

**1. DEFINITIONS**

- 1.1. If applicable, capitalised terms have the meaning given to them in this Agreement. In addition, the following definitions apply in this Agreement:
- 1.2. 'Contractor,' 'we', or 'us' means Letton Kerb and Channel Limited trading as Letton Kerb and Channel (our successors and assigns) or any person acting with the authority of Letton Kerb and Channel Limited.
- 1.3. 'Client,' 'you', or 'your' means the Client purchasing Materials or Services from us or any person acting on your behalf (including authorised agents).
- 1.4. 'Services' means all Services provided to you, including any provision of Materials as specified in any documentation or otherwise provided to you by us under this Agreement.
- 1.5. 'Worksite' means the address or location you nominate for us to provide the Materials or Services.
- 1.6. 'Materials' means all Materials required to complete the Services.
- 1.7. 'Price' means the Price of the Services (in accordance with clause 6).
- 1.8. 'Equipment' means all Equipment (including any accessories) supplied on hire to you (and where the context permits, shall include any incidental supply of Services). You agree that we own the Equipment, and any charges are for hire and not an outright purchase.
- 1.9. 'Agreement' means these terms & conditions of trade, as may be amended from time to time (including our privacy policy and any orders, purchases or schedules as applicable).
- 1.10. 'Amounts Owing' means any amount you owe to us, from time to time, including the Price, any interest payable, any of your liability under this Agreement and any enforcement expenses incurred by us in seeking payment of any Amounts Owing by you.
- 1.11. 'Business Day' means Monday to Friday, excluding public holidays in New Zealand.
- 1.12. 'Confidential Information' means all information that could be reasonably regarded in the circumstances as confidential, including information that relates to the business, interests or affairs of a party, this Agreement, the Materials or Services (as applicable), and intellectual property rights, but excludes information which is:
  - (a) in the public domain, other than as a result of a breach of this Agreement;
  - (b) in the possession of a party prior to the commencement of this Agreement without any obligation of confidentiality; and
  - (c) is independently developed or acquired by a party prior to the commencement of this Agreement without relying on information that would itself be Confidential Information.
- 1.13. 'Event of Default' means a party's failure to comply with this Agreement (including your obligations in clause 6).
- 1.14. 'Insolvency Event' means an event of insolvency or bankruptcy, including: (i) the appointment of an insolvency administrator, manager, receiver or liquidator; (ii) any action related to winding up or making a material arrangement in relation to creditors; (iii) applying for any type of protection against creditors; (iv) being unable to pay your debts as they fall due; or (v) taking or suffering any similar or analogous action in any jurisdiction as a consequence of debt.
- 1.15. 'Personnel' means directors, officers, employees, agents and contractors.
- 1.16. 'CCLA' means the Contract and Commercial Law Act 2017.
- 1.17. 'PPSA' means the Personal Property Securities Act 1999.
- 1.18. 'CCA' means the Construction Contracts Act 2002.
- 1.19. 'Security Agreement' and 'Security Interest' have the meanings given to them in Part 2, sections 16 and 17 of the PPSA.
- 1.20. 'Regulator' means any authority, commission, government department, court, tribunal, or similar having regulatory or supervisory authority over the parties or Services.
- 1.21. 'Related Company' has the meaning given to it in Part 1, section 2(3) of the Companies Act 1993.

**2. INTERPRETATION**

- 2.1. In this Agreement, unless the context otherwise requires:
  - (a) headings are for convenience only and do not affect interpretation;
  - (b) a reference to legislation includes all regulations, orders, instruments, codes, guidelines or determinations issued under that legislation or any modification, consolidation, amendment, re-enactment, replacement or codification of it;
  - (c) a reference to 'in writing' includes by email;
  - (d) the words 'include' or 'including' or similar expressions are to be construed without limitation;
  - (e) a reference to a party shall include that party's successors, permitted assigns and substitutes; and
  - (f) a word importing the singular includes the plural and vice versa.

**3. ACCEPTANCE**

- 3.1. All orders are subject to our acceptance. We may (at our sole discretion) accept any order in whole or part by issuing an invoice for the applicable Services, delivering the Materials or Services or otherwise confirming the order in writing.
- 3.2. You acknowledge and accept that:
  - (a) the supply of Materials on credit shall not take effect until you have completed a credit application with us and it has been approved with a credit limit established for the account;
  - (b) if the supply of Materials requested exceeds your credit limit or the account exceeds the payment terms, we reserve the right to refuse further delivery;
  - (c) where necessary, this Agreement will be modified or amended to the extent required to comply with any applicable legislation; and
  - (d) this Agreement shall supersede any other document or agreement between both parties.

- 3.3. If you place an order for or accept any Services from us, you are taken to accept this Agreement and are bound jointly and severally (including if you are part of a trust, in which case you shall be bound in your capacity as a trustee). You do not need to sign any formal documentation to indicate your acceptance. It will be assumed from you continuing to order any Materials or Services.
- 3.4. Your acceptance of this Agreement shall continue to all future orders, purchases or schedules (as applicable), and this Agreement will be or is deemed to be incorporated into and form part of each order, purchase or schedule as if this Agreement was set out or implied therein in full.
- 3.5. Both parties shall accept electronic signatures (including acceptance by a receiving mail server) provided both parties have complied with sections in Part 4, subpart 3 and all other relevant sections in Part 4 of the CCLA.
- 3.6. Once you have accepted the quote, you are not entitled to have any part of the Services carried out by any third party (unless we agree in writing).

**4. AUTHORISED AGENTS**

- 4.1. We are not obligated to enquire about the authority of any person placing an order on your behalf.
- 4.2. If you introduce any third party to us as your authorised agent, you agree that the agent shall have your full authority to order any Services on your behalf, and such authority shall continue until the Services have been completed or you notify us in writing that the third party is no longer your authorised agent.
- 4.3. Where your authorised agent is to have only limited authority to act on your behalf, you must explain the parameters of the limited authority to us in writing.

**5. CHANGES TO DETAILS**

- 5.1. You agree that you will give us (addressed to the financial controller or equivalent) not less than fourteen (14) days prior written notice of any proposed change to your name or any other changes to your details (including changes to the ownership of the company, address, email, contact phone or business structure).
- 5.2. You acknowledge and accept that if you fail to comply with clause 5.1, you will breach this Agreement and shall be liable for any expense or loss of profit suffered by us (including any Related Company).

