

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 **“FCL”** means Findlater Construction Limited, its successors and assigns.
- 1.3 **“Client”** means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting FCL 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 FCL 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 **“Worksite”** means the address nominated by the Client to which the Materials are to be supplied by FCL.
- 1.6 **“Intended Use”** means a product and the use thereof, for which the product is intended to be, or is reasonably likely to be, associated with the Works.
- 1.7 **“Non-Conforming Building Product”** means building products that are regarded as Non-Conforming for an Intended Use if, when associated with a building:
(a) the product is not, or will not be, safe; or
(b) does not, or will not, comply with the relevant regulatory provisions; or
(c) the product does not perform, or is not capable of performing, for the use to the standard it is represented to conform by or for a person in the chain of responsibility for the product.
- 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 FCL’s 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 FCL and the Client in accordance with clause 6 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 that the supply of Works on credit shall not take effect until the Client has completed a credit application with FCL and it has been approved with a credit limit established for the account.
- 2.5 In the event that the supply of Works requested exceeds the Client’s credit limit and/or the account exceeds the payment terms, FCL reserves the right to refuse delivery.
- 2.6 In the event that FCL is required to provide emergency or day Works (including but not limited to, oil spills, cyclone damage or blocked roads), that may require FCL’s staff to work outside normal business hours (including, but not limited to working, through lunch breaks, weekends and/or Public Holidays) then FCL reserves the right to charge the Client additional labour and/or travel costs (penalty rates will apply), unless otherwise agreed between FCL and the Client.
- 2.7 These terms and conditions may be meant to be read in conjunction with FCL’s Hire Form, and where the context so permits, the terms ‘Works’ or ‘Materials’ shall include any supply of Equipment, as defined therein.
- 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. Errors and Omissions

- 3.1 The Client acknowledges and accepts that FCL 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 FCL 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 FCL in respect of the Works.
- 3.2 In the event such an error and/or omission occurs in accordance with clause 3.1, and is not attributable to the negligence and/or wilful misconduct of FCL; the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.

4. Change in Control

- 4.1 The Client shall give FCL 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 number/s, change of trustees, or business practice). The Client shall be liable for any loss incurred by FCL as a result of the Client’s failure to comply with this clause.

5. Authorised Representatives

- 5.1 Unless otherwise limited as per clause 5.2 the Client agrees that should the Client introduce any third party to FCL as the Client’s duly authorised representative, that once introduced that person shall have the full authority of the Client to order any Materials or Works on the

- Client's behalf and/or to request any variation to the Works on the Client's behalf (such authority to continue until all requested Works have been completed or the Client otherwise notifies FCL in writing that said person is no longer the Client's duly authorised representative).
- 5.2 In the event that the Client's duly authorised representative as per clause 5.1 is to have only limited authority to act on the Client's behalf, then the Client must specifically and clearly advise FCL in writing of the parameters of the limited authority granted to their representative.
- 5.3 The Client specifically acknowledges and accepts that they will be solely liable to FCL for all additional costs incurred by FCL (including FCL's profit margin) in providing any Works, Materials or variation/s requested by the Client's duly authorised representative (subject always to the limitations imposed under clause 5.2 (if any)).

