

**1. Definitions and interpretation**

**Active** means Active Tree Services Pty Ltd (ACN 002 919 299) and any related body corporate of that entity.

**Agreement** means these terms and conditions of engagement.

**Authority** means any public or other authority which has jurisdiction in relation to the Works.

**Business Day** has the same meaning as that term under the SOP Act in the state which the Works are being carried out.

**Client** means the entity or person identified in the Quotation and any related body corporate of that entity.

**Client's Representative** means the Client's representative who will give directions and carry out all its functions under this Agreement as the agent of the Client.

**Complete or Completion** means the stage when the Works are, in Active's opinion, completed in accordance with this Agreement, subject to minor Defects.

**Defect** means an error, omission, deficiency or discrepancy in the Works, or a failure of the Works to comply with the Specifications.

**Fee** means the fee for the Works identified in the Quotation, excluding any applicable GST, as adjusted in accordance with this Agreement.

**GST** has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**IP Right** means any copyright, trade mark, moral right, patent, registered design, confidential information or trade secret.

**Payment Schedule** has the meaning given to a:

- (a) "payment schedule" under the SOP Act relevant to New South Wales, Victoria, South Australia, Queensland and the Australian Capital Territory; or
- (b) "notice of dispute" under the SOP Act relevant to Western Australia,

as applicable.

**Purpose** means the purpose for the Works as identified in the Quotation.

**Site** means the land upon which the Works will be carried out.

**SOP Act** means, if the Works are being carried out in:

- (a) New South Wales, *Building and Construction Industry Security of Payment Act 1999* (NSW);
- (b) Victoria, *Building and Construction Industry Security of Payment Act 2002* (Vic);
- (c) South Australia, *Building and Construction Industry Security of Payment Act 2009* (SA);
- (d) Tasmania, *Building and Construction Industry Security of Payment Act 2009* (Tas);
- (e) Queensland, *Building Industry Fairness (Security of Payment) Act 2017* (Qld); or
- (f) Northern Territory, *Construction Contracts (Security of Payments) Regulations 2005* (NT).

**Quotation** means the quote for the Works to be carried out by Active to the Client.

**Specifications** means the Works specifications as identified in the Quotation.

**WHS** means work health and safety in the context of the WHS Laws.

**WHS Laws** means all legislation (including any legislative requirement) applicable to work health and safety, dangerous goods and electrical safety and any directions on safety or notices issued by any relevant authority or any Code of Practice or Compliance Code appropriate or relevant to the Works and means, if the Site is located in:

- (a) New South Wales, the Work Health and Safety Act 2011 (NSW) and Work Health and Safety Regulations 2011 (NSW);
- (b) Queensland, the Work Health and Safety Act 2011 (QLD) and Work Health and Safety Regulation 2011 (QLD);
- (c) Victoria, the Occupational Health and Safety Act 2004 (Vic), Occupational Health and Safety Regulations 2007 (Vic) and Workplace Injury Rehabilitation and Compensation Act 2013 (Vic);
- (d) South Australia, the Work Health and Safety Act 2012 (SA) and Work Health and Safety Regulations 2012 (SA);
- (e) Western Australia, the Occupational Health and Safety Act 1984 (WA) and Occupational Health and Safety Regulations 1996 (WA); and
- (f) Australian Capital Territory, the Work Health and Safety Act 2011 (ACT) and Work Health and Safety Regulation 2011 (ACT).

**Works** means the works offered to be performed by Active as stated in the Quotation, and any variation under this Agreement.

**2. Terms of Engagement**

2.1 Unless otherwise stated in the Quotation, the Quotation is valid for a period of 30 days.

2.2 Unless otherwise stated in the Quotation:

- (a) the Works do not include removal of grubbed stumps; and
- (b) grubbed stumps will be left at the Site for removal by the Client.

2.3 Active agrees to carry out the Works in accordance with the terms identified in the Quotation and the Agreement.

2.4 In consideration for Active carrying out and completing the Works, the Client will pay the Fee.

2.5 The Client may accept the Quotation and this Agreement by email or by instructing Active to commence performance of the Works.

2.6 In carrying out the Works, Active will exercise the degree of skill, care and diligence generally employed by professionals carrying out works similar to the Works.

2.7 Information contained in the Quotation is confidential and not to be disclosed to any third party or used for any purpose other than in connection with the Works without the prior written consent of Active.

2.8 Quotations are valid for existing Site conditions at the time of assessment and the assumptions stated are not exclusive. Any works carried out at a Site prior to commencement of the

Works or other changes to circumstances and conditions under which the Quotation was provided permit Active to vary or void the Quotation at Active's sole discretion.