**6. PRICE AND PAYMENT**

- 6.1. You will pay us the Price set out in any quotation or documentation that we provide to you under this Agreement, plus any 'Goods and Services Tax' (as defined and imposed in Part 2, section 8(1) of the Goods and Services Tax Act 1985 (GST)).
- 6.2. Unless otherwise agreed by us in writing, the Price shall be:
  - (a) indicated in the building contract or on invoices provided to you in respect of the Services;
  - (b) our estimated Price (subject to clause 8), with the final Price being ascertained upon completion of the Services (and any variances in the estimated Price of more than ten percent (10%) will be subject to your approval before proceeding with any further Services); or
  - (c) our quoted Price, which will be binding, subject to your acceptance of our quotation in writing within thirty (30) days.
- 6.3. If the Price is not set out in quotations or other documentation, the Price for the relevant Materials or Services will be at our standard rate according to our current Price list or at a rate notified to you.
- 6.4. The Price will be payable by you on the dates determined by us (at our sole discretion), which may be:
  - (a) on delivery of the Materials or completion of the Services;
  - (b) by way of progress payments in accordance with our agreed progress payment schedule, and such progress payment claims may include the value of any authorised variations and the value of any Materials that have been delivered to the Worksite (whether installed or not);
  - (c) due twenty (20) days following the end of the month in which a statement or invoice is sent to your address or address for notices; or
  - (d) seven (7) days following the date of any invoice given to you by us if there is no notice to the contrary.
- 6.5. The progress payment claims may be submitted in the form of an invoice or as a payment claim in accordance with Part 2 of the CCA. A payment schedule must be provided to us within five (5) Business Days from receipt of our payment claim (and if you wish to dispute the amount of any payment claim, you must do so in accordance with Part 2 of the CCA).
- 6.6. We reserve the right to charge you the costs of hiring all plant and equipment, including machinery or requirements of our subcontractors (or other costs excluded from the Agreement).
- 6.7. Where we pay any subcontractor's account on your behalf, you agree to reimburse us for the payment of the subcontractor's account within seven (7) days (unless otherwise agreed in writing).
- 6.8. We reserve the right at any time to alter any Price lists. Any alterations to any Price list will be effective from the date specified by us and apply to all orders or purchases we accept on or after that date.
- 6.9. Payment may be made by cash, electronic/online banking, or any other method we agree to in writing.
- 6.10. Payment in any form other than cash shall not be taken to be payment for the Amounts Owing, and all ownership rights of the Materials or Services remain with us until that form of payment has been cleared and received in accordance with clause 18.1.
- 6.11. We may require that you pay a deposit or provide a guarantee as security for paying any Amounts Owing.
- 6.12. At our sole discretion, we may allocate any payment from you towards any invoice that we determine and may do so at the time of receipt or any time afterwards. On any default by you, we may reallocate any payments previously received and

- allocated, and in the absence of any payment allocation by us, payment will be deemed to be allocated in such a manner that preserves the maximum value of our Security Interests.
- 6.13. You shall not withhold payment of any Amounts Owing because part of the Services are disputed, and if part of the Services are disputed, you agree that you will:
- perform all of your obligations to us under this Agreement and pay in full any Amounts Owing except for the amount that is in dispute; and
  - provide a specific and detailed explanation of the dispute in writing within seven (7) days from delivery.
- 6.14. If an Insolvency Event occurs, all Amounts Owing will (whether or not due for payment) immediately become due and payable.
- 7. CONSTRUCTION CONTRACTS (RETENTION MONEY) AMENDMENT ACT 2023**
- 7.1. At the agreement of both parties, payment of the Price may be subject to a retainable amount, being a set amount or equal to a percentage of the Price, that becomes retention money under Part 1, section 18B(2) or section (6)(a) of the Construction Contracts (Retention Money) Amendment Act 2023 (CCRMA). Any retention money shall be trust property, held on trust by you for the agreed period following completion of the Services, during which all Defects are to be remedied.
- 7.2. You acknowledge and agree to:
- keep and use all retention money that applies to this Agreement in accordance with Part 1, section 18D of the CCRMA;
  - maintain accounting records of all retention money, including maintaining separate ledger records for each party and in relation to each construction contract for which money is held on trust;
  - report on retention money when requested and at least every three (3) months until the retention money trust ends; and
  - compensate us if any unallocated withdrawals or deposits occur and lead to a loss of any retention money held for us (if Part 1, section 18EA of the CCRMA applies).
- 8. VARIATIONS**
- 8.1. The Price will be adjusted to reflect any extra cost or expense we incur due to any instruction received from you (or your authorised agent) or any action or inaction on your part.
- 8.2. We reserve the right to change the quoted Price if:
- there is any change to the Services, including: (i) any information supplied by you is inaccurate; (ii) there is an increase or decrease in the quantity of the Services; (iii) you request any change to plans or specifications; (iv) there is a change in the character or quality of any Material or Services; (v) there are changes to the level, line position, or dimensions of the Services; or (vi) there is any changes to the timing or sequencing of the Services;
  - any additional Services are required due to hidden or unseen complications that are discovered after the commencement of the Services, including: (i) prerequisite work done by a third party that is incomplete or not up to standard; (ii) faults found upon disassembling the premises (such as covered components, pipes or wires behind walls); (iii) barriers obstructing access (including hard rock or metal below the surface); (iv) if heavy machinery or trucks cannot access the Worksite, and we are required to wheelbarrow concrete or Materials manually; or (v) the presence of asbestos or other health and safety considerations); or
  - the cost of labour or Materials increases due to changes beyond our control, including: (i) economic factors such as inflation or supply shortages; (ii) any taxes imposed by any Regulator; (iii) overseas transactions that may increase due to variations in foreign currency rates of exchange; or (iv) or international freight and insurance charges).
- 8.3. We will provide written notice where a variation must be completed, and you may not arbitrarily withhold agreement to undertake that variation.
- 8.4. In addition to any Price adjustment for variations, we shall be entitled to charge for our time and expenses in assessing and pricing any variation (whether or not the variation goes ahead). You shall pay a reasonable additional fee based on our regular hourly rate and expenses (including where you request us to take any steps in preparation for a variation that, for any reason, does not proceed).
- 8.5. If a variation is required by a territorial authority (including as a condition of the granting or retaining a building consent or for any part of the Services to comply with the building code, then both parties must communicate regarding the requirement of the variation. You agree to advise us whether you wish the variation to be carried out or whether an alternative arrangement can be made to avoid the need for the variation.
- 8.6. Where you request us to estimate the quantity of the Materials to be supplied from sketches, plans, schedules, specifications or otherwise, you agree to pay for any variation between the estimate and the actual quantities provided, and this Agreement shall be deemed to be adjusted accordingly to reflect the increased Price.
- 8.7. You must not negotiate any variations directly with our subcontractors or merchants without our written consent.
- 9. PROVISION OF SERVICES**
- 9.1. Subject to the provisions of this Agreement, we must commence the Services on the expected start date (unless we notify you of a delay in writing). We must exercise reasonable diligence in seeking to complete the Services on or before the expected completion date agreed upon by both parties (and where the documentation does not record a scheduled completion date, the Services shall be completed within a reasonable time).
- 9.2. You agree that where delays are caused by weather conditions (including rain or wind) that will, in our opinion, affect the quality of the Services, we shall not be in breach of this Agreement if we cannot complete the Services within the original time frame.
- 9.3. We will deliver the Materials or Services to the delivery location that we each agree to in writing, and if the delivery location is at your premises (subject to clause 27), you will provide us (and our Personnel) with suitable access to the premises, together with any amenities we reasonably require to perform delivery of the Materials or Services.
- 9.4. We shall not be liable for any delay caused by: (i) variations or additional work; (ii) a failure or delay on your part in complying with your obligations under this Agreement (including paying the deposit, providing proof of finance or insurance, obtaining sufficient title, obtaining consents, ensuring all necessary services are available at the Worksite, or providing us with access to and possession of the Worksite for the purpose of carrying out the Services); (iii) any other delays for which you are responsible (including delays caused by third parties you have engaged); (iv) suspensions of the Services by either party; (v) delays on the part of a consenting authority or other Regulators; (vi) weather conditions affecting the Services completion; (vii) unforeseen health and safety requirements (such as the discovery of asbestos); (viii) if (despite our reasonable endeavours), subcontractors or Materials are unavailable; (ix) unforeseen physical conditions; (x) the poor condition of any existing structure (that is being built onto or any adjoining structure); (xi) any matter covered clause 36.8 of this Agreement (including industrial action such as strikes or pandemics); (xii) dispute resolution procedures invoked by either party in circumstances that, in our reasonable opinion, make it impracticable to proceed as otherwise planned; (xiii) legal proceedings, relating to the Services, commenced or threatened by a third party in circumstances that make it impracticable for us to proceed; or (xiv) any other matter outside our reasonable control.
- 9.5. Where we deliver the Materials or Services, you will:
- ensure we have all-weather access to the Worksite to enable us to deliver the Materials safely;
  - locate, mark and advise us of all pipes, cabling and other utilities that are on, near, or adjacent to the delivery point and of any actual or possible hazards on the land or premises where the Materials are to be delivered; and
  - indemnify us against any costs, claims and damages incurred in the delivery of the Materials (including any cleaning, repair, damage to the site or delivery Equipment and returning the delivery vehicle to the road, provided we have acted with reasonable care and skill).
- 9.6. It is further agreed that:
- the final location of the exact excavation site must be determined by you and marked at the Worksite (and it is your sole responsibility);
  - when delivering Materials, if the discharge of such Materials is not completed within thirty (30) minutes after arrival on the Worksite, we shall charge any additional time at our regular hourly rate; and
  - you shall be responsible for: (i) maintenance, cleaning and the repair of entry and exit points from the Worksite over any third-party property or public road. We will accept no liability for any maintenance, cleaning or repair of entry and exit points from the Worksite, including any local or government charges or fines relating to mud or debris on the road; and (ii) any fees, penalties or infringements (whether imposed by any Regulator or court) incurred by us as a result of your failure to receive delivery of the Materials.
- 9.7. You shall take delivery of the Materials tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased, and you agree that:
- such discrepancy in amount shall not exceed five percent (5%); and
  - the Price shall be adjusted to reflect the value that has been delivered.
- 9.8. We are entitled to charge for any time placing framing and moulds at our regular hourly rate, regardless of whether the pour proceeds or not (including any alterations or repairs that are required due to adverse weather conditions affecting the framing or moulds).
- 9.9. The final decision on entry onto any site will be at our sole discretion, and failure to deliver any Materials will not be deemed a breach by us of this Agreement.
- 9.10. If you refuse all or part of any order upon delivery at the site, you shall be bound to make full payment for the Materials, together with all disposal costs in respect of the returned Materials.
- 9.11. You accept that the supply of Materials for accepted orders may be subject to availability, and if, for any reason, Materials are not or cease to be available, we reserve the right to substitute comparable Materials (or components of the Materials) and vary the Price (in accordance with clause 8). In all such cases, we will notify you before any such substitution and reserve the right to place your order on hold until both parties agree to such changes.
- 9.12. Where a delay has occurred, we shall be entitled to an extension of time to complete the Services and amend the expected completion date. Within a reasonable time after the delay becomes apparent, we shall issue a notice to you setting out the amended scheduled completion date.
- 9.13. If you engage any third party prior to the expected start date, and we encounter a delay in the completion of those services, then that delay shall entitle us to amend the scheduled start and completion date.
- 9.14. If we cannot supply the Services as agreed solely due to any action or inaction of you, then we shall be entitled to charge a reasonable fee for the re-supplying of Services at a later time and date (including storage of the Materials if applicable).
- 9.15. If we are required to provide the Services urgently, which may require us to work outside regular business hours (including working through lunch breaks, weekends or public holidays), we reserve the right to charge additional costs unless otherwise agreed between the parties.

