

TERMS OF TRADE

This Agreement governs the provision of Goods, Services and/or Works by Simmons Civil to the Client.

1. Definitions and Interpretations

- a) Headings are for ease of reference only and shall not be deemed to be part of or be taken into consideration in the interpretation and construction of this Agreement.
- b) Words in the singular include the plural and vice versa.

Agreement means the terms and conditions contained herein between Simmons Civil and the Client and all other documents agreed upon in writing by the Parties, including without limitation, any Proposal, variations, schedule or other document or amendment expressed to be supplemental to this Agreement.

Business Day means a day other than a Saturday, Sunday or a public holiday in the state of QLD and/or a Commonwealth public holiday.

Client means the party named in the proposal, tender, quotation or purchase order or any other party who has ordered Services from Simmons Civil or to whom Simmons Civil has supplied Services, and includes any person acting on behalf of and with the authority of that party, and any of the party's executors, administrators, successors and assigns, and:

- a) If there is more than one Client, is a reference to each Client jointly and severally; and
- b) If the Client is a partnership, it shall bind each partner jointly and severally; and
- c) If the Client is a part of a Trust, shall be bound in their capacity as a trustee.

Client Supplied Product means any materials, consumables or parts that are supplied by the Client.

Conditions means these terms and conditions and where applicable includes the terms of any Invoice, Proposal or Purchase Order and includes the whole of this document as amended, supplemented or varied by Simmons Civil from time to time, provided that the terms of this document shall prevail in the event of any inconsistency between such terms.

Consequential Loss means loss expected savings, loss of use, loss of opportunity, loss of profit, loss of revenue, increased financing costs, loss arising from delay, or any consequential, special or indirect loss or damage, whether or not the possibility or potential extent of the loss or damage was known or foreseeable, and whether arising from a claim under an indemnity, contract, tort (including negligence), statute or otherwise.

Contract Personnel means contractors provided to the Client on a contract hire basis by Simmons Civil as part of the Services.

Defect means any aspect of the Goods and/or Works not in accordance with this Agreement, or which is damaged, faulty, or incomplete in workmanship or quality and **Defective** has an equivalent meaning.

Delivery Date means the date for completion of the works as specified on the proposal or as agreed in writing between the parties.

Force Majeure Event means an act of God, strike, lockout or other industrial disturbance, accident, act of the public enemy, war (declared or undeclared), terrorism, pandemic or epidemic, blockade, revolution, public riot, flood, earthquake, explosion, governmental restraint or action, industrial action, inclement weather which prevents access to, or work at the Site, embargoes or restrictions, delays in transportation and also includes the consequential effect of any of the events or things detailed above, or events otherwise beyond the reasonable control of Simmons Civil.

Goods means any materials, consumables or parts that are provided by Simmons Civil as incidental to the performance of the Services including as may be specified in the Proposal or any related Purchase Order.

GST means Goods and Services Tax as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).

Guarantor means that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.

Insolvency Event means, for a Party, as applicable, being placed, or applying, or resolving to apply, to be placed in liquidation or provisional liquidation, bankruptcy or under administration, having a controller or analogous person appointed to the Party or any of the Party's property, being unable to pay the Party's debts, dying, ceasing to be of full legal capacity or otherwise becoming incapable of managing the Party's own affairs for any reason, taking any step that could result in the Party becoming an insolvent under administration, entering into a compromise or arrangement with, or assignment with, or assignment for the benefit of, any of the Party's members or creditors, or any analogous or similar events.

Invoice means a tax invoice for the Goods and/or Services provided to the Client by Simmons Civil.

Party or Parties mean respectively a party or parties to this Agreement.

Price means the price payable (plus any GST where applicable) for the Goods and/or Services as agreed between the parties.

Proposal means a written proposal, estimate, schedule of rates, budget estimate, quotation or tender for submission for the supply of Goods and/or Services provided by Simmons Civil to the Client.

Purchase Order means a formal order placed by the Client for Services on the terms set out in the proposal/tender.

