

# Terms and Conditions of H Piling Pty Ltd (ABN: 26 613 738 588) ("the Supplier")

## 1. Application

These Terms and Conditions ("T&Cs") will apply to any supply of Goods and/or Services supplied by the Supplier to the Customer.

## 2. Definitions

2.1 In these T&Cs:

"**Claim**" means any actual, contingent, present or future claim, demand, action, suit or proceeding for any Liability, restitution, equitable compensation, account, injunctive relief, specific performance or any other remedy of whatever nature and however arising, whether direct or indirect, and whether in contract, tort (including but not limited to negligence) or otherwise;

"**Confidential Information**" means information, whether in visual, oral, documentary, electronic, machine-readable, tangible, intangible or any other form, relating to the Supplier or any related entity of the Supplier including but not limited to any information relating to any business, products, markets, operations, processes, techniques, technology, forecasts, strategies or any other matter;

"**Contract**" means the contract formed as a result of an acceptance of an Order by the Supplier. It includes these terms, any covering letter, quotation, estimate and any other document that refers to these terms.;

"**Control**" has the meaning set out in the Corporations Act 2001 (Cth);

"**Customer**" means the customer set out in any quotation, offer, credit application or other document provided by the Supplier (or, in the absence of such information, the customer who placed the Order);

"**Customer's Address**" means any Installation address in a Contract;

"**Goods**" means the goods in the Contract;

"**Guarantors**" means the Director/s of the Customer and their spouses (if required by the Supplier) and the Trustee (if the Customer is a Trust);

"**Insolvency Event**" means any of the following, or any analogous, events:

- (a) the Customer disposes of the whole or any part of the Customer's assets, operations or business other than in the ordinary course of business;
- (b) the Customer ceases, or threatens to cease, carrying on business;
- (c) the Customer is unable to pay the Customer's debts as the debts fall due;
- (d) any step is taken by a mortgagee to take possession or dispose of the whole or any part of the Customer's assets, operations or business;
- (e) any step is taken for the Customer to enter into any arrangement or compromise with, or assignment for the benefit of, the Customer's creditors or any class of the Customer's creditors; or
- (f) any step is taken to appoint an administrator, receiver, receiver and manager, trustee, provisional liquidator or liquidator of the whole or any part of the Customer's assets, operations or business;

"**Liability**" means any loss, liability, cost, payment, damages, debt or expense (including but not limited to reasonable legal fees);

"**Order**" means any written or verbal order by the Customer to the Supplier for Goods and/or Services;

"**Personnel**" means any employee, servant, contractor, subcontractor, agent, partner, director or officer of a party;

"**PPSA**" means the *Personal Property Securities Act 2009*;

"**Price**" means the price of the Goods and/or Services;

"**Security Interest**" means a security interest within the meaning of the PPSA;

"**Services**" means the services in a Contract and any services associated with the Goods, including carrying out pile installation and recording of installation data in accordance with the relevant clauses of AS2159-2009 "Piling – Design and Installation"

"**Works**" means the works being carried out by the Supplier pursuant to the Contract, being the provision of Services.

## 3. Acceptance of terms and placement of orders

- 3.1 Any Order by the Customer to the Supplier and/or any acceptance of any Goods and/or Services by the Customer will constitute agreement to these T&Cs by the Customer.
- 3.2 If the Supplier accepts an Order, the parties will have created a binding Contract and the Supplier will supply the Goods and/or Services to the Customer, and the Customer will pay the Price to the Supplier in accordance with the terms of the Contract (which includes these T&Cs).
- 3.3 The Customer must provide the Supplier with written details of any required specifications or properties of Goods and/or Services at the time the Customer provides an Order to the Supplier.
- 3.4 The Customer must ensure the specifications or properties of Goods and/or Services stated in any Order by the Customer will be fit for the intended purpose of the Goods and/or Services.
- 3.5 The Supplier may cancel any Contract at any time prior to delivery of the Goods and/or Services with no liability other than to repay any amount of the Price paid in advance of the cancellation.

## 4. Delivery of Goods

- 4.1 If the Supplier agrees to deliver Goods to the Customer, the Supplier:
  - (a) will endeavour to deliver the Goods to the Customer's Address on or before any date agreed between the parties;

- (b) The Supplier may add to the Price any further charges incurred by the supplier including but not limited to storage, transport or delivery costs for any delay caused by the Customer.

- (c) The Supplier may vary the Price to include further charges if the Customer varies their instructions. Any variation must be agreed to by the Supplier and confirmed in writing by the Supplier.

4.2 The Supplier will not be liable for any delay in delivery of Goods to the Customer's Address.

4.3 The Customer will ensure a member of the Customer's Personnel will be at the Customer's Address to accept any delivery of Goods.

