

ACE Plumbing & Heating Ltd – Terms & Conditions of Trade

1. **Definitions**
- 1.1 **Contract** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.2 **APHL** means Ace Plumbing & Heating Limited, its successors and assigns or any person acting on behalf of and with the authority of Ace Plumbing & Heating Limited.
- 1.3 **Client** means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting APHL to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
- (a) if there is more than one Client, is a reference to each Client jointly and severally; and
- (b) if the Client is a partnership, it shall bind each partner jointly and severally; and
- (c) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
- (d) includes the Client's executors, administrators, successors and permitted assigns.
- 1.4 **Works** means all Works (including consultation, manufacturing and/or installation services) or Materials supplied by APHL to the Client at the Client's request from time to time (where the context so permits the terms 'Works' or 'Materials' shall be interchangeable for the other).
- 1.5 **Service Agreement** means a fixed term Contract for a designated timeframe for the supply of specific Works as agreed between the Client and APHL.
- 1.6 **Worksite** means the address nominated by the Client to which the Materials are to be supplied by APHL.
- 1.7 **Confidential Information** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party's intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, contracts, client information (including but not limited to, **Personal Information** such as: name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
- 1.8 **Cookies** means small files which are stored on a user's computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website, and can be accessed either by the web server or the client's computer. **If the Client does not wish to allow Cookies to operate in the background when using APHL website, then the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**
- 1.9 **Price** means the Price payable (plus any Goods and Services Tax ("GST") where applicable) for the Works as agreed between APHL and the Client in accordance with clause 7 below.
2. **Acceptance**
- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of any Works.
- 2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- 2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.4 The Client acknowledges and accepts that:
- (a) the supply of Works on credit shall not take effect until the Client has completed a credit application with APHL and it has been approved with a credit limit established for the account;
- (b) in the event that the supply of Works requested exceeds the Client's credit limit and/or the account exceeds the payment terms, APHL reserves the right to refuse delivery; and
- (c) 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, APHL reserves the right to substitute comparable Materials (or components of the Materials) and vary the Price as per clause 7.2. In all such cases APHL will notify the Client in advance of any such substitution, and also reserves the right to place the Client's order and/or Works on hold, as per clause 8.2 until such time as APHL and the Client agree to such changes.
- 2.5 In the event that the Client requests APHL to:
- (a) make an emergency Call-Out for critical equipment after hours or causes APHL to cancel or reschedule other work then APHL reserves the right to charge a minimum Call-Out fee of one (1) hour labour cost plus a per kilometre travelled rate plus any Materials used to undertake the Works unless otherwise agreed between APHL and the Client; and
- (b) provide the Works urgently, that may require APHL staff to work outside normal business hours (including but not limited to working, through lunch breaks, weekends and/or Public Holidays) then APHL reserves the right to charge the Client additional labour costs (penalty rates will apply at time and a half normal rates), unless otherwise agreed between APHL and the Client.
- 2.6 If APHL has been requested by the Client to diagnose a fault that requires investigation, disassembly and/or testing, all costs involved will be charged to the Client irrespective of whether or not the repair goes ahead.
- 2.7 The Client acknowledges and agrees that these terms and conditions may be meant to be read in conjunction with APHL Service Agreement form where an additional four (4) year warranty is provided with Air Conditioning products/Materials.
- 2.8 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 226 of the Contract and Commercial Law Act 2017 or any other applicable provisions of that Act or any Regulations referred to in that Act.
3. **Authorised Representatives**
- 3.1 The Client acknowledges that APHL shall (for the duration of the Works) liaise directly with one (1) authorised representative, and that once introduced as such to APHL, that person shall have the full authority of the Client to order any Works and/or to request any variation thereto on the Client's behalf. The Client accepts that they will be solely liable to APHL for all additional costs incurred by APHL (including APHL profit margin) in providing any Works or variations requested thereto by the Client's duly authorised representative.
4. **Errors and Omissions**
- 4.1 The Client acknowledges and accepts that APHL shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by APHL in the formation and/or administration of this Contract; and/or
- (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by APHL in respect of the Works.
- 4.2 In the event such an error and/or omission occurs in accordance with clause 4.1, and is not attributable to the negligence and/or willful misconduct of APHL, the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.
