

## 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 Plant Propagation Systems Limited trading (our successors and assigns) or any person acting with the authority of Plant Propagation Systems 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 representatives).
- 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. 'Materials' means all Materials required to complete the Services.
- 1.6. 'Price' means the Price of the Services (in accordance with clause 6).
- 1.7. 'Worksite' means the address or location you nominate to which the Materials or Services are to be supplied by us.
- 1.8. '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).
- 1.9. 'Amounts Owing' means any amount owed by you 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.
- 1.10. 'Business Day' means Monday to Friday, excluding public holidays in New Zealand.
- 1.11. '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 which would itself be Confidential Information.
- 1.12. 'Event of Default' means your failure to comply with this Agreement (including your obligations in clause 6).
- 1.13. 'Insolvency Event' means an event of insolvency, including bankruptcy; the appointment of an insolvency administrator, manager, receiver or liquidator; any action related to winding up or making a material arrangement in relation to creditors; applying for any type of protection against creditors; being unable to pay your debts as they fall due; or taking or suffering any similar or analogous action in any jurisdiction as a consequence of debt.
- 1.14. 'Personnel' means directors, officers, employees, agents and contractors.
- 1.15. 'CCLA' means the Contract and Commercial Law Act 2017.
- 1.16. 'PPSA' means the Personal Property Securities Act 1999.
- 1.17. 'CCA' means the Construction Contracts Act 2002.
- 1.18. 'Security Agreement' and 'Security Interest' have the meanings given to them in Part 2, sections 16 and 17 of the PPSA.
- 1.19. 'Regulator' means any authority, commission, government department, court, tribunal, or similar having regulatory or supervisory authority over the parties or Services.
- 1.20. '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, and we may (at our sole discretion) accept any order in whole or in part by issuing an invoice in respect of the applicable Services, delivering the Materials or Services or otherwise confirming the order in writing.
- 3.2. We are under no obligation to enquire as to the authority of any person placing an order on your behalf.
- 3.3. If you place an order for or accept any provision of Services from us, you are taken to accept this Agreement and are immediately 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).
- 3.4. Your acceptance to 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. Electronic signatures shall be accepted by both parties (provided that both parties have complied with sections in Part 4, subpart 3 and all other relevant sections in Part 4 of the CCLA).
- 3.6. This Agreement may only be amended with our written consent and shall supersede any other document or other agreement between both parties.

#### **4. AUTHORISED REPRESENTATIVES**

- 4.1. Should you introduce any third party to us as your authorised representative, that representative shall have the full authority of you to order any variation or Services on your behalf, and such authority shall continue until all requested Services have been completed or you notify us in writing that said person is no longer your authorised representative.
- 4.2. You agree that you will be solely liable for any expenses incurred in providing any variation or Services requested by your authorised representative.
- 4.3. If your authorised representative is to have only limited authority to act on your behalf, you must advise in writing to us the parameters of the limited authority granted to your authorised representative.

#### **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 and any other changes to your details (including but not limited to, changes to the ownership of the company, address, email, contact phone or business structure).
- 5.2. Should you fail to comply with clause 5.1, you agree that 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 on invoices provided to you in respect of the Services; or
  - (b) 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 by us.
- 6.4. The Price will be payable by you on the date(s) determined by us (at our sole discretion), which may be:
- (a) on 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. 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).
- 6.6. 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 accepted by us on or after that date.
- 6.7. Payment may be made by cash, electronic/online banking, or any other method that we agree to in writing.
- 6.8. 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).
- 6.9. We may require that you pay a deposit (as detailed in our quotation or proposal) or provide a guarantee as security for paying any Amounts Owing.
- 6.10. At the agreement of both parties, payment of the Price may be subject to retention by you (retention money), being a set amount or equal to a percentage of the Price. You shall hold the retention money for the agreed period following completion of the Services, during which time all Services are to be completed, and all defects are to be remedied. Any retention money applicable to this Agreement is to be dealt with in accordance with Part 2, Subpart 2A of the CCA.
- 6.11. You shall not withhold payment of any Amounts Owing because part of the Services are disputed, and in the event that part of the Services is disputed, you agree that you will:
- (a) 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
  - (b) provide a specific and detailed explanation of the dispute in writing to us within seven (7) days from delivery.
- 6.12. If an Insolvency Event occurs, all Amounts Owing will (whether or not due for payment) immediately become due and payable.