4.4 The Supplier may deliver any Goods to any person at the Customer's Address who has apparent authority to receive delivery of the Goods.

4.5 The Customer will inspect any Goods immediately on delivery and will be deemed to have accepted the Goods as is unless the Customer provides immediate written notice to the Supplier that the Customer rejects the Goods.

## 5. Price

5.1 The Price is exclusive of GST unless otherwise stated by the Supplier in writing.

5.2 The Customer must not withhold, make deductions from, or set-off, payment of any money owed to the Supplier for any reason.

5.3 The Supplier may charge, in addition to the Price, any other fees and charges that the Supplier notifies to the Customer from time to time.

## 6. Payment Terms

6.1 The Customer, if required by the Supplier, must pay a deposit to the Supplier of an amount equivalent to 30% of the Price upon enter into a Contract with the Supplier.

6.2 The Customer must make full payment of the balance of the Price and any other amounts payable to the Supplier within 30 days of end of month of delivery.

6.3 The Customer must reimburse the Supplier for the full amount of any bank or other fees associated with any dishonoured payments or cheques and any legal, debt recovery or other expenses associated with any action by the Supplier to recover money from the Customer.

6.4 In the event that delays are caused to the Works by parties other than the Supplier, standby rates will be applied and charged by way of variation, at a minimum rate of 6 hours.

6.5 No retention sum is to be withheld unless otherwise agreed between the parties. If it is agreed that a retention sum is to be withheld, the retention sum shall not exceed 5% of the total Contract Price. The Supplier will require an amount equivalent to 10% of the retention sum to be paid upon completion of the Works and the balance of the retention sum to be paid within 4 months of completion of the Works.

## 7. Payment Default

7.1 If the Customer defaults in payment by the due date of any amount payable to the Supplier and does not remedy the default within 14 days of written notice of the default by the Supplier, then all money which would become payable by the Customer to the Supplier at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and the Supplier may, without prejudice to any of its other accrued or contingent rights:

- (a) charge the Customer interest on any sum due at the rate of 15% p.a. for the period from the due date until the date of payment in full;
- (b) charge the Customer for, and the Customer must indemnify the Supplier from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Contract or to recover any Goods;
- (c) cease or suspend supply of any further Goods and/or Services to the Customer;
- (d) by written notice to the Customer, terminate any uncompleted Contract with the Customer.

## 8. Risk, Title and Insurance

8.1 The risk in Goods passes to the Customer immediately on the collection of the Goods by the Customer or delivery of the Goods by the Supplier.

8.2 The Customer will not receive title to Goods until the Customer makes full payment of the Price and any other amounts payable to the Supplier.

8.3 Until title in the Goods passes to the Customer in accordance with these T&Cs, the Customer will:

- (a) be only a bailee of the Goods;
  - (b) ensure the Goods are kept separate and identifiable from other goods;
  - (c) not grant any charge over, or interest in, the Goods to any third party;
  - (d) return any Goods to the Supplier immediately on request;
  - (e) authorise the Supplier or any agent of the Supplier to enter any land and premises owned, occupied or controlled by the Customer where the Goods are located and take possession of the Goods; and
  - (f) hold the proceeds from any sale or disposal of the Goods on trust for the Supplier.
- 8.4 The Customer assumes all responsibility for filing claims for damage

- against the carriers and other agents.
- 8.5 The Customer must insure the Goods from the time of the delivery at its cost against such risks as it thinks appropriate, and shall note the interest of the Supplier on the insurance monies policy and shall produce a certificate to this effect to the Supplier upon request.
- 8.6 If any of the Goods are damaged or destroyed after collection or delivery of same, the Customer must direct the insurer to make payment to the Supplier of all insurance monies payable in respect of the insurance claim made on the damaged or destroyed goods.
- 8.7 Insurance monies received by the Supplier will be applied firstly against the outstanding Price of the Goods that are damaged or destroyed, secondly against the outstanding Price of all Goods supplied under this Contract, thirdly against the outstanding balance payable to the Supplier on any account under our agreements and fourthly in payment of any balance to the Customer.

## 9. Personal Property Securities Act

- 9.1 To protect the Suppliers' Security Interest in the Goods until payment the Supplier may choose to register this agreement between the parties under the PPSA. The Customer agrees to do all things necessary to facilitate such registration.
- 9.2 To secure the punctual payment of all amounts owed by the Customer to the Supplier, the Customer grants to the Supplier
- (a) a Security Interest over all present and after-acquired property of the Customer in relation to which the Customer can be a grantor of a Security Interest under the PPSA, whether or not the Customer has title to the property, including but not limited to all PPSA retention of title property (as defined under section 51F of the Corporations Act); and
- (b) a fixed charge over all present and after-acquired property of the Customer in relation to which the Customer cannot be a grantor of a Security Interest under the PPSA, including without limitation all of the Customer's legal and beneficial interests in freehold and leasehold land
- 9.3 The Customer acknowledges the Supplier may lodge caveats over land or Security Interests on the Personal Properties Securities Register, and take any action to enforce the Supplier's security over the charged property pursuant to clause 9.2.
- 9.4 The Customer agrees to sign documents or do all things necessary to perfect the Supplier's rights under this agreement and appoint the Supplier as the Customer's attorney to sign any document or do anything that may reasonably be required to enforce the Supplier's rights on default.