9.16. Any time specified by us for delivery of the Materials is an estimate only, and we will not be liable for any expenses or losses incurred due to your reliance on our estimated time for delivery, nor can you cancel any order for any delay in delivery that is less than fourteen (14) days after our estimated time for delivery (or any delay in delivery due to any event beyond our control).

9.17. We may deliver the Materials in separate instalments, which will be invoiced and paid as individual transactions.

## 10. ERRORS AND OMISSIONS

10.1. You agree that we have no liability regarding any errors or omissions:

- (a) resulting from any inadvertent mistake made in the formation or administration of this Agreement; or
- (b) contained in any documentation supplied to you regarding the Services.

10.2. If such an error or omission occurs that is not attributable to our negligence or wilful misconduct, all obligations or rights under or in connection with this Agreement shall continue in full force and effect.

## 11. DEFECTS

11.1. You shall inspect all Materials or Services immediately on delivery and shall notify us of any alleged Defect within seven (7) days from the date of delivery. If you do not notify us within this timeframe, the Materials or Services shall be presumed free of Defects or any other issues (subject to clause 15.1).

11.2. You shall allow us to inspect the Materials or Services to rectify any Defects within fourteen (14) days (from the date of delivery) if you believe the Materials or Services are defective and shall not engage any third party unless you have given us at least twenty (20) Business Days notice of your intention to engage a third party (or we have permanently abandoned the Services and have provided written notice confirming this). If you engage a third party to rectify any defects when you are not entitled, then we are:

- (a) entitled to cancel this Agreement;
- (b) not be obliged to provide any information or documentation or take any other action necessary to enable a code compliance certificate to be issued in respect of the Services; and
- (c) immediately discharged from any further obligation or liability regarding the Services and this Agreement.

11.3. Any period during which the Services has been suspended as a consequence of your default shall not be counted when calculating a reasonable time for rectification of Defects, and any suspension shall not be construed as a permanent abandonment of the Worksite.

11.4. A Defect does not include any fair wear and tear or damage resulting from your failure to follow our reasonable instructions.

## 12. RETURNS AND WARRANTIES

12.1. Return of the Materials will only be accepted (at our sole discretion) provided that:

- (a) the Materials are returned to us within seven (7) days of the delivery date;
- (b) we have agreed in writing to accept the return of the Materials;
- (c) the Materials are returned in the condition in which they were received (including all packaging material, brochures and any instructions in as new condition as is reasonably possible);
- (d) we will not accept the return of Materials that have not been stored or used correctly; and
- (e) the return of any Materials for credit may incur a restocking fee of twenty-five percent (25%) of the value of the Materials (and any additional freight costs we incur).

12.2. Subject to the conditions of the warranty set out in clause 12.3, we warrant that if any Defect in any of our workmanship becomes apparent and is reported to us within twelve (12) months from the date of delivery (time being of the essence), we will either (at our sole discretion) replace or remedy the Defect.

12.3. The conditions applicable to the warranty given under clause 12.2 are:

- (a) the warranty shall not cover any Defect or damage which may be caused by or arise through: (i) failure on your part to maintain any Materials or Services properly; (ii) failure on your part to follow any instructions or guidelines we provide; (iii) any use of the Materials or Services for any purpose other than the appropriate applications specified on the quote, invoice or any other documentation supplied to you; (iv) the continued use of any Materials or Services after any Defect becomes apparent (or would have become apparent to a reasonably competent operator); (v) fair wear and tear; or (vi) any accident or act of God;
- (b) we shall not be liable to compensate you for any delay in remedying the Defect or in properly assessing your claim regarding the defective Services; and
- (c) the warranty shall cease, and we shall in no circumstances be liable (including the warranty set out in clause 12.2) if the Defect is repaired, altered or overhauled by any third party without our consent.

12.4. For any Materials not manufactured by us, the warranty shall be the current warranty provided by the manufacturer, and we shall not be bound by any condition, representation, or warranty other than what the manufacturer offers.

## 13. PRIVACY ACT 2020

13.1. You authorise us (and our agents) to collect, use, retain and disclose 'personal information' (as defined in Part 1, section 7 of the Privacy Act 2020) about you and your Personnel that you or they provide to us for the following purposes:

- (a) exercising our rights or performing our obligations under this Agreement;
- (b) using the services of credit reporting and debt collection agencies, and you consent to us disclosing personal information (including any information about an Event of Default or repayment history) to a credit reporter, who may hold that information and use it to provide its credit reporting services;

- (c) registering any Security Interest under this Agreement;
- (d) direct marketing purposes (including by email and other electronic means), unless you notify us that you do not wish to receive direct marketing from us; and

(e) the use or transfer of personal information to a Related Company in connection with the performance of our obligations or exercise of our rights under this Agreement.