5. **Change in Control**
- 5.1 The Client shall give APHL not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax numbers, change of trustees, or business practice). The Client shall be liable for any loss incurred by APHL as a result of the Client's failure to comply with this clause.
6. **Service Agreement Term**
- 6.1 The Client acknowledges and accepts that:
- (a) the commencement date shall be the date of the first delivery of the Works under a Service Agreement, or from the date of signing, whichever, is the earlier. A Service Agreement shall be for the period ("initial term") as agreed between both parties and shall revert to a monthly roll over basis automatically, thereafter, unless agreed otherwise until terminated by either party by giving at least thirty (30) days written notice as defined in the Service Agreement prior to the expiration date of the initial term or any additional term; and
- (b) the Price stated will remain fixed for an initial period of twelve (12) months from the date of this Contract and will then be subject to revision on the basis of the movement in the Consumer Price Index (CPI).
7. **Price and Payment**
- 7.1 At APHL sole discretion the Price shall be either:
- (a) as indicated on invoices provided by APHL to the Client in respect of Works performed or Materials supplied; or
- (b) APHL Price at the date of delivery of the Works according to APHL current price list; or
- (c) APHL quoted Price (subject to clause 7.2) which shall be binding upon APHL provided that the Client shall accept APHL quotation in writing within thirty (30) days.
- 7.2 APHL reserves the right to change the Price:
- (a) if a variation to the Materials which are to be supplied is requested; or
- (b) if a variation to the Works originally scheduled (including any applicable plans or specifications) is requested; or
- (c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather, limitations to accessing the Worksite, transport/freight costs, obscured building/Worksite defects or where the substructure is inadequate/rotten and is not able to sustain the weight of the air conditioning unit, incorrect measurements, plans and/or specifications provided by the Client, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, or due to existing workmanship being of a poor quality or non-compliant to the building code, hard rock barriers below the surface, iron reinforcing rods in concrete or hidden pipes and wiring in walls, etc.) which are only discovered on commencement of the Works; or
- (d) in the event that overseas transactions increase as a consequence of variations in foreign currency rates of exchange and/or international freight and insurance charges or as a result of increases to APHL in the cost of labour or materials which are beyond APHL control.
- 7.3 Variations will be charged for on the basis of APHL quotation, and will be detailed in writing, and shown as variations on APHL invoice. The Client shall be required to respond to any variation submitted by APHL within ten (10) working days. Failure to do so will entitle APHL to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 7.4 At APHL sole discretion a non-refundable deposit may be required.
- 7.5 Time of payment for the Works being of the essence, the Price will be payable by the Client on the date determined by APHL, which may be:
- (a) on completion of the Works;
- (b) by way of progress payments in accordance with APHL specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the Worksite but not yet installed. Such progress payments are due and payable in accordance with 7.5(e) and will generally follow the following formula:
- (i) forty percent (40%) due upon acceptance of the quotation;
- (ii) forty percent (40%) due upon the completion of the Works; and
- (iii) ten percent (10%) upon practical completion of the Works and handover to the Client; or
- (c) for certain approved Clients, during twenty (20) days following the end of the month in which a statement is posted to the Client's address or address for notices; or
- (d) the date specified on any invoice or other form as being the date for payment;
- (e) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by APHL.
- 7.6 At the agreement of both parties, payment of the Price may be subject to retention by the Client of an amount (hereafter called the "Retention Money"), being a set amount or equal to a percentage of the Price. The Client shall hold the Retention Money for the agreed period following completion of the Works during which time all Works are to be completed and/or all defects are to be corrected. Any Retention Money applicable to this Contract is to be dealt with in accordance with Subpart 2A - sections 18(a) to 18(f) of the Construction Contracts Amendment Act 2015.
- 7.7 Payment may be made by, electronic/on-line banking, or by any other method as agreed to between the Client and APHL.
- 7.8 APHL may in its discretion allocate any payment received from the Client towards any invoice that APHL determines and may do so at the time of receipt or at any time afterwards. On any default by the Client APHL may re-allocate any payments previously received and allocated. In the absence of any payment allocation by APHL, payment will be deemed to be allocated in such manner as preserves the maximum value of APHL Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 7.9 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 APHL nor to withhold payment of any invoice because part of that invoice is in dispute, unless the request for payment by APHL is a claim made under the Construction Contracts Act 2015.
