

PART B: GENERAL CONDITIONS – RESIDENTIAL LANDSCAPING CONTRACT

1 INTERPRETATION

- 1.1 Any ambiguity, uncertainty or inconsistency between the documents forming part of this Contract will be resolved using the following order of precedence:
- a The Special Conditions (if any) in Item 13 of the Schedule;
 - b These General Conditions;
 - c The description of the Landscape Works in Item 12 of the Schedule;
 - d The specifications annexed to the Contract;
 - e The plans and drawings annexed to the Contract; and
 - f Any other documents detailed in Item 14 of the Schedule.
- 1.2 In the Contract:
- a clause and other headings are for ease of reference only and do not affect the interpretation of the Contract;
 - b words importing the singular include the plural and vice versa; and
 - c a reference to:
 - i a party to this Contract includes that party's permitted assigns; and
 - ii "including" and similar words do not imply any limit.

2 DEFINITIONS

- 2.1 In this Contract, the following terms have the stated meaning:

Business Day: means a day that is not:

- a a Saturday or Sunday;
- b a public holiday, special holiday, or bank holiday in Western Australia.

Client's Representative: means the person identified in Item 2 of the Schedule (or other person notified to the Contractor as the Client's Representative) as the person authorised by the Client to communicate with the Contractor, including giving instructions as to variations.

Confidential Information: the terms and conditions of the Contract and any information that is not public knowledge and which is obtained from the other party in the course of, or in connection with, the Contract.

Contract: means and includes Section A - Schedule, Section B – General Conditions, all specifications, plans and drawings, and the Notice.

Contract Sum: means the total price of the Landscape Works stated in Item 4 of the Schedule as adjusted under this Contract.

Contractor's Representative: means the person identified in Item 1 of the Schedule (or any other person notified to the Client as the Contractor's Representative) as the person authorised by the Contractor to communicate with the Client, including giving or receiving instructions as to variations to the Landscape Works.

Corporations Act: means the *Corporations Act 2001 (Cth)*.

Date for Practical Completion: means the date stated in Item 8 of the Schedule or any extended date made pursuant to this Contract.

Date of Practical Completion: means the actual date certified as such in a certificate issued pursuant to clause 11.4 or 11.5.

Delay: means the causes of delay that can be identified and calculated by the Contractor as:

- a non-working days (weekends; public holidays; RDO's etc.);
- b poor weather allowance for the location of the Site;
- c other identified delays.

Deposit: means money paid or payable under the Contract and detailed in Item 5 of the Schedule as a deposit towards the Contract Sum.

Force Majeure: an event that is beyond the reasonable control of a party, excluding an event to the extent that it could have reasonably been avoided by a party taking reasonable steps or reasonable care.

GST: means any tax imposed by or through the GST Legislation on supply (without regard to any input tax credit).

GST Legislation: means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and any related tax imposition Act (whether imposing tax as a duty or excise or otherwise), and includes any legislation which is enacted to validate, recapture or recoup the tax imposed by any of such Acts.

Insolvent: means for a party to this Contract:

- a being in liquidation or provisional liquidation or under administration;
- b having a controller (as defined in the Corporations Act) or analogous person appointed to it or any of its property;

- c being taken under section 459F(1) of the Corporations Act to have failed to comply with a statutory demand;
- d being unable to pay its debts or is otherwise insolvent;
- e taking of any step that could result in the person becoming an insolvent under administration (as defined in section 9 of the Corporations Act);
- f entering into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors;
- g dying, ceasing to be of full legal capacity or otherwise becoming incapable of managing its own affairs for any reason;
- h presenting a declaration of intention under section 54A of the *Bankruptcy Act 1966 (Cth)*;
- i presentation of a petition for the making of a sequestration order against the estate of the person where the petition is not stayed, withdrawn or dismissed within 7 days or the person presents the petition against him or herself; or
- j any analogous event to those set out in (a)-(i) under the laws of any applicable jurisdiction.

Intellectual Property Rights: includes copyright and all rights conferred under statute, common law or equity relating to inventions (including patents), registered or unregistered trade-marks and designs, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity. Intellectual Property has a consistent meaning. Intellectual Property owned by the supplier is that supplier's Confidential Information.

Item: means an item listed in the Schedule.

Key Details: the specific details set out in each Item in the Schedule.

Landscape Works: means the works described in Item 12 of the Schedule to be constructed in accordance with this Contract, including variations provided for by the Contract, and which by the Contract is to be handed over to the Client upon Practical Completion.

Latent Condition: means any physical condition on, under or around the Site which differs materially from the physical conditions reasonably expected by the Contractor at the time the Contract was entered into, or the Contractor using reasonable skill and diligence becomes aware that the Site will or may not support the Landscape Works.

Lender: means:

- a the lender nominated in Item 10 of the Schedule;

- b if no lender is nominated, any Australian bank or other financial institution which makes loans.

Local Authority: means the council, shire or body detailed in Item 3 of the Schedule and having jurisdiction over the Site.

Loan Approval Date: means the date stated in Item 10 of the Schedule by which the Client must provide the Contractor with written evidence in accordance with clause 5.2.

Notice: means the Notice for the Homeowner given under the *Home Building Contracts Act 1991 (WA)*.

PPSA: means the *Personal Property and Security Act 2009 (Cth)*.

PPSA Register: has the meaning given in the PPSA.

Practical Completion: means that stage when the Landscape Works are completed in accordance with the requirements of this Contract apart from minor defects or omissions identified by the parties.

Practical Completion Stage: means the stage of the Landscape Works in which Practical Completion will be achieved in accordance with this Contract.

Progress Payment: means payments required towards to Contract Sum as detailed in Item 11 of the Schedule.