Simmons Civil means Simmons Civil Pty Ltd (ABN: 80 625 408 479) of 10 Dennis Street Boyne Island QLD 4680 and includes its successors and assigns.

Services means services to be performed by Simmons Civil for the Client in accordance with the Proposal and shall be inclusive of supply of Goods, plant hire, transportation and any other element of supply or performance which is necessary in the undertaking of the Services.

Terms means the Legal Terms of this Agreement.

Works means the whole of the work to be carried out and completed in accordance with this Agreement including any variations as agreed between the Parties.

2. Offer and Acceptance

- 2.1 All Proposals made by Simmons Civil are subject to this Agreement, unless expressly agreed otherwise in writing, and are open for acceptance for a period of thirty (30) days from the date of Proposal/tender submission.
- 2.2 A Proposal issued to the Client by Simmons Civil may be withdrawn at any time for any reason prior to it having been accepted by the Client.
- 2.3 The Client agrees that, without limitation, the issue of Purchase Order by the Client to Simmons Civil for the supply of goods and/or Services shall, in absence of any written reservations, be deemed evidence of the Client's acceptance of the Proposal and acknowledges that they have read and understood these terms and conditions and agrees to be bound by this Agreement.
- 2.4 Any variations of the Proposal, whether contemplated or unforeseeable, may incur additional costs and Simmons Civil reserves the right to pass these costs onto the Client or terminate the Proposal and issue the Client a new Proposal which reflects the additional variations.
- 2.5 The Parties agree that any reference to the Client's terms and conditions on the Purchase Order, or any form of document, shall not import those terms into this Agreement, unless otherwise expressly agreed in writing and signed by an authorised representative of Simmons Civil. Where additional terms or conditions do apply, this Agreement shall prevail in case of any inconsistency.

3. Price and Payment

- 3.1 Invoices shall be issued to the Client and the price shall be paid in full, without any deduction or set-off of any kind, and within 14 days of the Invoice date and the Client will make payment of fees by the method prescribed in the Invoice in line with the *Building Industry Fairness (Security of Payment) Act 2017*.
- 3.2 At Simmons Civil's sole discretion, a deposit may be required.
- 3.3 In the event the Client disputes any part of an Invoice, it shall notify Simmons Civil within 7 days after receipt. Where an Invoice is disputed, payment of those parts of the Invoice which are not in dispute shall be made within 14 days of the Invoice date.
- 3.4 If payment of an invoice or undisputed part of an invoice is not made within the period prescribed in clause 3.1, the Client will be in default, and Simmons Civil reserves the right to charge interest on the unpaid amount at the rate of 1.5% per calendar month, calculated daily for the period ending on the day the Invoice is actually paid.
- 3.5 All references to a currency, \$ or dollars are in Australian dollars, unless otherwise stated
- 3.6 If the Client owes Simmons Civil any money the Client shall indemnify Simmons Civil from and against all costs and disbursements incurred by Simmons Civil in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own Client basis, Simmons Civil's Agreement default fee, and bank dishonour fees).

4. GST

- 4.1 Unless otherwise stated, all amounts payable or any consideration to be provided under this Agreement are exclusive of GST.

5. Variation

- 5.1 Either Party may propose changes to this Agreement before the delivery date, however no proposed changes shall come into effect until a variation has been signed by both Parties.

6. Delays

- 6.1 The Client acknowledges that any estimates as to the time frames for the commencement and completion of the Work are approximate only. Simmons Civil will use all reasonable endeavours to ensure the Work is commenced and completed within the time frame specified but shall not be liable for any delay or failure to do so as a result of wet weather, labour shortages or material shortages.
- 6.2 Simmons Civil shall not be liable to compensate the Client for any delay or delays caused by separate or nominated subcontractors.