- 7.10 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to APHL an amount equal to any GST APHL must pay for any supply by APHL under this or any other agreement for the sale of the Materials. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
8. **Provision of the Works**
- 8.1 Subject to clause 8.2 it is APHL responsibility to ensure that the Works start as soon as it is reasonably possible.
- 8.2 The Works commencement date will be put back and the completion date extended by whatever time is reasonable in the event that APHL claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond APHL control, including but not limited to any failure by the Client to:
- (a) make a selection; or
- (b) have the Worksite ready for the Works; or
- (c) notify APHL that the Worksite is ready.
- 8.3 At APHL sole discretion, the cost of delivery is included in the Price.
- 8.4 APHL may deliver the Works by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 8.5 Any time specified by APHL for delivery of the Works is an estimate only and APHL will not be liable for any loss or damage incurred by the Client as a result of delivery being late. However, both parties agree that they shall make every endeavour to enable the Works to be supplied at the time and place as was arranged between both parties. In the event that APHL is unable to supply the Works as agreed solely due to any action or inaction of the Client, then APHL shall be entitled to charge a reasonable fee for re-supplying the Works at a later time and date, and/or for storage of the Materials.
9. **Risk**
- 9.1 If APHL retains ownership of the Materials under clause 13 then:
- (a) where APHL is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery and the Client must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that the Materials are delivered by APHL or APHL nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address); and
- (b) where APHL is to both supply and install Materials then APHL shall maintain a contract works insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Client.
- 9.2 Notwithstanding the provisions of clause 9.1 if the Client specifically requests APHL to leave Materials outside APHL premises for collection or to deliver the Materials to an unsecured location then such materials shall always be left at sole risk of the Client and it shall be the Client's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Client's expense.
- 9.3 APHL shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, APHL accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 9.4 The Client warrants that any structures to which the Materials are to be affixed are able to withstand the installation of the Materials and that any electrical connections are of suitable capacity to handle the Materials once installed. If, for any reason (including but not limited to, the structure not being watertight, wood rot, the discovery of asbestos, defective or unsafe wiring, or dangerous access etc.) APHL reasonably forms the opinion that the Client's property is not safe for the installation of the Materials, then APHL shall be entitled to refuse to undertake the installation of the Materials (in accordance with clause 8.2) until APHL is satisfied that it is safe for the installation to proceed. APHL may in agreement with the Client bring the property up to a standard suitable for installation to proceed but all such Works undertaken and any additional Materials supplied shall be treated as a variation and be charged for in addition to the Price.
- 9.5 Whilst the final location of the condensing unit is at the discretion of the Client, a charge will apply as a variation as per clause 7.2, if the Client requests the unit to not be located adjacent to the external wall, due to the underground piping required.
- 9.6 In the event that any of the Materials needs to be relocated due to complaints from neighbours or local authorities, then the Client shall be responsible for any and all costs involved.
- 9.7 APHL shall upon installation ensure that all installed Materials meet current industry standards applicable to noise levels, however APHL cannot guarantee that noise levels will be constant as installation of the Materials may be impacted by many factors such as the weather, lack of maintenance, tampering etc.
- 9.8 Whilst APHL will take all due care when working in ceiling space/cavities, APHL will not be liable for any hairline cracks that may occur and/or where screws become dislodged due to general and normal movement within a ceiling, unless due to the negligence of APHL.
- 9.9 In the event that the electrical wiring is required to be re-positioned at the request of any third party contracted by the Client, then the Client agrees to notify APHL immediately upon any proposed changes. The Client agrees to indemnify APHL against any additional costs incurred with such a relocation of electrical wiring. All such variations shall be invoiced in accordance with clause 7.2.