13.2. Clause 13.1 is authority and consent from you in accordance with sections in Part 3 and all other relevant sections in the Privacy Act 2020.

13.3. You (if you are an individual) have the right under information privacy principles 6 and 7, and sections in Part 4, subpart 1 and Part 4, subpart 2 of the Privacy Act 2020 to access, and request correction of, any of your personal information held by us, and if you provide any personal information about a third party (including your Personnel) to us, you confirm that you are authorised to do so by the relevant individual, and you have informed the relevant individual that they have the right to contact us to access and, if applicable, request correction of any personal information that we hold about them.

13.4. If the Services are expected to involve sharing any data sets or other personal information, we will enter into a separate data protection agreement with you.

13.5. If you do not provide the personal information requested, we may be unable to perform our obligations under this Agreement.

## 14. CONFIDENTIAL INFORMATION AND INTELLECTUAL PROPERTY

14.1. Each party must keep confidential all Confidential Information, however, nothing in clause 14 prevents a party from disclosing Confidential Information:

- (a) in the circumstances expressly provided for in this Agreement;
- (b) if the disclosure is required by law or Regulator (but only to the extent necessary); or
- (c) if the disclosure is reasonably required to enable a party to perform its obligations or enforce its rights under this Agreement.

14.2. We may disclose Confidential Information to a Related Company and their Personnel on a 'need to know' basis, provided that person is under a duty to keep the Confidential Information confidential in accordance with this Agreement.

14.3. We own all right, title and interest (including all intellectual property rights) in the Materials or Services at all times.

14.4. Any new intellectual property created as a result of, or in connection with, the provision of our Materials or Services will be owned by us (unless otherwise agreed in writing).

14.5. If, notwithstanding clauses 14.3 and 14.4, any intellectual property rights in any of our Materials or Services vests in you, you assign those intellectual property rights to us with effect from creation and agree to do all things reasonably required by us to give effect to such assignment.

14.6. You warrant that the use by us of any designs, instructions, plans, specifications or other technical information provided by you will not infringe the intellectual property rights of any other person and indemnify us against any expenses or losses (including full legal costs on a solicitor client-basis) that we may incur or suffer in the event of any such infringement.

## 15. CONSUMER GUARANTEES ACT 1993 & FAIR TRADING ACT 1986

15.1. Subject to clause 15.2, nothing in this Agreement will affect any rights you may have as a 'consumer' (as defined under the Consumer Guarantees Act 1993 (CGA)) under the CGA.

15.2. For the purposes of section 2 and Part 5, section 43(2) of the CGA, the parties acknowledge and agree that if you are acquiring, or hold yourself out as acquiring, the Materials or Services in trade:

- (a) to the extent permitted by law, you are contracting out of the CGA (to the extent that the CGA would otherwise apply to any matters covered by this Agreement); and
- (b) it is fair and reasonable for the parties to be bound by clause 15.2.

15.3. If you are acquiring the Materials or Services for the purpose of resupplying the Materials or Services in trade, you undertake that you will:

- (a) contract out of the CGA to the maximum extent permitted by law in your contracts with your clients; and
- (b) procure that your clients and each person in the distribution chain thereafter contract out of the CGA to the maximum extent permitted by law in their contracts with clients.

15.4. For the purposes of section 5D of the Fair Trading Act 1986 (FTA), the parties acknowledge and agree that if you are acquiring, or hold yourself out as acquiring, the Materials or Services in trade:

- (a) to the extent permitted by law, you are contracting out of sections 9, 12A and 13 of the FTA; and
- (b) it is fair and reasonable for the parties to be bound by clause 15.4.

15.5. You will indemnify us against any expenses or losses incurred by us due to your breach of clause 15.

## 16. CANCELLATION

16.1. Either party may cancel the Services provided under this Agreement if:

- (a) any provision in this Agreement expressly authorises cancellation in the circumstances;
- (b) either party have a right to cancel this Agreement under Part 2, subpart 3 of the CCLA (or any other statute); or
- (c) either party have permanently abandoned the Services before completion of the Services or has become permanently incapable of complying with the obligations under this Agreement.

16.2. If we choose to cancel the Agreement, without prejudice to our other rights and remedies, we may forfeit your deposit or any amount paid in advance and apply it

