

EARTH-TECH CIVILS PTY LTD

TRADING TERMS AND CONDITIONS

1. DEFINITIONS

In this agreement, unless the context requires otherwise, the terms defined below will have the meanings as follows:

“the Customer” includes the Premises owner or occupant and any person engaging the Supplier on behalf of the person or entity that the Order is provided for/who owns or rents the Premises and obtains the benefit of the Order.

The “Equipment” is the boring, drilling, trenching, excavation and associated machinery/tools used by the Supplier to provide the Services.

The “Goods” are the parts, components and materials provided by the Supplier and used up by the Supplier in performing the Services.

The “Operator” is the personnel provided by the Supplier to operate the Equipment or provide the Services.

The “Order” is defined as any request or requests from or for the Customer, for the supply of Equipment, Goods, and the Operator of the Equipment, and Services to the Customer by the Supplier.

The “Premises” is the land or land and buildings where the Equipment is to be used to alter the Premises or and/or where the Services/works are to be carried out.

The “Price” is that included in a quote from the Supplier, accepted by the Customer, plus the agreed in writing additional charges from the Supplier for any additional works or Services requested of the Supplier (or required in light of evolving circumstances at the Premises) during the period the Services or Goods are being provided, or due to delay (see clause 3.14), in accurate or incomplete information or latent site conditions (see clause 6.2) or due to the need to remove and return equipment (see clause 5.1);

“Scheduled Date” means the date on or by which the Supplier will commence the provision of Services.

The “Services” are works at the Premises including as necessary, excavation, removal of earth/soil from the Premises, boring, trenching, concreting, drainage, landscaping and associated services, including any advice or recommendations given.

The “Supplier” is Earth-Tech Civils Pty Ltd (ACN 165 569 871) of '38 Breamlea Rd Connewarre Vic 3227-, together with the Supplier's employees servants and agents and sub contractors.

“underground utility assets” includes Internet or telephone cabling, water, sewerage, drainage or other pipes, electricity wiring and the like.

1.2. Reference to loss and damage includes indirect, reliance, special or consequential loss and/or damage including i) any loss of income profit or business; ii) any loss of goodwill or reputation; iii) any loss of value of intellectual property.

1.3. Any reference to the following acronyms are references to legislation as follows:

“ACL” means the Australian Consumer Law comprised in The Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010, Schedule 1

“DBCA” means the Domestic Building Contracts Act 2007 (Vic)

“SOPA” refers to the Building and Construction Industry Security of Payment Act 2002 (Vic).

1.4. GST refers to goods and services tax under the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

1.5. The terms “security agreement”, “security interest”, “PPS lease”, “purchase money security interest”, “collateral”, “financing statement”, “financing change statement” are as defined in the Personal Property Securities Act 2009 (Cth).

1.6 The word “writing” connotes and includes exchanges of emails, letters or text messages between the parties, or such communications from the Supplier to the Customer, or between them, confirming agreements between them.

1.7. In these terms and conditions, the singular shall include the plural, the masculine shall include feminine and neuter and words importing persons shall apply to corporations.

## 2. GENERAL

2.1. These terms and conditions together with the Supplier’s quotation, fee hire schedule, credit application form, the Customer’s written order (if any) and/or Customer’s purchase order (excluding any terms and conditions inconsistent with these terms and conditions, on or contained in the Customer’s purchase order) constitutes the agreement between the Supplier and the Customer (“the agreement”).

2.2. Any Order is deemed to incorporate these terms and conditions, which may not be varied unless expressly agreed to by the parties in writing. In the event that an inconsistency exists and/or arises between these terms and the Order, it is acknowledged and agreed between the parties that these terms and conditions will prevail.