- 9.10 The Client acknowledges and accepts that:
- (a) where APHL has performed temporary repairs that:
- (i) APHL offers no guarantee against the recurrence of the initial fault, or against other damage caused;
- (ii) APHL will immediately advise the Client of the fault and shall provide the Client with an estimate for the full repair required; and
- (b) APHL is only responsible for components that are replaced by APHL and does not at any stage accept any liability in respect of previous goods and/or services supplied by any other third party that subsequently fail and found to be the source of the failure;
- (c) APHL shall not be responsible or liable for any defect in other appliances or power points as a coincidence of APHL installing the Materials;
- (d) any defects in the Materials or appearing in the Works after completion due to the Client or any third party using any items that overloads the structure or system to which APHL Materials are installed or connected to, or by workmanship not performed by APHL, shall not be covered by any applicable warranty pertaining to the Materials;
- (e) it is the Client's responsibility to insure any equipment partly or completely installed on the Worksite, against theft or damage;
- (f) APHL shall not be liable for any loss or damage caused in accessing the work area beyond reasonable control of APHL (including, without limitation, to ceiling lifts and panels, face brickwork and rendered masonry services) which APHL may have to break into or disturb in performance of the Works), unless due to the negligence of APHL;
- (g) under no circumstances, will APHL handle removal of asbestos product. In the event asbestos (or other hazardous material) is discovered on the Worksite:
- (i) APHL shall suspend the Works;
- (ii) the Client shall be fully responsible for the resolution of any resulting problems; and
- (iii) any additional cost incurred by APHL shall be added to the Price under clause 7.2;
- (h) Materials supplied may exhibit variations in shade, colour, texture, surface and finish, and
- (i) may fade or change colour over time;
- (j) extend contract or distort as a result of exposure to heat, cold, weather;
- (k) mark or stain exposed to certain substances; and
- (l) be damaged or disfigured by impact or scratching.
- APHL 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.
- 9.11 APHL accepts no responsibility for any damage or performance related problems with any Materials where they have not been used and/or maintained in accordance with APHL and/or manufacturers' recommendations.
- 9.12 Where APHL requires that Materials, tools etc. required for the Works be stored at the Worksite, the Client shall supply APHL a safe area for storage and shall take all reasonable efforts to protect all items from destruction, theft or damage. In the event that any of the stored items are destroyed, stolen or damaged, then the cost of repair or replacement shall be the Client's responsibility.
10. **Worksite Access and Condition**
- 10.1 APHL is not responsible for the removal of rubbish from or clean-up of the building/construction Worksite/s. All rubbish generated by APHL will be placed in a designated area appointed by the Client but the responsibility of removal of same is the Client or the Client's agent, unless otherwise agreed.
- 10.2 It is the intention of APHL and agreed by the Client that:
- (a) the Client shall ensure that APHL has clear and free access to the Worksite at all times to enable them to undertake the Works (including carrying out Worksite inspections, gain signatures for required documents, and for the delivery and installation of the Materials). APHL shall not be liable for any loss or damage to the Worksite (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of APHL; and
- (b) it is the Client's responsibility to provide APHL, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities.
- 10.3 The Client must be on the Worksite to meet with the installers on the day of the installation to confirm all location before the commencement of the Works. If the Client fails to comply with this clause, then APHL accepts no responsibility for installation decisions that need to be made by APHL in the Client's absence.
- 10.4 **Worksite Inductions**
- (a) in the event the Client requires an employee or sub-contractor of APHL to undertake a Worksite induction during working hours, the Client will be liable to pay the hourly charges for that period. If any induction needs to be undertaken prior to the commencement date of the Works the Client shall be liable to pay APHL standard (and/or overtime, if applicable) hourly labour rates;
- (b) where APHL is in control of the Worksite, the Client and/or the Client's third-party contractors must initially carry out APHL Health & Safety induction course before access to the Worksite will be granted. Inspection of the Worksite during the course of the Works will be by **appointment only** and unless otherwise agreed, in such an event the Client and/or third party acting on behalf of the Client must at all times be accompanied by APHL.
11. **Underground Locations**
- 11.1 Prior to APHL commencing any work the Client must advise APHL of the precise location of all underground services on the Worksite and clearly mark the same. The underground mains and services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on the Worksite.
- 11.2 Whilst APHL will take all care to avoid damage to any underground services the Client agrees to indemnify APHL in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 11.1.
12. **Compliance with Laws**
- 12.1 The Client and APHL shall comply with the provisions of all statutes, regulations and bylaws of the government, local and other public authorities that may be applicable to the Works, including any WorkSafe health and safety laws relating or any other relevant safety standards or legislation pertaining to the Works.