- to any Amounts Owing, damages, costs, interest or other Amounts Owing are entitled (including any loss of profit).
- 16.3.If either party becomes entitled to cancel this Agreement, the cancellation shall take effect on the service of a notice on the other party (in accordance with clause 36.7) advising of the cancellation (and the particular statutory provision, clause, or grounds relied upon to justify the cancellation).
- 16.4.If either party exercises a right to cancel this Agreement, then:
- you shall pay us for all Materials delivered and all Services performed up to the date of cancellation, and if the amount owed for those Materials or the Services is not apparent from the provisions of this Agreement, it shall be calculated as if the relevant Materials and Services were provided as a variation (in accordance with clause 8); and
  - we shall deliver up possession of the building to you (subject to all Amounts Owing being paid in full) and remove from the Worksite all Materials, tools, plant, equipment, appliances or vehicles belonging to us (and our subcontractors).
- 16.5.We shall be entitled to cancel all or part of any order of yours which remains unperformed, and all Amounts Owing to us shall (whether or not due) become immediately payable if: (i) any Amounts Owing to us become overdue, or in our opinion, you will be unable to meet your payments as they fall due; or (ii) an Insolvency Event occurs, and you become insolvent or bankrupt, convene a meeting with your creditors, or a liquidator or similar person is appointed for you or any of your assets.
- 16.6.You may cancel this Agreement if we commit any of the following acts of default and we have not remedied the default within twenty (20) Business Days of receiving written notice of the default, including if we: (i) become insolvent or bankrupt, convene a meeting with our creditors or a liquidator or similar person is appointed in respect of our assets; (ii) have persistently failed to proceed with the Services with reasonable diligence; or (iii) persistently or wilfully neglected our obligations under this Agreement.
- 16.7.Where you cancel the Agreement, any warranty provided may be withdrawn or rendered void (including the warranty in clause 12). To avoid rendering the warranty void, you must act in good faith and consult with us regarding the options for a resolution (including obtaining our prior written consent to a proposed cancellation).
- 16.8.Orders made to your specifications or non-stock-list items cannot be cancelled once production has commenced.
- 16.9.All provisions of this Agreement intended to continue in force beyond cancellation shall continue to bind the parties (in accordance with clause 36.12).
- 16.10.Subject to clause 16.9, on cancellation, each party shall be immediately discharged from any further obligation or liability regarding the Services and this Agreement (without prejudice to any right or remedy arising from either party's prior breach of this Agreement or unlawful act occurring before cancellation).
- 17. EVENT OF DEFAULT**
- 17.1.Unless waived by us in writing, we may charge interest at a rate of two and a half percent (2.5%) per calendar month on any outstanding Amounts Owing from the due date of payment until the date the outstanding amount is paid (and interest shall compound monthly at such a rate).
- 17.2.You agree to reimburse us for any fees or expenses we incur in recovering any Amounts Owing (including, without limitation, administration fees, debt collection agency fees, disbursements and full legal costs on a solicitor-client basis).
- 17.3.Should you fail to pay any account, we may withhold the release of any producer statement, certification, or documentation relating to the Services provided until all Amounts Owing are paid in full.
- 18. RETENTION OF TITLE**
- 18.1.Ownership (including all right, title and interest) of the Materials and Services remains with us until:
- we have received all Amounts Owing; and
  - you have performed all of your obligations under this Agreement.
- 18.2.If any Amounts Owing is overdue, or an Insolvency Event occurs, you give irrevocable authority to us to use reasonable force to enter anywhere Materials may be stored, to remove any Materials. We shall not be liable in contract, tort or otherwise for any damages, expenses, or losses incurred by you or any third party, and you indemnify us against any liability we may have to any third party (including full legal costs on a solicitor-client basis), as a result of us exercising our rights under clause 18.2 (except where damages, costs or losses are due to our negligence or fraud).
- 18.3.If you resell or use any Materials before ownership of the Materials has passed to you (including combining or processing the Materials), the proceeds of such sale or use will be received and held by you (in whatever form) in trust for us to the extent of the Amounts Owing (where our interest as beneficiary under that trust will be that portion of the proceeds which is equivalent to the Amounts Owing to us and the balance of the proceeds (if any) will be your beneficial interest under that trust).
- 18.4.It is further agreed that:
- where possible, the Materials shall be kept separate and identifiable until we have received full payment and you have fulfilled all of your obligations under this Agreement; and
  - until ownership of the Materials passes to you, we may give notice in writing to return the Materials (or any accessories or components), and your rights to obtain ownership or any other interest in the Materials shall cease.
- 18.5.If any Materials are damaged where full payment has not been received, you agree that we are entitled to:
- receive all insurance proceeds paid for the Materials; and
  - deal directly with the insurance company to receive all insurance proceeds paid for the Materials we own (in accordance with clause 18.1).
- 18.6.We may commence proceedings to recover the Price of the Services provided, notwithstanding that ownership of the Materials or Services has not passed to you.
- 19. SECURITY AND LIEN**
- 19.1.Subject to us providing any Materials or Services, you charge all of your right, title and interest (whether joint or several) in any land, real estate or other assets capable of being legally charged with a lien, owned by you either now or in the future, to secure the performance of all obligations (including full payment of all Amounts Owing) under this Agreement.
- 19.2.You irrevocably appoint all directors of our companies (including any Related Company) as your true and lawful attorney(s) and agree that the appointed attorney(s) may perform all necessary acts to enforce our rights provided in clause 19.1 of this Agreement (including signing any document on your behalf).
- 19.3.You are liable for all our disbursements and expenses (including full legal expenses on a solicitor-client basis) incurred in exercising our rights under clause 19 to secure the performance of your obligations under this Agreement.
- 19.4.In accordance with Part 5, subpart 5 of the CCLA, we hold a lien for work done and may sell at public auction any property that has been left by you for Services if any Amounts Owing are outstanding.
- 19.5.It is fair and reasonable for the parties to be bound by clause 19.
- 20. PERSONAL PROPERTY SECURITIES ACT 1999**
- 20.1.You acknowledge and agree that:
- this Agreement constitutes, in favour of us, a Security Agreement creating a Security Interest in the Materials or Services or the proceeds of such Materials or Services; and
  - the Security Interest granted to us secures the payment of all Amounts Owing (all present and after-acquired personal property) you may owe us from time to time and at any time.
- 20.2.You agree that you will sign any further documentation and provide any information which we may reasonably require to ensure we are paid all Amounts Owing due to us and otherwise to protect our interests under this Agreement, including by registration of a financing statement and ensuring that we have a first ranking perfected Security Interest in the Materials or Services, or a Security Interest in the proceeds of any Materials or Services (a Security Interest taken in all collateral and any proceeds of any collateral).
- 20.3.To the extent permitted by law, we each contract out of:
- sections 114(1)(a), 133 and 134 of the PPSA; and
  - your rights referred to in sections 107(2)(a), (c), (d), (e), (f), (g), (h) and (i) of the PPSA.
- 20.4.You waive your right to receive a verification statement under section 148 of the PPSA regarding any financing statement relating to a Security Interest.
- 20.5.Nothing in this Agreement is to be construed as an agreement that: (i) a Security Interest in Materials (collateral) attaches at a later time than the time specified in Part 3, section 40(1) of the PPSA; (ii) a Security Interest is perfected in accordance with Part 3, section 41(1) of the PPSA; (iii) a Security Interest in all after-acquired property attaches at the time specified in Part 4, section 44(1) of the PPSA; and (iv) a Security Interest in collateral shall extend to the proceeds as specified in Part 4, section 45(1) of the PPSA.
- 20.6.Each Security Interest is a continuing Security, notwithstanding any intermediate payments, settlement of accounts or anything else.
- 20.7.You must provide us with information and any associated documentation reasonably requested by us from time to time relating to your financial status.
- 20.8.If at any time we consider that your financial status is unsatisfactory, we may require you to grant additional Security Interests as security for the Amounts Owing, and we may suspend or cancel further supply of Materials or Services until you have provided such Security Interests.
- 20.9.You shall unconditionally ratify any actions taken by us under clause 20.
- 21. WORKSITE ACCESS**
- 21.1.It is your responsibility to ensure that:
- we have clear and free access to the Worksite to deliver the Materials or undertake the Services (including carrying out any inspections or for the delivery or installation of the Materials). We shall not be liable for any loss or damage to the Worksite (including damage to pathways, driveways, concrete, paved tiles or grassed areas) unless due to our negligence; and
  - access is suitable to accept the weight of laden trucks, front-end loaders, or other earth-moving equipment as necessary.
- 21.2.When a patch of discoloured concrete is discovered, we may use an acid wash to remedy the issue for which we need access to the Worksite for the period we determine to ensure the best results are achieved. Iron oxides are extremely colour stable, and any slight fading that will occur would be barely noticeable, even after years, so we can only affect a slight colour change in the concrete through acid washes without affecting the integrity of the slab.
- 21.3.You agree to give us free access to the Worksite after the concrete has been cured to perform stress relief cuts in the concrete slab to avoid cracking and structural damage.
- 21.4.You (your agents and contractors) shall be entitled to have reasonable access to inspect the Worksite during regular working hours, provided that: (i) all inspections of the Services will be done with us present on the Worksite; (ii) the inspection is with our consent and within reasonable hours (which we shall not arbitrarily withhold); (iii) you have provided us with notice before exercising these access rights; (iv) we are not responsible for any damage done to the Services by you (or your agents); (v) you shall not exercise access with such frequency or duration that

causes delays (or a distraction to our employees or contractors); (vi) you are not to interfere with our progress (and we may (at our sole discretion) temporarily decline access to complete any necessary Services to meet the agreed deadlines); and (vii) you agree to comply with all health and safety legislation requirements, including all reasonable and relevant instructions we provide, such as wearing protective clothing when on the Worksite (in accordance with clause 27).

21.5. Nothing in this clause shall limit or negate sections in Part 3, subpart 2 of the Building Act 2004 related to territorial authority's powers to conduct inspections and enter land.

21.6. You are responsible for organising temporary fencing to protect the Worksite from damage or theft if any fencing or other boundary is removed.

## 22. SURPLUS MATERIALS

22.1. We are not responsible for removing excess Materials or rubbish (including demolished materials) from the Worksite. All waste we generate will be placed in a designated area that you appoint.

22.2. Materials that we bring to the Worksite, which are surplus at the completion of the Services, will remain our property.

## 23. CLIENT'S RESPONSIBILITIES

23.1. It is your responsibility to:

- (a) remove any furniture, furnishings or personal goods from the Worksite or vicinity of the Services and agree that we shall not be liable for any damage caused to those items through your failure to remove personal goods from the Worksite;
- (b) extinguish all naked flames near the Worksite before any Services (including fireplaces or heaters);
- (c) provide us with adequate access to amenities, including available water, electricity, toilet and washing facilities (in accordance with clause 9.1); and
- (d) ensure that children or animals near the Worksite are safe (and do not interfere with the Services).