2.3. These terms and conditions are binding on the Customer, his or her (or it’s) heirs, assignees, executors, trustees and where applicable, any liquidator, receiver or administrator. The person signing or initiating the Order warrants to the Supplier that they have the authority to bind the Customer, and if a different legal entity, the legal entity placing the Order. *If the person signing or initiating the Order is a director or shareholder of the Customer or a beneficiary of the trust which the Customer is trustee (hereafter “the person”), the person signing or initiating the Order, by their signature or initiation of the Order, acknowledges that they are personally bound, in addition to the Customer, by the Customer’s obligation to the Supplier under this agreement and the person guarantees to the Supplier the performance by the Customer of all the terms and conditions herein contained and indemnifies the Supplier from any loss resulting from the Customer failing to abide by these terms and conditions.*

2.4. The Customer acknowledges that, to the extent that they have contracted with the Supplier in the past under these terms and conditions, that these terms and conditions shall apply to any future dealings as between the parties, unless and until the Customer engages the Supplier under Supplier modified terms and conditions.

2.5. Where more than one Customer completes this Agreement or is bound by it (including through the action of agents), each shall be liable jointly and severally.

2.6. If any provision of these terms and conditions shall be held by a Court to be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired and the offending provision shall be deemed as severed from these terms and conditions.

2.7. The Supplier may sub-contract all or any part of the Order works to be performed without the Customer's consent, but the Supplier acknowledges that it remains at all times, as between the parties to this contract, liable to the Customer.

2.8. The failure by the parties to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the party's right to subsequently enforce that provision.

### 3. QUOTATIONS, ORDERS, VARIATIONS ON QUOTES AND BASIC ASSUMPTIONS

3.1. Any quotation given by the Supplier will expire after thirty (30) days of being given and must be accepted, generally in writing, but in any event, if the Supplier is invited onto the Premises to perform the Services, the Customer will be deemed to have accepted the quotation and these terms and conditions.

3.2. To provide Customer(s) with a quotation, the Customer may be requested to allow the Supplier to inspect the Premises and must provide the following documents either at the time of submitting a request for Services or subsequently:

3.2.1. The proposed site plans;

3.2.2. The site assessment and survey report (including a soil report if obtained); and

3.2.3. The engineer's designs, including any in relation to protection of adjoining property or structures.

3.3. The Customer must also provide any other documentation as requested by the Supplier in connection with a quotation or which a reasonable person would regard the Supplier as needing to have to provide a quote in the circumstances.

3.4. All prices quoted or advertised by the Supplier on its website are based on taxes and statutory charges applicable to the Services current at that time. Should these vary between the date of the Order/quote to the date of the incurring of the tax or charge, the difference is the responsibility of the Customer and the Customer acknowledges it will be invoiced for the extra charge paid by the Supplier..

3.5. A written quotation from the Supplier may include a scope of works detailing the specific Services, Equipment and Operator to be provided by the Supplier.

3.6. The Supplier does not represent that it will provide any Services unless included in the Order.

3.7. As a condition of acceptance of an Order, the Supplier may require the payment of a deposit in respect of the Price and in this event, the Supplier is deemed not to have accepted the Customer's Order unless or until such deposit has been paid.

3.8. If the Supplier notifies the Customer that it requires a payment of a deposit, the Customer must pay the deposit at least twenty four (24) hours prior to the Scheduled Date. If the deposit is not

paid, the Supplier may delay the provision of the Services until a time reasonably determined by the Supplier, after the deposit is paid.

3.9. The Customer warrants that it is either the owner of the Premises or is acting with the express authority of the Owner and the Customer indemnifies and will continue to indemnify the Supplier in respect of this warranty; including any claim for loss and damage by the owner of the Premises against the Supplier.

3.10. The Customer grants full access to the Premises to the Supplier and its servants and agents and shall ensure a supply of water and/or electricity (at no cost to the Supplier) as necessary to undertake works and to enable the Supplier to carry out the Services. The Customer, to the extent that it is in control of the Premises, must use its best endeavours to ensure that the Supplier is given unimpeded access to enable the Supplier to quickly and efficiently perform the Services and minimise disruption from other trades on the Premises to the Supplier so doing.

3.11. The Customer will be taken to have accepted the quotation, if the Customer:

3.11.1. Accepts the quotation in writing, or where acceptance may be implied in the circumstances;

3.11.2. Completes and issues a purchase Order or similar; or

3.11.3. pays to the Supplier the required deposit prior to the Scheduled Date; or

3.11.4 Allows or invites the Supplier on to the Premises to perform works specified in the quote or Order.

3.12. The Customer is responsible for obtaining all necessary permits and to mark out the site at the Premises for the provision of the Services and obtaining all engineer reports or similar required to protect adjoining property or structures on the Premises.