#### **7. VARIATIONS**

- 7.1. The Price will be adjusted to reflect any extra cost or expense incurred by us because of any instruction received from you (or your authorised representative) or any action or inaction on your part.
- 7.2. We reserve the right to change the quoted Price in the event that:
- (a) any information supplied by you is inaccurate;
  - (b) you request any change to plans, specifications or the Services that were initially quoted;
  - (c) additional Services are required due to hidden or unseen complications that are discovered subsequent to the commencement of the Services (including but not limited to prerequisite work done by a third party that is incomplete or not up to standard, faults found upon disassembling the equipment or the premises (such as covered components, pipes or wires behind walls), barriers obstructing access (including hard rock or metal below the surface), the presence of asbestos or other health and safety considerations); or
  - (d) our costs increase due to changes beyond our control (including any charges, taxes, or levies imposed by any Regulator).
- 7.3. You agree that where earthmoving or excavation work (or any site preworks) has been provided by a third party (that has been engaged by you) and such work is found to be defective or not up to standard, we reserve the right to charge a variation to remedy such work.

7.4. 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 supplied, and this Agreement shall be deemed to be adjusted accordingly to reflect the increased Price.

## **8. PROVISION OF SERVICES**

8.1. 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 reasonably required by us or our Personnel to perform delivery of the Materials or Services.

8.2. Where we deliver the Materials or Services, you will:

- (a) ensure we have all-weather access to the site, to enable us to deliver the Materials safely;
- (b) 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 hazard on the land where the Materials are to be delivered; and
- (c) 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.

8.3. It is further agreed that:

- (a) any delivered Materials will be your responsibility to unload (including providing a forklift or any required equipment);
- (b) when delivering Materials, if the discharge of such Materials is not completed within thirty (30) minutes after arrival on the Worksite, we may charge any additional time at our regular hourly rate;
- (c) you shall be responsible for: (i) all costs incurred by us when taking possession of our equipment from any restricted or WorkSafe controlled area; (ii) maintenance, cleaning and the repair of entry and exit points from the Worksite over any third-party property or public roadway. 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 roadway; and (iii) 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;

8.4. It is our responsibility to ensure that the Services start as soon as reasonably possible. However, the Services commencement date will be postponed, and the completion date will be extended by whatever time is reasonable if the provision of the Services is delayed by any event beyond our control (including poor weather conditions affecting the commencement date or the failure by you to obtain consents, have the Worksite ready or make a selection of Materials that are required to complete the Services).

8.5. If we are unable to 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).

8.6. 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 7). In all such cases, we will notify you in advance of any such substitution and reserve the right to place your order on hold until both parties agree to such changes.

8.7. 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 thirty-one (31) days after our estimated time for delivery, or any delay in delivery due to any event beyond our control.

8.8. 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:

- (a) such discrepancy in quantity shall not exceed five percent (5%); and
- (b) the Price shall be adjusted to reflect the value that has been delivered.

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

8.10. In the event that we are required to provide the Services urgently, which may require us to work outside our normal business hours (including working through lunch breaks, weekends or public holidays), then we reserve the right to charge additional labour costs.

## **9. ERRORS AND OMISSIONS**

9.1. You agree that we have no liability in respect of any error(s) or omission(s):

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

9.2. If such an error or omission occurs and 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.

## **10. DEFECTS**

10.1. You shall inspect all Materials or Services immediately on delivery and shall notify us of any alleged defect, shortage in quantity, damage or any other issue within seven (7) days from the date of delivery.

