
PKM Civil Pty Ltd T/A PKM Earthmoving– Terms & Conditions of Trade (“Terms”)

1. Definitions

- 1.1 "Client" means the person/s specified as the Client on the Engagement Agreement.
- 1.2 "Contractor" means PKM Civil Pty Ltd ACN 606 306 478 T/A PKM Earthmoving.
- 1.3 "Site" means the site specified as the delivery site on the Engagement Agreement.
- 1.4 "Guarantor" means the person/s named as the Guarantor on the Engagement Agreement.
- 1.5 "Goods" means the goods supplied by the Contractor to the Client and are as described on the Engagement Agreement.
- 1.6 "GST" has the meaning given to that term by *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 1.7 "Price" means the price stated on the Engagement Agreement or as varied in accordance with clause 2 these Terms
- 1.8 "Services" means the services supplied by the Contractor to the Client described on the Engagement Agreement.
- 1.9 "Engagement Agreement" means the form titled "Engagement Agreement" or "Quote" and attached to these Terms and any variations agreed in writing and signed by the parties.

2. Price And Payment

- 2.1 The Client must pay the Price to the Contractor by either (at the contractors sole discretion):
 - (a) prior to delivery of the Goods and/or commencement of the Services;
 - (b) on delivery or completion (as applicable) of the Goods and/or Services;
 - (c) within 7 days of provision of a tax invoice for the Goods and/or Services.
- 2.2 The Contractor reserves the right to change the Price in the event of a variation to the Work Approval From. Any variation from the plan of scheduled Services, works or specifications (including, but not limited to, any variation as a result of additional works required due to hidden or unidentifiable difficulties beyond the reasonable control of the Contractor such as hard rock barriers below the surface or iron reinforcing rods in concrete) will be charged for on the basis of the Contractor's then current rates and will be shown as variations on the invoice in addition to any quoted price.
- 2.3 The Client must not set off any amount owing by the Contractor to the Client against the Price.
- 2.4 Payment must be made by cash, cheque, bank cheque, direct credit, credit card or any other method agreed between the Client and the Contractor. Payment by credit card will incur a 2% surcharge above the Price.
- 2.5 Unless stated otherwise, the Price excludes any GST or other applicable taxes or duties. Any applicable GST, other tax or duty will be payable in addition to the Price.
- 2.6 If the Client fails to pay the Price in accordance with this agreement, without limiting any other remedies available to the Contractor, the Contractor may suspend or terminate the supply of Goods and/or Services to the Client and any of its other obligations under these Terms. 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.
- 2.7 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of 10% per annum calculated daily.
- 2.8 If any account remains overdue over 30 days , the greater of \$50.00 or 20.00% of the amount overdue (up to a maximum of \$500.00) will be levied for administration fees which is immediately due and payable.

3. Delivery, title and risk

- 3.1 Delivery of the Goods and/or Services occurs when the Goods and/or Services are delivered to the Site.
- 3.2 The Contractor may deliver the Goods and/or Services by separate instalments.
- 3.3 The Client must take delivery of the Goods and/or Services tendered notwithstanding that the quantity delivered may be either greater or lesser than the quantity ordered. The Contractor will adjust the Price pro rata to the discrepancy.
- 3.4 The Contractor shall not be liable for any loss or damage whatsoever due to failure by the Contractor to deliver the Goods and/or Services (or any part of them) promptly or at all, due to circumstances beyond the control of the Contractor.
- 3.5 Title to an item of Goods passes from the Contractor to the Client when all amount payable by the Client to the Contractor under these Terms or in connection with the Goods and/or Services have been paid in full and any other obligations of the Client in respect of all contracts between the Contractor and the Client have been met.
- 3.6 The Client bears the risk relating to the Goods from the delivery of the Goods to the Site.
- 3.7 It is further agreed that:
 - (a) where practicable the Goods will be kept separate and identifiable until the Contractor has received payment in full and all other obligations of the Client are met;
 - (b) until such time as ownership of the Goods and/or Services pass from the Contractor to the Client the Contractor may give notice in writing to the Client to return the Goods or any of them to the Contractor;
 - (c) if the Client fails to pay the price in accordance with these terms or otherwise return the Goods to the Contractor at the request of the contractor then the Contractor or the Contractor's agent may enter premises owned, occupied or used by the Client including the site or any premises as the invitee of the Client, where the Goods and/or Services are situated and take possession of the Goods and/or Services;
 - (d) the Client is only a bailee of the Goods and/or Services and until such time as the Contractor has received payment in full for the Goods and/or Services then the Client must hold any proceeds from the sale or disposal of the Goods and/or Services, up to and including the amount the Client owes to the Contractor for the Goods and/or Services, on trust for the Contractor;
 - (e) the Client must not charge in any way grant or otherwise give any interest in the Goods and/or Services while they remain the property of the Contractor;
 - (f) the Contractor can commence proceedings to recover the Price of the Goods and/or Services notwithstanding that ownership of the Goods and/or Services may not have passed to the Client; and
 - (g) until such time that ownership in the Goods and/or Services passes to the Client, if the Goods and/or Services are converted into other products, the parties agree that the Contractor will be the owner of the end products and as such shall agree to PPSA registration in accordance with clause 15.