Relevant Criteria: for materials means:

- a generally accepted practices or standards applied in the residential building industry for the materials used in the Landscape Works;
- b specifications, instructions or recommendations of manufacturers or suppliers of the materials used in the Landscape Works; and
- c fit for the specified purpose or result.

Schedule: means Part A to this Contract.

Security Interest: means a security interest as defined under the PPSA.

Site: means the Site described in Item 3 of the Schedule.

Special Conditions: means the special conditions to this Contract (if any) detailed in Item 13 of the Schedule.

Start Date: means the date detailed in Item 6 of the Schedule.

Substantial Client Breach: includes, but is not limited to:

- a failing to produce evidence of the Client's capacity to pay the Contract Sum in compliance with clause 5.2 of this Contract, or

- of the Client's title to the Site in compliance with clause 6.1 of this Contract;
- b failing to pay any money due and owing to the Contractor within 5 Business Days of the receipt of a valid claim and tax invoice;
- c substantially or persistently obstructing the Contractor in the performance of the Work under this Contract; and
- d failing to provide access to the Site in accordance with clause 6.3 and 6.7.

Substantial Contractor Breach: includes, but is not limited to:

- a failing to perform the Work under this Contract in an appropriate and satisfactory way and with reasonable care and skill;
- b failing to provide materials which comply with the Relevant Criteria;
- c unreasonably failing to replace or remedy defective work or materials;
- d unreasonably failing to perform the Work under this Contract diligently or unreasonably and without cause delaying, suspending or failing to maintain reasonable progress;
- e failing to effect or maintain any insurance required by this Contract; and
- f failing to hold a current and appropriate vocational licence or having the necessary authorities to complete the Landscape Works.

Total Construction Period: means the estimated construction period detailed in Item 7 of the Schedule.

Work under this Contract: means all work necessary to undertake and complete the Landscape Works in accordance with the plans, drawings and specifications and this Contract and, unless expressly excluded, includes:

- a provision of any specialist plant and equipment;
- b subject to clause 6.6, work to clear the Site for commencing the Landscape Works;
- c set out for the Landscape Works and survey if necessary; and
- d provision of clean up and disposal of waste materials from the Site.

3 WORK UNDER THIS CONTRACT

3.1 In addition to the other obligations of the Contract:

- a the Contractor must undertake and complete the Work under this Contract:

- i in accordance with the Contract, including any requirement set out in the Key Details, and all applicable laws;
- ii comply with all relevant statutes, regulations, by-laws, and orders and directions made thereunder;
- iii in accordance with all relevant consents, approvals, codes, standards and specifications that the Works under this Contract are required to comply with under any law;
- iv by providing all necessary labour, plant, equipment, machinery, transport and logistics;
- v by utilising materials that meet the Relevant Criteria;
- vi exercising reasonable care, skill and diligence; and
- vii using suitably skilled, experienced and qualified staff or sub-contractors as required; and
- b the Client must promptly make decisions (including giving approvals) and provide the Contractor with all information reasonably necessary to provide the services to complete the Work under this Contract.

4 APPROVALS

4.1 The party named in Item 9 of the Schedule (or if no party is named, the Contractor) must, within 10 Business Days after the Client has provided written evidence satisfactory to the Contractor of the Client's capacity to pay the Contract Sum under clause 5.2 and any written evidence required under clause 6.1, lodge all plans and other documentation necessary for permission, consent or approval required for commencement of the Landscape Works with the Local Authority and any other body having relevant jurisdiction in respect of the Site and the Landscape Works.

4.2 The party named in Item 9 of the Schedule (or if no party is named, the Contractor) must do all things as may be reasonably necessary to obtain all permissions, consents or approvals required for the commencement of the Landscape Work under this Contract.

5 FINANCE APPROVAL AND/OR CAPACITY TO SATISFY CONTRACT SUM

5.1 The Client acknowledges having had the opportunity to receive all the independent legal and financial advice required by the Client prior to entering into this Contract.

- 5.2 If the Contract is subject to finance approval then by the Loan Approval Date the Client must give the Contractor written confirmation from the Lender, or other written evidence, satisfactory to the Contractor of the Client's capacity to pay the Contract Sum. If the Contract is not subject to finance, the Client must, within 10 Business Days after the date of this Contract, provide the Contractor with written evidence satisfactory to the Contractor of the Client's capacity to pay the Contract Sum.
- 5.3 If the Contract is subject to finance approval and the Client fails to provide satisfactory evidence of financial capacity required under clause 5.1, the Contract is at an end.
- 5.4 If the Contract is ended under clause 5.3, the Contractor must immediately refund to the Client any Deposit or other money paid by the Client to the Contractor less any administration charges, fees, costs and expenses reasonably and properly incurred by the Contractor in relation to the Contract.
- 5.5 At any time after commencement of Work under this Contract, the Client must, upon reasonable written request from the Contractor, provide the Contractor with evidence satisfactory to the Contractor of the Client's continuing capacity to pay the unpaid balance of the Contract Sum.