## 10. Work Clearance Form & Working Platform Certificate

- 10.1 For public liability purposes, the Customer must complete and return to the Supplier a Work Clearance Form prior to the commencement of any Works by the Supplier. If the Customer does not have their own Work Clearance Form, the Supplier can provide the Customer with a Work Clearance Form for completion.
- 10.2 For public liability purposes, the Customer must obtain a signed Working Platform Certificate prior to the equipment being dispatched. The Customer agrees to pay a stand down rate of \$2,000.00 plus GST per day if, after the equipment has been dispatched, the site is not ready for the equipment and it is required to be returned.

## 11. Representations

- 11.1 The Customer warrants as to the correctness of the information which they have furnished to the Supplier, and acknowledges that the Supplier has relied upon this information in determining whether or not to provide the Goods and/or Services.
- 11.2 The Customer further warrants that it has not failed to disclose to the Supplier anything relevant to its decision to have dealings with the Supplier and that no court proceedings or dispute is current that may have an adverse effect on performing the Customer's obligations under the Contract.

## 12. Guarantee & Indemnity

- 12.1 If the Customer is a company or trustee, the Supplier may require the Guarantors to guarantee the performance of the Customer's obligations and enter into a Guarantee & Indemnity.
- 12.2 All Guarantors shall be jointly and severally liable for performance of all of the terms, covenants and conditions of the Supplier's agreements.
- 12.3 The Customer and Guarantors jointly and severally authorise the Supplier to exchange information about the creditworthiness of either the Customer or the Guarantors with any credit reporting agency at any time during the term of the Contract.

## 13. Force Majeure

The Supplier will not be liable to the Customer for any failure to perform, or delay in performing, the Supplier's obligations under these T&Cs if the failure or delay is due to any cause beyond the Supplier's reasonable control. If any such failure or delay continues for a period of 14 days the Supplier may terminate any affected Contract.

## 14. Confidential Information and Intellectual Property

- 14.1 The Customer will not use, or disclose to any third party, any

Confidential Information disclosed to the Customer.

- 14.2 Copyright in all drawings, reports, specifications, bills of quantity, calculations and other documents provided by the Supplier in connection with the Services shall remain the sole property of the Supplier, unless otherwise agreed in writing by the Supplier.
- 14.3 The Supplier may, with the Customer's approval, which shall not be unreasonably withheld, engage third parties to assist the Supplier in delivery of the Services. The Customer accepts responsibility for payment of all monies due to any such third party.

## 15. Warranties

- 15.1 The Supplier does not warrant the Goods and/or Services are fit for any purpose whether or not made known by the Customer or any third party to the Supplier or any member of the Supplier's Personnel.
- 15.2 The Supplier excludes all express and implied conditions and warranties in relation to the Goods and/or Services and this Agreement except those conditions or warranties that cannot be excluded by law.
- 15.3 Nothing in these T&Cs are intended to have the effect of contracting out of any applicable provisions of the Competition and Consumer Act 2010 (Cth) or any equivalent Act of any State or Territory of Australia except to the extent permitted by such Acts.

## 16. Liability

- 16.1 The Supplier's liability for any Liability or Claim in relation to these T&Cs, the Contract, and any supply of Goods and/or Services will be limited to the amount of the cost of rectifying the Goods and/or Services which have been supplied to the Customer.
- 16.2 The Supplier will not be liable to the Customer or any other person for any Liability or Claim of any kind whatsoever arising directly or indirectly (whether under statute, contract, tort, negligence or otherwise) in relation to any indirect or consequential loss (including but not limited to any loss of actual or anticipated profits, revenue, savings, production, business, opportunity, access to markets, goodwill, reputation, publicity, or use) or any other remote, abnormal or unforeseeable loss or any similar loss whether or not in the reasonable contemplation of the parties.
- 16.3 The Supplier shall be released from any Liability or Claim (whether under statute, contract, tort, negligence or otherwise) after the expiration of one year from the date the invoice is issued to the Customer for the final amount being claimed by the Supplier.
- 16.4 Liquidated damages will be set at \$1,750.00 per day, but will not exceed 5% of the total Contract Price.
- 16.5 The Defects Liability period under the Contract is 4 months after completion of the Works.

