

Clever Dick Services PTY LTD - Terms and Conditions

Application of Terms and Conditions

1. For the purposes of these Terms and Conditions, the Contractor is the entity trading from time to time as Clever Dick the Services PTY LTD ("**Contractor**") and Customer is the person or persons to whom the Contractor offers to supply goods and/or services.
2. The Contractor's offer to supply goods and/or services is set out in the Contractor's quotation (which may describe a specific contract sum / price for the goods and/or services, or a method for calculating it), any documents referred to in the quotation and these Terms and Conditions. Unless otherwise specified by the Contractor, acceptance of the offer is valid whether acceptance is communicated verbally, in writing, electronically or by conduct which signifies acceptance of the offer (such as payment of the Deposit, inviting or permitting the Contractor to supply goods and/or services or scheduling any date and/or time for the supply of goods and/or services). Acceptance of the Contractor's offer creates a binding legal agreement between the Customer and the Contractor which includes these Terms and Conditions ("**Contract**").

Scope of Works

3. The Contractor must provide the labour and materials necessary for the proper supply of the goods and/or services specified in the Contract, subject to any exclusions specified in the Contract ("**Works**"). Unless expressly provided in the Contract, the Contractor is not engaged to supply design services in relation to the Works. For the avoidance of doubt, if the proper performance of the Works requires the Contractor to comply with any design or design parameters (whether mandated by the Customer, by law or by any Australian or industry standard applicable to the Works), the Contractor is not (and is not deemed to be) engaged to supply design services.

Variations

4. The Customer or Contractor may from time to time given notice to the other party proposing additional works or a change to the Works, provided that the proposed additional works or changes do not affect the overall design intent of the Works (each a "**Variation**").
5. If the variation is of an urgent nature, or relates to an issue of safety, the Customer may require the Contractor to carry out the variation.
6. Unless clause 5 applies, the Contractor is not obliged to carry out any Variation unless and until the parties have agreed on the Variation and the price of the Variation.
7. The Customer shall pay or allow the Contractor (or vice versa as the case requires) the price of the Variation determined in accordance with the Contract.
8. The price of the Variation shall be the price agreed prior to the Variation being commenced or, if the price has not been agreed, shall be the amount valued on the basis of applicable prices or rates set out in the Contract (if any) or otherwise on the basis of reasonable rates or prices which shall include an allowance for profit and overheads. The price shall be added to or subtracted from the Contract Sum.
9. If the parties do not agree to the Variation and the price of the Variation within fourteen (14) days of the notice being given under clause 4, a dispute is taken to arise for the purposes of clause 56 the Contract.

Deposit and Security

10. The Customer must pay the deposit specified in the Contract (if any) ("**Deposit**") prior to commencement of the Works.
11. The Contractor may from time to time by notice in writing require the Customer to provide security up to the amount of the Contract Sum for performance of the Customer's obligations under the Contract ("**Security**").
12. Where the Contractor requests Security in accordance with these Terms and Conditions:
 - a. the Customer must provide Security of a kind and in a form that is acceptable to the Contractor within fourteen (14) days or prior to the commencement of works. Kinds of security which might be acceptable (subject to circumstances and form) include an unconditional undertaking from a financial institution or insurance company or a written personal guarantee from a third party; and
 - b. the Contractor is not required to commence or perform the Works (or any further Works) until the Customer has provided Security and complied with its obligations under this clause.
13. The Contractor may have recourse to the Security or convert the Security into money if the Customer has not complied with its obligations under the Contract and the Contractor has notified the Customer that it intends to have recourse to the Security or convert the Security into cash.
14. The Contractor must release the Security within fourteen (14) days of the Customer paying all amounts due and payable to the Contractor under or in relation to the Contract.

Contract Sum and Payment

15. The Customer must pay the contract price specified in the Contract as adjusted by these Terms and Conditions ("**Contract Sum**") or any part of it as and when it becomes due and payable under the Contract. Time is of the essence.
16. The Contractor may make a claim for payment of the Contract Sum or make a progress claim by issuing an invoice to the Customer.
17. The Contractor may:
 - a. submit any progress payment claim at the times specified in the Contract or, if no times are specified at any time; and
 - b. make a final payment claim (for the unpaid balance of the Contract Sum and any other amount payable under the Contract) at completion of the Works, and
 each is a "**Payment Claim**".
18. Each Payment Claim is a progress claim within the meaning of the *Building and Construction Industry Security of*



Contracts Act 2002 (Vic) and for the purposes of that Act, the date of the invoice is the reference date.

19. The due date for payment of the Contract Sum or any Payment Claim is the date specified in the Contractor's invoice(s) or, if no date is specified, is seven (7) days from the date on which the relevant invoice was sent by the Contractor.