23.2. If you are to supply any materials or services in connection with this Agreement (whether personally or by arrangement with a supplier or contractor), then our prior written consent is required, and you must ensure that the materials or services:

- (a) meet the same standards as we are required to attain in respect of the Materials and Services we are responsible for supplying under this Agreement; and
- (b) are delivered at such a time and in such a manner that we are not impeded from complying with our obligations under this Agreement.

23.3. You must proceed with the services you are supplying expeditiously and without delay and not unreasonably impede us from performing our obligations. You agree to promptly and comprehensively provide any information and make any decision we may reasonably request regarding any Services you are supplying.

23.4. If you are a tenant (and not the owner of the land and premises where we provide the Services), you warrant that consent for the Services has been obtained from the owner (or the owner's agent), and you agree to supply contact information for us to verify such consent before the commencement of the Services. Should you fail to obtain consent or notify us that you are not the owner of the land and premises, you acknowledge and agree that you shall be personally liable for all Amounts Owed and indemnify us against any claim made by the owner in relation to the Services (excluding our negligence).

## 24. INSURANCE AND RISK

24.1. Where we retain ownership of the Materials or Services (in accordance with clause 18.1), you acknowledge and accept that if:

- (a) we supply Materials only, all risk for the Materials shall immediately pass to you on the delivery (by us or our nominated carrier), and you must insure the Materials on or before delivery; or
- (b) we are to supply and utilise the Materials for the Services, we shall maintain an insurance policy for the Services until completion, at which point all risk shall immediately pass to you.

24.2. Corrosion of embedded steel can cause deterioration in the strength and longevity of the concrete, and we are not liable for damage caused by any embedded item you request, including structural steel installations, gate posts, or any ornamental items to be embedded in the concrete.

24.3. You agree that we are not liable for: (i) chemical reactions, such as the alkali-silica reaction (a deleterious swelling reaction that occurs over time in concrete between the highly alkaline cement paste and the reactive amorphous or non-crystalline silica found in many common aggregates, given sufficient moisture); (ii) damage to the concrete surface from excessively heavy loads, such as a truck operating or parking on the concrete; (iii) deterioration of the concrete surface if there is a fireplace or incinerator on the concrete; (iv) contaminants from soil, such as sulphates, weakening the concrete; (v) natural shades or imperfections caused through natural processes such as water moving through the slab, including where very occasionally, irregular, dark blotching or pinto may appear on the surface of your concrete, which can happen regardless of whether a colour is used or not; (vi) efflorescence which is a crystalline deposit of salts, usually white, that forms on or near the surface of the concrete as a natural process, formed when salts are dissolved by water migrating through the concrete and then precipitating at the surface; (vii) cracking or scaling that is caused by cold weather conditions that cause significant frosting followed by sun exposure (exposing concrete to a freeze-thaw cycle) during the curing process of the concrete or where you request us to pour new concrete over old existing concrete, as the existing concrete conditions can affect the structural integrity of the new concrete slab; (viii) any condensation that occurs to the concrete we install in any area next to a pool or water feature (where the surface of the concrete slab is cooler than the dew point of the ambient air above it and causes moisture to start condensing on the surface, causing mould, mildew and a slip hazard); or (ix) any stress in the concrete that exceeds its

design and creates pop-outs (formed as the water in saturated coarse aggregate particles near the surface freezes, expands, and pushes off the top of the aggregate and surrounding cement to create a shallow conical depression).

24.4. If we form a reasonable opinion based on industry experience that shading of the concrete is required (including in hot weather or if we are not using air-trained concrete), we are entitled to erect sunshades around the concrete and construct temporary walls to block or reduce wind velocity to avoid excessive moisture loss which can cause scaling, disintegration, efflorescence, honeycombing, erosion, spalling, and pop-outs in concrete, and this may result in additional costs (in accordance with clause 8).

24.5. We do not warrant that trucks providing concrete to us will be free from unwanted materials, including the failure to remove clay, silt and dust content before mixing (as this can lead to laitance in the concrete, a thin and weak layer of cement dust, sand, and lime appear on the surface) or colour variations caused by contaminant chemicals being introduced during the mixing process. We accept no responsibility for any mix provided by a third party and will treat any additional costs, including remedying laitance or colour variances in the concrete, as a variation (in accordance with clause 8).

24.6. You acknowledge and accept that where we are requested to perform an acid wash, this can damage the concrete and weaken the concrete structure with each application. This may cause scaling, pitting, peeling, and cracking on the concrete surface, and if the acid wash gets into the soil, it will evaporate on the surface but remain beneath the surface (just like it does with concrete).

24.7. Where we provide any coating for concrete surfaces, you acknowledge and accept that we are not liable for damage caused by osmosis after the Services are completed, as this can cause the coating to fail (when actual moisture vapour emission through the concrete slab tries to equalise the soluble ions at the surface and creates a pressure that can be greater than the adhesion strength of the coating).

24.8. You agree that if:

- (a) we decide (based on industry experience) that the risk is too significant to continue during any excavation, we shall advise you (or your agent) regarding the risk of continuing. Where such advice is not acted on, and we are requested to continue, we shall require you (or your agent) to authorise the continuance of the Services in writing. We shall not be liable for any damage or losses that occur after any subsequent continuation of the Services, and you agree to reimburse us for any damage to our Equipment (except where our negligence causes the damage);
- (b) we give advice or recommendations to you regarding the suitability of the Worksite for the laying of concrete slabs, foundations or similar Services and such advice or recommendations are not relied upon, then we shall require you to authorise the commencement of the Services in writing, and we shall not be liable for any damages or losses that occur after any subsequent commencement of the Services;
- (c) we discover any fossils, artefacts, or other remains of geological or archaeological interest while performing the Services, we reserve the right to halt all Services, remove any of our Equipment from the Worksite, and immediately notify you. You agree that all additional costs that may be incurred by us as a result of any such delays (including if we are unable to remove our Equipment from the Worksite) will be your responsibility and shall be treated as a variation (in accordance with clause 8); and
- (d) any undisclosed waste or hazardous materials are discovered, we reserve the right to halt all Services and immediately notify you. It shall be your responsibility to arrange the removal of all such materials. If we agree to remove such materials for you, this shall be treated as a variation (in accordance with clause 8) and will be an addition to the Price.

24.9. Where you have supplied Materials for us to complete the Services, you accept responsibility for the suitability of purpose, quality and any faults inherent in those Materials, and if (in our opinion) it is believed that the Materials supplied will not conform to New Zealand regulations (set out by any Regulator), then we shall be entitled to halt all Services until the appropriate conforming Materials are sourced (and you will be solely liable for all additional expenses incurred, which will be invoiced as a variation to the Services under clause 8).

24.10. We may, at our discretion, notify you that we require you to store Materials or tools required for the completion of the Services at the Worksite, in which case you agree to provide us with a safe area for storage and shall take all reasonable efforts to protect any Materials or tools from theft or damage (and the cost of repair or replacement of any Materials or tools that are stolen or damaged while stored at the Worksite shall be your responsibility).

24.11. You accept that we are only responsible for Materials or Services that are provided or replaced by us, and we do not accept any responsibility for previous Services carried out by any third party or for any loss or damage to the Materials or Services that are caused by any other third party after the completion of the Services.

24.12. Where we are required to install Materials, you warrant that the structure of the premises in or upon which the Materials are to be installed is sound and will sustain the installation. We shall not be liable for any damages or expenses caused by the premises being unable to accommodate the installation of the Materials.

24.13. You agree that variations of colour, grain or shade are inherent in natural Materials, and while we will make every effort to match colour, grain or shade when selecting Materials, we shall not be liable for any variation in colour, grain or shade between batches of Materials or between new Materials and existing materials (and if there is a variation between batches or new and existing materials, the Materials and Services will not be considered to contain any defect or faulty workmanship).

