

# Prompt Contracting & Fencing Pty Ltd – Terms & Conditions of Trade

## 1. Definitions

- 1.1 "Supplier" shall mean Prompt Contracting & Fencing Pty Ltd its successors and assigns or any person acting on behalf of and with the authority of Prompt Contracting & Fencing Pty Ltd.
- 1.2 "Client" shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by the Supplier to the Client.
- 1.3 "Guarantor" means that person (or persons) who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 "Goods" shall mean all Goods supplied by the Supplier to the Client (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by the Supplier to the Client.
- 1.5 "Services" shall mean all Services supplied by the Supplier to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.6 "Price" shall mean the price payable for the Goods as agreed between the Supplier and the Client in accordance with clause 4 of this contract.

## 2. The Commonwealth Trade Practices Act 1974 ("TPA") and Fair Trading Acts ("FTA") and application of these terms and conditions to consumers

- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.
- 2.2 Clause 8 (Defects) and clause 9 (Warranty) may NOT apply to the Client where the Client is purchasing Goods or Services not for resale or hire where the Price of the Goods or Services does not exceed \$40,000, or where the Price of the Goods or Services does exceed \$40,000 and are of a kind ordinarily acquired for personal, domestic or household use or consumption, or where the Client is in any other way a consumer within the meaning of the TPA or the FTA of the relevant state or territories of Australia.

## 3. Acceptance

- 3.1 Any instructions received by the Supplier from the Client for the supply of Goods and/or the Client's acceptance of Goods supplied by the Supplier shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of the Supplier.
- 3.4 The Client shall give the Supplier not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any loss incurred by the Supplier as a result of the Client's failure to comply with this clause.
- 3.5 Goods are supplied by the Supplier only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.

## 4. Price And Payment

- 4.1 At the Supplier's sole discretion the Price shall be either:
  - (a) as indicated on invoices provided by the Supplier to the Client in respect of Goods supplied; or
  - (b) the Supplier's quoted Price (subject to clause 4.2) which shall be binding upon the Supplier provided that the Client shall accept the Supplier's quotation in writing within thirty (30) days.
- 4.2 The Supplier reserves the right to change the Price in the event of a variation to the Supplier's quotation. 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 such as hard rock barriers below the surface or iron reinforcing rods in concrete that require excessive rock excavation) will be charged for on the basis of the Supplier's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 4.3 At the Supplier's sole discretion a non refundable deposit may be required.
- 4.4 At the Supplier's sole discretion:
  - (a) payment shall be due on delivery of the Goods; or
  - (b) payment for approved Clients shall be due fourteen (14) days following the date of the invoice.
- 4.5 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 4.6 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Client and the Supplier.
- 4.7 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