20. If the Customer does not make any payment to the Contractor on time in accordance with these Terms and Conditions, the Contractor will immediately be entitled to, and the Customer must pay the Contractor on demand, interest on all outstanding payments at the rate fixed from time to time pursuant to section 2 of the *Penalty Interest Rates Act 1983 (Vic)*.

GST

21. Words or expressions used in this clause which are defined in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* have the same meaning in this clause. Any amount or consideration to be paid under or in connection with the Contract (however expressed) is taken to be exclusive of GST unless otherwise stated.

22. If a party ("**supplier**") makes a taxable supply to the other party ("**recipient**") under or in connection with the Contract:

- the recipient must also pay to the supplier, an amount equal to the GST exclusive consideration multiplied by the prevailing rate of GST; and
- the amount by which the GST exclusive consideration is increased pursuant to subparagraph (a) of this clause must be paid to the supplier by the recipient without set off, deduction or requirement for demand, at the same time and in the same manner as the GST exclusive consideration is due and payable.

Customer's obligations

23. The Customer must, at its own cost, obtain all necessary building and planning permits to enable commencement of the Works on the scheduled commencement date specified in the Contract (if any), and provide a copy of each relevant permit (if any) to the Contractor on request. The Contractor is not obliged to commence the Works until the Customer has complied with all applicable obligations under the Contract.

24. For the purpose of facilitating performance of the Works in accordance with the Contract, the Customer must:

- give the Contractor (and its subcontractors, employees and representatives) sufficient access to and possession of the site, land and buildings as is reasonably required by the Contractor to carry out the Works in accordance with the Contract;
- provide all services (including water and electricity) required by the Contractor to carry out the Works in accordance with the Contract;
- provide all materials and equipment (not being materials or equipment which the Contractor is required to supply) required by the Contractor to carry out the Works in accordance with the Contract;
- supply information, and make decisions, promptly as and when required by the Contractor to carry out the Works in accordance with the Contract;
- act in a manner that enables the Contractor to carry out the Works efficiently and in accordance with the Contract;
- not directly or indirectly obstruct, interfere with or hinder the Contractor from carrying out the Works in accordance with the Contract or otherwise obtaining the benefit of the Contract; and
- provide evidence on demand that the Customer is registered as the proprietor of the land or otherwise has sufficient right, title and interest in and to it to authorise performance of the Works; and
- provide evidence on demand, that the Customer has the capacity to comply with its payment obligations under the Contract.

25. The Customer warrants on an ongoing basis that:

- it is registered as the proprietor of the land or otherwise has sufficient right, title and interest in and to it to authorise performance of the Works; and
- all plans, specifications and other information and documents provided to the Contractor in relation to the Works are accurate and may be relied upon by the Contractor.

Performance and Completion of the Works

26. Unless otherwise agreed, the working hours and days shall be those notified from time to time by the Contractor to the Customer.

27. The Customer is not entitled to require the Contractor to accelerate the performance of the Works.

28. Subject to these Terms and Conditions, the Contractor must make reasonable efforts to commence the Works by the scheduled commencement date specified in the Contract (if any) and complete the Works by the estimated completion date specified in the Contract (if any).

Extensions of time

29. If the progress of the Works is delayed by circumstances beyond the control of the Contractor; any act or omission of the Customer including any breach of the Contract; any act or omission of a third party (not being a party controlled by the Contractor); unavailability of the land, buildings or services required by the Contractor for performance of the Works; unavailability of materials or equipment to be supplied by any third party; any objection to the Works; delay or refusal of any authority to grant any necessary permit; industrial actions; inclement weather; any Variation (or any delay caused by a proposed Variation); or suspension of the Works in accordance with the Contract, then the Contractor must notify the Customer in writing of the actual or anticipated length of the delay ("**Delay Claim**").

30. The date for completion shall automatically be extended by the time specified in the Delay Claim unless the Customer disputes the Delay Claim (in whole or in part) by serving notice in writing on the Contractor within seven (7) days of receiving the Delay Claim. A notice served under this clause also constitute a notice of dispute for the purpose of clause 56. If a dispute notice is served under this clause, the Contractor is entitled to a fair and reasonable extension of time for



completion of the Works.

31. For every day (or part of it) of delay for which the Contractor is entitled to an extension of time under the Contract, the Contractor shall be entitled to delay damages (if any).

Latent conditions

32. The Contractor does not accept the risk of latent conditions (other than those identified in the Contract) and is entitled to claim a Variation if additional works are required because the physical conditions on site or in the near surrounds differ materially from the conditions which were, or ought reasonably to have been, expected by the

Contractor on the basis of information and documents that were provided by the Customer to the Contractor before the Contract was made.