6. Price and Payment

- 6.1 At FCL's sole discretion the Price shall be either:
- (a) as indicated on invoices provided by FCL to the Client in respect of Works performed or Materials supplied; or
 - (b) FCL's quoted Price (subject to clause 6.2) which shall be binding upon FCL provided that the Client shall accept FCL's quotation in writing within thirty (30) days.
- 6.2 FCL 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, scope of Works 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, obscured building/Worksite defects, 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, lack of required utilities, remedial work required due to existing workmanship being of a poor quality or non-compliant to the building code, hard rock barriers below the surface, latent soil conditions, 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 of increases to FCL in the cost of labour or materials which are beyond FCL's control.
- 6.3 Variations will be charged for on the basis of FCL's quotation, and will be detailed in writing, and shown as variations on FCL's invoice. The Client shall be required to respond to any variation submitted by FCL within ten (10) working days. Failure to do so will entitle FCL 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.
- 6.4 Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by FCL, which may be:
- (a) for certain approved Clients, due twenty (20) days following the end of the month in which a statement is posted to the Client's address or address for notices;
 - (b) the date specified on any invoice or other form as being the date for payment; or
 - (c) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by FCL.
- 6.5 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 remedied. Any Retention Money applicable to this Contract is to be dealt with in accordance with Subpart 2A - sections 18(a) to 18(i) of the Construction Contracts Amendment Act 2015 and as such no Retention Money shall be use other than to remedy defects in the performance of FCL's obligations under the Contract.
- 6.6 Payment may be made by electronic/on-line banking, or by any other method as agreed to between the Client and FCL.
- 6.7 FCL may in its discretion allocate any payment received from the Client towards any invoice that FCL determines and may do so at the time of receipt or at any time afterwards. On any default by the Client FCL may re-allocate any payments previously received and allocated. In the absence of any payment allocation by FCL, payment will be deemed to be allocated in such manner as preserves the maximum value of FCL's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 6.8 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 FCL nor to withhold payment of any invoice because part of that invoice is in dispute, unless the request for payment by FCL is a claim made under the Construction Contracts Act 2002. Nothing in this clause 6.8 prevents the Client from the ability to dispute any invoice.
- 6.9 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to FCL an amount equal to any GST FCL must pay for any supply by FCL 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.

7. Provision of the Works

- 7.1 Subject to clause 7.2 it is FCL's responsibility to ensure that the Works start as soon as it is reasonably possible.
- 7.2 The Works' commencement date will be put back and the completion date extended by whatever time is reasonable in the event that FCL claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond FCL's 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 FCL that the Worksite is ready.
- 7.3 At FCL's sole discretion, the cost of delivery is included in the Price.
- 7.4 FCL 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.
- 7.5 Any time specified by FCL for delivery of the Works is an estimate only and FCL 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 FCL is unable to supply the Works as agreed solely

due to any action or inaction of the Client, then FCL 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.

8. Risk

- 8.1 If FCL retains ownership of the Materials under clause 13 then:
- (a) where FCL 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 FCL or FCL's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address); or
 - (b) where FCL is to both supply and install Materials then FCL 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.
- 8.2 Notwithstanding the provisions of clause 8.1 if the Client specifically requests FCL to leave Materials outside FCL's premises for collection or to deliver the Materials to an unattended 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.
- 8.3 The Client acknowledges that, under no circumstances, will FCL handle removal of asbestos product. In the event asbestos (or other hazardous material) is discovered on the Worksite:
- (a) FCL shall suspend the Works; and
 - (b) the Client shall be fully responsible for the resolution of any resulting problems; and
 - (c) any additional cost incurred by FCL shall be added to the Price in accordance with clause 6.2.
- 8.4 In the event that during the course of the Works FCL discovers any fossils, artefacts or any other remains of geological or archaeological interest are discovered FCL reserves the right to halt all Works, remove any of their equipment from the Worksite and immediately notify the Client. Unless the Client accepts and agrees that all additional costs that may be incurred by FCL as a result of any such delays (including, but not limited to, in the event FCL is unable to remove their equipment from the Worksite, etc.) shall be borne by the Client and shall be treated as a variation in accordance with clause 6.2.
- 8.5 The Client warrants that any structures/foundations to/in which the Materials are to be affixed/laid are able to withstand the installation of the Materials and that any electrical connections (including, but not limited to, meter boxes, main switches, circuit breakers, and electrical cable) are of suitable capacity to handle the Materials once installed. If, for any reason (including, but not limited to, the structure not being watertight, the discovery of asbestos, defective or unsafe wiring, dangerous access etc.) FCL reasonably forms the opinion that the Client's property is not safe for the installation of Materials to proceed then FCL shall be entitled to delay installation of the Materials (in accordance with the provisions of clause 7.2) until FCL is satisfied that it is safe for the installation to proceed. FCL 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.
- 8.6 FCL shall upon installation ensure that all Materials are to be installed in a manner that is fully compliant with industry standards. If, for any reason, the Client specifically requires the Materials to be installed in any way which goes against FCL's recommendations and/or falls below industry standards; a request detailing that requirement must be made in writing to FCL. Accordingly, FCL offers no warranty in regards to the aforementioned.
- 8.7 FCL 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, FCL accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 8.8 The Client acknowledges and accepts that Materials supplied may:
- (a) fade or change colour over time; and
 - (b) expand, contract or distort as a result of exposure to heat, cold, weather; and
 - (c) mark or stain if exposed to certain substances; and
 - (d) be damaged or disfigured by impact or scratching.
- 8.9 Where FCL is engaged to repair and/or replace a damaged surface that FCL is only responsible for that portion of Works. FCL does not at any stage accept any liability in respect of previous works carried out by any other third party that subsequently fail and found to be the source of the failure, the Client agrees to indemnify FCL against any loss or damage to the Works, or caused by the Works, or any part thereof howsoever arising.
- 8.10 The Client acknowledges that FCL is only responsible for parts that are replaced by FCL, and in the event that other parts or materials, subsequently fail, the Client agrees to indemnify FCL against any loss or damage to the Materials, or caused by the materials, or any part thereof howsoever arising.
- 8.11 FCL 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 FCL's and/or the manufacturers' recommendations.
- 8.12 The Client warrants that no other tradesmen interfere with any Works and/or Materials supplied under this Contract. FCL shall not be liable for any costs, damages or loss however arising from the Client's failure to comply with this clause.
- 8.13 FCL accepts no responsibility for:
- (a) any damage or defects in any Materials caused by movement and/or interference of the said Materials;
 - (b) painting, re-decorating, re-sealing, carpentry or any other Works required for the restoration or making good of any surface/area where any Works have been carried out.
- 8.14 The Client acknowledges that the presence of plant or tree root growth and/or other blockages may indicate damaged pipe work and therefore where FCL is requested to merely clear such blockages, FCL can offer no guarantee against reoccurrence or further damage. In the event of collapse during the pipe clearing process, FCL will immediately advise the Client of the same and shall provide the Client with an estimate for the full repair of the damaged pipe work.