7. Client Supplied Information

- 7.1 Simmons Civil shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, Simmons Civil accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 7.2 Where the Client is to supply Simmons Civil with any documentation or information, (including but not limited to, design specifications and drawings), the Client shall be responsible for providing accurate data. Simmons Civil shall not be liable whatsoever for any errors in the Goods and/or Works that are caused by incorrect or inaccurate data being supplied by the Client.
- 7.3 Under no circumstances whatsoever will Simmons Civil be liable, whether in contract or tort or otherwise, for any direct, indirect or Consequential loss or damage arising out of incorrect or inaccurate data being supplied by the Client.

8. Client Supplied Product

- 8.1 Where the Client has elected to supply and/or install a product, the Client acknowledges and agrees that the Client has elected to take on the responsibility for the supply and/or installation, and that they are legally obliged to supply a conforming product, which may include, documentation that verifies a product's conformance.

Simmons Civil Terms of Trade

- 8.2 Should any costs be incurred for replacement of non-conforming products and/or delays in the Services scheduled due to non-conforming issues, the Client will be liable for such costs.
- 8.3 Simmons Civil reserves the right to suspend their Services until such time as the Client provides evidence of conformance of a product prior to installation and/or use of the product by Simmons Civil or the Client.
- 8.4 Under no circumstances whatsoever will Simmons Civil be liable, whether in contract or tort or otherwise, for any direct, indirect or Consequential loss, damage arising out of a non-conforming product being supplied by the Client.

9. Warranties

- 9.1 Simmons Civil will ensure that Goods and/or Works supplied by it will:
 - (a) comply with the Client's specifications under this Agreement and all required statutory requirements and Australian Standards; and
 - (b) are supplied with a manufacturer's warranty to the extent that the manufacturer offers such a warranty in respect of the Goods.
- 9.2 All other express or implied warranties that may be applicable by operation of law are excluded to the fullest extent permitted by law.

10. Defect Liability Period

- 10.1 The defect liability period (DLP) of the Goods and/or Works supplied by Simmons Civil will commence from the delivery date and shall continue for a period of three (3) months from the delivery date, unless expressly agreed otherwise in writing on the letter of proposal/tender submission.
- 10.2 Any additional warranty provided by a manufacturer of product incorporated into the Goods and/or Works which Simmons Civil has supplied will be assigned to the Client on agreement with the manufacturer (if applicable).
- 10.3 During the DLP, Simmons Civil will rectify and/or replace (as the case may be) Defective Goods and/or Works, excluding:
 - (a) any interfacing between the Client's, equipment, Site, plant or design (unless expressly included as part of the Services under this Agreement);
 - (b) where the Client has continued to use the Goods after any Defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - (c) where the Goods and/or Works have been found to have been repaired, altered or over-hauled without Simmons Civil's consent;
 - (d) any Client Supplied Product and/or any Goods and/or Works that have been commingled with non-conforming Client Supplied Product;
 - (e) ordinary wear and tear, any accident or act of God; or
 - (f) any damage which has been caused or contributed to by the Client's negligence or acts or omissions.
- 10.4 The Client acknowledges and agrees that Simmons Civil will have the first right to perform Defects rectification and/or replacement to the Goods and/or Works and the Client agrees it will not prohibit Simmons Civil from rectifying and/or replacing the Defects.
- 10.5 The Client must notify Simmons Civil in writing of the Defect within five (5) business days of discovery of the Defect and;
 - (a) must take all reasonable actions to prevent further damage;
 - (b) explain why the Goods and/or Works do not meet the requirements of this Agreement;
 - (c) explain how it considers Simmons Civil should rectify the Defects to bring the Goods and/or Works into conformance with this Agreement; and
 - (d) provide a reasonable notification time period for commencement and completion for rectification.
- 10.6 Upon such notification pursuant to subclause 10.5, Simmons Civil reserves the right to inspect the Client's claim of Defect, and in its absolute discretion, engage a licenced independent assessor and/or certifier to inspect and assess the Client's claim of Defect. The Client must allow Simmons Civil and/or its authorised representatives sufficient access and reasonable time to inspect the Claim of Defect.
- 10.7 Simmons Civil shall within five (5) business days upon inspection of the Client's claim of Defect give written notice to the Client stating the scope and manner in which it intends making good the Defect. If the Client is not satisfied with the scope and manner of the proposed rectification and/or replacement work, the Client must advise Simmons Civil in writing prior to commencement of any rectification and/or replacement work by Simmons Civil.
- 10.8 A second DLP shall apply only to the portion of the Goods and/or Works which have been rectified and/or replaced, commencing from the date Simmons Civil completes the rectification/replacement work ('Delivery Date').
- 10.9 Simmons Civil will only be responsible for the costs of actual rectification and/or replacement work, and any other associated costs (including removal, travel or transportation costs) shall be borne by the Client.
- 10.10 If Simmons Civil uses a subcontractor or supplier or other person to perform any Work under this Agreement, any work, labour and services carried out by such other person shall only be warranted by Simmons Civil to the degree that the other person indemnifies Simmons Civil.
- 10.11 In respect of all claims, Simmons Civil shall not be liable to compensate the Client for any delay in either replacing or remedying the Goods and/or Works or in properly assessing the Client's claim of Defect.