Intellectual Property

33. Any intellectual property created by the Contractor in the course of performing this Contract (including in any drawing or plan) is and remains at all times the property of the Contractor. The Contractor grants the Customer a limited licence to use the Contractor's intellectual property to facilitate completion of the Works by the Contractor, and for any subsequent repair, maintenance or servicing of the Works by the Contractor in accordance with the Contract.

Defects Warranty

34. The Contractor undertakes to the Customer, subject to the terms and conditions set out below and to the Customer complying with them, to repair or replace the Works (at the Contractor's option) if there is a substantial defect in materials or workmanship and the defect is notified to the Contractor in writing with all supporting documents (including photographs) within fourteen (14) days from completion of the Works.
35. The Contractor shall, acting reasonably, determine whether to accept or reject any warranty claim.
36. To be eligible to claim under the warranty in clause 34 above, the Customer must have paid the contract sum in full.
37. The warranty does not require the Contractor to repair or replace any Works if the Customer has been refunded any money paid for the Works or if any other person has undertaken repair or replacement the Works.
38. The warranty is for the benefit of the Customer and is not transferable.
39. The warranty does not apply to, or in any way cover:
- a. normal wear and tear;
 - b. any design failure or defect;
 - c. any failure or defect caused by the Customer;
 - d. any failure or defect abnormal or improper use of the Works;
 - e. any failure or defect arising from any use which is contrary to law;
 - f. any failure or defect that would not have occurred if the Customer had taken reasonable steps to prevent the failure from occurring;
 - g. any failure that occurs for a reason or reasons that were specifically drawn to the Customer's attention;
 - h. any failure or defect that ought reasonably to have been revealed to you by an examination of the Works before the Customer made paid for the Works;
 - i. any failure of, or caused by, materials or workmanship which were not supplied by the Contractor;
 - j. any failure arising from accident, abuse, act of God, fire, sabotage, vandalism, or neglect or failure to operate, store and/or maintain the Works in accordance with instructions for use;
 - k. repairs made necessary due to the Works coming into contact with or being exposed to abnormal environmental conditions;
 - l. any failure arising from any negligent act or omission of any person other than the Contractor or any of its employees or representatives;
 - m. any failure arising from an act, default or omission of, or any representation made by, a person other than the Contractor or any employee or representative of the Contractor;
 - n. any failure of the Works to meet a description that was not applied to the Works by the Contractor; or
 - o. any failure of the Works to be reasonably fit for a disclosed purpose where the Customer did not rely on, or where it was unreasonable for the Customer to rely on, the skill or judgment of the Contractor.
40. If a claim under the warranty is accepted, the repair or replacement works will be scheduled and performed in accordance with the normal work flow of Contractor, by arrangement with the Customer. The timing of a repair or replacement may also depend upon the availability of materials from one or more third parties.
41. All of the work pursuant to the warranty shall be performed by the Contractor, unless the Contractor provides written authorisation for work to be performed by a third party, prior to performance of that work.
42. There will be no charge for repairs or replacements made to meet the Contractor's obligations under this Warranty (though the Customer may incur other costs in making a claim under this warranty).
43. Under the Australian Consumer Law ("ACL") if you are a consumer who enters into an agreement to acquire a good or service and you do not make the acquisition for the purpose of re-supply, then the goods and services come with guarantees that cannot be excluded under the ACL. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods and/or services repaired or replaced if it or they fail to be of acceptable quality and the failure does not amount to a major failure. The Contractor offers you the benefit of the warranty set out above in addition to any rights and remedies you may have under existing laws and regulations. The warranty does not limit or remove those rights or remedies. The Customer's rights under the ACL are not incorporated into, or enforceable under, this Contract.

Limitation of liability

44. Except for any liability which the Contractor may have under or as a result of any existing law or regulation which cannot be validly excluded, restricted or modified by the Contractor, the liability of the Contractor to the Customer or any other person for loss caused or contributed to by any failure or defect of or in the Works:
- a. is limited to the following (at the election of the Contractor):

- i. repair of the Works;
 - ii. replacement of the Works
 - iii. refunding the amount paid for the Works;
 - iv. paying the cost of authorised repairs;
 - v. paying for the cost of an authorised replacement.
- b. does not extend to any consequential loss which may be suffered or incurred, or which may arise directly or indirectly from or in connection with the Works and/or any failure or defect in the Works, however caused (including negligence);
- c. is excluded in relation to design work.
45. In clause 44:
- a. "loss" means any loss, cost, liability or damage, including reasonable legal costs; and
 - b. "consequential loss" means any consequential or reasonably foreseeable loss or damage, including exemplary, punitive or incidental loss or damage, loss of revenue or profits, loss of anticipated savings, loss of rental, other commercial or personal loss or damage or any loss or damage that is an indirect loss.
46. The Contractor makes no representation, expressly or impliedly, as to the quality of the Works or as to their fitness for any particular purpose.