6 THE SITE

- 6.1 Within 10 Business Days after the date of this Contract, the Client must give the Contractor written evidence satisfactory to the Contractor of the Client's ownership and title to the Site and of the boundaries and position of the Site.
- 6.2 If the Client is not the owner of the Site, the Client must give the Contractor satisfactory evidence that the Client is authorised by the owner to instruct and cause the Work under this Contract to be carried out.
- 6.3 The Client grants to the Contractor a licence to enter and occupy the Site for the purpose of performing the Landscape Works.
- 6.4 The Contractor may occupy the Site from the Start Date until the Contractor hands over the Landscape Works to the Client upon the Date of Practical Completion. During that time, the Contractor will be entitled to free and uninterrupted access to the Site for the purposes of carrying out the Work under this Contract.
- 6.5 Subject to clause 14.7, the rights granted by the Client to the Contractor under clause 6.3 and 6.4 do not convey to the Contractor an interest in the land comprising the Site.
- 6.6 The Client must (except where otherwise agreed) ensure that the Site will be cleared of all rubbish and debris prior to the Start Date and provide the Contractor with access to power and water. Where the Site is handed over to the Contractor following construction of a building or other improvements, the Client will use its reasonable endeavours to ensure that the builder leaves the Site at 100mm below finished paving level.
- 6.7 The Client is responsible for providing and maintaining safe access to the Site for any vehicles or machinery reasonably necessary for the carrying out the Work under this Contract. If the Site becomes inaccessible due to any reason beyond the control of the Contractor, the reasonable cost incurred by the Contractor in obtaining workable alternative access is to be added to the Contract Sum.
- 6.8 Subject to clause 6.12 and 6.13, the Contractor must permit the Client or any person authorised by the Client to have reasonable access to the Site, at their own risk, under the Contractor's supervision.
- 6.9 Unless otherwise agreed in writing, the Client must arrange for the searching of records to determine the existence and position of pipes, cables and other utilities or services on or about the Site. For the purposes of this clause 6.9, the term utilities and services will include legal survey marks which at any time have been set in or on the ground for the purpose of survey of the Site.
- 6.10 The Contractor will be responsible for physically locating the position of utilities and services and must arrange with any relevant authority for any necessary exploratory work, location, protection, isolation, off-setting, reinstatement or alteration required for the purpose of the Landscape Works.
- 6.11 Where a utility or service is not indicated or is not substantially in the position indicated, any additional work in physically locating the actual position or altering, protecting, off-setting, or reinstating the utility or service must be paid for by the Client.
- 6.12 The Client must not interfere with, or allow any other person authorised by the Client to interfere with, the performance of the Landscape Works when at the Site. If the Client or any person authorised by the Client causes such an interference and:
- a the interference causes the Contractor to incur additional costs (including costs arising from or in relation to delay); and
 - b the Contractor gives the Client written notice of the additional costs within 10 Business Days after becoming aware of the interference,
- then the Client is liable to the Contractor for the additional costs.
- 6.13 The Client must ensure that if other contractors engaged by the Client are to be allowed access to the Site to perform other works, that it will only be with the prior approval of the Contractor (which may be withheld in the Contractor's absolute discretion). Subject to the Contractor's approval, the Client must ensure that all additional contractors are co-ordinated to allow maximum continuity of the Landscape Works by the Contractor and cause as little disruption or delay as possible in the relevant circumstances.

7 COMMENCEMENT AND PERFORMANCE OF WORKS

- 7.1 The Contractor must use reasonable endeavours to start the Work under this Contract at the Site on or before the Start Date.
- 7.2 If no Start Date is stated the Contractor will do everything reasonably possible for the Contractor to ensure that the Works under this Contract start as soon as reasonably possible after execution of this Contract.
- 7.3 Either party may give a written notice to the other party terminating the Contract if, without fault on the part of the party giving the notice, any permission, consent or approval necessary for the commencement of the Works under this Contract has not been issued within 40 Business Days after the date of this Contract or such later date as may be extended by the written agreement of the parties.
- 7.4 If the Contract is terminated pursuant to Condition 7.2, the Contractor's only entitlement to payment from the Client is for the reasonable costs (including administration charges, fees, charges and expenses) incurred for any work properly carried out by the Contractor prior to the date of termination and which has not been the subject of a previous payment.
- 7.5 There is no obligation on the Contractor to issue and provide a commencement notice to the Client. If the Contractor does provide a commencement notice, the Client must acknowledge in writing receipt of the commencement notice within 2 Business Days after the date of issue.
- 7.6 The Contractor must diligently carry out the Work under this Contract and must not, except as permitted by this Contract, delay, suspend, or fail to maintain reasonable progress in the performance of the Landscape Works.
- 7.7 Where the Contractor encounters unforeseen difficulties in respect of the Site, including such matters as inaccessibility to the Site beyond the control of the Contractor, care, protection and retention orders for flora issued by a Local Authority, Latent Condition including hidden rock, underground services, waste fill, rubble, contamination, toxic materials, or biological pathogens (which could not have previously been detected by the Contractor by visual inspection of the Site) the Contractor will immediately consult with the Client and:
- a the parties may negotiate or determine the extent of additional work required (including investigating and testing) and any resultant amendments to the Contract Sum directly arising from the additional costs and expenses to be incurred by the Contractor; or
 - b either party may immediately terminate this Contract by written notice, whereupon the Client must pay to the Contractor the value of all Landscape Works completed at such date

and the cost of any materials pre-ordered by the Contractor for the Work under this Contract.

- 7.8 Where the Contractor becomes aware that this Contract, including plans, specifications or drawings contains any discrepancy or error, the Contractor must notify the Client and the Client must within 5 Business Days give the Contractor necessary instructions, directions or, where plans and drawings have not been prepared by the Contractor, new plans or drawings to enable the Contractor to proceed with the Work under this Contract. If the Client fails to give the necessary instructions, directions or new plans and drawings, the Contractor, acting reasonably, may determine a resolution and proceed with the Landscape Works. The Contractor will be entitled to recover a reasonable sum (including for profit and additional costs) as a variation.
- 7.9 Without prejudice to the Contractor's rights under this Contract or at law, the Contractor will be entitled to suspend the carrying out of the Work under this Contract if the Client commits a Substantial Client Breach of this Contract. If the Contractor suspends works under this clause 7.7:
- a the Contractor must immediately give written notice to the Client of the suspension, and details of the Substantial Client Breach;
 - b if the Contractor wishes to claim an extension of time for delay as a result of the suspension because of the Substantial Client Breach, the Contractor may claim an extension of time in respect of the Date for Practical Completion under clause 10.2;
 - c when the Client has remedied the Substantial Client Breach it must give written notice to the Contractor and the Contractor must promptly recommence the Work under this Contract within 10 Business Days after receiving the notice from the Client; and
 - d the Date for Practical Completion will be automatically extended by a period of time the Works under this Contract are suspended.
- 7.8 On completion of the Works under this Contract the Contractor must remove and dispose from the Site all rubbish, surplus materials, excavated material, unwanted vegetation and demolished or dismantled structures.

