

Dig-It Contracting Pty Ltd – Terms & Conditions of Trade

1. **Definitions**
 - 1.1 "Dig-It" shall mean Dig-It Contracting Pty Ltd its successors and assigns or any person acting on behalf of and with the authority of Dig-It Contracting Pty Ltd.
 - 1.2 "Client" shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by Dig-It to the Client.
 - 1.3 "Guarantor" means that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
 - 1.4 "Works" shall mean Works supplied by Dig-It to the Client (and where the context so permits shall include any supply of Materials as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by Dig-It to the Client.
 - 1.5 "Materials" shall mean all Materials supplied by Dig-It to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Works as defined above).
 - 1.6 "Equipment" shall mean Equipment supplied on hire by Dig-It to the Client (and where the context so permits shall include any supply of Works) and is as described on the invoices, quotation, authority to hire, or any other work authorisation forms as provided by Dig-It to the Client.
 - 1.7 "Price" shall mean the price payable for the Works as agreed between Dig-It and the Client in accordance with clause 4 of this contract.
2. **The Commonwealth Trade Practices Act 1974 ("TPA") and Fair Trading Acts ("FTA")**
 - 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.
3. **Acceptance**
 - 3.1 Any instructions received by Dig-It from the Client for the supply of Works and/or the Client's acceptance of Works supplied by Dig-It shall constitute acceptance of the terms and conditions contained herein.
 - 3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
 - 3.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of Dig-It.
 - 3.4 The Client shall give Dig-It not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any loss incurred by Dig-It as a result of the Client's failure to comply with this clause.
 - 3.5 Works are supplied by Dig-It only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
4. **Price And Payment**
 - 4.1 At Dig-It's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by Dig-It to the Client in respect of Works supplied; or
 - (b) Dig-It's quoted Price (subject to clause 4.2) which shall be binding upon Dig-It provided that the Client shall accept Dig-It's quotation in writing within Thirty (30) days.
 - 4.2 Dig-It reserves the right to change the Price in the event of a variation to Dig-It's quotation, including but not limited to, variations as a result of a rise in the cost of Materials and/or labour. Any variation from the plan of scheduled Works or specifications (including, but not limited to, any variation as a result of additional Works required due to hidden or unidentifiable difficulties beyond the reasonable control of Dig-It such as hard rock barriers below the surface or iron reinforcing rods in concrete) will be detailed in writing and charged for on the basis of Dig-It's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
 - 4.3 At Dig-It's sole discretion a non-refundable deposit may be required.
 - 4.4 At Dig-It's sole discretion:
 - (a) payment shall be due on delivery of the Equipment; or
 - (b) payment shall be due on completion of the Works; or
 - (c) payment shall be due before delivery of the Equipment; or
 - (d) payment shall be due before commencement of the Works; or
 - (e) payment for approved Clients shall be made by instalments in accordance with Dig-It's payment schedule.
 - 4.5 Where no payment schedule has been specified Dig-It may submit a detailed payment claim at intervals not less than one (1) month for Works performed up to the end of each month. The value of Works so performed shall include the reasonable value of authorised variations and the value of materials delivered to the site but not yet installed.
 - 4.6 Time for payment for the Works shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due twenty-one (21) days following the date of the invoice.
 - 4.7 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Client and Dig-It.
 - 4.8 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.
5. **Delivery**
 - 5.1 At Dig-It's sole discretion delivery shall take place when the Client takes possession of the Equipment at the Client's nominated address (in the event that the Works are delivered by Dig-It or Dig-It's nominated carrier).
 - 5.2 At Dig-It's sole discretion the costs of delivery are:
 - (a) included in the Price; or
 - (b) in addition to the Price; or
 - (c) for the Client's account.
 - 5.3 The Client shall make all arrangements necessary to take delivery of the Equipment whenever it is tendered for delivery. In the event that the Client is unable to take delivery of the Equipment as arranged then Dig-It shall be entitled to charge a reasonable fee for redelivery.
 - 5.4 Delivery to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
 - 5.5 The Client shall take delivery of Materials tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:
 - (a) such discrepancy in quantity shall not exceed five percent (5%); and
 - (b) the Price shall be adjusted pro rata to the discrepancy.