## 5. Delivery Of Goods

- 5.1 At the Supplier's sole discretion delivery of the Goods shall take place when the Client takes possession of the Goods at the Client's nominated address.
  - 5.2 At the Supplier's sole discretion the costs of delivery are included in the Price.
  - 5.3 The Client shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged then the Supplier shall be entitled to charge a reasonable fee for redelivery.
  - 5.4 The failure of the Supplier to deliver shall not entitle either party to treat this contract as repudiated.
  - 5.5 The Supplier shall not be liable for any loss or damage whatsoever due to failure by the Supplier to deliver the Goods (or any of them) promptly or at all where due to circumstances beyond the control of the Supplier.
- ## 6. Risk
- 6.1 If the Supplier retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
  - 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, the Supplier is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Supplier is sufficient evidence of the Supplier's rights to receive the insurance proceeds without the need for any person dealing with the Supplier to make further enquiries.
  - 6.3 Where the Client expressly requests the Supplier to leave Goods outside the Supplier's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Client's sole risk and it shall be the Client's responsibility to ensure the Goods are insured adequately or at all.
  - 6.4 The Client must be on site to supervise the marking out of the fence line, placement of boundary pegs and during the installation of the fence. If the Client fails to comply with this clause then the Supplier accepts no responsibility for installation decisions that need to be made by the Supplier in the Client's absence.
  - 6.5 The Client acknowledges that it is their responsibility to remove any existing fence (including existing footings), trees, vines and shrubs to allow the Supplier clear access along the proposed fence line prior to commencement of work by the Supplier unless otherwise agreed in writing between the Supplier and the Client. Under no circumstances will the Supplier handle removal of asbestos product.
  - 6.6 The Client shall provide the Supplier with a suitable free power source.
  - 6.7 Whilst the Supplier will take all due care during installation the Supplier will not accept any responsibility for tiles or pavers damaged during installation.
  - 6.8 Where fencing is installed on a retaining wall the Supplier shall not be liable for any movement in the fence due to consolidation, or the movement of soil or any other component of the retaining wall.
  - 6.9 Location of underground services by a licensed service locator is mandatory prior to commencement of any works. "Dial Before You Dig" must be consulted and any potential underground services marked on site. Whilst the Supplier will take all care to avoid damage to any underground services the Client agrees to indemnify the Supplier 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. If the Client requests the Supplier to engage the service locator then this shall be in addition to the Price.
  - 6.10 The Supplier shall not be responsible for digging land out under fence lines nor removal of soil from the work site.
  - 6.11 The Client acknowledges that Goods supplied may exhibit variations in shade, colour, texture, surface and finish, and may fade or change colour over time. The Supplier will make every effort to match batches of product supplied in order to minimise such variations but shall not be liable in any way whatsoever where such variations occur.

## 7. Title

- 7.1 The Supplier and the Client agree that ownership of the Goods shall not pass until:
  - (a) the Client has paid the Supplier all amounts owing for the particular Goods; and
  - (b) the Client has met all other obligations due by the Client to the Supplier in respect of all contracts between the Supplier and the Client.
- 7.2 Receipt by the Supplier of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Supplier's ownership or rights in respect of the Goods shall continue.
- 7.3 It is further agreed that:
  - (a) where practicable the Goods shall be kept separate and identifiable until the Supplier shall have received payment and all other obligations of the Client are met; and
  - (b) until such time as ownership of the Goods shall pass from the Supplier to the Client the Supplier may give notice in writing to the Client to return the Goods or any of them to the Supplier. Upon such notice the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and
  - (c) the Supplier shall have the right of stopping the Goods in transit whether or not delivery has been made; and
  - (d) if the Client fails to return the Goods to the Supplier then the Supplier or the Supplier's agent may (as the invitee of the Client) enter upon and into land and premises owned, occupied or used by the Client, or any premises where the Goods are situated and take possession of the Goods; and
  - (e) the Client is only a bailee of the Goods and until such time as the Supplier has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Client owes to the Supplier for the Goods, on trust for the Supplier; and
  - (f) the Client shall not deal with the money of the Supplier in any way which may be adverse to the Supplier; and
  - (g) the Client shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of the Supplier; and
  - (h) the Supplier can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Client; and
  - (i) until such time that ownership in the Goods passes to the Client, if the Goods are converted into other products, the parties agree that the Supplier will be the owner of the end products.

## 8. Defects

- 8.1 The Client shall inspect the Goods on delivery and shall within three (3) days of delivery (time being of the essence) notify the Supplier of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Supplier an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Supplier has agreed in writing that the Client is entitled to reject, the Supplier's liability is limited to either (at the Supplier's discretion) replacing the Goods or repairing the Goods except where the Client has acquired Goods as a consumer within the meaning of the Trade Practices Act 1974 (Cwth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Goods, or repair of the Goods, or replacement of the Goods.
- 8.2 Goods will not be accepted for return other than in accordance with 8.1 above.

## 9. Warranty

- 9.1 For Goods not manufactured by the Supplier, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Supplier shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.