3.13. The Customer is responsible for ensuring that the Goods and any tools or Equipment of the Supplier left on the Premises are secured at the Premises in accordance with the Supplier's reasonable instruction and agrees to be responsible for any loss and damage to the Supplier for theft or vandalism of the Goods and tools or Equipment at the Premises not so secured.

3.14 The Supplier may vary the quote in writing during or immediately after providing Services if:

13.14.1. in circumstances where it was reasonable to conclude rock would not be encountered, the Supplier encounters rock at the site,

13.14.2. the information or specifications provided by the Customer are wrong or materially inaccurate (including through omission);

13.14.3. there are latent (at any time of inspection of the site by the Supplier) abnormal site conditions, including but not limited to, excessive grass, wet soil profile, or contaminated fill; or

13.14.4 there is a need to remove the Equipment, reassess the situation and recommence provision of the Services due to there being a failed excavation attempt.

In this clause a "failed excavation attempt" occurs when the Supplier is unable to complete the Services on the day or days anticipated, due to unmarked easements and/or underground utility assets (water, power, Internet cabling), steps have not been taken as recommended by an engineer for the protection of adjoining property or structures on the Premises, the Customer has not checked for the location of underground utility assets to the reasonable satisfaction of the Supplier .

3.15. The customer will maintain all insurances required by law, and will also maintain adequate public and products liability insurance, professional indemnity insurance (if required) and any other insurances that the Supplier deems necessary. All insurances required to be effected by the Customer under this agreement is to be with insurance companies authorised under the Insurance Act 1973 (Cth).

3.16. The Customer will provide the Supplier with certificates of currency issued by the insurer for the insurance required in clause 10.19 within ten business days of receiving a written request from the Supplier.

3.17. If the Customer fails to maintain the insurance required under this agreement, then the Supplier may take out that insurance and the costs of doing so will be a payment due and payable by the Customer to the Supplier.

#### 4. PRICE AND PAYMENT

4.1. GST will be charged on the Price including for the Operator, Goods and Services provided by the Supplier, that attract GST, at the applicable rate.

4.2. At the Supplier's sole discretion the Price shall be paid either at the finish of the job, or instalments, based on invoices levied by the Supplier from time to time during completion of the Services.:

4.3. The payment for an invoice shall be made by the Customer in the timeframe indicated in the invoice and never more than 7 days from date of invoice;

4.4. If an invoice is overdue for payment, the Supplier may cease work at the Premises and remove, at its absolute discretion, all of its Equipment and only return to the Premises to complete the Services once all invoices are paid.;

4.5. If there has been a failure to pay an invoice in full or on time by the Customer (whether with the Supplier or another), the Supplier may, in its absolute discretion require a deposit on account of further works/Services to be performed, before re-commencing work or continuing work .

#### 5. PROVISION OF THE EQUIPMENT AND OPERATOR FOR PERFORMING THE SERVICES

5.1. The Customer must make all arrangements necessary to enable safe delivery of the Equipment (including security arrangements required by the Supplier if the Equipment is to be left at the Premises overnight) otherwise the Customer may be liable for a further or additional charge in respect of transport and re-transport of the Equipment.

5.2. Unless specified to the contrary in the quote or agreed specifically in writing between the Customer and Supplier subsequently, the Supplier does not warrant that it will be capable of providing the Services on a specific day or at a specific time requested by the Customer in its Order but the Supplier will make its best endeavours to meet requested timeframes.

5.3. Subject to otherwise complying with its obligations under the agreement, the Supplier shall exercise its independent discretion as to the most appropriate and effective manner of providing the Services to achieve the Customer's desired result in accordance with plans provided to the Supplier. The Supplier will supervise the operation of the Equipment subject to any reasonable directions of the Customer.