 - 5.6 The failure of Dig-It to deliver shall not entitle either party to treat this contract as repudiated.
 - 5.7 Dig-It shall not be liable for any loss or damage whatsoever due to failure by Dig-It to deliver (either partially or in full) promptly or at all, where due to circumstances beyond the control of Dig-It.
6. **Equipment Hire**
 - 6.1 The Equipment shall at all times remain the property of Dig-It and is returnable on demand by Dig-It. In the event that the Equipment is not returned to Dig-It in the condition in which it was delivered Dig-It retains the right to charge the Price of repair or replacement of the Equipment.
 - 6.2 The Client shall:
 - (a) keep the Equipment in their own possession and control and shall not assign the benefit of the Equipment nor be entitled to lien over the Equipment.
 - (b) not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment.
 - (c) keep the Equipment, complete with all parts and accessories, clean and in good order as delivered, and shall comply with any maintenance schedule as advised by Dig-It to the Client.
 - 6.3 The Client accepts full responsibility for the safekeeping of the Equipment and the Client agrees to insure, or self insure, Dig-It's interest in the Equipment and agrees to indemnify Dig-It against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property or persons arising out of the use of the Equipment. Further the Client will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.
7. **Risk**
 - 7.1 If Dig-It retains ownership of the Materials nonetheless, all risk for the Materials passes to the Client on delivery.
 - 7.2 If any of the Materials are damaged or destroyed following delivery but prior to ownership passing to the Client, Dig-It is entitled to receive all insurance proceeds payable for the Materials. The production of these terms and conditions by Dig-It is sufficient evidence of Dig-It's rights to receive the insurance proceeds without the need for any person dealing with Dig-It to make further enquiries.
8. **Underground Locations**
 - 8.1 Prior to Dig-It commencing the Works the Client must advise Dig-It of the precise location of all underground services on the site and clearly mark the same. The underground mains & 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, Telstra cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
 - 8.2 Whilst Dig-It will take all care to avoid damage to any underground services the Client agrees to indemnify Dig-It in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 8.1.
9. **Wet Hire**
 - 9.1 In the event of "wet" hire of the Equipment the operator of the Equipment remains an employee of Dig-It and operates the Equipment in accordance with the Client's instructions. As such Dig-It shall not be liable for any actions of the operator in following the Client's instructions.
10. **Title**
 - 10.1 Dig-It and the Client agree that ownership of the Materials shall not pass until:
 - (a) the Client has paid Dig-It all amounts owing for the particular Materials; and
 - (b) the Client has met all other obligations due by the Client to Dig-It in respect of all contracts between Dig-It and the Client.
 - 10.2 Receipt by Dig-It of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then Dig-It's ownership or rights in respect of the Materials shall continue.
- 10.3 It is further agreed that:
 - (a) where practicable the Materials shall be kept separate and identifiable until Dig-It shall have received payment and all other obligations of the Client are met; and
 - (b) until such time as ownership of the Materials shall pass from Dig-It to the Client Dig-It may give notice in writing to the Client to return the Materials or any of them to Dig-It. Upon such notice the rights of the Client to obtain ownership or any other interest in the Materials shall cease; and
 - (c) Dig-It shall have the right of stopping the Materials in transit whether or not delivery has been made; and
 - (d) if the Client fails to return the Materials to Dig-It then Dig-It or Dig-It's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Materials are situated and take possession of the Materials; and
 - (e) the Client is only a bailee of the Materials and until such time as Dig-It has received payment in full for the Materials then the Client shall hold any proceeds from the sale or disposal of the Materials, up to and including the amount the Client owes to Dig-It for the Materials, on trust for Dig-It; and
 - (f) the Client shall not deal with the money of Dig-It in any way which may be adverse to Dig-It; and
 - (g) the Client shall not charge the Materials in any way nor grant nor otherwise give any interest in the Materials while they remain the property of Dig-It; and
 - (h) Dig-It can issue proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials may not have passed to the Client; and
 - (i) until such time that ownership in the Materials passes to the Client, if the Materials are converted into other products, the parties agree that Dig-It will be the owner of the end products.