- 12.2 Both parties acknowledge and agree:
- (a) to comply with the Building Amendment Act 2013, in respect of all workmanship and building products to be supplied during the course of the Works; and
- (b) that the Works will be provided in accordance with any current relevant standards of the New Zealand Standards applicable to the Works.
- 12.3 Where the Client has supplied products for APHL to complete the Works, the Client acknowledges that it accepts responsibility for the suitability of purpose and use for their products and the intended use and any faults inherent in those products. However, if in APHL opinion, it is believed that the materials supplied are non-conforming products and will not conform with New Zealand regulations, then APHL shall be entitled, without prejudice, to halt the Works until the applicable conforming products are sourced and all costs associated with such a change to the plans and design will be invoiced in accordance with clause 7.2.
- 12.4 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.
- 12.5 APHL shall comply with the terms and conditions of all such consents and approvals in so far as such consents and approvals relate to the carrying out of the Works.
- 12.6 All work will be tested to ensure that it is electrically safe and is in accordance with the applicable standards and codes of practice for the electrical installation under the Electrical Safety Regulations. All of the cabling work will comply with all relevant New Zealand and Australian Wiring standards.
- 12.7 If during the course of installation when the Works are being conducted within and around switchboards that if the same is found defective or deemed to be unsafe by APHL, then APHL shall notify the Client immediately. The power if isolated will not be re-generated until such time as the existing condition has been rectified and made safe in accordance to the Electrical Safety Regulations. The Client accepts and agrees that all electrical assets associated with the rectification Works including any Materials and labour shall be to the Client's account.
- 12.8 Any live Works or Works undertaken near live conductors where it is safe to do so shall be dealt with in accordance with New Zealand and Australian Wiring standards being "Safe working on Low Voltage Electrical Installations, relevant Commonwealth and Statutory Acts and Work Place Regulations". APHL live Works procedures are designed to eliminate risk of injury to APHL employees, damage to the Client's installations and unexpected power disconnections. If may in some cases require disconnection and isolation of the installation to undertake such Works for which additional charges may be applicable. This shall be invoiced in accordance with clause 7.2.
- 12.9 Notwithstanding clause 12.1 and pursuant to the Health & Safety at Work Act 2015 (the "HSW Act"), APHL agrees at all times to comply with sections 28 and 34 of the "HSW Act" with meeting their obligations for health and safety laws in the

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- workplace regardless of whether they may be the party in control of the Worksite or where they may be acting as a sub-contractor for the Client who has engaged a third party head contractor.
- 13. Title**
13.1 APHL and the Client agree that ownership of the Materials shall not pass until:
(a) the Client has paid APHL all amounts owing to APHL; and
(b) the Client has met all of its other obligations to APHL.
- 13.2 Receipt by APHL of any form of payment other than cash shall not be deemed to be payment until the form of payment has been honoured, cleared or recognised.
- 13.3 It is further agreed that:
(a) until ownership of the Materials passes to the Client in accordance with clause 13.1 that the Client is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to APHL on request;
(b) the Client holds the benefit of the Client's insurance of the Materials on trust for APHL and must pay to APHL the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed;
(c) the production of these terms and conditions by APHL shall be sufficient evidence of APHL's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with APHL to make further enquiries;
(d) the Client 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 the Client sells, disposes or parts with possession of the Materials then the Client must hold the proceeds of any such act on trust for APHL and must pay or deliver the proceeds to APHL on demand;
(e) the Client should not convert or process the Materials or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of APHL and must sell, dispose of or return the resulting product to APHL as it so directs;
(f) unless the Materials have become fixtures the Client irrevocably authorises APHL to enter any premises where APHL believes the Materials are kept and recover possession of the Materials;
(g) APHL may recover possession of any Materials in transit whether or not delivery has occurred;
(h) the Client shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of APHL; and
(i) APHL may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Client.
- 14. Personal Property Securities Act 1999 ("PPSA")**
14.1 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:
(a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
(b) a security interest is taken in all Materials and/or collateral (account) – being a monetary obligation of the Client to APHL for Works – that have previously been supplied and that will be supplied in the future by APHL to the Client.
- 14.2 The Client undertakes to:
(a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which APHL may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
(b) indemnify, and upon demand reimburse, APHL for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Materials charged thereby;
(c) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials and/or collateral (account) in favour of a third party without the prior written consent of APHL; and
(d) immediately advise APHL of any material change in its business practices of selling Materials which would result in a change in the nature of proceeds derived from such sales.