9. Worksite Access and Condition

- 9.1 FCL is not responsible for the removal of rubbish from or clean-up of the building/construction Worksite/s. All rubbish generated by FCL 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.
- 9.2 It is the intention of FCL and agreed by the Client that:
- (a) the Client shall ensure that FCL 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). FCL 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 FCL;
 - (b) it is the Client's responsibility to provide FCL, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities; and
 - (c) the Client shall contact adjoining neighbours and gain their permission to remove any walls or fences on boundaries and unless otherwise agreed, it shall be the Client's responsibility to organise either temporary fencing and/or security guards to secure the Worksite during the performance of the Works by FCL and shall be liable for all costs associated in taking all reasonable precautions to protect against destruction or damage by way of vandalism or theft. Failure to comply with this clause 9.2(c) in the event that the Worksite is destroyed or damaged due to vandalism then the cost of repair or replacement shall be borne by the Client;
 - (d) if the Works are interrupted by the failure of the Client to adhere to the work schedule agreed to between FCL and the Client or if FCL is denied access to the Worksite on the agreed start date, then FCL reserves the right to charge the Client additional costs (including, but not limited to, any loss of profits, employee wages, mileage, etc.) which will be invoiced to the Client as a variation in accordance with clause 6.2.
- 9.3 It shall be the Client's responsibility (where applicable) to ensure that, prior to commencement of the Works:
- (a) all gas and electricity are cancelled and disconnected (from the main supply at the street); and
 - (b) a safety fence is erected around the perimeter of the Worksite to ensure public safety; and
 - (c) the Client will supply access to toilet, waste disposal amenities, eating and first aid facilities, if required; and
 - (d) the Client must advise FCL of the precise location of all underground services on the Worksite and clearly mark the same:
 - (i) 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;
 - (e) whilst FCL will take all care to avoid damage to any underground services the Client agrees to indemnify FCL 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 sub-clause 9.3(d)(i).