- 24.14. You acknowledge and accept that:
- all descriptive specifications, illustrations, drawings, data dimensions, and weights stated in our fact sheets, Price lists, or advertising material are indicative only; and
  - the Materials supplied may: (i) fade or change colour over time; (ii) expand, contract or distort as a result of exposure to heat, cold, or weather conditions; (iii) mark or stain if exposed to certain substances (including those stated by the manufacturer); and (iv) be damaged or scratched by impact.
- 24.15. Should you request us to leave Materials outside our premises for collection or deliver the Materials to an unattended location, you agree that those Materials shall be left at your sole risk.

## 25. NOTIFICATION OF SERVICES

- 25.1. You must precisely locate all unseen or underground services on the Worksite and mark the same prior to us commencing any of the Services (including electrical services, gas services, sewer services, water mains, telephone cables, fibre optic cables, or any other services that may be present on the Worksite).
- 25.2. You agree that we are in no way liable for any damages, expenses or fines incurred due to any unseen or underground services that are not precisely located and marked by you in accordance with clause 25.1.

## 26. PROVISION OF CONCRETE

- 26.1. We give no guarantee (expressed or implied) as to the length of time the curing process will take to avoid cracking of the concrete (that may occur naturally, such as hairline cracking) due to weather conditions that prolong or accelerate the curing process of the concrete.
- 26.2. You agree that concrete is a natural material and is inherently variable. The concrete may contain blow holes, air voids and minor colour variations due to factors beyond our control (including but not limited to oxide-containing concrete curing at differing rates, variations in ground moisture under the concrete, partial shading of the Worksite and weather variations during the pour/curing of the concrete).
- 26.3. We shall not be liable for any damage that is caused to the concrete by not following our recommendations, including:
- to water the concrete periodically to limit the risk of potential cracking due to weather conditions;
  - that no foot traffic or furniture is to be on the concrete for a minimum of forty-eight (48) hours from the completion of the Services; and
  - that no vehicles are to be on the concrete for seven (7) days from the completion of the Services.
- 26.4. You agree that it is your responsibility to organise and protect the concrete once the Services have been completed, and we will not be responsible for any damage caused by any third party.
- 26.5. We are not responsible for aggregate segregation, where there is a separation of cement paste and the aggregates present in the concrete. A variable dispersion of aggregates can be an aesthetic issue in exposed aggregate concrete and concrete made with alluvial aggregates containing driftwood or other materials that may be visible on the surface of the concrete. You accept this is an unavoidable occurrence with some aggregate-containing Materials and agree that any inherently exposed aggregates due to segregation shall not be considered a defect in the Services. We are not liable for any exposed aggregates inherent with the Materials that cause an aesthetic issue in the concrete finish, and you agree that any additional Services required to alter the finish will be charged as a variation (in accordance with clause 8).
- 26.6. While we will take all reasonable care and use all information available to us, we shall not be liable for any damage or additional expenses caused by unforeseeable weather conditions which are not predicted by any weather-predicting services and cannot be reasonably anticipated or managed. Should there be any damage due to unforeseeable weather conditions (including but not limited to rain, hail or heavy winds), the additional cost to repair such damage will be treated as a variation (in accordance with clause 8).
- 26.7. Detailed drawings of any services that will be embedded in the concrete are to be provided to us prior to the commencement of any Services, and whilst we will take all due care, we accept no liability for any damage to the embedded services.
- 26.8. If we are requested to pour a thinner slab which, in our opinion, will not be sufficient for weight tolerances based on your information and industry experience regarding depth or dimensions, then we will require you to provide written instructions to proceed and shall not be liable for any future issues that arise from pouring the concrete too thin (including heavy vehicles, equipment, and materials causing cracks or structural damage in the concrete slab).
- 26.9. Occasionally, after the concrete is sealed, dark patches may appear when the surface is wet and then disappear when the surface dries. It's caused by microscopic pin holes, cracks and high points in the sealer that let small amounts of water into the concrete. This is an inherent natural occurrence and is not because of faulty workmanship or Materials, and the effect will occur less and less over time.
- 26.10. All finished work shall be assessed in accordance with the New Zealand Standard 3114:1987 (specification for concrete surface finishes), which states that finishes need to be assessed from a distance of 3 metres.
- 26.11. You shall supply an area suitable for washing out our Equipment and depositing unused concrete or slurry.

## 27. HEALTH AND SAFETY AT WORK ACT 2015

- 27.1. Each party will comply with the Health and Safety at Work Act 2015 (HSW Act), including all health and safety duties specified in Part 2 of the HSW Act and all other applicable standards and codes of practice relating to health and safety. In

addition, each party will comply with the other party's pre-notified and reasonable health and safety policies when on the party's premises.

- 27.2. You must notify us of any known hazards arising from your premises to which any person may be exposed, as well as inform us of any notifiable injury, illness, incident or event (as defined in Part 1, subpart 3 of the HSW Act) to ensure that your workplace is without risks to the health and safety of any person.
- 27.3. Each party must consult, cooperate and coordinate activities with all other persons with a health and safety duty in relation to the same matter in providing the Materials or Services (including in connection with the delivery of the Materials or Services).

## 28. PLANS AND SPECIFICATIONS

- 28.1. Where you supply us with any plans, specifications or other technical information (such as CAD drawings or any other electronic software that provides detailed plans and specifications), you will be responsible for providing accurate information, and we shall be entitled to rely on the accuracy of the information you provide.
- 28.2. If there is any discrepancy between the drawings and the specifications, precedence will be determined based on the election of authority agreed to by both parties and recorded in writing. If no election of authority has been made, then the drawings will take precedence, and you agree that:
- figured specifications take precedence over scaled specifications;
  - large-scale specifications take precedence over small-scaled specifications;
  - amended drawings take precedence over older drawings; and
  - all drawings and specifications are subject to any building consent.
- 28.3. We are not responsible for any errors in the Materials or Services or additional expenses caused by you supplying inaccurate information.

## 29. STATUTORY COMPLIANCE AND CONSENT

- 29.1. We will obtain and pay (on your behalf) for any building or resource consent and other necessary approvals and inspections required for the Services (including consents, approvals or reports required after the commencement of the Services, such as geotechnical data). You appoint as your agent to obtain such consents, approvals and reports and agree to do all things necessary to facilitate such agency.
- 29.2. You acknowledge and agree that:
- we shall be responsible for applying for and obtaining the code compliance certificates for the Services; and
  - you shall provide us with all the necessary information to apply for code compliance certificates.
- 29.3. Both parties acknowledge and agree to comply with the Building Act 2004 regarding all 'building work' (as defined in Part 1, section 7 of the Building Act 2004) supplied under this Agreement.

## 30. SURVEY PEGS AND WORKSITE BOUNDARIES

- 30.1. Survey pegs we require to define Site boundaries, unless already established, must be provided by you (through a surveyor you engage). If and when required, you must show us the survey pegs, offset pegs and datum pegs (and we will record the position of those pegs). We will take all reasonable steps to maintain the survey pegs. You shall indemnify us for any expense, loss, action or claim arising out of the position of pegs or mistakes by you (or your agents) regarding the correct boundaries of the Worksite.
- 30.2. Any additional Services required or costs incurred by us due to the inaccurate location of any site boundary pegs, offset pegs, and datum pegs, shall be treated as a variation unless we (or our agents) cause the inaccuracy).

## 31. LAND SUBSIDENCE AND DEFECTIVE EARTHWORKS

- 31.1. You acknowledge and agree that we are not liable for any:
- damage to the Services caused by the subsidence of the Worksite (including any partial subsidence) or additional costs resulting from the absence of information on any foundation, defects or difficulties that were not discovered by a reasonable inspection of the Worksite;
  - deterioration to the Services or the Worksite caused by or resulting from the inadequacy or negligent application of earth fill (or removal) unless such damage or deterioration may be adequately attributable to our negligence.
- 31.2. You agree that where earthmoving or excavation work has been provided by a third party (you have engaged) and such work is found to be defective or not up to standard (including depth or dimensions), we reserve the right to charge a variation to remedy such work (in accordance with clause 8).