2.9 In providing the Quotation, Active assumes the Site complies with all applicable laws and the Client holds and maintains all permits, approvals and consents required to enable Active to access the Site and carry out and complete the Works.

2.10 If Active is or reasonably considers it may be delayed in carrying out or completing the Works due to a matter beyond the control of either party (including a pandemic or natural disaster), the Client must extend the time by which the Works (or part thereof) must be completed by Active, by a period of time that reflects that delay.

**3. Acceptance of Services**

3.1 The Client will be deemed to have accepted the Works within 14 days of completion of the Works, unless clause 3.2 applies.

3.2 If the Client identifies any Defect in the Works, it must within no later than 14 days after completion of the Works, notify Active of the Defect and identify what is required (acting reasonably) to rectify the Defect.

3.3 If the Client fails to strictly comply with clause 3.2, it will have no claim against Active for the Defect.

**4. WHS**

4.1 Active will employ reasonable endeavours to ensure its personnel, when accessing the Site, or carrying out the Works at the Site, comply with the reasonable directions of the Client or its appointed WHS officer at the Site, to the extent those directions pertain to WHS at the Site.

4.2 Active is in no way responsible, and accepts no liability, for WHS at the Site, other than in respect of its own personnel.

4.3 The Client must provide all required inductions under the WHS Laws to Active's personnel at the Site and is at all times the 'principal contractor' for the purpose of the WHS Laws at the Site (or the person responsible for WHS).

**5. Client-supplied documents**

5.1 The Works are informed by the information and documentation provided by the Client prior to the date of the Quotation.

5.2 The Client acknowledges and agrees that in carrying out and completing the Works, Active relies upon the information and documentation provided by the Client.

5.3 Active is not responsible or liable for the information provided by any third parties engaged by the Client and relied upon by Active in carrying out and completing the Works.

5.4 Active is not responsible for any error, deficiency, Defect or inconsistency in the Works or the Specifications arising from Active's reliance upon the information or documentation provided by the Client prior to or after the date of this Agreement, whether or not those documents or information are included or referenced in the Quotation.

**6. Client's Representative**

6.1 The Client must notify Active at the time of commencement of the Works, of the name and contact details of the Client's Representative.

6.2 All communication between Active and the Client will be directed to the Client's Representative. Any notice or other

communication issued to the Client's Representative will be deemed to have been received by the Client.

6.3 The Client agrees that the Client's Representative has the authority to act and issue all approvals and consents on behalf of the Client in all matters concerning the Works.

**7. Access to Site**

7.1 The Client must provide Active with sufficient access to the Site to enable Active to carry out and complete the Works.

7.2 If the Client fails to provide sufficient access to the Site to Active, the additional costs incurred by Active as a result of the inadequate possession will be added to the Fee.

7.3 The Client must ensure that there is adequate power, water and other utilities reasonably required by Active at the Site to enable Active to carry out and complete the Works. Any specific utilities required by Active will be identified in the Quotation.

7.4 The Client must notify Active of any safety requirements, regulations and sources of danger that are present or may be encountered at the Site. If Active is not notified of these requirements, regulations or sources of danger prior to providing the Quotation, the additional costs incurred by Active in carrying out and completing the Works will be added to the Fee.

7.5 Active will in no way be liable or responsible for damage to underground pipes or services unless they have been clearly identified to Active by the Client.

**8. Change to the Works or Fee**

8.1 If the conditions of the Site change or are altered by the Client or any third parties between the date of the Quotation and the date(s) of inspection of or access to the Site by Active, it must notify Active in writing as soon as possible.

8.2 If the Client becomes aware of any change that may affect the Works, including in respect of conditions of the Site or the timing for the provision of the Works, it must notify Active in writing as soon as possible.

8.3 The Client acknowledges and agrees that any change to the Site or nature or timing of the Works may result in a change to the Fee.

8.4 Any additional costs that have been or are likely to be incurred by Active as a result of any change to the Works will be added to the Fee.

8.5 Any change to the Fee will be calculated in accordance with the pre-disclosed rates of charge included in the Quotation (as updated and notified to the Client from time to time).

**9. Additional fees and expenses**

9.1 Unless otherwise stated in the Quotation, all authority fees and charges are excluded from the Fee.

9.2 Active may, with the prior agreement of the Client (which must not be unreasonably withheld), engage other specialist consultants or third parties which Active considers appropriate to carry out and complete the Works.

9.3 If Active engages a specialist consultant or third party under clause 9.2 the Client agrees that it will be solely liable for the payment of the fees associated with that engagement. To the extent any of those fees are paid directly by Active, the Client must reimburse Active for that payment.