11. Delivery of Goods

- 11.1 Simmons Civil is authorised by the Client to deliver the Goods to the address nominated by the Client for that purpose and it is expressly agreed that Simmons Civil shall be conclusively taken to have delivered the Goods in accordance with this Agreement if at that address it obtains from any person a receipt or signed delivery docket for the Goods.
- 11.2 If the nominated place of delivery should be unattended or if delivery cannot otherwise be effected by Simmons Civil, it may at its option deposit the Goods at that place (which shall be conclusively taken to be due delivered) or store the Goods.
- 11.3 If the Goods are stored by Simmons Civil, the Client shall pay or indemnify the Simmons Civil for all costs and expenses incurred in or about such storage. Simmons Civil shall be entitled to redeliver the Goods to the Client from the place of storage, which shall be done at the Client's expense.
- 11.4 The Client shall reimburse Simmons Civil all reasonable costs, including but not limited to overheads incurred by Simmons Civil for any delays except for delays caused by Simmons Civil itself.

12. Sub-contracting

- 12.1 Simmons Civil may in its sole discretion subcontract all or any of the Works to be performed in connection with the delivery or provision of the Services.

13. Title and Risk

- 13.1 The Goods shall be at the Client's sole risk immediately on delivery into the care, custody or control of the Client or its agent, carrier or contractor.
- 13.2 Property and title in the Goods will not pass to the Client until such time as the Client has paid all outstanding invoices to Simmons Civil and has met all of its other obligations.

14. Intellectual Property

- 14.1 Simmons Civil retains all intellectual property and ownership rights of such in any intellectual property whether protected by statute, at common law or in equity, including any patent, invention, copyright or design right (whether or not registrable), in any design, specification, process, technique, software, know-how, trade secret, technical information, financial information, business method and Confidential Information, and other information relating to the Goods which is created or modified by Simmons Civil during this Agreement.
- 14.2 Simmons Civil grants to the Client a perpetual, irrevocable, non-exclusive, royalty free, transferable licence to use all intellectual property which is used or developed by Simmons Civil, for the purpose of, or in connection with, the Goods and/or Works supplied under this Agreement.
- 14.3 The Client warrants that all designs, drawings, specifications or instructions given to Simmons Civil will not cause Simmons Civil to infringe any patent registered design or trademark in the executions of the Client's order and the Client agrees to indemnify Simmons Civil against any action taken by a third party against Simmons Civil in respect of any such infringement.
- 14.4 The Client agrees that Simmons Civil may (at not cost) use for the purpose of marketing any documents, designs, drawings or Goods which Simmons Civil has created for the Client.

