



Terms of Trade

Please read prior to any dealings with **EarthCraft Excavations**.

Brett P. Jones trading as **EarthCraft Excavations** accepts that all customers have read and agree with our terms of trading as outlined below.

1. Definitions

- 1.1. **“Client”** means the person/entity specified as the Customer on the Quote/Invoice.
- 1.2. **“Contractor”** means Brett P. Jones trading as **EarthCraft Excavations**.
- 1.3. **“Delivery Site”** refers to the location where the services will be performed.
- 1.4. **“Guarantor”** means the person/entity named as the Guarantor on the Quote/Invoice.
- 1.5. **“Goods”** shall mean goods supplied by the Contractor to the Client and are as described on the Quote/Invoice.
- 1.6. **“GST”** has the meaning given to that term by the A New Tax System (Goods and Services Tax) Act 1999 (Cth).
- 1.7. **“Price”** shall mean the price stated on the Quote/Invoice and as may be varied in accordance with clause 2 of this agreement.
- 1.8. **“Services”** means the services supplied by the Contractor to the Client and are as described on the Quote/Invoice.
- 1.9. **“Quote”** means the written quotation setting out the proposed scope of works, estimated quantities, inclusions, exclusions, and quoted price for the specified works. Does not include unforeseen works, additional materials, changes requested by the Client, or conditions not reasonably identifiable at the time of quoting. Any additional works or costs will be discussed with the Client and, where practicable, agreed before the additional work is undertaken. Acceptance of the Quote by the Customer constitutes agreement to the scope of works and these Terms and Conditions. Quote is valid for the period stated.

2. Price And Payment

- 2.1. The Client must pay the Price to the Contractor.
- 2.2. The Contractor reserves the right to change the Price in the event of a variation to the Quote. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation as a result of additional works required due to hidden or unidentifiable difficulties beyond the reasonable control of the Contractor such as hard rock barriers below the surface or iron reinforcing rods in concrete) will be charged for on the basis of the Contractors then current rates and will be shown as variations on the invoice.

- 2.3. At the Contractors sole discretion, payment must be made at either:
(a) prior to delivery of the Goods and/or commencement of the provision of the Services;
(b) on delivery or completion (as applicable) of the Goods and/or Services; or
(c) within 7 days of provision of a tax invoice for the Goods and/or Services.
- 2.4. The Client must not set off any amount owing by the Contractor to the Client against the Price.
- 2.5. Payment must be made by cash, electronic bank transfer, direct credit, credit card or any other method agreed between the Client and the Contractor. Payment by credit card will incur service surcharges above the Price.
- 2.6. The Price excludes any GST or other applicable taxes or duties. Any applicable GST, other tax or duty will be payable in addition to the Price.
- 2.7. If the Client fails to pay the Price in accordance with this agreement, without limiting any other remedies available to the Contractor, the Contractor may suspend or terminate the supply of Goods and/or Services to the Client and any of its other obligations under the terms and conditions. The Contractor will not be liable to the Client for any loss or damage the Client suffers because the Contractor has exercised its rights under this clause.
- 2.8. Interest on overdue invoices may accrue daily from the date when payment becomes due, until the date of payment, at a rate of 8% per annum calculated daily.
- 2.9. If any account remains overdue after 30 days, then an amount of the greater of \$50.00 or 30% of the amount overdue shall be levied for administration fees and recovery costs which sum shall become immediately due and payable.

3. Delivery, title and risk

- 3.1. Delivery of the Goods and/or Services shall take place when the Goods and/or Services are delivered to the Delivery Site.
- 3.2. The Contractor may deliver the Goods and/or Services by separate instalments.
- 3.3. The Client shall take delivery of the Goods and/or Services tendered notwithstanding that the quantity delivered shall be either greater or lesser than the quantity ordered. The Contractor will adjust the Price pro rata to the discrepancy.
- 3.4. The failure of the Contractor to deliver shall not entitle either party to treat this agreement as repudiated.
- 3.5. The Contractor shall not be liable for any loss or damage whatever due to failure by the Contractor to deliver the Goods and/or Services (or any part of them) promptly or at all, where due to circumstances beyond the control of the Contractor.
- 3.6. Title to an item of Goods passes from the Contractor to the Client when all amount payable by the Client to the Contractor under this agreement or in connection with the Goods and/or Services have been paid in full and any other obligations of the Client in respect of all contracts between the Contractor and the Client have been met.
- 3.7. The Client bears the risk relating to the Goods and/or Services from the delivery of the Goods and/or Services to the Delivery Site. It is further agreed that:

- (a) where practicable the Goods and/or Services shall be kept separate and identifiable until the Contractor shall have received payment and all other obligations of the Client are met;
- (b) until such time as ownership of the Goods and/or Services shall pass from the Contractor to the Client the Contractor may give notice in writing to the Client to return the Goods and/or Services or any of them to the Contractor;
- (c) if the Client fails to return the Goods and/or Services to the Contractor then the Contractor or the Contractors agent may enter premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Goods and/or Services are situated and take possession of the Goods and/or Services;
- (d) the Client is only a bailee of the Goods and/or Services and until such time as the Contractor has received payment in full for the Goods and/or Services then the Client shall hold any proceeds from the sale or disposal of the Goods and/or Services, up to and including the amount the Client owes to the Contractor for the Goods and/or Services, on trust for the Contractor;
- (e) the Client shall not charge the Goods and/or Services in any way nor grant nor otherwise give any interest in the Goods and/or Services while they remain the property of the Contractor;
- (f) the Contractor can issue proceedings to recover the Price of the Goods and/or Services sold notwithstanding that ownership of the Goods and/or Services may not have passed to the Client; and
- (g) until such time that ownership in the Goods and/or Services passes to the Client, if the Goods and/or Services are converted into other products, the parties agree that the Contractor will be the owner of the end products.

4. Limitation of liability

- 4.1. Subject to clauses 4.2, 4.3 and 4.4, the Contractor is not liable for any loss or damage, including consequential loss, however caused (including by the negligence of the Contractor) suffered by the Client in connection with the Goods and/or Services.
- 4.2. The Client shall inspect the Goods and/or Services immediately on completion and/or delivery (time being of the essence) notify the Contractor of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Contractor an opportunity to inspect the Goods and/or Services within a reasonable time following delivery if the Client believes the Goods and/or Services are defective in any way. If the Client shall fail to comply with these provisions the Goods and/or Services shall be presumed to be free from any defect or damage.
- 4.3. Any claim made by the Client against the Contractor for loss or damage however caused (including by the negligence of the Contractor) suffered by the Client in connection with the Goods and/or Services must be made in accordance with clause 4.2 or in a reasonable time of the Client becoming entitled to make the claim and any claim not made in accordance with clause 4.2 and this clause 4.3 is absolutely barred.
- 4.4. If the Trade Practices Act 1974 (Cth) or any other legislation implies a condition or warranty into this agreement in respect of goods or services supplied, and the Contractors liability for breach of that condition or warranty cannot be excluded but may be limited, clause 4.1 does not apply to that liability and instead the Contractors liability for such breach is limited to, in the case of a supply of goods, the Contractor replacing

the goods or supplying equivalent goods or repairing the goods, or in the case of a supply of services, the Contractor supplying the services again or paying for the cost of having the services supplied again.

5. Indemnity

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

6. Client requirements

- 6.1. The Client **MUST**:
- (a) provide the Contractor with access to the Delivery Site to enable the Contractor to deliver the Goods and/or provide the Services;
 - (b) follow the directions of the Contractor in connection with the provision of the Goods and/or Services; and
 - (c) provide the Contractor with such information and assistance necessary to enable the Contractor to deliver the Goods and/or provide the Services, including prior to the Contractor commencing any work the Client must advise the Contractor of the precise location of all underground services on the site and clearly mark the same. The underground mains & services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, Telecommunication cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
- 6.2. Whilst the Contractor will take all care to avoid damage to any underground services the Client agrees to indemnify the Contractor in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 6.1.
- 6.3. The Client acknowledges and agrees that if the Client does not comply with clause 6.1 then the Contractor is only obliged to endeavour to supply the Goods and/or Services to the Client.

7. Guarantee

- 7.1. The Guarantor unconditionally and irrevocably guarantees to the Contractor:
- (a) the Client's payment of any money the Client is required to pay;
 - (b) the performance and observance of the Client's obligations; and
 - (c) the payment of any indemnity or damages payable by the Client for the Client's failure or delay to fulfil any of the Client's obligations.
- 7.2. If the Client defaults in:
- (a) the payment of any amount due under this agreement, the Guarantor must pay that

amount on demand to the Contractor; or

(b) the performance and observance of any of the Client's other obligations under this agreement, the Guarantor must pay to the Contractor on demand all losses, damages, expenses and costs which the Contractor is entitled to recover because of that default, whether or not the Contractor has exercised or exhausted the Contractor's remedies for their recovery from the Client.

7.3. As a separate and additional liability, the Guarantor indemnifies the Contractor in respect of:

(a) all liabilities incurred by the Contractor arising directly or indirectly out of any default or delay by the Distributor in the performance and observance of the Client's obligations under this agreement;

(b) any money payable under this agreement (including money which would have been payable if it were recoverable which is not recoverable from the Client for any reason and whether or not:

(i) any transaction relating to any money payable under this agreement was void or illegal or has been avoided; or

(ii) anything relating to that transaction was or ought to have been known to the Contractor.