10.2. If you do not notify us within the seven (7) day timeframe (in accordance with clause 10.1), then the Materials or Services shall be presumed to be free from any defect, and we will consider all Materials or Services to be supplied free from any defect or other issue, subject to clause 15.1.

10.3. You shall allow us to inspect the Materials or Services within fourteen (14) days (from the date of delivery) if you believe the Materials or Services are defective in any way.

## **11. RETURNS AND WARRANTIES**

11.1. Any Materials will not be accepted for return without our prior written consent (which may be withheld at our sole discretion), on the condition that: (a) you have notified us and obtained our agreement within seven (7) days of receiving the Materials; and (b) the Materials are returned in the condition in which they were received (including all packaging).

11.2. Return of any Materials for credit may incur a restocking fee of twenty-five percent (25%) of the value of the Materials.

11.3. Materials that are non-stock-list items, specially manufactured to order or modified in any way shall not be accepted for return (unless agreed to by us in writing).

11.4. Subject to the conditions of the warranty set out in clause 11.5, we warrant that if any fault 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), then we will remedy the workmanship.

11.5. The conditions applicable to the warranty given under clause 11.4 shall not cover any defect or damage which is caused by or arises through:

(a) the failure on your part to properly maintain any Materials or to follow any instructions or guidelines provided by us; or

(b) the continued use of any Materials after any defect or damage becomes apparent.

11.6. We shall not be liable to compensate you for any delay in remedying our workmanship, and the warranty shall cease if any of the Services are altered or repaired without our consent by any third party.

11.7. For Materials not manufactured by us, the warranty shall be the current warranty provided by the manufacturer of the Materials, and we shall not be bound by any condition, representation or warranty other than that which the manufacturer of the Materials gives.

## **12. PRIVACY ACT 2020**

12.1. 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.

12.2. Clause 12.1 is authority and consent from you in accordance with sections in Part 3 and all other relevant sections in the Privacy Act

2020. 12.3. 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.

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

12.5. If you do not provide the personal information requested by us, we may not be able to perform our obligations under this Agreement.

## **13. CONFIDENTIAL INFORMATION**

13.1. Each party must keep confidential all Confidential Information, however, nothing in clause 13 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 required); or

(c) if the disclosure is reasonably required to enable a party to perform its obligations or enforce its rights under this Agreement.

13.2. 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. INTELLECTUAL PROPERTY**

14.1. Copyright in all Materials or Services (including any plans, specifications or other technical information) provided by us under this Agreement is vested in us, including any new intellectual property created as a result of, or in connection with the provision of our Materials or Services.

14.2. If, notwithstanding clause 14.1 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.

14.3. You warrant that the use by us of any 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 expenses on a solicitor client-basis) that we may suffer or incur in the event of any such infringement.

## **15. CONSUMER GUARANTEES ACT 1993 AND 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 customers; and

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

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 as a result of your breach of clause 15.

## **16. CANCELLATION**

16.1. Should you cancel all or part of any order, you shall be liable for all Amounts Owing to us prior to cancellation (including any direct or indirect expenses incurred by us due to you cancelling any part of any order).

16.2. 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:

(a) any Amounts Owing to us becomes overdue, or in our opinion, you will be unable to meet your payments as they fall due; or

(b) an Insolvency Event occurs, and you become insolvent/bankrupt, convene a meeting with your creditors or a receiver/liquidator or similar person is appointed in respect of you or any of your assets.

16.3. Orders made to your specifications or non-stock-list items cannot be cancelled once production has commenced.

## **17. 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 the outstanding amount from the due date of payment until the date the outstanding amount is paid (and any interest shall compound monthly at such a rate).

17.2. If an Event of Default occurs, you agree to reimburse us for any fees or expenses we incur in recovering any Amounts Owing (including but not limited to a late payment fee (of ten percent (10%)), administration fees, debt collection agency fees and full legal expenses on a solicitor-client basis).