8 CARE AND PROTECTION OF THE LANDSCAPE WORKS

- 8.1 The Contractor is responsible for the care and protection of the Landscape Works from the Start Date until the Contractor hands over the Site to the Client on the Date of Practical Completion.
- 8.2 The Contractor must promptly make good, and will indemnify the Client in respect to, any loss or damage to the Site to the extent caused or contributed to by any act, neglect or default of the

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Contractor or the Contractor's employees, agents or subcontractors and must also make good any such loss or damage which is or which ought to have been the subject of any insurance required to be held by the Contractor under this Contract.

9 VARIATIONS

- 9.1 The Work under this Contract may be varied by way of an increase, decrease or substitution of the Work under this Contract agreed between the Contractor and the Client, provided that the details of the variation are put in writing before any work commences and an appropriate form of variation document is used, signed by both of the parties and initialled as necessary.
- 9.2 Either party may give the other written notice requesting a variation of the Work under this Contract.
- 9.3 If the Client requests a variation of the Work under this Contract, the Contractor must give to the Client the Contractor's calculation of the change to the Contract Sum as a consequence of the proposed variation.
- 9.4 The Client must strictly comply with clause 22.2.
- 9.5 If the Contractor has requested the variation, the Contractor is only entitled to additional payment if the variation was necessary because of circumstances that could not have been reasonably foreseen by the Contractor when the Contract was entered into by the parties.
- 9.6 The Contractor will not be obliged to carry out any requested variation until the Contractor and the Client have mutually agreed to the variation and recorded the details of the variation in writing.
- 9.7 If a variation is required by reason of the lawful requirements of the relevant Local Authority or other body having jurisdiction in respect of the Landscape Works or the Site and the matter could not reasonably have been foreseen by a competent Contractor at the date this Contract was entered into, the Contractor must request a variation to the Work under this Contract accordingly, and the Client must not unreasonably withhold or delay its consent to the variation.
- 9.8 If a Latent Condition is encountered, then subject to clause 7.6, the Contractor is entitled to recover a reasonable sum (including for profit and additional costs) as a variation:
- a for any work performed (including for labour, machinery, plant, equipment and materials used); and
 - b additional costs incurred (including for Delay or disruption for which the Contractor is entitled to an extension of time for the Date for Practical Completion),

arising as a direct result of or in relation to the Latent Condition.

- 9.9 The Contractor will not be obliged to carry out any work or incur any additional costs until the Contractor and the Client have mutually agreed to the variation and put the details of the variation in writing. The Client must not unreasonably withhold or delay its consent to the variation.
- 9.10 In relation to clause 9.8, the Client's consent is deemed to be reasonably withheld if the Client withholds consent because the relevant variation will cause the Contract Sum to increase by more than 15%.
- 9.11 If the Contractor is entitled to seek additional payment for a variation, but the Client does not provide its consent to the variation (including if it reasonably withholds its consent in accordance with clause 9.8), the Contractor will not be required to carry out the variation.

10 TIME FOR PRACTICAL COMPLETION

- 10.1 The Contractor must achieve Practical Completion of the Landscape Works by the Date for Practical Completion detailed or calculated in accordance with Item 8 of the Schedule or any extended date under this clause 10.
- 10.2 The Contractor may only claim and is entitled to a reasonable extension of the Date for Practical Completion if:
- a there is a need for an extension of time because the Contractor is delayed in achieving Practical Completion and the delay causing the need for the extension of time:
 - i results from a Force Majeure event not reasonably foreseeable and beyond the reasonable control of the Contractor; or
 - ii caused by an act or omission of the Client or the Client's Representative;
 - iii results from the suspension of work because of a Substantial Client Breach;
 - iv caused by other contractors engaged by the Client;
 - v caused by a variation in respect of which the requirements of clause 10.6 have been satisfied;
 - vi caused by other identifiable delays, including but not limited to:
 - an error, omission, discrepancy or ambiguity in the Contract documents;
 - any Latent Condition;