10. Materials, Documents and Works Supplied by the Client

- 10.1 The Client:
- (a) warrants that any documentation supplied for the Works and the content or methods therein are accurate and/or suitable to be used for the purpose for which the document/s were created;
 - (b) agrees that it is reasonable for FCL to rely on the documentation;
 - (c) agrees to supply FCL with as many copies of the documentation as FCL may reasonably need to perform the Works or to obtain any necessary approvals required for the Works.
- 10.2 FCL shall have no liability whatsoever in terms of the performance of, or suitability of, any materials or works supplied by either the Client or any third party employee of the Client.
- 10.3 In the event that the Client undertakes or employs any third party to undertake any works at the Worksite whilst FCL is undertaking Works then the Client must ensure that the Client and/or any third party so employed:
- (a) is appropriately licensed for the works being undertaken, and will provide evidence of the same upon request by FCL;
 - (b) does not interfere with the progress of Works by FCL;
 - (c) holds all relevant insurances as FCL is required to hold or as are otherwise required under this Contract;
 - (d) co-operates with all requests or directives of FCL in relation to the timeliness and co-ordination of works to be performed;
 - (e) co-operates as may be reasonably expected with all other persons on the Worksite;
 - (f) discusses any Worksite issues directly with FCL and not with any of FCL's employees.
- 10.4 In the event that the Client or the Client's third party employees do not comply with clauses 10.2 or 10.3, then FCL may require the non-compliant party to either leave and/or stay off the Worksite as FCL may so direct or suspend the carrying out of the Works as per clause 7.2.

11. Compliance with Laws

- 11.1 The Client and FCL 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, including any WorkSafe health and safety laws relating or any other relevant safety standards or legislation pertaining to the Works.
- 11.2 Both parties acknowledge and agree:
- (a) to comply with the Building Act 2004 (including any subsequent Amendments) in respect of all workmanship and building products to be supplied during the course of the Works; and
 - (b) that Works will be provided in accordance with any current relevant Australian/New Zealand Standards applicable.
- 11.3 Where the Client has supplied products for FCL 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 FCL's opinion, it is believed that the materials supplied are Non-Conforming products and will not conform with New Zealand regulations, then FCL shall be entitled, without prejudice, to halt the Works until the appropriate conforming products are sourced and all costs associated with such a change to the plans and design will be invoiced in accordance with clause 6.2.
- 11.4 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.

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- 11.5 Notwithstanding clause 11.1 and pursuant to the Health & Safety at Work Act 2015 (the “HSW Act”), FCL 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 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.
- 11.6 All work will be tested to ensure that it is electrically safe and is in accordance with the wiring rules and other relevant industry standards applying to the electrical installation under the Electrical Safety Regulations. All of the cabling work will comply with the Australian and New Zealand Wiring standards.

12. Insurance

- 12.1 FCL shall have public liability insurance of at least five million dollars (\$5m). It is the Client's responsibility to ensure that they are similarly insured.

13. Title

- 13.1 FCL and the Client agree that ownership of the Materials shall not pass until:
- (a) the Client has paid FCL all amounts owing to FCL; and
 - (b) the Client has met all of its other obligations to FCL.
- 13.2 Receipt by FCL 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.
- 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 FCL on request;
 - (b) the Client holds the benefit of the Client's insurance of the Materials on trust for FCL and must pay to FCL 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 FCL shall be sufficient evidence of FCL's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with FCL 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 FCL and must pay or deliver the proceeds to FCL 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 FCL and must sell, dispose of or return the resulting product to FCL as it so directs;
 - (f) unless the Materials have become fixtures the Client irrevocably authorises FCL to enter any premises where FCL believes the Materials are kept and recover possession of the Materials;
 - (g) FCL 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 FCL; and
 - (i) FCL 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 that have previously been supplied and that will be supplied in the future by FCL to the Client and the proceeds from such Materials.
- 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 FCL may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, FCL 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 or the proceeds of such Materials in favour of a third party without the prior written consent of FCL; and
 - (d) immediately advise FCL 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 FCL 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 FCL, 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 FCL 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 FCL 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, and the Client grants a security interest in all of its present and after-acquired property, 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). The terms of the charge and security interest are the terms of Memorandum 2018/4344 registered pursuant to s.209 of the Land Transfer Act 2017.

- 15.2 The Client indemnifies FCL from and against all FCL's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising FCL's rights under this clause.
- 15.3 The Client irrevocably appoints FCL and each director of FCL 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 Works on completion and/or Materials on delivery and shall within seven (7) days of delivery (time being of the essence) notify FCL of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford FCL 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 Works shall be presumed to be free from any defect or damage. For defective Works, which FCL has agreed in writing that the Client is entitled to reject, FCL's liability is limited to either (at FCL's discretion) rectifying or re-providing the Works.
- 16.2 Materials will not be accepted for return other than in accordance with 16.1 above.

17. Warranties

- 17.1 The warranty shall be the current warranty provided by the manufacturer of the Materials. FCL 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.