17.3. Should you fail to pay any account, we may withhold the release of any producer statement or other certification or documentation relating to the Services performed until all Amounts Owing are paid in full.

## **18. RETENTION OF TITLE**

18.1. Ownership (including all right, title and interest) of the Materials or Services remains with us and does not pass to you until:

(a) we have received all Amounts Owing; and

(b) 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 expenses on a solicitor-client basis), as a result of us exercising our rights under clause 18.2, except where damages, expenses 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:

(a) until ownership of the Materials passes to you in accordance with clause 18.1, you are only a bailee of the Materials, and unless the Materials have become fixtures, must return the Materials to us on request;

(b) you must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If you sell, dispose or part with possession of the Materials, then you must hold the proceeds of any such act on trust for us and must pay or deliver the proceeds to us on demand;

(c) you should not convert or process the Materials or intermix them. If you do so, you hold the resulting Materials or products on trust for us and must sell or return the resulting product to us as we direct;

(d) we may recover possession of any Materials in transit whether or not delivery has occurred; and

(e) you shall not charge or grant an encumbrance over the Materials or give away any interest in the Materials while they remain our property.

18.5. If any Materials are damaged where full payment has not been received, and therefore ownership remains with us, you agree that we are entitled to:

(a) receive all insurance proceeds paid for the Materials; and

(b) supply this Agreement as a binding legal agreement which is sufficient evidence for us to deal directly with the insurance company to receive all proceeds for the Materials we legally own under 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:

(a) 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

(b) the Security Interest granted to us secures the payment of all Amounts Owing (all present and after-acquired personal property) you may owe to 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:

(a) sections 114(1)(a), 133 and 134 of the PPSA; and

(b) 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 in respect of any financing statement relating to a Security Interest.

20.5. Nothing in this Agreement is to be construed as an agreement that a Security Interest in Materials (collateral) attaches at a later time than the time specified in Part 3, section 40(1) of the PPSA; a Security Interest is perfected in accordance with Part 3, section 41(1) of the PPSA; a Security Interest in all after-acquired property attaches at the time specified in Part 4, section 44(1) of the PPSA; and 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 Interest(s) as security for the Amounts Owing, and we may suspend or cancel further supply of Materials or Services until you have provided such Security Interest(s).

20.9. You shall unconditionally ratify any actions taken by us under clause 20.

## **21. WORKSITE ACCESS**

21.1. You shall ensure that we have clear and free access to the Worksite at all times to enable us to undertake the Services (including carrying out any inspections or for the delivery or installation of the Materials), and we shall not be liable for any loss or damage to the Worksite (including damage to pathways, driveways, footpaths or grassed areas) unless due to our negligence.

21.2. Inspection of the Worksite during the course of the Services shall be by appointment only, and we must accompany you at all times when on the Worksite unless otherwise agreed.

21.3. It is your responsibility to organise temporary fencing to ensure the Worksite is protected from damage or theft if any fencing or other boundary is removed from the Worksite.

## **22. SURPLUS MATERIALS**

22.1. We are not responsible for the removal of excess Materials or rubbish (including demolished materials) from the Worksite, and all rubbish we generate will be placed in a designated area appointed by you (unless we have agreed in writing to remove excess Materials).

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

### **23. CLIENT'S RESPONSIBILITIES**

23.1. It is your responsibility to provide and have erected scaffolding to enable the Services to be undertaken (if, in our opinion, it is deemed necessary), and all scaffolding is required to be erected by a person who holds a current certificate of competence. In addition, you agree to provide any equipment required for the completion of the Services (including a scissor lift or elevated working platform).

23.2. You will be responsible for all additional costs incurred in arranging any amenities reasonably required by us or our Personnel to perform the Services (in accordance with clause 8.1).

23.3. You warrant that you have sufficient funds available to honour your obligations of payment and will, on request, provide us with evidence verifying such funds by way of a letter of credit from your banking institution.