9.4 If Active is delayed in carrying out and completing, or prevented from carrying out and completing, the Works by the

Client or a third party under the direction or control of the Client, the additional costs incurred by Active will be charged on an hourly rates basis and added to the Fee.

9.5 Any expenses incurred by Active will be added to the Fee.

## 10. Payment

10.1 Unless otherwise stated in the Quotation, Active will issue invoices to the Client:

(a) on a monthly basis for all work done up to and including the date of the invoice; or

(b) upon completion of the Works,

as identified in the Quotation (**Payment Claim**). The amount of the Fee claimed in each Payment Claim will be:

(c) if the Fee is a lump sum, based upon a percentage of completion of the Works as at that date; or

(d) if the Fee for the Works is being charged on the basis of hourly rates, details of the personnel who carried out the work, the number of hours of work carried out, the associated hourly rate, a list of tasks undertaken, and a statement of any additional expenses under clause 9.

10.2 Payment Claims are due and payable:

(a) if the SOP Act applies to the Works and the Works are being carried out in New South Wales, 15 business days after the date of issue; or

(b) if the SOP Act does not apply to the Works or if the Works are being carried out in a State or Territory other than New South Wales, 30 business days from the end of the month in which the Payment Claim is issued.

10.3 If the Client has any objection to a Payment Claim issued by Active, the Client must notify Active in writing within the time required under the relevant SOP Act.

10.4 Any objection made by the Client under clause 10.3 does not relieve it of its obligation to make payment of the Payment Claim.

10.5 For each day after the due date for payment up until payment is received into Active's nominated account, interest will be applied to the amount due for payment at the rate of Active's nominated bank's overdraft lending rate plus 3% per annum and applied to the next Payment Claim. If there are no further payment claims, Active may issue a further claim for payment of interest and the Client must make payment of that invoice within 7 days of receipt of same.

10.6 If the Client fails to make payment of a Payment Claim (or an invoice for payment of interest under clause 10.5), the Client acknowledges and agrees:

(a) Active will be entitled to suspend carrying out the Works until payment is made; and

(b) it will be liable to make payment of all costs on an indemnity basis (including legal costs, collection agents' fees and disbursements) incurred by Active in suspending the Works and taking any action whatsoever to recover the debt.

10.7 For the avoidance of doubt, all invoices or claims for payment issued are pursuant to and treated as being a claim for payment under and pursuant to the SOP Act.

10.8 If the Client suspends the Works within 12 hours of a scheduled Site inspection or commencement of the Works, a fee, being the amount that is 50% of the Fee will be a debt due payable by the Client to Active.

10.9 Payment may be made by way of:

(a) credit or debit card via the phone, by calling +61 2 9979 0400 or +61 2 9979 0428;

(b) by post sending the payment slip at the bottom of an invoice to PO Box 1332, Mona Vale NSW 2103; or

(c) by way of electronic funds transfer to Active:

ABN: 56 002 919 229

Email: [accountspayable@active.com.au](mailto:accountspayable@active.com.au)

Account Name: Active Tree Services

BSB: 062 205

Account Number: 10346997

Payment reference: Invoice number

## 11. Retention of Documents

Until payment of the Fee in full is made by the Client, Active:

(a) retains all right, title, possession and ownership in; and

(b) may withhold in its sole and absolute discretion,

all documentation (including Reports) prepared by Active in carrying out and completing the Works or otherwise.

## 12. Intellectual Property

12.1 All IP Rights in any documentation, including drawings, calculations, specifications, sketches, Reports and other intellectual property used or prepared by Active in carrying out and completing the Works shall remain the property of Active.

12.2 Upon receipt of payment of the Fee in full by the Client, Active grants to the Client a licence to use the documentation prepared by Active for the Purpose.

12.3 The Client shall not distribute or disseminate any information or documentation provided or disclosed to the Client by Active to any third parties without the prior written consent of Active.

## 13. Insurance

13.1 During the carrying out of the Works Active will hold and maintain:

(a) contractor works insurance in respect of the Works, up to the aggregate value of the Fee;

(b) workers compensation and employer's liability insurance in accordance with applicable awards or legislation; and

(c) any other insurance required at Law.

## 14. Risk and Liability

14.1 The total liability of Active arising under or in connection with this Agreement, whether in contract, tort (including negligence), under any statute, common law, equity or otherwise is limited (to the extent permitted at law) to the lesser of:

(a) the cost of reperforming the Works (not exceeding the Fee); or

(b) the total amount of the Fee paid as at the date on which the claim arose.