4. Limitation of liability

- 4.1 Subject to clauses 4.2, 4.3 and 4.4, the Contractor is not liable for any loss or damage, including consequential loss, however caused (including by the negligence of the Contractor) suffered by the Client in connection with the Goods and/or Services.
- 4.2 The Client must inspect the Goods and/or Services immediately on completion and/or delivery and notify the Contractor of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client must allow the Contractor an opportunity to inspect the Goods and/or Services within a reasonable time following notification of an issue if the

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Client believes the Goods and/or Services are defective in any way. If the Client fails to comply with these provisions the Goods and/or Services shall be presumed to be free from any defect or damage.

- 4.3 Any claim made by the Client must against the Contractor for loss or damage however caused (including by the negligence of the Contractor) suffered by the Client in connection with the Goods and/or Services must be made in accordance with clause 4.2 or in a reasonable time of the Client becoming entitled to make the claim and any claim not made in accordance with clause 4.2 and this clause 4.3 is absolutely barred.
- 4.4 If the *Competition and Consumers Act 2010* (Cth) or any other applicable legislation implies a condition or warranty into this agreement in respect of goods or services supplied, and the Contractor's liability for breach of that condition or warranty cannot be excluded but may be limited, clause 4.1 does not apply to that liability and instead the Contractor's liability for such breach is limited to, in the case of a supply of goods, the Contractor replacing the goods, supplying equivalent goods or repairing the goods, or in the case of a supply of services, the Contractor supplying the services again or paying for the cost of having the services supplied again.

5. Indemnity

- 5.1 The Client is liable for, and indemnifies the Contractor from and against, all loss or damage (including legal costs on a solicitor and client basis) incurred or suffered by the Contractor however caused in connection with:
- (a) any breach of this agreement by the Client;
 - (b) pursuing payment of any outstanding amounts owed to the Contractor by the Client;
 - (c) any claim or threatened claim by a third party in connection with the Goods and/or Services or the Site;
 - (d) any deliberate, unlawful or negligent act or omission of the Client or any person acting or purporting to act on behalf of the Client.

6. Client requirements

- 6.1 The Client must:
- (a) provide the Contractor with reasonable access to the Site to enable the Contractor deliver the Goods and/or provide the Services;
 - (b) follow the directions of the Contractor in connection with the provision of the Goods and/or Services; and
 - (c) provide the Contractor with such information and assistance necessary to enable the Contractor to deliver the Goods and/or provide the Services, including 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, communication cables, fibre optic cables, oil pumping mains, and any other services that may be on site. Whilst the Contractor will take reasonable care to avoid damage to any underground services the Client agrees to indemnify the Contractor in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 6.1.
- 6.2 The Client must comply with the provisions of all statutes, regulations and by-laws of government, local and other public authorities that may be applicable to the delivery of the Goods and/or Services.
- 6.3 The Client must obtain (at its own expense) all licences and approvals that may be required for the Services. The Client must ensure that the Site complies with any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.

7. Guarantee

- 7.1 The Guarantor unconditionally and irrevocably guarantees to the Contractor:
- (a) the Client's payment of any money the Client is required to pay;
 - (b) the performance and observance of the Client's obligations under these terms; and
 - (c) the payment of any indemnity or damages payable by the Client for the Client's failure or delay to fulfil any of the Client's obligations.
- 7.2 If the Client defaults in:
- (a) the payment of any amount due under these Terms, the Guarantor must pay that amount on demand to the Contractor; or
 - (b) the performance and observance of any of the Client's other obligations under these Terms, the Guarantor must pay to the Contractor on demand all losses, damages, expenses and costs which the Contractor is entitled to recover because of that default, whether or not the Contractor has exercised or exhausted the Contractor's remedies for their recovery from the Client.
- 7.3 As a separate and additional liability, the Guarantor indemnifies the Contractor in respect of:
- (a) all liabilities incurred by the Contractor arising directly or indirectly out of any default or delay by the client in the performance and observance of the Client's obligations under this agreement;
 - (b) any money payable under these Terms (including money which would have been payable if it were recoverable which is not recoverable from the Client for any reason and whether or not:
 - (i) any transaction relating to any money payable under these Terms was void or illegal or has been avoided; or
 - (ii) anything relating to that transaction was or ought to have been known to the Contractor.
- 7.4 This clause contains a continuing guarantee and indemnity despite any settlement of account, intervening payment or anything else until all money payable under these Terms have been paid in full and all the Client's other obligations under these Terms have been performed and observed.