### **24. INSURANCE AND RISK**

24.1. In the event we retain ownership of the Materials or Services in accordance with clause 18.1, then:

(a) where we supply Materials only, all risk for the Materials shall

immediately pass to you on the delivery of the Materials (by us or our nominated carrier), and you must insure the Materials on or before delivery; or

(b) where we are to supply and install Materials, then we shall maintain an insurance policy for the Services until completion, at which point all risk shall immediately pass to you.

24.2. Where we are requested to provide the Services on any land or premises that has had any communicable disease or pest (including Mites, Pseudomonas Syringae pv. Actinidiae (PSA), Bacterial Vector-Borne (BVB), Leaf Roller or Myrtle Rust), you expressly agree to provide written notice to us prior to the provision of any Services. We reserve the right to charge additional cleaning costs, which will be charged as a variation (in accordance with clause 7).

24.3. In the event that:

(a) during the Services, we discover any fossils, artefacts, or other remains of geological or archaeological interest, 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 7); and

(b) we discover any undisclosed waste or hazardous materials then 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. In the event that we agree to remove such materials for you then this shall be treated as a variation (in accordance with clause 7) and will be an addition to the Price.

24.4. Where we have provided information or figures to you regarding the performance of the Materials, you accept that these have been given in good faith and are estimates based on the Energy Efficiency and Conservation Authority (EECA), the Water Efficiency Labelling and Standards (WELS) or any information provided by a manufacturer. The water efficiency may be less than estimated due to factors out of our control (including water pressure, water source or the mineral content of water based on geographical location).

24.5. If you have requested us to diagnose a fault that requires investigation, disassembly or testing, all costs will be charged to you irrespective of whether or not the repair goes ahead (including any third party costs).

24.6. 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 7).

24.7. 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). In the event we are not supplied with a safe storage location, we reserve the right to arrange suitable storage at your expense (which will be treated as a variation in accordance with clause 7).

24.8. 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.

24.9. You warrant that any structures to which the Materials are to be affixed can withstand the installation of the Materials and that any plumbing connections (including meter boxes, pipes, couplings or valves) are of suitable capacity to handle the Materials once installed. If for any reason we, or employees, reasonably form the opinion that your premises are not safe for the installation of the Materials to proceed (including the discovery of defective plumbing or dangerous access to crawl spaces), then we shall be entitled to delay the installation of the Materials until we are satisfied that it is safe to proceed. We may, at our sole discretion, agree to bring the premises up to a standard suitable for the installation to proceed, but all additional Services required shall be treated as a variation (in accordance with clause 7).

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

24.11. 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 7). In all such cases, we will notify you in advance of any such substitution, and we also reserve the right to place your order and Services on hold until both parties agree to such changes.

24.12. You acknowledge that:

- (a) stainless steel is a textured material and can be porous. You accept that products made from this material can rust and mark easily and that care should be taken to maintain the finish and longevity of stainless steel products;
- (b) where an anodised surface finish has been selected, slight colour variations may occur between the main unit frame and any installation trims used due to the difference in aluminium alloys available or batches of Materials. Such manufacturing standards and tolerances shall not be deemed to be a defect in the Materials or Services;
- (c) Materials supplied may: (i) exhibit variations in shade, colour, texture, surface and finish and may fade or change colour over time. We will make every effort to match batches of Materials (including any existing materials) supplied to minimise such variations but shall not be liable in any way where such variations occur; (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; and (iv) be damaged or disfigured by impact or scratching; and
- (d) where we have performed temporary repairs that: (i) we offer no guarantee against the reoccurrence of the initial fault or any further damage caused; and (ii) we will provide you with an estimate for the full repair required.

24.13. Any advice, recommendation or information that we provide in relation to Goods or Services supplied by us is given in good faith, is based on our knowledge and experience and shall be accepted without liability on our part.