7.4. This clause contains a continuing guarantee and indemnity despite any settlement of account, intervening payment or anything else until all money payable under this agreement has been paid in full and all the Client's other obligations under this agreement have been performed and observed.

8. Termination

8.1. Without prejudice to the Contractor's other remedies at law the Contractor shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable in the event that:

(a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Client will be unable to meet its payments as they fall due; or

(b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or

(c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

8.2. The Contractor may terminate this agreement at any time by notice to the Client in which case this agreement will terminate on the date specified in that notice, or if no date is specified, immediately.

8.3. The Client expressly waives any rights it may have to terminate this agreement.

8.4. The Client acknowledges that the Contractor may terminate this agreement under this clause 8 without considering the impact on the Client.

8.5. After termination of this agreement, accrued rights or remedies of a party are not affected.

9. Security and Charge

- 9.1. Despite anything to the contrary contained herein or any other rights which the Contractor may have howsoever:
- (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Contractor or the Contractor's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that the Contractor (or the Contractor's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should the Contractor elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify the Contractor from and against all the Contractor's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Contractor or the Contractor's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 9.1.

10. Insurance

- 10.1. The Contractor shall maintain public liability insurance of at least \$10m. The Client must maintain insurances that a prudent person in the circumstances would maintain.

11. Dispute Resolution

- 11.1. If a dispute arises between the parties to this contract, then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
- (a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
 - (b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.

12. Compliance with Laws

- 12.1. The Client shall comply with the provisions of all statutes, regulations and by-laws of government, local council and other public authorities that may be applicable to the works.
- 12.2. The Client shall obtain (at its own expense) all licences, permits and approvals that may be required for the works.
- 12.3. The Client must ensure that the site will comply with any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.

13. Privacy Act 1988 (Cth)

- 13.1. The Client and/or the Guarantor/s agree for the Contractor to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by the Contractor.
- 13.2. The Client and/or the Guarantor/s agree that the Contractor may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by Client;
 - (b) to notify other credit providers of a default by the Client;
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and
 - (d) to assess the credit worthiness of Client and/or Guarantor/s.
- 13.3. The Client consents to the Contractor being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988 (Cth)).
- 13.4. The Client agrees that personal credit information provided may be used and retained by the Contractor for the following purposes and for other purposes as shall be agreed between the Client and Contractor or required by law from time to time:
- (a) provision of Goods and/or Services;
 - (b) marketing of Goods and/or Services by the Contractor, its agents or distributors in relation to the Goods and/or Services;
 - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Goods/Services;
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and
 - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods and/or Services.
- 13.5. The Contractor may give information about the Client to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Client; and
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.

14. Building and Construction Industry Payments Act 2004

- 14.1. At the Contractor's sole discretion, if there are any disputes or claims for unpaid Goods/Services and/or Services then the provisions of the Building and Construction Industry Payments Act 2004 (Qld) may apply.

15. General

- 15.1. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 15.2. These terms and conditions and any contract to which they apply shall be governed by the laws of Queensland and the parties submit to the jurisdiction of the courts of that Queensland.

- 15.3. The Contractor may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 15.4. The Client agrees that the Contractor may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Contractor notifies the Client of such change.
- 15.5. Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 15.6. The failure by the Contractor to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Contractor's right to subsequently enforce that provision.
- 15.7. This agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.
- 15.8. If a party to this agreement consists of more than one person, then an obligation of those persons under this agreement is joint and several.
- 15.9. Any instructions received by the Contractor from the Client for the supply of Goods and/or Services or the Client's acceptance of Goods and/or Services supplied by the Contractor shall constitute acceptance of the terms and conditions contained herein.
- 15.10. In this document, unless the context requires otherwise:
- (a) the singular includes the plural and vice versa;
 - (b) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
 - (c) a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure of this document;
 - (d) a reference to any document or agreement includes a reference to that document or agreement as amended, novated, supplemented, varied or replaced from time to time;
 - (e) a reference to a time is a reference to Australian Eastern Standard Time;
 - (f) a reference to a party includes its executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
 - (g) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
 - (h) words and expressions denoting natural persons include bodies corporate, partnerships, associations, firms, governments and governmental authorities and agencies and vice versa; and
 - (i) a reference to any legislation or to any provision of any legislation includes:
 - (i) any modification or re-enactment of the legislation;
 - (ii) any legislative provision substituted for, and all legislation, statutory instruments and regulations issued under, the legislation or provision; and
 - (iii) where relevant, corresponding legislation in any Australian State or Territory.