8. Termination

- 8.1 Without prejudice to the Contractor's other remedies at law the Contractor is 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 in the event that:
- (a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Client will be unable to meet its payments as they fall due; or
 - (b) the Client becomes bankrupt, insolvent, 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

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- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 8.2 The Contractor may terminate the delivery of the goods and / or services at any time by notice to the Client in which case termination will occur on the date specified in that notice, or if no date is specified, immediately.
- 8.3 After termination of this agreement, accrued rights or remedies of a party are not affected.
- 9. Security and Charge**
- 9.1 Despite any other rights which the Contractor may have:
- (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their interest in that land, realty or any other asset to the Contractor or the Contractor’s nominee to secure all amounts and other monetary obligations payable under these Terms. The Client and/or the Guarantor acknowledge and agree that the Contractor the client has met (or the Contractor’s nominee) may lodge where appropriate a caveat, which will be withdrawn once all payments and other monetary obligations payable hereunder have been met.
- (b) should the Contractor elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor indemnifies the Contractor from and against all the Contractor’s costs and disbursements including legal costs on a solicitor and own client basis.
- (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Contractor or the Contractor’s nominee as the Client’s and/or Guarantor’s attorney to perform all acts necessary to give effect to the provisions of this clause 9.1.
- 10. Insurance**
- 10.1 The Contractor will maintain public liability insurance of at least \$10m. The Client must maintain those insurances that a prudent person in the circumstances would maintain in connection with the delivery of the Goods and/or Services at the Site.
- 11. Dispute Resolution**
- 11.1 If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within 14 days after service of a notice of dispute, the parties must meet at least once, to attempt to resolve the dispute. At that conference each party must be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be resolved either party may by further notice to the other party refer such dispute to arbitration. Any arbitration will be:
- (a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
- (b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.
- 12. Privacy Act 1988 (Cth)**
- 12.1 The Client and/or the Guarantor/s agree for the Contractor to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by the Contractor.
- 12.2 The Client and/or the Guarantor/s agree that the Contractor may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by Client;
- (b) to notify other credit providers or credit reporting agencies of a default by the Client;
- (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and
- (d) to assess the credit worthiness of Client and/or Guarantor/s.
- 12.3 The Client consents to the Contractor being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) *Privacy Act 1988 (Cth)*).
- 12.4 The Client agrees that personal credit information provided may be used and retained by the Contractor for the following purposes and for other purposes as agreed between the Client and Contractor or required by law from time to time:
- (a) provision of Goods and/or Services;
- (b) marketing of Goods and/or Services by the Contractor, its agents or distributors in relation to the Goods and/or Services;
- (c) analysing, verifying and/or checking the Client’s credit, payment and/or status in relation to provision of Goods/Services;
- (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and
- (e) enabling the daily operation of Client’s account and/or the collection of amounts outstanding in the Client’s account in relation to the Goods and/or Services.
- 12.5 The Contractor may give information about the Client to a credit reporting agency for the following purposes:
- (a) to notify of a default by the Client;
- (b) to obtain a consumer credit report about the Client; and
- (c) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
- 13. Building and Construction Industry Payments Act 2004**
- 13.1 At the Contractor’s sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the *Building and Construction Industry Payments Act 2004* (Qld) may apply.
- 14. General**
- 14.1 These terms and conditions and any contract to which they apply shall be governed by the laws of Queensland and the parties submit to the jurisdiction of the courts of that Queensland.
- 14.2 The Contractor may license or sub-contract all or any part of its rights and obligations without the Client’s consent.
- 14.3 The Client agrees that the Contractor may review these terms and conditions at any time. If, following any such review, there is to be any change to these Terms, then that change will take effect from the date on which the Contractor notifies the Client of such change.
- 14.4 The Contractor is not liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of the contractor.