24.14. Should you request us to leave Materials outside our premises for collection or to deliver the Materials to an unattended location, you agree that those Materials shall be left unattended 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. If you request us to engage a service locator, this shall be in addition to the Price and 'dial before you dig' must be consulted and any potential underground services marked on the site. Whilst we will take all care to avoid damage to any underground services, you agree to indemnify us in respect of all and any liability (including expenses or fines) as a result of damage to services not precisely located and marked (in accordance with clause 25.1).

## **26. REPAIR AND INSTALLATION OF PIPES**

26.1. You acknowledge that the presence of plant or tree root growth or other blockages may indicate damaged pipework and where we are requested to merely clear such blockages, we can offer no guarantee against reoccurrence or further damage. In the event of collapse during the pipe clearing process, we will immediately advise you of such collapse and shall provide you with an estimate for the full repair of the damaged pipework.

26.2. Where we have performed temporary repairs, we:

- (a) offer no guarantee against the reoccurrence of the initial fault or any further damage caused; and
- (b) will immediately advise you of the fault and provide you with an estimate for the full repair.

26.3. Installing new pipework or components can cause existing pipework to fail or become damaged. You agree to indemnify us from all liability should the existing pipework fail or become damaged due to the installation of any new pipework or components.

## **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, as well as 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 notify 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 who have 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 and specific technical information), you shall be responsible for providing accurate data, and we shall be entitled to rely on the accuracy of any plans, specifications or other technical information supplied by you.

28.2. We are not responsible for any errors in the Materials or Services or for additional expenses caused by you supplying inaccurate plans, specifications or other technical information.

## **29. COMPLIANCE AND CONSENTS**

29.1. You agree to obtain (at your expense) all approvals, consents and licences that may be required (including geotechnical data or any other reports required for the completion of the Services) and, where applicable: (a) you shall be responsible for applying for and obtaining the Code



Compliance Certificate(s) for the Services; and

(b) we shall provide you with all necessary information so that you may apply for any Code Compliance Certificate(s). All additional costs incurred by us in collating such information will be an addition to the Price and charged as a variation (in accordance with clause 7).

29.2. Both parties acknowledge and agree to comply with the Building Act 2004 in respect of all 'building work' (as defined in Part 1, section 7 of the Building Act 2004) that is supplied under this Agreement.

### **30. CONSTRUCTION CONTRACTS ACT 2002**

30.1. 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.

30.2. 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 that you incur due to the suspension of Services under clause 30.1.

30.3. 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:

(a) 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

(b) we may exercise any rights for payments or adjudication of disputes under Part 2 and Part 3 of the CCA.

### **31. THIRD PARTY SUPPLIERS**

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

31.2. 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 in the event we arrange any supply of Materials or Services that are provided directly to you by a third party supplier.

31.3. No warranty is offered by us regarding the quality of the third party supplier's workmanship, including whether their recommendations are appropriate or accurate (unless we include these Services in our quotation).

### **32. LIABILITY**

32.1. 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).

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

32.3. 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) supplying the Services again; or (ii) the payment of the expense of having the Services supplied again.

32.4. If, notwithstanding clause 31, 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

32.5. The limitations and exclusions on liability in this clause 32 will apply irrespective of the legal basis for the applicable claim, including contract, equity, tort or statute, except negligence and fraud.

32.6. 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 representatives); or (c) to any third party.

### **33. GENERAL**

33.1. 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.

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

33.3. 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 set out above will apply (with (a) having the highest priority).

33.4.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.

33.5.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.

33.6.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.

33.7.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.

33.8.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).

33.9.Severability: If any part of this Agreement is illegal or unenforceable, it will be severed, and all remaining rights in this Agreement will continue in full force and effect.

33.10.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.

33.11.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.

33.12.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.

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

33.14.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.

33.15.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.

33.16.Counterparts: This Agreement may be executed in any number of counterparts (including by electronic signature or by email exchange of pdf copies) which together will constitute the one instrument.