11. **Defects**
 - 11.1 The Client shall inspect the Works on completion and shall within seven (7) days of completion (time being of the essence) notify Dig-It of any alleged defect, shortage in quantity, damage or failure to comply with the description, quote or invoice. The Client shall afford Dig-It an opportunity to inspect the Works within a reasonable time following completion if the Client believes the Works 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 Dig-It has agreed in writing that the Client is entitled to reject, Dig-It's liability is limited to either (at Dig-It's discretion) replacing the Materials or repairing the Works except where the Client has acquired Works as a consumer within the meaning of the Trade Practices Act 1974 (Cwth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Works, or repair of the Works, or replacement of the Materials.
12. **Warranty**
 - 12.1 To the extent permitted by statute, no warranty is given by Dig-It as to the quality or suitability of the Works for any purpose and any implied warranty, is expressly excluded. Dig-It shall not be responsible for any loss or damage to the Works, or caused by the Works, or any part thereof however arising.
13. **Default & Consequences of Default**
 - 13.1 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 one half percent (2.5%) per calendar month (and at Dig-It's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
 - 13.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by Dig-It.
 - 13.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify Dig-It from and against all costs and disbursements incurred by Dig-It in pursuing the debt including legal costs on a solicitor and own client basis and Dig-It's collection agency costs.
 - 13.4 Without prejudice to any other remedies Dig-It may have, if at any time the Client is in breach of any obligation (including those relating to payment), Dig-It may suspend or terminate the supply of Works to the Client and any of its other obligations under the terms and conditions. Dig-It will not be liable to the Client for any loss or damage the Client suffers because Dig-It has exercised its rights under this clause.
 - 13.5 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
 - 13.6 Without prejudice to Dig-It's other remedies at law Dig-It shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to Dig-It shall, whether or not due for payment, become immediately payable in the event that:
 - (a) any money payable to Dig-It becomes overdue, or in Dig-It's opinion the Client will be unable to meet its payments as they fall due; or
 - (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes assignment for the benefit of its creditors; or
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
14. **Security And Charge**
 - 14.1 Despite anything to the contrary contained herein or any other rights which Dig-It may have howsoever:
 - (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to Dig-It or Dig-It's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that Dig-It (or Dig-It's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should Dig-It elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify Dig-It from and against all Dig-It's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint Dig-It or Dig-It's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 14.1.
15. **Cancellation**
 - 15.1 Dig-It may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are delivered by giving written notice to the Client. On giving such notice Dig-It shall repay to the Client any sums paid in respect of the Price. Dig-It shall not be liable for any loss or damage whatsoever arising from such cancellation.
 - 15.2 In the event that the Client cancels delivery of Works the Client shall be liable for any loss incurred by Dig-It (including, but not limited to, any loss of profits) up to the time of cancellation.
16. **Privacy Act 1988**
 - 16.1 The Client and/or the Guarantor/s agree for Dig-It to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by Dig-It.
 - 16.2 The Client and/or the Guarantor/s agree that Dig-It may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
 - (a) to assess an application by Client; and/or
 - (b) to notify other credit providers of a default by the Client; and/or
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
 - (d) to assess the credit worthiness of Client and/or Guarantor/s.
 - 16.3 The Client consents to Dig-It being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
 - 16.4 The Client agrees that personal credit information provided may be used and retained by Dig-It for the following purposes and for other purposes as shall be agreed between the Client and Dig-It or required by law from time to time:
 - (a) provision of Works; and/or
 - (b) marketing of Works by Dig-It, its agents or distributors in relation to the Works; and/or
 - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Works; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and/or
 - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Works.
 - 16.5 Dig-It may give information about the Client to a credit reporting agency for the following purposes:
 - (a) to obtain a consumer credit report about the Client; and/or
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
17. **General**
 - 17.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
 - 17.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales and are subject to the jurisdiction of the courts of New South Wales.
 - 17.3 Dig-It 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 Dig-It of these terms and conditions.
 - 17.4 In the event of any breach of this contract by Dig-It the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Works.
 - 17.5 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by Dig-It nor to withhold payment of any invoice because part of that invoice is in dispute.
 - 17.6 Dig-It may license or sub-contract all or any part of its rights and obligations without the Client's consent.
 - 17.7 The Client agrees that Dig-It may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which Dig-It notifies the Client of such change.
 - 17.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
 - 17.9 The failure by Dig-It to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect Dig-It's right to subsequently enforce that provision.