5.4. The Customer acknowledges that the Supplier is the owner of the Equipment and the Customer may not, except with the Supplier's prior written consent, authorise or allow any person

to operate the Equipment other than the Operator(s) supplied by the Supplier for that purpose. The Customer may not use the Equipment or direct the use of the Equipment other than on the Premises or remove or allow the removal of the Equipment from the Premises.

## 6. RISK AND CUSTOMER WARRANTIES

6.1. The Customer will ensure that there is sufficient and accurate information to enable the Supplier to execute the Order/provide the Services, including, but not limited to any special requirements pertaining to the Equipment and Operator skills required to provide the Services and the location of underground utility assets.

6.2. The Supplier takes no responsibility and will not be liable for any loss and damage or costs as a consequence of insufficient or inaccurate/misleading (including through omission) information provided by the Customer. If the Customer provides the Supplier incorrect or misleading information regarding the site, or in the Supplier's reasonable opinion, the Supplier is unable to complete the earthworks in a proper safe manner due to inaccurate or misleading information or to site conditions beyond its control, the Supplier may charge the Customer any additional costs it incurs, or fees payable, as a result.

6.3 The Customer warrants that it is in control of the Premises and the Premises are in as safe a condition as is reasonably possible for the Supplier's servants and agents to perform the Services, and the Customer shall indemnify, and keep indemnified the Supplier for any and all claims of a third party for loss and/or damage for personal injury and damage arising from or in connection with failing to keep the Premises safe to work in, including but not limited to injury caused by any feature or condition of the Premises, whether or not any such feature or condition is reasonably obvious and whether or not the feature or condition is known to the Customer.

6.4. The Customer acknowledges that it is the Customer's responsibility to locate/mark out and advise the Supplier prior to the commencement of the Services, of all underground utility assets, including by providing the Supplier with 'dial before you dig', underground radar or other similar reports. The Supplier will take all reasonable care not to damage any utility service or fixed property that the Supplier is aware of. However, the Supplier does not guarantee and is in no way responsible for any damage to these services and/or fixed property as a result of the Supplier's access to the site and/or performance of the Services and the Customer, to the extent damage or loss flows from its failure to advise the Supplier, indemnifies the Supplier for the consequences of damage to underground utility assets.

6.5. Where Services are performed near existing structures at the site, such as buildings and fences, the Supplier will:

6.5.1. Not be responsible for moving or removing any structures such as temporary fences, site amenities, building materials or the like at the site, unless their removal was quoted for; and

6.5.2. Provide its Services and excavate as far as practically possible whilst maintaining the stability and structural integrity of the nearby structures (which are not removed prior to the commencement of the earthworks).

## 7. APPLICATION OF ACTS AND MODIFICATIONS

7.1. The parties acknowledge that the SOPA applies to this contract unless that Act's provisions provide otherwise (e.g. the work is carried out on premises the Customer will reside in permanently and this contract is with the Customer).

7.2. If the SOPA applies, the Supplier will, at a minimum, have rights to payment and assessment of claims for payment in accordance with that Act, but if this agreement provides for faster payment or more convenient resolution of disputes, the Supplier may at its sole discretion opt for the method under this agreement.

7.3. Issuing of an invoice for an interim or progress payment by the Supplier for the Services that the Supplier is entitled to make, pursuant to this agreement constitutes a payment claim pursuant to the SOPA.

7.4. If the DBCA applies to this agreement (as it involves domestic building work within section 5 of that Act including landscaping, retaining structures, work associated with the construction of a home including related to water supply, sewerage or drainage), the warranties contained in section 8 of the Act apply, but subject to the Customer having complied with clause 6.

7.5. If the ACL applies to this agreement, the guarantees provided for in section 60 – 62 apply as to the exercise of due care and skill, fitness for a particular purpose and the timeliness of supply, subject always to/to be read in light of the Customer's compliance (or non-compliance) with clauses 5 and 6 in this agreement.

7.6. If the ACL applies and the Services do not involve services of a kind ordinarily acquired for personal, domestic or household use or consumption, the Supplier's extent of liability for failure to comply with a guarantee contained in the ACL will be limited to the lesser of the cost of supplying the services again or payment of the cost of having the services supplied again.