14.2 For the avoidance of doubt, Active will not be liable to the Client for any loss of use, loss of production, loss of profit,

- loss of revenue, loss of rent, loss of business, loss of contract or loss of anticipated saving or increase in operating costs arising out of or in connection with this Agreement whether under statute, the law of contract, tort, equity, or otherwise.
- 14.3 The Client indemnifies Active against:
- (a) a breach or non-performance of any of the obligations or warranties of the Client under this Agreement whether express or implied;
  - (b) any negligent, wrongful or unlawful act or omission of the Client;
  - (c) any personal injury or death to any person or damage to property caused or contributed to by the Client;
  - (d) any claims in respect of the Client's right to have the Works carried out at the Site;
- 14.4 loss, costs or damage suffered by Active as a result of Active or its personnel accessing the Site.
- 15. Disputes**
- 15.1 If any dispute or difference arises between the Client and Active under or in relation to this Agreement, the party claiming in respect of the dispute must issue a notice of dispute to the other party identifying the dispute and the amount (if any) claimed in relation to that dispute (**Notice of Dispute**).
- 15.2 Within 10 business days of receipt the Notice of Dispute, appropriate representatives of the parties must meet and endeavour to resolve the dispute by way of negotiation.
- 15.3 Neither party may commence proceedings in respect of a dispute:
- (a) until the negotiation under clause 15.2 has taken place; and
  - (b) only if the dispute remains unresolved for a period of 15 business days following that negotiation.
- 16. Termination**
- 16.1 Without limiting any other rights under this Agreement or at law, Active may suspend carrying out and completing the Works and provide written notice of breach if:
- (a) the Client fails to make payment of a Payment Claim or invoice by the due date;
  - (b) the Client fails to provide adequate information to allow Active to carry out and complete the Works;
  - (c) the Client changes the scope of the Works and the parties cannot agree to an appropriate increase to the Fee; or
  - (d) the Client's instructions are contrary to the Agreement or are, in the reasonable opinion of Active, in breach of any law, statute or regulation,
- and Active may terminate the Agreement and cease carrying out the Works if the Client has not remedied that breach or the reasons for suspension within fourteen (14) days written notice.
- 16.2 The Client may only terminate the Agreement:
- (a) in circumstances where Active is in breach of an essential term of the Agreement, provided the Client has provided written notice of that breach and its intention to terminate for that breach and Active has failed to show reasonable cause why that right should not be exercised within fourteen (14) days; or
  - (b) for its convenience, provided it gives Active sixty (60) days' notice of its intention to terminate.
- 16.3 Upon termination of this Agreement for either reason in clause 16.2, clause 16.4 will apply. If the Client terminates for the reasons in clause 16.2(b), then in addition to Active's entitlement under clause 16.4, Active will also be entitled to be paid:
- (a) its costs associated with the termination; and
  - (b) the amount that is 10% of the unpaid Fee, as compensation for Active's loss of profit,
- up to a maximum amount of the balance of the Fee unpaid as at the date of termination.
- 16.4 Upon termination of this Agreement by Active or the Client, Active may render a Payment Claim for the Works carried out up to and including the date of termination, which will be payable by the Client in accordance with clause 10.
- 16.5 Irrespective of whether the Agreement is terminated by the Client or Active, Active has no obligation to provide, and may in its absolute discretion retain, any documentation or information until payment of any Payment Claim has been paid in full by the Client.
- 16.6 Active is not liable and accepts no responsibility for costs, damages, collection agent's fees or loss associated with the suspension or termination of the Works under this clause 16 or otherwise.
- 17. General**
- 17.1 Each party warrants that it has the capacity to enter into and perform the obligations under this Agreement.
- 17.2 The Agreement cannot be varied unless agreed in writing by Active.
- 17.3 This Agreement is to be read together with the Quotation. If there is any conflict between the Quotation and this Agreement, the Quotation will prevail to the extent of the conflict.
- 17.4 This Agreement constitutes the whole agreement between the parties and supersedes all previous agreements between the parties relating to its subject matter. The Client acknowledges that, in entering into this Agreement it has not relied on and will have no right or remedy against Active in respect of, any statement, representation, misrepresentation, assurance or warranty other than as expressly set out in this Agreement.
- 17.5 If any clause or part of a clause in this Agreement is found by a Court of competent jurisdiction to be illegal, unenforceable or invalid, that clause or part thereof, shall be severed from this Agreement and the remainder of this Agreement shall not be affected.
- 17.6 This Agreement is governed by the laws, and each party irrevocably submits to the jurisdiction of the State or Territory in which the Site is located.
- 17.7 The person entering into this Agreement on behalf of the Client warrants that it has the relevant authority to bind the Client to the terms of this Agreement.