## 32. CONSTRUCTION CONTRACTS ACT 2002

- 32.1. If you are a 'residential occupier' (as defined in Part 1, section 5 of the CCA), then you agree that we shall have the right to suspend any Services by providing five (5) days written notice, should a payment claim be served on you and an Event of Default occurs (in accordance with section 24A in Part 2, subpart 4 of the CCA).
- 32.2. Should we suspend the Services, it shall not be considered a breach of this Agreement, and we are not liable for any losses or expenses you incur due to the suspension of Services under clause 32.1.
- 32.3. In the event the Services are suspended, we shall be entitled to an extension of time to complete any Services that remain incomplete under this Agreement, and you agree that:
- we retain the right to cancel this Agreement whilst the Services are suspended, and all other rights available to us in this Agreement shall remain in full force and effect; and
  - we may exercise any rights for payments or adjudication of disputes under Part 2 and Part 3 of the CCA.

**33. MEASUREMENT OF SERVICES**

33.1. At the completion of the Services, you (or your agent) shall attend the Worksite and the Services shall be measured (and where you are absent and do not attend the Worksite, we shall carry out the necessary measurements and forward you the calculations). If you do not object to the measurements or calculations within seven (7) days of receiving such information, then it shall be deemed acceptance of the measurements and any subsequent calculations. If you dispute the measurements or calculations taken in your absence, we reserve the right to charge any additional time spent in providing new measurements or calculations as a variation (in accordance with clause 8).

**34. THIRD PARTY SUPPLIERS**

34.1. We shall be entitled to engage third party suppliers (including subcontractors), and you agree that we have the authority to enter into contracts with such third party suppliers in your name.

34.2. If you request and authorise us to arrange the provision of Materials or Services directly to you by a third party supplier (whether or not such arrangement involves us contracting as your agent), to the extent applicable, this Agreement shall apply to our Services in arranging such supply, provided that we exclude all liability in connection with the supply of Materials or Services to you directly by a third party supplier. You agree to pay all Amounts Owing in accordance with this Agreement if we arrange any supply of Materials or Services provided directly to you by a third party supplier.

34.3. We offer no warranty regarding the quality of the third party supplier's workmanship (including whether their recommendations are appropriate or accurate).

**35. LIABILITY**

35.1. To the extent permitted by law, we shall have no liability whatsoever to you for any direct or indirect expense or loss of profit suffered by you arising out of a breach by us of this Agreement (including any unintentional misrepresentation made to you by us regarding any of the Materials or Services).

35.2. To the extent permitted by law, our liability shall not exceed the Price of the Services provided by us under this Agreement.

35.3. To the extent permitted by law, our total liability under or in connection with this Agreement and the Materials or Services is limited to, at our option:

(a) in the case of Materials, any one or more of the following: (i) the replacement of the Material(s) or the supply of equivalent Material(s); (ii) the repair of the Material(s); (iii) the payment of the expense of replacing the Material(s) or of acquiring equivalent Material(s); or (iv) the payment of the expense of having the Material(s) repaired; or

(b) in the case of Services: (i) resupplying the Services; or (ii) the payment of the expense of having the Services resupplied.

35.4. If, notwithstanding clause 34, we have any liability under or in connection with this Agreement, to the maximum extent permitted by law:

(a) our total aggregate liability to you for any loss, damage or liability arising out of or in connection with this Agreement will be limited to the lesser of: (i) the Price paid by you to us for the applicable Materials or Services; or (ii) the actual loss or damage suffered by you; and

(b) we will not be liable for any: (i) indirect, special or consequential loss or damage whatsoever; or (ii) loss of profits, revenue, data, goodwill, customers, opportunities or loss of or damage to reputation.

35.5. The limitations and exclusions on liability in this clause 35 will apply irrespective of the legal basis for the applicable claim, including contract, equity, tort or statute, except negligence and fraud.

35.6. In no circumstances will we have any liability whatsoever under or in connection with this Agreement:

(a) for the acts or omissions of any third party;

(b) any act or omissions performance in accordance with your instructions (or instructions from your authorised agents); or

(c) to any third party.

**36. GENERAL**

36.1. **Governing law:** This Agreement is governed by and to be construed in accordance with the laws of New Zealand, and each party submits to the exclusive jurisdiction of the courts of New Zealand.

36.2. **Entire Agreement:** This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, representations and understandings.

36.3. **Priority:** To the extent of an inconsistency between:

(a) this Agreement;

(b) all other schedules to this Agreement;

(c) any privacy or data agreement (if applicable); and

(d) the order of priority above will apply (with (a) having the highest priority).

36.4. **Subcontracting:** We may subcontract the performance of our obligations (including to a Related Company) on the basis that we remain solely liable to you for the performance of our obligations.

36.5. **Assignment:** You must not assign, novate or transfer your rights or obligations under this Agreement without our prior written consent (which may be withheld at our sole discretion). We may assign this Agreement to any other person. Without limiting the foregoing, we may assign to any other person all or part of the Amounts Owing by you.

36.6. **Amendments:** Except where stated otherwise in this Agreement, any amendment to this Agreement must be in writing, signed by both parties, except where we are required to make changes to ensure compliance with applicable laws, in which case we can give you notice of any such amendments required, and you will be bound by the same.

36.7. **Notices:** Any notice, demand or other communication to be served on a party must be in writing and sent by personal delivery, pre-paid post or email to the address of the relevant party (or otherwise notified to the other party from time to time). Any notice or other communication is deemed to be received (i) if personally delivered, on receipt, (ii) if posted by pre-paid official postal service, on the fifth Business Day after posting (or seven Business Days after posting if sent from one country to another), and (iii) if sent by email on the date and time that the email was sent (as evidenced in the sender's email sent history). Notices received after 5pm on a Business Day will be deemed received on the next Business Day.

36.8. **Force majeure:** We will not be liable to you for any failure or delay in performing our obligations under this Agreement where such failure or delay is caused by events or circumstances beyond our reasonable control (including any strike, lockout, labour dispute, delay in transit, embargo, epidemic, pandemic, accident, emergency, order of government or other authority or act of god).

36.9. **Severability:** If any part of this Agreement is illegal or unenforceable, you agree that part shall be amended to the extent permitted by law to allow the enforceability of any rights, and if it is not able to be amended, then it will be severed, and all remaining rights in this Agreement will continue in full force and effect.

36.10. **Waiver:** A single or partial exercise or waiver of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.

36.11. **Termination:** Either party may terminate this Agreement immediately by written notice if the other party breaches a term of this Agreement which is not capable of remedy or, where the breach is capable of remedy, fails to remedy the breach within 20 Business Days of written notice of the breach.

36.12. **Survival:** Any rights or obligations under or in connection with this Agreement, which is by nature a continuing obligation, will survive termination of this Agreement by either party.

36.13. **Rights of third parties:** This Agreement is not intended to confer a benefit on any person other than the parties to this Agreement.

36.14. **Relationship:** We will provide Materials or Services to you as an independent contractor. Nothing in this Agreement creates any partnership, joint venture or employment relationship between the parties.

36.15. **Non-exclusive:** This Agreement is not exclusive, and you agree that there are no restrictions on us to provide any Materials or Services to any other person.

36.16. **Counterparts:** This Agreement may be executed in any number of counterparts (including by electronic signature or email exchange of pdf copies), constituting one instrument.