## 17. Indemnity

The Customer indemnifies the Supplier and each member of the Supplier's Personnel on a full and continuing indemnity basis from and against any Liability or Claim arising directly or indirectly in relation to:

- (a) the Customer's breach of these T&Cs or any Contract;
- (b) the negligence or wilful misconduct of the Customer or any member of the Customer's Personnel;
- (c) damage to the property of the Customer or any third party during any delivery of Goods;
- (d) any breakage, spillage or contamination of Goods during any transport or delivery;
- (e) the Goods and/or Services not being fit for any particular purpose;
- (f) the Customer or any member of the Customer's Personnel directly or indirectly causing any delay in the supply of any Goods and/or Services;
- (g) the Customer or any member of the Customer's Personnel refusing to accept any delivery; or
- (h) the Customer or any member of the Customer's Personnel purporting to cancel a Contract.

## 18. Dispute Resolution

- 18.1 When a dispute arises between the parties, the Customer agrees to comply with the Suppliers' dispute resolution process. To this end a party with a complaint against the other is first required to notify the other of the dispute by giving them written notice specifying the nature of the dispute, the outcome required and the action believed necessary under the circumstances that will assist both in settling the dispute.
- 18.2 Each party will then in good faith attempt to resolve the dispute by negotiation, and if the dispute in some aspect involves payment of monies, the party withholding payment is required immediately upon receipt of the notice to deposit the disputed amount into an escrow account with instructions pertaining to the release of funds. Undisputed amounts must be paid forthwith.

## 19. Termination

- 19.1 The Supplier may immediately terminate, or suspend the performance of, any Contract and the Customer must immediately pay any money owed to the Supplier if:
- (a) the Customer breaches a term of these T&Cs or any Contract and does not remedy the breach within 14 days;
- (b) any invoice rendered by the Supplier remains outstanding for more than 14 days;

- (c) the Customer breaches a term of these T&Cs or any Contract which is not capable of remedy;
  - (d) there is any direct or indirect change in the Control of the Customer;
  - (e) an Insolvency Event arises in relation to the Customer; or
  - (f) the Supplier gives 14 days notice of its intention to terminate or suspend the performance of the Contract.
- 19.2 The Customer may immediately terminate, or suspend the performance of, any Contract if:
- (a) In the event of substantial breach by the Supplier of its obligations hereunder, where any such breach has not been remedied within 30 days of written notice from the Customer requiring the breach to be remedied;
  - (b) Upon giving the Supplier 30 days written notice of its intention to terminate or suspend the performance of the Contract.

## **20. Notice**

Notices must be in writing and be given personally by express or registered post with delivery confirmation or by facsimile transmission or email with receipt confirmation.

## **21. Jurisdiction**

This Contract is governed by and construed in accordance with the laws of the State of Victoria and the parties irrevocably submit to the jurisdiction of the courts of that State.

## **22. Miscellaneous**

- 22.1 These T&Cs or any Contract may only be amended with the Supplier's express written agreement. Any waiver by the Supplier must be express and in writing.
- 22.2 The Supplier's rights under these T&Cs or any Contract do not exclude any other rights the Supplier may have at law.
- 22.3 If any provision of these T&Cs or any Contract is unenforceable, the provision will be severed and the remaining provisions will continue to apply.
- 22.4 The Customer must immediately provide written notice to the Supplier if there is any direct or indirect change in the Control of the Customer.
- 22.5 The Supplier may assign any rights or benefits under any Contract or these T&Cs or any Contract to any third party.
- 22.6 The Customer may only assign any rights or benefits under any Contract or these T&Cs or any Contract with the Supplier's prior written consent.
- 22.7 In these T&Cs:
- (a) the headings do not affect interpretation;
  - (b) the singular includes the plural and vice versa, and a gender includes other genders;
  - (c) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
  - (d) a reference to a party to a document includes the party's executors, administrators, heirs, successors in title, permitted assigns and substitutes;
  - (e) a reference to a person includes a natural person, body corporate, partnership, trust, association or any governmental, administrative or judicial body, tribunal, department, commission, authority, agency, minister, corporation or instrumentality or any other entity;
  - (f) a reference to a statute, ordinance, code or other law includes regulations, rules and other instruments under the statute, ordinance, code or other law and any consolidations, amendments, re-enactments or replacements;
  - (g) a word or expression defined in the Corporations Act has the meaning given to the word or expression in the Corporations Act;
  - (h) the meaning of general words is not limited by specific examples introduced by "including", "for example" or similar expressions;
  - (i) any agreement, representation, warranty or indemnity by two or more parties binds those parties jointly and severally;
  - (j) if a day on or by which an obligation must be performed or an event must occur is not a business day, the obligation must be performed or the event must occur on the next business day.