- an industrial dispute;
 - any dispute with an adjoining neighbour or local resident;
 - delay in supply of materials;
 - delay in obtaining any approval or permit required under this Contract;
 - any breach of this Contract by the Client;
 - poor weather and the effect of poor weather delays in excess of the allowance for poor weather calculated by the Contractor.
- b the claim for an extension of time is made by the Contractor to the Client in writing;
- c the claim for an extension of time is given to the Client within 10 Business Days after the Contractor becoming aware of the cause and extent of the delay or when the Contractor reasonably ought to have become aware of the cause and extent of the delay; and
- d the Client (acting reasonably) approves the claim for an extension of time in writing.
- 10.3 The Contractor will make an allowance in calculating the Total Contract Period and the Date for Practical Completion for the number of days of Delay. In respect of each of the causes of Delay, the Contractor will not be entitled to an extension of time for that specific cause of Delay, until the Contractor has been delayed by the number of days for which the Contractor has allowed for that cause in the Total Contract Period.
- 10.4 Both the Contractor and the Client (if applicable) must take all reasonable steps to minimise any Delay to the Landscape Works.
- 10.5 When assessing whether or not a Delay was not a Force Majeure event and reasonably foreseeable or beyond the reasonable control of the Contractor, regard must be had to the allowance which has been made by the Contractor for Delay.
- 10.6 The requirements referred to in clause 10.2 a (v) are:
- a the Contractor has given the Client a copy of the variation in writing before the first of the following happens:
 - i 5 Business Days have elapsed from the day the Contractor and the Client agree to the variation;
 - ii any work the subject of the variation starts;
 - b the Contractor has not started to carry out any work the subject of the variation before the Client agrees to the variation in writing.
- 10.7 The Client must within 10 Business Days after receiving the Contractor's claim for an extension of time, in good faith assess and respond to the claim in writing, including either:
- a approving the extension of time in whole or in part or rejecting the claim; or
 - b if the claim is disputed and not approved in whole or part, giving reasons why the whole or part of the claim is not approved or why the claim is rejected (as the case may be).
- 10.8 If the Client does not respond to the extension of time claim in writing, the claim will be deemed to be disputed by the Client.

11 ACTUAL PRACTICAL COMPLETION

- 11.1 The Contractor must give the Client at least 2 Business Days prior written notice of the date upon which the Contractor anticipates that the Landscape Works will reach Practical Completion.
- 11.2 On or prior to the date specified in that notice as the anticipated date on which the Landscape Works will reach Practical Completion, the Contractor must give the Client satisfactory evidence that all relevant inspections and approvals that may be required by any body having relevant jurisdiction in respect of the Landscape Works have been satisfactorily completed.
- 11.3 On the date specified in that notice as the anticipated date on which the Landscape Works will reach Practical Completion, the Contractor and the Client or the Client's Representative will inspect the Landscape Works.
- 11.4 If the Client or the Client's Representative is satisfied that the Landscape Works have reached Practical Completion, and the Contractor has complied with clause 11.2, the Contractor must give the Client a form of certificate of practical completion or similar document stating the date of inspection as the Date of Practical Completion and listing any minor defects or omissions in the Landscape Works agreed by the parties which the Contractor must rectify or complete within a reasonable period after the Date of Practical Completion. The Client must sign the certificate of practical completion.
- 11.5 If the Client reasonably considers that the Landscape Works have not reached Practical Completion the Client must give the Contractor written notice of those matters which are required to be completed for the Landscape Works to reach Practical Completion. The Contractor must promptly carry out such matters as may be necessary for the Landscape Works to reach Practical Completion. Once the Contractor has carried out those works, the Contractor will give the Client a form of certificate of practical completion or similar document stating that date as the Date of

Practical Completion, and listing any minor defects or omissions in the Landscape Works which the Contractor must rectify or complete within a reasonable period after the Date of Practical Completion, and the Client must sign the certificate of practical completion.

- 11.6 The issuing of a certificate of practical completion does not constitute approval of any Work under this Contract, a waiver of the Client's rights, nor does it prejudice any claim by the Client in respect of the Work under this Contract.
- 11.7 When the Landscape Works have reached Practical Completion and the Contractor has satisfied all of its obligations under clause 11.2 and has submitted a certificate of practical completion under either of clause 11.4 or 11.6 the Client must immediately pay the Contractor any progress claim for the Practical Completion Stage as adjusted under clause 14, if applicable.
- 11.8 The Contractor is not required to hand over the Landscape Works to the Client until the Client has made payment in accordance with clause 11.7. If the Client takes possession of the Landscape Works, or any part of the Landscape Works, before it is entitled to under this Contract, the Landscape Works are accordingly deemed to have reached Practical Completion, and any progress claim for the Practical Completion Stage becomes immediately payable by the Client, despite any non-compliance by the Contractor with clauses 11.1 to 11.7.

12 MAINTENANCE

- 12.1 The Client is solely responsible for all maintenance of the Landscape Works from the Date of Practical Completion (other than for minor defects to be rectified by the Contractor), including the watering and general care of all plants, turf, vegetation, or perishable horticultural items and any and all maintenance required to ensure that the Landscape Works do not pose a danger to persons and are compliant with any relevant laws.
- 12.2 The Contractor will not be responsible for any damage to the Landscape Works arising out of or in connection with:
- a any failure of the Client to comply with clause 12.1;
 - b the improper use, negligence, use other than as intended, or use contrary to manufacturers specifications or instructions;
 - c alterations made by persons other than the Contractor;
 - d defects in design prepared by a person other than the Contractor,

and the Client will indemnify and hold harmless the Contractor in respect of any loss, damage or claim arising out of or in connection with any failure of the Client to comply with clause 12.1.

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- 12.3 The Client acknowledges that the respective manufacturers warranties will apply to materials used in the Landscape Works.

13 DEFECTS

- 13.1 The Contractor must rectify and make good defects or omissions in the Work under this Contract which become apparent within 4 months after the Date of Practical Completion.
- 13.2 If there are any defects or omissions, the Client must give the Contractor written notice to make good the defects or omissions within the 4 month period and must give the Contractor reasonable access to the Site for that purpose.
- 13.3 Subject to reasonable access being provided by the Client and subject to clause 12.3, the Contractor must, within 20 Business Days after the notice being given by the Client, rectify and make good all defects notified to the Contractor under clause 13.2 during usual working hours.

