust for Jolly and must pay or deliver the proceeds to Jolly on demand;
- (e) the Customer should not convert or process the Materials or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of Jolly and must sell, dispose of or return the resulting product to Jolly as it so directs;
- (f) unless the Materials have become fixtures the Customer irrevocably authorises Jolly to enter any premises where Jolly believes the Materials are kept and recover possession of the Materials;
- (g) Jolly may recover possession of any Materials in transit whether or not delivery has occurred;
- (h) the Customer 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 Jolly; and
- (i) Jolly may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Customer.

17. Personal Property Securities Act 1999 ("PPSA")

- 17.1 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that:
- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
- (b) a security interest is taken in all Materials and/or collateral (account) – being a monetary obligation of the Customer to Jolly for Works – that have previously been supplied and that will be supplied in the future by Jolly to the Customer.
- 17.2 The Customer 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 Jolly may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;

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- (b) indemnify, and upon demand reimburse, Jolly 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 Jolly; and
 - (d) immediately advise Jolly 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.
- 17.3 Jolly and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 17.4 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA.
- 17.5 Unless otherwise agreed to in writing by Jolly, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 17.6 The Customer shall unconditionally ratify any actions taken by Jolly under clauses 17.1 to 17.5.
- 17.7 Subject to any express provisions to the contrary (including those contained in this clause 17), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

18. Security and Charge

- 18.1 In consideration of Jolly agreeing to supply the Works, the Customer 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 Customer either now or in the future, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 18.2 The Customer indemnifies Jolly from and against all Jolly's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising Jolly's rights under this clause.
- 18.3 The Customer irrevocably appoints Jolly and each director of Jolly as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 18 including, but not limited to, signing any document on the Customer's behalf.

19. Defects and Returns

- 19.1 The Customer shall inspect the Materials on delivery and shall within seven (7) days of delivery (time being of the essence) notify Jolly of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford Jolly an opportunity to inspect the Materials within a reasonable time following delivery if the Customer believes the Materials are defective in any way. If the Customer shall fail to comply with these provisions the Materials shall be presumed to be free from any defect or damage. For defective Materials, which Jolly has agreed in writing that the Customer is entitled to reject, Jolly's liability is limited to either (at Jolly's discretion) replacing the Materials or repairing the Materials.
- 19.2 Materials will not be accepted for return other than in accordance with 19.1 above and provided that:
- (a) Jolly has agreed in writing to accept the return of the Materials; and
 - (b) the Materials are returned at the Customer's cost within seven (7) days of the delivery date; and
 - (c) Jolly will not be liable for Materials which have not been stored or used in a proper manner; and
 - (d) the Materials are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
- 19.3 Jolly will not accept the return of Materials for credit.

20. Warranties

- 20.1 Subject to the conditions of warranty set out in clause 20.2 Jolly warrants that if any defect in any workmanship of Jolly becomes apparent and is reported to Jolly within three (3) months of the date of delivery (time being of the essence) then Jolly will either (at Jolly's sole discretion) replace or remedy the workmanship.
- 20.2 The conditions applicable to the warranty given by clause 20.1 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 Customer to properly maintain any Materials; or
 - (ii) failure on the part of the Customer to follow any instructions or guidelines provided by Jolly; 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 Jolly shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without Jolly's consent.
 - (c) in respect of all claims Jolly shall not be liable to compensate the Customer for any delay in either replacing or remedying the workmanship or in properly assessing the Customer's claim.
- 20.3 For Materials not manufactured by Jolly, the warranty shall be the current warranty provided by the manufacturer of the Materials. Jolly shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Materials.

21. Consumer Guarantees Act 1993

- 21.1 If the Customer is acquiring Materials for the purposes of a trade or business, the Customer acknowledges that the provisions of the Consumer Guarantees Act 1993 ("CGA") do not apply to the supply of Materials by Jolly to the Customer.

22. Intellectual Property

- 22.1 Where Jolly has designed, drawn, written plans or a schedule of Works, or created any products for the Customer, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in Jolly, and shall only be used by the Customer at Jolly's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of Jolly.

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- 22.2 The Customer warrants that all designs, specifications or instructions given to Jolly will not cause Jolly to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify Jolly against any action taken by a third party against Jolly in respect of any such infringement.
- 22.3 The Customer agrees that Jolly may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which Jolly has created for the Customer.

23. Default and Consequences of Default

- 23.1 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 Jolly's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 23.2 If the Customer owes Jolly any money the Customer shall indemnify Jolly from and against all costs and disbursements incurred by Jolly in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, Jolly's collection agency costs, and bank dishonour fees).
- 23.3 Further to any other rights or remedies Jolly may have under this Contract, if a Customer has made payment to Jolly, and the transaction is subsequently reversed, the Customer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by Jolly under this clause 23, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Customer's obligations under this Contract.
- 23.4 Without prejudice to Jolly's other remedies at law Jolly shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to Jolly shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to Jolly becomes overdue, or in Jolly's opinion the Customer will be unable to make a payment when it falls due;
 - (b) the Customer has exceeded any applicable credit limit provided by Jolly;
 - (c) the Customer 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 Customer or any asset of the Customer.