7.7. Notwithstanding anything else contained in this Agreement, if the Customer unreasonably and unjustifiably (in the reasonable opinion of the Supplier) claims the Supplier's work on the Premises is not up to standard or not in accordance with the quote or Order, and refuses to pay an invoice issued by the Supplier, the Supplier has:

- a. the right to payment of the invoice issued (subject to any right in the Customer to dispute payment later under the SOPA, or the general law); and
- b. the right, at its discretion, to return to the Premises to fix any works or services which the Supplier wishes to fix.

Prior to returning to the Premises, as described in this clause, the Supplier may issue a fresh quote for any works the Supplier considers are additional to those originally contracted for by the Customer and the Customer will be deemed to have placed an order for those works and Services.

7.8. Except where the ACL applies, or there are mandatory warranties implied by the DBCA, to the maximum extent permitted by law, the Supplier will not have any liability to the Customer or a customer of the Customer, for loss and damage including fines, penalties, taxes (except GST) and any exemplary, aggravated or punitive damages, or damages for any indirect or consequential loss (including but not limited to loss of business, loss of revenue, loss of contract, loss of production, lost opportunity costs), legal costs and expenses (except reasonable legal costs awarded by a court)

## 8. CREDIT POLICY

8.1. Credit will only be granted at the sole discretion of the Supplier and upon submission of a completed credit application form by the Customer, which, if accepted by the Supplier, will make the Customer an Account Customer.

8.2. Account Customers must make full payment to the Supplier within seven (7) days from the date of issue of invoice, but will not normally be required to pay a deposit, unless the purchase of goods by the Supplier to be incorporated with the Services on the Premises is unusually large or the price for the Services is unusually large and the work unusually prolonged.

8.3. Any credit, or credit limit granted by the Supplier may be revised by the Supplier at any time and at its discretion.

8.4. The Supplier reserves the right to withdraw any credit facility upon any breach by the Customer of these terms and conditions or upon the Customer ceasing to trade and/or being subject to any legal proceedings and/or the Customer committing an act of insolvency.

8.5. The Customer agrees that upon such withdrawal, any and all monies owing on the account shall become immediately due and payable.

#### Account Customer's Privacy

8.6. The Customer agrees:

8.6.1. For the Supplier to obtain from a credit reporting agency a credit report containing personal credit information about the Customer in relation to credit provided by the Supplier.

8.6.2. That the Supplier may exchange information about the Customer with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency.

8.6.3. The Customer consents to the Supplier being given a consumer credit report to collect overdue payment on commercial credit (Privacy Act 1988).

#### 9. DEFAULT

9.1. In this clause the "default date" is:

9.1.1. The day after the date by which payment of the Supplier's invoice(s) was due to be made by the Customer to the Supplier.

9.1.2. The day after the date of completion of the Services to the Customer and the Customer unreasonably disputes the quality of the work/Services.

9.2. In this clause the "outstanding balance" is the Price less any payments made by the Customer prior to the default date, or the sum of the Supplier's invoices to the Customer outstanding at the default date.

9.3. The Customer will be liable for a dishonoured cheque fee of \$40.00 for each cheque issued by the Customer and rejected by the Supplier's bank.

9.4. If the Supplier does not receive the outstanding balance by the default date the Customer will be liable for:

9.4.1. Interest on the outstanding balance from the default date at the rate of twelve per centum (12%) per annum calculated on a daily basis; and

9.4.2. An account keeping fee of \$15.00 to be charged at the end of each calendar month after the default date until the outstanding balance has been paid; and

9.4.3. Any debt collection or recovery costs, including the Supplier's reasonable legal fees, incurred by the Supplier; and if the Supplier engages a debt collection agency, Supplier's debt collection agency ("the agency") charges commission on a contingency basis then the Customer shall pay as a liquidated debt the commission payable by the Supplier to the agency, at the agency's prevailing rate as if the agency achieved one hundred per cent recovery.

(n.b In the event the agency is Prushka Fast Debt Recovery the applicable commission rate for the amount unpaid is as detailed on the website [www.prushka.com.au](http://www.prushka.com.au)).