- 14.3 APHL and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 14.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA.
- 14.5 Unless otherwise agreed to in writing by APHL, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 14.6 The Client shall unconditionally ratify any actions taken by APHL under clauses 14.1 to 14.5.
- 14.7 Subject to any express provisions to the contrary (including those contained in this clause 14), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 15. Security and Charge**
15.1 In consideration of APHL agreeing to supply the Works, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 15.2 The Client indemnifies APHL from and against all APHL's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising APHL's rights under this clause.
- 15.3 The Client irrevocably appoints APHL and each director of APHL, as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 15 including, but not limited to, signing any document on the Client's behalf.
- 16. Defects in Materials**
16.1 The Client shall inspect the Materials on delivery and shall within forty-eight (48) hours of delivery (time being of the essence) notify APHL of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford APHL an opportunity to inspect the Materials within a reasonable time following delivery if the Client believes the Materials are defective in any way. If the Client shall fail to comply with these provisions the Materials shall be presumed to be free from any defect or damage. For defective Materials, which APHL has agreed in writing that the Client is entitled to reject, APHL's liability is limited to either (at APHL's discretion) replacing the Materials or repairing the Materials.
- 16.2 Materials will not be accepted for return other than in accordance with 16.1 above.
- 16.3 Subject to clause 16.1, non-stockist items or Materials made to the Client's specifications are under no circumstances acceptable for credit or return.
- 17. Warranties**
17.1 Subject to the conditions of warranty set out in clause 17.2 APHL warrants that if any defect in any workmanship of APHL becomes apparent and is reported to APHL within twelve (12) months of the date of delivery (time being of the essence) then APHL will either (at APHL's sole discretion) replace or remedy the workmanship.
- 17.2 The conditions applicable to the warranty given by clause 17.1 are:
(a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
(i) failure on the part of the Client to properly maintain any Materials; or
(ii) failure on the part of the Client to follow any instructions or guidelines provided by APHL;
(iii) any use of any Materials otherwise than for any application specified on a quote or order form; or
(iv) the continued use of any Materials after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
(v) fair wear and tear, any accident or act of God.
(b) the warranty shall cease and APHL shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without APHL's consent;
(c) in respect of all claims APHL shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.
- 17.3 For Materials not manufactured by APHL, the warranty shall be the current warranty provided by the manufacturer of the Materials. APHL 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 Materials.
- 17.4 In the case of such Materials, the Client acknowledges that full opportunity to inspect the same has been provided and accepts the same with all faults and that no warranty is given by APHL as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. APHL shall not be responsible for any loss or damage to the Materials, or caused by the Materials, or any part thereof however arising.
- 18. Consumer Guarantees Act 1993**
18.1 If the Client is acquiring Materials for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 ("CGA") do not apply to the supply of Materials by APHL to the Client.
- 19. Intellectual Property**
19.1 Where APHL has designed, drawn, written plans or a schedule of Works, or created any product, or where the Client then the copyright in such designs, drawings, documents, plans, schedules and products shall remain vested in APHL, and shall only be used by the Client at APHL's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of APHL.
- 19.2 The Client warrants that all designs, specifications or instructions given to APHL will not cause APHL to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify APHL against any action taken by a third party against APHL in respect of any such infringement.
- 19.3 The Client agrees that APHL may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which APHL has created for the Client.
- 20. Default and Consequences of Default**
20.1 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 APHL's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 20.2 If the Client owes APHL any money the Client shall indemnify APHL from and against all costs and disbursements incurred by APHL in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, APHL's collection agency costs, and bank dishonour fees).
- 20.3 Further to any other rights or remedies APHL may have under this Contract, if a Client has not paid to APHL, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by APHL under this clause 20, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- 20.4 Without prejudice to any other rights or remedies APHL may have, if at any time the Client is in breach of any obligation (including those relating to payment and/or failure to remedy any breach in respect of this Contract within ten (10) working days of receipt of such notice) then APHL may suspend or terminate the supply of the Works. APHL will not be liable to the Client for any loss or damage the Client suffers because APHL has exercised its rights under this clause.