15. Personal Property Securities Act 2009

- 15.1 For the purposes of this clause, the defined terms used in this clause have the meaning given in the PPSA unless the context indicates otherwise.
- 15.2 Title to any Goods delivered to the Client will not pass to the Client until the Client has paid all amounts that it owes to Simmons Civil in full.
- 15.3 The Client must keep the Products separately stored and marked as the property of Simmons Civil.
- 15.4 The Client must not do any of the following in relation to any of the Goods except where expressly permitted by this Agreement:
- (a) create or allow any interest in, or dispose or part with possession of, the Products;
 - (b) allow the Products to be taken outside Australia;
 - (c) allow the Products to become an accession to or commingled with any other property; or
 - (d) grant any security interest in respect of accounts owed to it in relation to the Products, without the Simmons Civil's prior written consent.

16. Liability

- 16.1 Nothing in this Agreement limits or excludes Simmons Civil's liability: for death or personal injury caused by its negligence or wilful misconduct or that of its employees; for fraud or fraudulent misrepresentation by it or its employees; or where liability cannot be limited or excluded by all applicable laws, statutes or regulations from time to time in force.
- 16.2 Subject to clause 16.1 above, Simmons Civil excludes any liability to the Client, whether in contract, tort (including negligence) or otherwise, for any special, indirect or Consequential Loss.

16.3 Subject to clause 16.1, Simmons Civil's aggregate liability in respect of claims arising out of or in connection with this Agreement or any collateral contract, whether in contract or tort (including negligence) or otherwise, will in no circumstances exceed the value of the total Fees payable by the Client to the Simmons Civil under this Agreement in that calendar year.

17. Termination

- 17.1 This Agreement and a Purchase Order may be terminated by either Party in writing, and without further liability as per the notice period specified in the Proposal and if no notice period is stated a minimum of 30 days written notice is required.
- 17.2 In the event of termination, the Client shall pay Simmons Civil for the Goods, Works and/or Services for the period up to and including the termination date and the Client will also be liable for any other reasonable costs incurred by Simmons Civil resulting from the termination.
- 17.3 Simmons Civil is entitled to immediately terminate this Agreement by written notice to the Client where:
- The Client suffers an Insolvency Event; or
 - The Client, following a written notice of default allowing a reasonable period of at least ten (10) days in which the breach can be remedied, has failed to remedy the breach within that period and remains in default of its obligations under this Agreement; or
 - A Force Majeure Event prevents Simmons Civil from providing the Services for a period exceeding thirty (30) days unless otherwise agreed in writing.
- 17.4 The Client irrevocably authorises Simmons Civil to enter any premises where Simmons Civil believes the Goods are kept and recover possession of any unpaid Goods.

18. Security and Charge

- 18.1 Where the Client and/or the Guarantor (if any) is the owner of land, realty of any other asset capable of being charged, both the Client and/or the Guarantor hereby agrees to charge all of its rights, title and interest (whether joint or several) in any real estate and personal property capable of being charged, owned by the Client and/or Guarantor either now or hereafter to Simmons Civil (or its nominee) to secure the performance of the Client of its obligations under this Agreement, including but not limited to, the payment of money.
- 18.2 The Client and/or Guarantor acknowledge and agree that Simmons Civil (or its nominee) shall be entitled to lodge where appropriate a caveat which shall be withdrawn only once all payments and other monetary obligations payable under this Agreement have been paid by the Client.
- 18.3 Should Simmons Civil elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or the Guarantor shall indemnify Simmons Civil from and against all Simmons Civil's cost and disbursements, including legal costs incurred and own client basis.
- 18.4 The Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint Simmons Civil (or nominee) as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause.

19. Force Majeure

- 19.1 If performance by Simmons Civil of any obligation under this Agreement is prevented, restricted or delayed by Force Majeure Event then Simmons Civil shall be excused from, and shall not be liable for, failure in performance to the extent of that prevention, restriction or delay, and the time for performance shall be extended accordingly as agreed by the parties.
- 19.2 If the supply of Goods and/or Services is delayed for more than thirty (30) days due to Force Majeure and the parties have not agreed upon a revised basis for continuing the supply at the end of the delay, then either Party may after that period and while the cause of non-performance still exists terminate this Agreement by not less than ten (10) Business Days' notice in writing to the other Party.