## 10. Default & Consequences of Default

- 10.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at the Supplier's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 10.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by the Supplier.
- 10.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify the Supplier from and against all costs and disbursements incurred by the Supplier in pursuing the debt including legal costs on a solicitor and own client basis and the Supplier's collection agency costs.
- 10.4 Without prejudice to any other remedies the Supplier may have, if at any time the Client is in breach of any obligation (including those relating to payment), the Supplier may suspend or terminate the supply of Goods to the Client and any of its other obligations under the terms and conditions. The Supplier will not be liable to the Client for any loss or damage the Client suffers because the Supplier has exercised its rights under this clause.
- 10.5 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 10.6 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 Client which remains unfulfilled and all amounts owing to the Supplier shall, whether or not due for payment, become immediately payable in the event that:
  - (a) any money payable to the Supplier becomes overdue, or in the Supplier'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.

## 11. Compliance with Laws

- 11.1 The Client and the Supplier shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the works.
- 11.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the works.
- 11.3 The Client agrees 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.

## 12. Cancellation

- 12.1 The Supplier may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice the Supplier shall repay to the Client any sums paid in respect of the Price. The Supplier shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 12.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any loss incurred by the Supplier (including, but not limited to, any loss of profits) up to the time of cancellation.
- 12.3 Cancellation of orders for Goods made to the Client's specifications or non-stocklist items will definitely not be accepted, once production has commenced.

## 13. Privacy Act 1988

- 13.1 The Client and/or the Guarantor/s (herein referred to as the Client) agree for the Supplier to obtain from a credit reporting agency a credit report containing personal credit information about the Client in relation to credit provided by the Supplier.
- 13.2 The Client agrees that the Supplier may exchange information about the Client 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 the Client; and/or
  - (b) to notify other credit providers of a default by the Client; and/or
  - (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/or
  - (d) to assess the creditworthiness of the Client.
14. The Client understands that the information exchanged can include anything about the Client's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
- 14.1 The Client consents to the Supplier being given a consumer credit report to collect overdue payment on commercial credit facilities (BK/1)th Privacy Act 1988).
- 14.2 The Client agrees that personal credit information provided may be used and retained by the Supplier for the following purposes (and for other purposes as shall be agreed between the Client and Supplier or required by law from time to time):
  - (a) the provision of Goods; and/or
  - (b) the marketing of Goods by the Supplier, its agents or distributors; and/or
  - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Goods; and/or
  - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
  - (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.
- 14.3 The Supplier 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;
  - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
- 14.4 The information given to the credit reporting agency may include:
  - (a) personal particulars (the Client's name, sex, address, previous addresses, date of birth, name of employer and commercial credit facilities);
  - (b) details concerning the Client's application for credit or commercial credit and the amount requested;
  - (c) advice that the Supplier is a current credit provider to the Client;
  - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
  - (e) that the Client's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
  - (f) information that, in the opinion of the Supplier, the Client has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Client's credit obligations);
  - (g) advice that cheques drawn by the Client for one hundred dollars (\$100) or more, have been dishonoured more than once;
  - (h) that credit provided to the Client by the Supplier has been paid or otherwise discharged.

## 15. Construction Contracts Act 2004

- 15.1 At the Supplier's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the Construction Contracts Act 2004 may apply.
- 15.2 Nothing in this agreement is intended to have the effect of contracting out of any provisions of the Construction Contracts Act 2004 of Western Australia, except to the extent permitted by the Act where applicable.

## 16. General

- 16.1 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.
- 16.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Western Australia and are subject to the jurisdiction of the courts of Western Australia.
- 16.3 The Supplier shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Supplier of these terms and conditions.
- 16.4 In the event of any breach of this contract by the Supplier the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 16.5 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Supplier nor to withhold payment of any invoice because part of that invoice is in dispute.
- 16.6 The Supplier may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 16.7 The Client agrees that the Supplier 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 Supplier notifies the Client of such change.
- 16.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 16.9 The failure by the Supplier to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Supplier's right to subsequently enforce that provision.