- 20.5 Without prejudice to APHL's other remedies at law APHL shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to APHL shall, whether or not due for payment, become immediately payable if:
(a) any money payable to APHL becomes overdue, or in APHL's opinion the Client will be unable to make a payment when it falls due;
(b) the Client has exceeded any applicable credit limit provided by APHL;
(c) the Client becomes insolvent or bankrupt, 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
(d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 21. Cancellation**
21.1 Either party may, cancel these terms and conditions or cancel provision of the Works:
(a) if there is no Contract term specified, at any time by giving thirty (30) days' notice to the other party; or
(b) if a Contract term is specified, at any time after the end of the Contract term by giving thirty (30) days' notice to the other party; and
(c) failure to give notice of intention to cancel at least thirty (30) days prior to the expiration date of the Contract term, the Contract term shall automatically renew on a monthly basis, unless cancelled by way of the Client providing the Contractor with thirty (30) days' notice.
- 21.2 The Client is required to provide APHL with thirty days (30) notice if there is consistent, documented failure by APHL to perform the Works to the Client's satisfaction.
- 21.3 APHL may, in addition to their right to cancel under clause 21.1:
(a) do so at any time:
(i) prior to the commencement of the Works, by giving notice to the Client. On giving such notice APHL shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to APHL for Works already performed. APHL shall not be liable for any loss or damage whatsoever arising from such cancellation; or
(ii) in the event the Client materially breaches these terms and conditions, and such breach is not capable of remedy.
- 21.4 In the event of the premature termination of this Contract (including by notification from the Client, at least thirty (30) days prior to the expiration date of the Contract term), or as a result of default, but excluding any breach or termination of this Contract by APHL):
(a) the Client shall be responsible for the immediate payment of the following sums:
(i) all monies due and payable up to the date of termination, noting applicable rates may change if the Service Agreement term is shorter than that noted in the quotation; and
(ii) all other sums owing by the Client under this Contract (or any other Contract with the Client) as a result of the default and termination of this Contract, including consequential damages and any and all loss of profits, costs, charges and expenses incurred by APHL in connection with (and resulting from) the premature termination of this Contract, which shall be calculated at a minimum of thirty percent (30%) of the remainder of the Price under this Contract where a fixed term applies.
- 21.5 Cancellation of orders for products made to the Client's specifications, or for non-stockist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 22. Privacy Policy**
22.1 All emails, documents, images or other recorded information held or used by APHL is Personal Information as defined and referred to in clause 22.3 and therefore considered confidential. APHL acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1993 ("the Act") including Part II of the OECD Guidelines and as set out in Schedule 5A of the Act and any statutory requirements where relevant in a European Economic Area "EEA" under the EU Data Privacy Laws (including the General Data Protection Regulation ("GDPR") (collectively "EU Data Privacy Laws"). APHL acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by APHL that may result in serious harm to the Client, APHL will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client by written consent, unless subject to an operation of law.
- 22.2 Notwithstanding clause 22.1, privacy limitations will extend to APHL in respect of Cookies where the Client utilises APHL's website to make enquiries. APHL agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Client's:
(a) IP address, browser, email client type and other similar details;
(b) tracking website usage and traffic; and
(c) reports are available to APHL when APHL sends an email to the Client, so APHL may collect and review that information "collectively Personal Information".
- If the Client consents to APHL's use of Cookies on APHL's website and later wishes to withdraw that consent, the Client may manage and control APHL's privacy controls via the Client's web browser, including removing Cookies by deleting them from the browser history when exiting the site.
- 22.3 The Client authorises APHL or APHL's agent to:
(a) access, collect, retain and use any information about the Client:
(i) (including, name, address, D.O.B, occupation, driver's license details, electronic contact details, email, Facebook or Twitter details, medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history or any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Client's creditworthiness; or
(ii) for the purpose of marketing products and services to the Client.
(b) disclose information about the Client, whether collected by APHL from the Client directly or obtained by APHL from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.
- 22.4 Where the Client is an individual the authorities under clause 22.3 are authorities or consents for the purposes of the Privacy Act 1993.
- 22.5 The Client shall have the right to request (by e-mail) from APHL, a copy of the Personal Information about the Client retained by APHL and the right to request that APHL correct any incorrect Personal Information.