## 10. FORCE MAJEURE

The Customer acknowledges that the Supplier shall not be liable for, and the Customer releases the Supplier from, any loss and damage incurred as a result of any cause or circumstance beyond the Supplier's reasonable control which delays, or prevents provision of the Equipment and Services, including but not limited to machinery breakdown, fuel delivery strikes, Covid or other pandemic event, motor vehicle accidents, floods, earthquakes, storms, or other inclement weather preventing work, explosions, fires or other natural disaster, acts of war, terrorism, riots, civil commotion, sabotage, failure of the Internet or telephone services .

## 11. EXCLUSIONS LIMITATIONS AND CLAIMS

11.1. The Supplier accepts that the Customer's rights and remedies under any engagement under these terms and conditions, arising from a warranty against defects, are in addition to other rights and remedies under any applicable law.

11.2. The Supplier does not purport to restrict, modify or exclude any liability that cannot be excluded under the Australian Consumer Law contained in Schedule 2 of the Competition and Consumer Act 2010 (Cth) as may be amended from time to time. Nothing in these terms and conditions is to be read as intended to have the effect of contravening any applicable provisions of the Competition and Consumer Act 2010 (Cth) or the Fair Trading Acts in each of the States and Territories of Australia which might cause the Supplier to commit an offence under those Acts.

11.3. Claims by the Customer for alleged defects in Services/works should be made in two of the following ways (ie one at least being in writing):

11.4.1. The Customer must send the claim in writing to the Supplier's business address at 38 Breamlea Rd Connewarre Vic 3227

11.4.2. The Customer must email the claim to the Supplier's email address [office@earthtechcivils.com](mailto:office@earthtechcivils.com); or

11.4.3. The Customer must contact the Supplier on the Supplier's business number 0439 195 935.

And, the claim should specify all relevant detail as to how it is said the Services have not met the standard required under the terms and conditions/by law.

## 12. TERMINATION AND CANCELLATION

### Cancellation by Supplier

12.1. The Supplier may, if the Customer, including on any other jobs with the Supplier:

a. behaves in a way which is in breach of contract, or leads the Supplier (reasonably) to believe payment will not be forthcoming for the Services;

- b. cancel any Order to which these terms and conditions apply by providing no less than seventy two (72) hours' notice to the Supplier before payment of the Price in full is made by the Customer;
- c. without the need for default or other behaviour by the Customer, by giving written notice to the Customer.

On giving such notice the Supplier shall repay to the Customer any deposit or sum advanced in respect of the Price. The Supplier shall not be liable for any loss and damage whatsoever arising from such cancellation.

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

12.2.1. Any money payable to the Supplier becomes overdue whether for Services under this contract or another contract with the Customer; or

12.2.2. The Customer 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

12.2.3. A receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer; or

12.2.4. . The Customer behaves in a way which is in breach of contract, or leads the Supplier (reasonably) to believe payment will not be forthcoming for the Services.

#### Cancellation by Customer

12.3. The Customer may cancel any Order by providing no less than forty eight (48) hours' notice of the cancellation to the Supplier prior to the time the Services were due to be supplied to the Customer.

12.4. In the event that the Customer cancels the Order without providing the requisite notice, the Customer shall be liable for any loss and damage suffered by the Supplier, but limited to the Price of the Order cancelled.

12.5. The Supplier may retain any deposit or other sum paid by the Customer in respect of the Price of the Order and offset such sum or deposit in satisfaction or partial satisfaction of any loss and damage suffered by the Supplier as a result of the Customer's late cancellation of the Order.

#### 13. PERSONAL PROPERTY SECURITIES ACT 2009 (CTH) ("PPSA")

13.1. This agreement is a security agreement for the purposes of the PPSA, which has the effect of creating a security interest in favour of the Supplier over the Equipment.

13.2. If the timeframe during which the Supplier's Equipment could remain on the Premises exceeds or could exceed (if renewed) one year then the security agreement is deemed to be a PPS lease, and the security interest acquired by the Supplier is a purchase money security interest ("PMSI") over the Hire Equipment.

13.3. The security interest will continue to apply as an interest in the collateral for the purposes of PPSA with priority over all subsequently registered or unregistered security interests.