24. Suspension of Works

- 24.1 Where the Contract is subject to section 24A of the Construction Contracts Act 2002, the Customer hereby expressly acknowledges that:
- (a) Jolly 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 Customer, and:
 - (i) the payment is not paid in full by the due date for payment in accordance with clause 6.5 and/or any subsequent amendments or new legislation and no payment schedule has been given by the Customer; or
 - (ii) a scheduled amount stated in a payment schedule issued by the Customer in relation to the payment claim is not paid in full by the due date for its payment; or
 - (iii) the Customer has not complied with an adjudicator's notice that the Customer must pay an amount to Jolly by a particular date; and
 - (iv) Jolly has given written notice to the Customer of its intention to suspend the carrying out of construction work under the construction Contract.
 - (b) if Jolly 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 Customer or by any person claiming through the Customer; 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 Jolly exercises the right to suspend work, the exercise of that right does not:
 - (i) affect any rights that would otherwise have been available to Jolly under the Contract and Commercial Law Act 2017; or
 - (ii) enable the Customer to exercise any rights that may otherwise have been available to the Customer under that Act as a direct consequence of Jolly suspending work under this provision;
 - (d) due to any act or omission by the Customer, the Customer effectively precludes Jolly from continuing the Works or performing or complying with Jolly's obligations under this Contract, then without prejudice to Jolly's other rights and remedies, Jolly may suspend the Works immediately after serving on the Customer 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 Jolly as a result of such suspension and recommencement shall be payable by the Customer as if they were a variation.
- 24.2 If pursuant to any right conferred by this Contract, Jolly suspends the Works and the default that led to that suspension continues unremedied subject to clause 25.1 for at least ten (10) working days, Jolly shall be entitled to terminate the Contract, in accordance with clause 25.

25. Cancellation

- 25.1 Without prejudice to any other rights or remedies Jolly may have, if at any time the Customer 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 Customer of such notice/s) then Jolly may suspend or terminate the supply of the Works. Jolly will not be liable to the Customer for any loss or damage the Customer suffers because Jolly has exercised its rights under this clause.
- 25.2 Jolly 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 Customer. On giving such notice Jolly shall repay to the Customer any sums paid in respect of the Price, less any amounts owing by the Customer to Jolly for Works already performed. Jolly shall not be liable for any loss or damage whatsoever arising from such cancellation.

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- 25.3 In the event that the Customer cancels the delivery of Works the Customer shall be liable for any and all loss incurred (whether direct or indirect) by Jolly as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 25.4 Cancellation of orders for products made to the Customer's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 26. Privacy Policy**
- 26.1 All emails, documents, images or other recorded information held or used by Jolly is Personal Information as defined and referred to in clause 26.3 and therefore considered confidential. Jolly acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 2020 ("the Act") including Part II of the OECD Guidelines and as set out in Schedule 8 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"). Jolly acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Customer's Personal Information, held by Jolly that may result in serious harm to the Customer, Jolly will notify the Customer 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 Customer by written consent, unless subject to an operation of law.
- 26.2 Notwithstanding clause 26.1, privacy limitations will extend to Jolly in respect of Cookies where the Customer utilises Jolly's website to make enquiries. Jolly 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 Customer's:
- (a) IP address, browser, email client type and other similar details;
 - (b) tracking website usage and traffic; and
 - (c) reports are available to Jolly when Jolly sends an email to the Customer, so Jolly may collect and review that information ("collectively Personal Information")
- If the Customer consents to Jolly's use of Cookies on Jolly's website and later wishes to withdraw that consent, the Customer may manage and control Jolly's privacy controls via the Customer's web browser, including removing Cookies by deleting them from the browser history when exiting the site.
- 26.3 The Customer authorises Jolly or Jolly's agent to:
- (a) access, collect, retain and use any information about the Customer;
 - (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 Customer's creditworthiness; or
 - (ii) for the purpose of marketing products and services to the Customer.
 - (b) disclose information about the Customer, whether collected by Jolly from the Customer directly or obtained by Jolly 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 Customer.
- 26.4 Where the Customer is an individual the authorities under clause 26.3 are authorities or consents for the purposes of the Privacy Act 2020.
- 26.5 Jolly will destroy Personal Information upon the Customer'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.
- 26.6 The Customer can make a privacy complaint by contacting Jolly via e-mail. Jolly 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 Customer is not satisfied with the resolution provided, the Customer can make a complaint to the Information Commissioner at <http://www.privacy.org.nz/comply/comptop.html>.
- 27. Service of Notices**
- 27.1 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;
 - (e) if sent by email to the other party's last known email address.
- 27.2 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.
- 28. Trusts**
- 28.1 If the Customer at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not Jolly may have notice of the Trust, the Customer covenants with Jolly as follows:
- (a) the Contract extends to all rights of indemnity which the Customer now or subsequently may have against the Trust and the trust fund;
 - (b) the Customer 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 take away the right of indemnity of the Customer against the Trust or the trust fund. The Customer 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 Customer will not without consent in writing of Jolly (Jolly will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
 - (i) the removal, replacement or retirement of the Customer 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.

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29. General

- 29.1 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 replacement(s).
- 29.2 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.
- 29.3 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 courts of Queenstown, New Zealand.
- 29.4 Except to the extent permitted by law "CGA", Jolly shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by Jolly of these terms and conditions (alternatively Jolly's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 29.5 Jolly may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Customer's consent.
- 29.6 The Customer cannot licence or assign without the written approval of Jolly.
- 29.7 Jolly 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 Customer agrees and understands that they have no authority to give any instruction to any of Jolly's sub-contractors without the authority of Jolly.
- 29.8 The Customer agrees that Jolly may amend their general terms and conditions for subsequent future contracts with the Customer by disclosing such to the Customer in writing. These changes shall be deemed to take effect from the date on which the Customer accepts such changes, or otherwise at such time as the Customer makes a further request for Jolly to provide Works to the Customer.
- 29.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc., ("Force Majeure") or other event beyond the reasonable control of either party.
- 29.10 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.