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 FCL to the Client.

19. Intellectual Property

- 19.1 Where FCL has designed, drawn, written plans or a schedule of Works, or created any products for the Client, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in FCL, and shall only be used by the Client at FCL's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of FCL.
- 19.2 The Client warrants that all designs, specifications or instructions given to FCL will not cause FCL to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify FCL against any action taken by a third party against FCL in respect of any such infringement.
- 19.3 The Client agrees that FCL may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which FCL has created for the Client, or any digital media of the Works which FCL has provided to 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 FCL'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 FCL any money the Client shall indemnify FCL from and against all costs and disbursements incurred by FCL in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, FCL's collection agency costs, and bank dishonour fees).
- 20.3 Further to any other rights or remedies FCL may have under this Contract, if a Client has made payment to FCL, 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 FCL 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 FCL's other remedies at law FCL shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to FCL shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to FCL becomes overdue, or in FCL'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 FCL;
 - (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 Without prejudice to any other rights or remedies FCL 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 by the Client of such notice/s) then FCL may suspend or terminate the supply of the Works. FCL will not be liable to the Client for any loss or damage the Client suffers because FCL has exercised its rights under this clause.
- 21.2 FCL may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are commenced by giving written notice to the Client. On giving such notice FCL shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to FCL for Works already performed. FCL shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 21.3 In the event that the Client cancels the delivery of Works the Client shall be liable for any and all loss incurred (whether direct or indirect) by FCL as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 21.4 Cancellation of orders for products made to the Client's specifications, or for non-stocklist 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 FCL is “**Personal Information**” as defined and referred to in clause 22.3 and therefore considered confidential. FCL acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Acts 1993 and 2020 (“the Act”) including Part II of the OECD Guidelines and as set out in the Act. FCL acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client’s Personal Information, held by FCL that may result in serious harm to the Client, FCL will notify the Client in accordance with the Act. Any release of such Personal Information must be in accordance with the Act 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 FCL in respect of Cookies where the Client utilises FCL’s website to make enquiries. FCL 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 FCL when FCL sends an email to the Client, so FCL may collect and review that information (“collectively Personal Information”)
- If the Client consents to FCL’s use of Cookies on FCL’s website and later wishes to withdraw that consent, the Client may manage and control FCL’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 FCL or FCL’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 (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 FCL from the Client directly or obtained by FCL 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 and 2020.
- 22.5 The Client shall have the right to request (by e-mail) from FCL, a copy of the Personal Information about the Client retained by FCL and the right to request that FCL correct any incorrect Personal Information.
- 22.6 FCL 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 FCL via e-mail. FCL 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 Privacy Commissioner at <http://www.privacy.org.nz>.

23. Suspension of Works

- 23.1 Where the Contract is subject to section 24A of the Construction Contracts Act 2002, the Client hereby expressly acknowledges that:
- (a) FCL 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 6.4 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 FCL by a particular date; and
 - (iv) FCL has given written notice to the Client of its intention to suspend the carrying out of construction work under the construction Contract.
 - (b) if FCL 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 FCL exercises the right to suspend work, the exercise of that right does not:
 - (i) affect any rights that would otherwise have been available to FCL 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 FCL suspending work under this provision;
 - (d) due to any act or omission by the Client, the Client effectively precludes FCL from continuing the Works or performing or complying with FCL’s obligations under this Contract, then without prejudice to FCL’s other rights and remedies, FCL 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 FCL as a result of such suspension and recommencement shall be payable by the Client as if they were a variation.

23.2 If pursuant to any right conferred by this Contract, FCL suspends the Works and the default that led to that suspension continues unremedied subject to clause 21.1 for at least ten (10) working days, FCL 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 in to the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not FCL may have notice of the Trust, the Client covenants with FCL 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 FCL (FCL 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 replacement(s).

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 courts of Blenheim, New Zealand.

26.4 Subject to the CGA, FCL 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 FCL of these terms and conditions (alternatively FCL's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).

26.5 FCL 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 FCL.

26.7 FCL 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 FCL's sub-contractors without the authority of FCL.

26.8 The Client agrees that FCL 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 FCL 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, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc, ("Force Majeure") or other event beyond the reasonable control of either party. This clause does not apply to a failure by the Client to make a payment to FCL.

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.