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- 14.5 The failure by the Contractor to enforce any provision of these terms and conditions does not constitute a waiver of that provision, nor does it affect the Contractor's right to subsequently enforce that provision.
- 14.6 These Terms constitute the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.
- 14.7 Any instructions received by the Contractor from the Client for the supply of Goods and/or Services or the Client's acceptance of Goods and/or Services supplied by the Contractor constitutes acceptance of these Terms. These terms are to be included in any contract offered by the client and will take precedence in the event of any dispute.
- 14.8 These Terms, unless the context requires otherwise:
- (a) the singular includes the plural and vice versa;
 - (b) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
 - (c) a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure of this document;
 - (d) a reference to any document or agreement includes a reference to that document or agreement as amended, novated, supplemented, varied or replaced from time to time;
 - (e) a reference to a party includes its executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
 - (f) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
 - (g) words and expressions denoting natural persons include bodies corporate, partnerships, associations, firms, governments and governmental authorities and agencies and vice versa; and
 - (h) a reference to any legislation or to any provision of any legislation includes:
 - (i) any modification or re enactment of the legislation;
 - (ii) any legislative provision substituted for, and all legislation, statutory instruments and regulations issued under, the legislation or provision; and
 - (iii) where relevant, corresponding legislation in any Australian State or Territory.

15. PPSA

- 15.1 In consideration of PKM Civil Pty Ltd supplying Goods or Services to the Customer at the request of the Customer, the Customer:
- a) grants PKM Civil Pty Ltd a “Purchase Money Security Interest” (“PMSI”)(as defined in the PPSA) in all Goods or Services supplied by PKM Civil Pty Ltd to the Customer from time to time as security for payment of the purchase price of such products;
 - b) grants to PKM Civil Pty Ltd a “Security interest” (“SI”) (as defined in the PPSA) in all Goods or Services supplied by PKM Civil Pty Ltd to the Customer from time to time and in all of the Customer's personal property as security for any other amount owed by the Customer to PKM Civil Pty Ltd and as security for the performance by the Customer of the obligations as set out in these Conditions;
 - c) agrees that any Goods or Services or proceeds of sale of the Goods or Services coming into existence after the date of the credit terms will come into existence subject to the PMSI and SI granted herein and these credit terms without the need for any further action or agreement by any party;
 - d) agrees that the Customer has received valuable and sufficient consideration from PKM Civil Pty Ltd;
 - e) has agreed that the PMSI and SI has attached to all Goods or Services supplied now or in the future by PKM Civil Pty Ltd and that the attachment of the PMSI has in no way been deferred or postponed.
 - f) The Customer acknowledges and agrees that PKM Civil Pty Ltd may apply to register a security interest in the Goods or Services at any time before or after delivery of the Goods or Services. The Purchaser waives its right under s 157 of the PPSA to receive notice of any verification of the registration.
- 15.2 PKM Civil Pty Ltd reserves the right to register a financing statement in the Personal Properties Securities Register to perfect the PMSI and/or SI created under these Conditions
- 15.3 The costs of registering a financing statement or a financing charge can be charged to the Customer by PKM Civil Pty Ltd at PKM Civil Pty Ltd's complete discretion, and may, where applicable, be charged to the Customer's credit account with PKM Civil Pty Ltd.
- 15.4 The Customer must promptly, on request by PKM Civil Pty Ltd, execute all documents and do anything else reasonably required by PKM Civil Pty Ltd to ensure that the PMSI and SI created under these Conditions constitutes a perfectly secured interest.
- 15.5 The Customer must not agree to allow any person to register a financing statement over any of the Goods or Services in which PKM Civil Pty Ltd has any PMSI and / or SI without the prior written consent of PKM Civil Pty Ltd and will immediately notify PKM Civil Pty Ltd if the Customer becomes aware of any person or entity taking steps to register a financing statement in relation to any such Goods or Services.
- 15.6 The Customer must not allow the Goods or Services in which PKM Civil Pty Ltd has a PMSI or SI to become accessions or commingled with other Goods or Services unless PKM Civil Pty Ltd has first perfected any PMSI or SI that PKM Civil Pty Ltd has in relation to the Goods or Services.
- 15.7 If PKM Civil Pty Ltd perfects any PMSI and/or SI that PKM Civil Pty Ltd has in relation to the Goods or Services, the Customer must not do anything that results in PKM Civil Pty Ltd having less than the security or priority granted by the PPSA that PKM Civil Pty Ltd assumed at the time of perfection, subject only to the rights of a mortgagee pursuant to a registered mortgage.
- 15.8 The Customer irrevocably grants to PKM Civil Pty Ltd the right to enter upon the Customer's property or premises, without notice, and without being in any way liable to the Customer or to any third party, if PKM Civil Pty Ltd has cause to exercise any of PKM Civil Pty Ltd's rights under Chapter 4 of the PPSA, and the Customer will indemnify PKM Civil Pty Ltd for any claims made by any third party as a result of such exercise.