14 CONTRACT SUM, GST AND PAYMENT

- 14.1 The parties acknowledge and agree that all pricing, consideration and amounts otherwise payable under this Contract (including under any variation pursuant to clause 9) have been or will be calculated on a GST exclusive basis.
- 14.2 If GST is imposed on any supply under this Contract, the recipient must pay to the supplier and amount equal to the GST payable on the taxable supply.
- 14.3 The amount referred to in clause 14.2 must be paid in addition to, and at the same time as, payment of the consideration for the taxable supply is required to be made under this Contract.
- 14.4 All duties, taxes and charges (other than GST) imposed or levied in Australia or overseas in connection with the supply of the goods and services under this Contract are payable by the Client.
- 14.5 The Client must pay the Contractor the Contract Sum for the Contract Works calculated and adjusted as provided by this Contract in accordance with the following provisions:
- a the Client must pay the Contractor the Deposit immediately upon the signing of this Contract.
 - b the Contractor is entitled to claim a Progress Payment when the Contractor has achieved completion of each of the stages set out in Item 11 of the Schedule or in any separate document setting out the payment stages, which claim will consist of:
 - i a percentage of the Contract Sum or other Progress Payment applicable to the relevant stage;

- ii any other amount then payable to the Contractor in respect of variations pursuant to and in accordance with clause 9.
 - c a progress claim must provide the necessary particulars to identify the requisite details of the claim.
 - d except in regard to the Progress Payment for the Practical Completion Stage payable in accordance with clause 11.7, the Client must pay the Contractor the relevant Progress Payment, or so much of the relevant claim for Progress Payment as is not disputed by the Client, within 5 Business Days after receipt of the relevant claim.
 - e if the Client in good faith disputes the relevant claim for Progress Payment or any part of it, the Client must, within 5 Business Days after receipt of the relevant claim, give to the Contractor an appropriate detailed written notice of dispute stating the reasons for disputing the claim or part of it.
 - f if the Client does not give notice of a dispute in accordance with clause 14.5(e), liability for the relevant progress claim will be deemed to be admitted by the Client.
 - g the Client will not be entitled to any set-off or deduction of amounts payable to the Contractor under this Contract for defects or omissions or for any other reason.
- 14.6 The Client must pay the Contractor interest on overdue payments at the rate of interest per annum equal to 3% above the Overdraft Reference Rate (or its replacement) published by the Commonwealth Bank of Australia from time to time. Interest will be calculated from the due date to the date of actual payment (both inclusive).
- 14.7 The Client acknowledges and agrees that as security for the due and punctual payment of the Contract Sum, the Contractor has an interest in the Site, and the Client:
 - a charges all of its right, title and interest of whatsoever nature (including as beneficial owner or as trustee of any trust) to and in the Site and all other land owned/partly owned or in the future acquired by the Client (either solely or jointly) with due payment to the Contractor of the Contract Sum and all amounts that may become due to the Contractor in relation to this Contract;
 - b warrants that it has obtained or will obtain promptly all necessary consents (including the consent of any prior mortgagee or chargee of the Site or other land) to the granting of the security by the Client to the Contractor;
 - c will, if requested to do so, promptly deliver an executed mortgage or other instrument of security in registrable form to secure the charge provided by this clause 14.7;
- d irrevocably consents to the Contractor as equitable chargee lodging an absolute caveat over all or part of the Site or any other land to secure the Contractor's interest in the Site or that land;
- e agrees to do all things and sign all documents necessary to enable the Contractor to enforce its interest in the Site or any other land;
- f will be liable for legal costs (on a full indemnity basis) and any duty or registration fees that are payable in relation to the lodgement, withdrawal, discharge or release of any caveat or mortgage lodged under this clause 14.7; and
- g acknowledges that the Contractor will not be required to remove any caveat or mortgage over the Site or any other land until the Contract Sum and all amounts that may become due to the Contractor in relation to this Contract have been paid in full and all of the Client's obligations have been satisfied.
- 14.8 Ownership of any goods, materials or equipment provided by the Contractor under this Contract or which are to or do form part of the Landscape Works remains with the Contractor until they have been paid for in full by the Client.
- 14.9 Upon signing this Contract the Client agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a Security Interest in all goods, materials or equipment provided by the Contractor under this Contract or which are to or do form part of the Landscape Works. To secure payment of all monies that may become payable to the Contractor from the Client, the Client agrees to grant the Contractor an irrevocable right to register a Security Interest in such goods and materials and the Client's after acquired property on the PPSA Register.
- 14.10 The Client undertakes, if requested to do so by the Contractor to:
 - a promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) that the Contractor may reasonably require to:
 - i register a financing statement or financing change statement in relation to a security interest on the PPSA Register;
 - ii register any other document required to be registered by the PPSA; or
 - iii correct a defect in a statement referred to in paragraph (i) above.
 - b indemnify, and upon demand reimburse, the Contractor for all expenses incurred in

registering a financing statement or financing change statement on the PPSA Register or releasing any items of goods and materials charged thereby;

- c not register a financing change statement in respect of a Security Interest without the prior written consent of the Contractor;
- d not register, or permit to be registered, a financing statement of a financing change statement in relation to the items of goods and materials charged thereby in favour of a third party without the prior written consent of the Contractor.

14.11 The Contractor and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by the terms of this Contract.

14.12 The Client waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d), and 132(4) of the PPSA. The Client waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA. Subject to any express provisions to the contrary nothing in this Contract is intended to have the effect of contracting out of any of the provisions of the PPSA.

15 INSURANCE

15.1 The Contractor must, at its own cost, effect and maintain during the course of this Contract the following insurances:

- a all insurance required to comply with the statutory requirements for workers' compensation cover;
- b Contract Works and Public Liability Insurances with a reputable and financially sound insurer which names or includes as an insured, the Client and the Contractor, for their respective rights and interests upon usual and reasonable terms;
- c Any other insurance cover a prudent contractor would maintain in relation to the undertaking of the Work under this Contract.

15.2 Contract Works Insurance must provide indemnity for the physical loss, destruction or damage to the Landscape Works or to materials or goods upon or adjacent to the Site, to the extent of the Contract Sum.