20. Building Industry Fairness (Security of Payment) Act 2017

- 20.1 At Simmons Civil's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the *Building Industry Fairness (Security of Payment) Act 2017* may apply.
- 20.2 Nothing in this Agreement is intended to have the effect of contracting out of any applicable provisions of the *Building Industry Fairness (Security of Payment) Act 2017 of Queensland*, except to the extent permitted by the Act where applicable.

21. Confidentiality

- 21.1 Both parties acknowledge and agree they must maintain confidentiality, and not disclose of any information of a confidential nature, whether oral, written or in electronic form including, but not limited to, this Agreement, either party's intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, contracts, client information, contract personnel, and other contact information (where applicable), accounts, invoices and pricing details unless required by law or when the information falls into the public domain.

22. Severability

22.1 In the event of any part of this Agreement becoming void or unenforceable, whether due to the provision of any statute or otherwise, then that part shall be severed from this Agreement, to the intent that all parts that shall not be or become void or unenforceable shall remain in full force and effect and be unaffected by any such severance.

23. Compliance with Law

- 23.1 The Client and Simmons Civil shall comply with the provisions of all statutes, regulations and bylaws of government that may be applicable to the Works.
- 23.2 The Client agrees that the site will comply with any work health and safety (WHS) laws and any other relevant safety standards or legislation.
- 23.3 This Agreement is subject to the laws of the State of Queensland and the parties must submit to the non-exclusive jurisdiction of those Courts.

24. Dispute Resolution

- 24.1 If a dispute arises out of or relates to the terms of this Agreement, either party may not commence any legal proceedings in relation to the dispute, unless the following clauses have been complied with (except where urgent interlocutory relief is sought).
- 24.2 A party to this Agreement claiming a dispute (the '**Dispute**') has arisen under the terms of this Agreement, must give written notice to the other party detailing the nature of the Dispute, the desired outcome and the action required to settle the Dispute (the '**Notice**').
- 24.3 On receipt of the Notice by the other party, the parties to this Agreement (the '**Parties**') must within seven (7) business days of the Notice endeavour in good faith to resolve the Dispute expeditiously by negotiation or such other means upon which they may mutually agree.
- 24.4 All communications concerning negotiations made by the Parties arising out of and in connection with this dispute resolution clause are confidential and to the fullest extent possible, must be treated as "without prejudice" negotiations.
- 24.5 If for any reason whatsoever, 30 days after the date of the Notice, the Dispute has not been resolved by negotiation, then either party may commence formal legal proceedings.

25. General

- 25.1 The Client must not assign any or all of its rights and obligations under this Agreement without the prior written consent of Simmons Civil.
- 25.2 To the extent permitted by law, this Agreement embodies the entire understanding of the Parties and constitutes the entire terms agreed upon between the Parties and supersedes any prior agreement (whether or not in writing) between the Parties, in relation to the subject matter of this Agreement.
- 25.3 The Client confirms that they have not entered into this Agreement on the basis of any representation that is not expressly incorporated into this Agreement.
- 25.4 This Agreement shall not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the Parties other than the contractual relationship expressly provided for in this Agreement.
- 25.5 Each party acknowledges and agree that any document in connection with this Agreement may be executed by electronic signature (whether digital, encrypted or otherwise) pursuant to the *Electronic Transactions (Queensland) Act 2001*, and such electronic signature shall be considered as an original signature for the purpose of validity, enforceability and admissibility.
- 25.6 Either party may serve written notice on the other party via email or letter to the address nominated by the receiving party, or if no address is nominated to that party's principal place of business or to the email address commonly used by the relevant party or to the email address otherwise advised by the relevant party.
- 25.7 Both parties warrant that they have the power to enter into this Agreement and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Agreement creates binding and valid legal obligations on them.