- 22.6 APHL will destroy Personal Information upon the Client's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- 22.7 The Client can make a privacy complaint by contacting APHL via e-mail. APHL will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within twenty (20) days of receipt of the complaint. In the event that the Client is not satisfied with the
- resolution provided, the Client can make a complaint to the Information Commissioner at <http://www.privacy.org.nz/comply/comptop.html>.
- 23. Suspension of Works**
23.1 Where the Contract is subject to section 24A of the Construction Contracts Amendment Act 2015, the Client hereby expressly acknowledges that:
(a) APHL has the right to suspend work within five (5) working days of written notice of its intent to do so if a payment claim is served on the Client; and
(i) the payment is not paid in full by the due date for payment in accordance with clause 7.5 and/or any subsequent amendments or new legislation and no payment schedule has been given by the Client; or
(ii) a scheduled amount stated in a payment schedule issued by the Client in relation to the payment claim is not paid in full by the due date for its payment; or
(iii) the Client has not complied with an adjudicator's notice that the Client must pay an amount to APHL by a particular date; and
(iv) APHL has given written notice to the Client of its intention to suspend the carrying out of construction work under the construction Contract.
(b) if APHL suspends work, it:
(i) is not in breach of Contract; and
(ii) is not liable for any loss or damage whatsoever suffered, or alleged to be suffered, by the Client or by any person claiming through the Client; and
(iii) is entitled to an extension of time to complete the Contract; and
(iv) keeps its rights under the Contract including the right to terminate the Contract; and may at any time lift the suspension, even if the amount has not been paid or an adjudicator's determination has not been complied with.
(c) if APHL exercises the right to suspend work, the exercise of that right does not:
(i) affect any rights that would otherwise have been available to APHL under the Contract and Commercial Law Act 2017; or
(ii) enable the Client to exercise any rights that may otherwise have been available to the Client under that Act as a direct consequence of APHL suspending work under this provision;
- (d) due to any act or omission by the Client, the Client effectively precludes APHL from continuing the Works or performing or complying with APHL's obligations under this Contract, then without prejudice to APHL's other rights and remedies, APHL may suspend the Works immediately after serving on the Client a written notice specifying the payment default or the act, omission or default upon which the suspension of the Works is based. All costs and expenses incurred by APHL as a result of such suspension and commencement shall be payable by the Client as if they were a variation.
- 23.2 If pursuant to any right conferred by this Contract, APHL suspends the Works and the default that led to that suspension continues unremedied subject to clause 20.4 for at least ten (10) working days, APHL shall be entitled to terminate the Contract, in accordance with clause 21.
- 24. Service of Notices**
24.1 Any written notice given under this Contract shall be deemed to have been given and received:
(a) by handing the notice to the other party, in person;
(b) by leaving it at the address of the other party as stated in this Contract;
(c) by sending it by registered post to the address of the other party as stated in this Contract;
(d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any) on receipt of confirmation of the transmission;
(e) if sent by email to the other party's last known email address.
- 24.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
- 25. Trusts**
25.1 If the Client at any time upon or subsequent to entering into the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not APHL may have notice of the Trust, the Client covenants with APHL as follows:
(a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
(b) the Client has full and complete power and authority under the Trust to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Client against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
(c) the Client will not without consent in writing of APHL (APHL will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
(i) the removal, replacement or retirement of the Client as trustee of the Trust;
(ii) any alteration to or variation of the terms of the Trust;
(iii) any advancement or distribution of capital of the Trust; or
(iv) any resettlement of the trust property.
- 26. General**
26.1 Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising hereunder, shall be submitted to, and settled by, either adjudication in accordance with section 26 of the Construction Contracts Act 2002 and/or by arbitration in accordance with the Arbitration Act 1996 or its replacements).
- 26.2 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. 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.
- 26.3 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the Auckland Courts of New Zealand.
- 26.4 Except to the extent permitted by law "CGA", APHL 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 APHL of these terms and conditions (alternatively APHL's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 26.5 APHL may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.
- 26.6 The Client cannot licence or assign without the written approval of APHL.
- 26.7 APHL may elect to subcontract out any part of the Works but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of APHL's sub-contractors without the authority of APHL.
- 26.8 The Client agrees that APHL may amend their general terms and conditions for subsequent future contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for APHL to provide Works to the Client.
- 26.9 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.
- 26.10 Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.