15.3 Public Liability Insurance must be for at least the amount of \$10,000,000 and must:

- a cover the liabilities of the Contractor and the Client to third parties in respect of personal injury, death or damage to property arising out of or in connection with the Work under this Contract; and
- b include cross-liability provisions by which the insurer waives all rights of subrogation or action

which the insurer may have against any of the persons comprising the insured and by which each person comprising the insured is deemed to be the subject of a separate policy of insurance.

15.4 Prior to commencement of the Work under this Contract, or upon request by the Client, the Contractor must provide to the Client written evidence that the Contract Works and Public Liability Insurances required under this clause 15 are current.

15.5 The Contractor's obligation to maintain the insurance policies required under clause 15.1 ceases on the Date of Practical Completion, or the date the Client takes possession of the Site, whichever is earlier.

15.6 As far as is permitted by law, the Contractor is not liable for, and does not provide an indemnity to the Client (or its agents, employees or any person for which the Client is responsible) in respect of any personal injury, death, property damage or other loss if that personal injury, death, property damage or other loss was caused or contributed to by an act or omission of the Client (or its agents, employees or any person for whom the Client is responsible). The Client must indemnify the Contractor in respect of any such personal injury, death, property damage or other loss.

15.7 The Client must maintain insurance cover for the Site and any improvements that a prudent land owner would maintain and prior to the Start Date must notify the relevant insurer of the Work under this Contract to be undertaken on the Site.

16 ASSIGNMENT AND SUBCONTRACTING

16.1 The Contractor must not assign this Contract or the Work under this Contract without the prior written consent of the Client.

16.2 The Contractor may sub-contract parts of the Work under this Contract to specialist services and appropriately licensed tradespersons, but the Contractor remains liable to the Client for the Work under this Contract.

16.3 If the Site is sold, transferred or in any way disposed of by the Client prior to payment of the Contract Sum, the Client will hold the proceeds of such sale or disposition on trust for the Contractor to the extent of any monies owing to the Contractor under this Contract.

17 TERMINATION

17.1 If either party is in Substantial Breach of this Contract, the party not in breach may give the other party a written request to remedy that breach.

17.2 If the Substantial Breach is not remedied within 10 Business Days after receipt of the written request, the party not in breach may terminate this Contract by giving written notice to that effect.

17.3 The right to terminate under this Condition is in addition to any other powers, rights or remedies the terminating party may have. Termination does not prejudice or restrict any claim or demand which a party has or, but for the termination of the Contract, would have had against the other party for or in respect of any breach of the Contract occurring before the date of termination.

18 INSOLVENT PARTY

18.1 Notwithstanding clause 17, should a party become Insolvent then the other party may, by giving a written notice, immediately terminate this Contract.

19 DISPUTE RESOLUTION

19.1 The Client and Contractor must act in good faith in relation to all matters under this Contract and use their best endeavours to resolve any dispute arising under or in connection with this Contract before commencing any legal proceedings.

19.2 A party must provide a written notice to the other party setting out the particulars of the dispute (“**Dispute Notice**”) and attempt to resolve the dispute by meeting with the other party within 5 Business Days of the date of service of the Dispute Notice.

19.3 In the event the dispute is not settled within 20 Business Days following the meeting of the parties, the parties will submit the dispute to arbitration in Perth, where:

- a the arbitration will be administered by the Australian Disputes Centre (ADC) and conducted in accordance with the ADC Rules for Domestic Arbitration operating at the time the dispute is referred to arbitration;
- b the terms of the ADC Rules are hereby incorporated into this Contract;
- c this clause will survive termination of this Contract.

19.4 Where a dispute has arisen under or in connection with this Contract, the parties must continue to comply with their obligations under this Contract notwithstanding the existence of the dispute.

19.5 The requirements of this clause 19 are without prejudice to the parties rights under the *Home Building Contracts Act 1991 (WA)* nor does it affect either party's right to seek urgent interlocutory and/or injunctive relief.

20 INTELLECTUAL PROPERTY

20.1 A party supplying plans and drawings for use in the Work under this Contract warrants that those plans may be used and indemnifies the other party against any action by any person claiming ownership or Intellectual Property Rights in respect of the plans and drawings.

20.2 Where plans and drawings are created by the Contractor, the Client agrees that as between the Client and the Contractor, the Contractor has copyright in those plans, but the Client has the right to cause the completion of the Landscape Works in accordance with those plans and drawings.

20.3 The following Intellectual Property (including any modification, enhancement or derivative work of that Intellectual Property) remains the property of the Contractor, regardless of its use in the Landscape Works:

- a Intellectual Property that existed prior to the date of the Contract; and
- b Intellectual Property that was developed independently of the Contract.

21 CONFIDENTIALITY

21.1 Each party agrees that, unless it has the prior written consent of the other party, it will:

- a keep confidential at all times the Confidential Information of the other party; and
- b ensure that any personnel or professional advisor to whom a party discloses the other party's Confidential Information are aware of, and comply with, the provisions of this clause 21.

21.2 Except to the extent that a party has ongoing rights to use Confidential Information, a party must, at the request of the other party following the Date of Practical Completion, promptly return to the other party or destroy all Confidential Information of the other party in the recipient party's possession or control.

21.3 Despite the other provisions of this clause 21, the Client irrevocably consents to the Contractor taking photographs and recording images of the Work under this Contract and the completed Landscape Works upon Practical Completion and, provided that the address of the Site is not disclosed, authorises the Contractor to publish or use in any manner and for any purpose all such photographs and images in any publication, and for advertising, promotion or marketing generally, including on the Contractor's own website. The Contractor will own all copyright in such photographs and images.