Suspension of Works

47. The Contractor may suspend performance of the Works for so long as is necessary to protect any person or property, and otherwise as permitted by the Contract or the *Building and Construction Industry Security of Contracts Act 2002 (Vic)*. The Customer is not entitled to claim for any expenses, costs, losses or damages suffered or incurred directly or indirectly as a result of performance of the Works being so suspended.

Indemnity

48. The Customer indemnifies the Contractor In respect of:
- a. all costs, loss, damage and expense (including without limitation, legal fees on an indemnity basis and any costs, loss, damage and expense of and incidental to recovery of compensation or any amount owing by the Customer) suffered or incurred by the Contractor, and which arise directly or indirectly as a result of any breach or non-performance of any of the Customer's obligations under or in relation to the Contract or any negligence on the part of the Customer; and
 - b. any personal injury or death to any person and any damage or loss to property which arises as a result of any act or omission by the Customer or any employee, agent, representative, contractor or consultant to the Customer.

Termination and Consequences

49. The Contract may be terminated by written agreement between the parties at any time.
50. Either party may terminate the Contract by serving written notice to the other party, if:
- a. the other party is a company, an administrator, receiver, manager, controller or liquidator (or any other form of external controller) is appointed or formal step is taken towards such appointment, or the company resolves that it be wound up or becomes insolvent;
 - b. the other party is a natural person, the person dies or becomes bankrupt, makes a proposal for a scheme of arrangement, proposes or accepts a composition with creditors, presents a debtors petition or has a sequestration order made against it.
51. The Customer may serve notice of termination of the Contract if the Customer reasonably considers that:
- a. the Contractor has failed to maintain any policy of insurance in accordance with the Contract;
 - b. the Contractor has failed to proceed with the Works in a competent manner;
 - c. the Contractor has refused or persistently failed to comply with the requirements of any permit; or d. the Contractor has abandoned the Works; or
 - e. the Contractor is unable or unwilling to complete the Works.
52. The Contractor may serve notice of termination of the Contract if the Contractor reasonably considers that:
- a. the Customer fails to strictly comply with or breaches clauses 10, 12a, 15, 20, 22, 23 or 24 of the Contract;
 - b. any warranty provided by the Customer is not, or ceases to be, true and correct; or
 - c. the Customer is unable or unwilling to meet its payment obligations under the Contract.
53. Notice of termination:
- a. pursuant to clause 50, 51 or 52 must be in writing and served by registered post; and
 - b. pursuant to clause 51 or 52, must detail the legal basis for termination (including the breach or breaches relied upon) and state that the Contract will come to an end fourteen (14) days after receipt of the notice unless the breach is, or those breaches are, remedied by that time.
54. If the Contract is terminated by the Customer pursuant to clause 50 or 51:
- a. the Contractor is entitled to be paid pursuant to the Contract for the Works carried out pursuant to the Contract, and for all expenses incurred in relation to the Works, up to the date on which the Contract ends but is not entitled to claim any compensation or payment for the expected value of Contract beyond the date on which the Contract ends; and
 - b. the Customer may, at its own cost and without recourse to the Contractor, engage another person to complete the Works.
55. If the Contract is terminated by the Contractor pursuant to clause 50, 52 or otherwise by law, the Contractor:
- a. may claim any and all remedies available in law and/or in equity in relation to the Contract and/or the Works, without limitation; and
 - b. the Customer (or its successor or legal personal representative) may, at its own cost and without recourse to the Contractor, engage another person to complete the Works.



Dispute resolution

56. If a dispute arises in connection with the subject matter of the Contract, then either party shall serve a notice dispute on the other by registered post. Subject to the right of any party to suspend its obligations under the Contract, the parties must continue to perform the Contract despite the existence of a dispute.
57. If the dispute remains unresolved within fourteen (14) days of notice being served (or such other period as may be agreed), either party may make issue legal proceedings.

General

58. Notice sent by email, or delivered to the physical address, specified in the Contract is deemed to be given and received on the date it was sent or delivered to the physical address (as applicable).
59. The Contractor may subcontract the Works (or any part of the Works) at any time but neither party is entitled assign any right, benefit or interest in or under the Contract without the written approval of the other party.
60. To the extent that any clause is void, voidable, unenforceable or illegal, it is to be read down so as to be valid and enforceable and if it cannot be so read down, it is to be severed from the Contract.
61. If there is more than one person named as the Customer in the Contract, the obligations of each person named as the Customer are joint and several.
62. The Contract is governed by the laws of Victoria and the parties submit to the exclusive jurisdiction of Victoria's courts and tribunals.