22 PARTY COMMUNICATIONS

22.1 The Client or the Client's Representative must communicate and deal with, and may only give directions to, the Contractor personally or to the Contractor's Representative.

22.2 The Client or the Client's Representative must not give directions to the Contractor's employees or sub-contractors including, without limitation, requesting a variation to any part of the Works under this Contract

22.3 Where communications or directions are in writing they must be clear, legible and in English.

23 NOTICES

23.1 Any notice under this Contract must, unless otherwise stated, be in writing and sent to the party to whom the notice is to be given at the address stated in the Schedule, or such other address as is subsequently advised in writing, by one of the following methods:

- a delivered to the other party by hand; or
- b delivered by pre-paid express post to the address detailed in the Schedule; or
- c sent by email to the address detailed in the Schedule; or
- d sent by facsimile to the facsimile number detailed in the Schedule.

23.2 Any notice given or sent in accordance with this clause 23 is treated as having been duly given and received:

- a in the case of delivery by hand, when it is delivered;
- b in the case of delivery by pre-paid express post, on the second Business Day after posting;
- c in the case of delivery by email, if sent prior to 4.00 pm on any given Business Day, on that Business Day, provided that no intimation has been received from the receiving party or their electronic mail system that the email has not been received;
- d in the case of delivery by facsimile, if sent prior to 4.00 pm on any given Business Day, at the time when a valid transmission report is received by the sender;
- e in the case of delivery by email or facsimile, if sent after 4.00 pm on any given Business Day, then on the next Business Day following transmission.

24 LIABILITY

24.1 **Maximum liability:** The maximum aggregate liability of the Contractor under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty or otherwise, must not exceed the Contract Sum payable by the Client under the Contract properly provided in accordance with the Contract.

24.2 **Unrecoverable loss:** Except for the Client's liability to pay the Contract Sum, neither party is liable to the other for any loss of profit, business, revenue, and/or goodwill, or other indirect, consequential or incidental loss or damage arising under or in connection with the Contract.

24.3 **Unlimited liability:**

The copyright of these General Conditions is the property of the Landscape Industries Association of Western Australia (Inc.) ("LIAWA") and neither the form or any part of it may be used or reproduced without the consent of LIAWA.

a Clauses 24.1 and 24.2 do not apply to limit the Contractor's liability for:

- i personal injury or death;
- ii fraud or wilful misconduct; or
- iii breach of clause 21.

b Clause 24.2 does not apply to limit the Client's liability for those matters stated in clause 24.3 a i - iii.

24.4 **No liability for the other's failure:** Neither party will be responsible, liable, or held to be in breach of the Contract for any failure to perform its obligations under the Contract or otherwise, to the extent that such failure is directly attributable to the other party failing to comply with its obligations under the Contract, or to the negligence or misconduct of the other party or its personnel.

24.5 **Mitigation:** Each party must take reasonable steps to mitigate any loss or damage, cost or expense it may suffer or incur arising out of anything done or not done by the other party under or in connection with the Contract.

24.6 **Statutory Liability:**

- a The Client agrees that other than for any express representations and warranties provided by the Contractor in this Contract, to the extent permitted by Law, no representation has been made and no warranty is or has been expressly or impliedly given by or on behalf of the Contractor in respect of any matter relating to this Contract.
- b Nothing in this Contract excludes, restricts, modifies or limits the application of any provision of any Law where to do so would:
 - i contravene that Law; or
 - ii cause any part of this Contract to be void.

25 GENERAL PROVISIONS

25.1 **Force Majeure:** Subject to clause 10.2, neither party is liable to the other for any failure to perform its obligations under the Contract to the extent caused by Force Majeure, provided that the affected party:

- a immediately notifies the other party and provides full information about the Force Majeure;
- b uses best endeavours to overcome the Force Majeure; and
- c continues to perform its obligations as far as practicable in the relevant circumstances.

25.2 **Waiver:** To waive a right under the Contract, that waiver must be in writing and signed by the waiving party.

- 25.3 **Independent contractor:** The Contractor is an independent contractor of the Client. No other relationship (e.g. joint venture, agency, trust or partnership) exists under the Contract.
- 25.4 **Costs:** Each party is responsible for its own legal and other costs, charges and expenses in relation to the preparation, negotiation and completion of this Contract and any other document contemplated by this Contract.
- 25.5 **Severability:** Any illegality, unenforceability or invalidity of a provision of the Contract does not affect the legality, enforceability or validity of the remaining provisions of the Contract.
- 25.6 **Variation:** Any variation to the Contract must be in writing and signed by both parties.
- 25.7 **Entire Agreement:** The Contract sets out everything agreed by the parties relating to the Work under this Contract and supersedes and cancels anything discussed, exchanged or agreed prior to the date of this Contract, including an initial quotation (unless specifically incorporated by reference in and annexure to this Contract). The parties have not relied on any representation, warranty or agreement relating to the subject matter of this Contract that is not expressly set out in this Contract, and no such representation, warranty or agreement has any effect from the date of this Contract.
- 25.8 **No Merger:** Insofar as any obligation under this Contract remains to be complied with after the Date of Practical Completion, that obligation and the relevant provisions relating to that obligation will survive and continue to be enforceable despite Practical Completion having been achieved.
- 25.9 **Law:** The Contract is governed by, and must be interpreted in accordance with, the laws of Western Australia. Each party submits to the non-exclusive jurisdiction of the Courts of Western Australia in relation to any dispute connected with the Contract.
- 25.10 **Counterparts:** This Contract may be signed in counterparts, each of which constitutes an original and all of which constitute the same agreement. A party may enter the Contract by signing and sending (including by facsimile or email) a counterpart copy to the other party.

