

Construction Terms and Conditions

THE PARTIES AGREE:

1. SCOPE OF THE AGREEMENT

1.1 Subject to the terms and conditions of this Agreement:

(a) the Contractor undertakes to carry out the Landscaping Works; and

(b) the Client undertakes to accept and pay for the Landscaping Works.

2. CONTRACTOR'S RESPONSIBILITIES

2.1 The Contractor shall provide the labour, materials, transport and such other components specified in, or to be reasonably inferred from, the Contract Documents, necessary to the carrying out of the Landscaping Works.

2.2 The Contractor shall be responsible for obtaining any necessary resource or building consents for the Landscaping Works that are specified as being the Contractor's responsibility in schedule 1. If such consents cannot reasonably be obtained in the form originally contemplated:

(a) the parties may negotiate to determine the extent of any required variations to this Agreement or the Contract Sum; or

(b) unless agreement under clause 2.2(a) is reached, either party may immediately terminate the Agreement in accordance with clause 14.4.

2.3 All materials placed on the Site by the Contractor and not incorporated within construction of the Landscaping Works shall remain the Contractor's property. Upon completion of Landscaping Works, the Contractor will remove all such materials together with any rubbish and debris associated with or caused by the Landscaping Works.

3. CLIENT'S RESPONSIBILITIES

3.1 The Client warrants that:

(a) the Client is the owner of the Site or is authorised by the owner of the Site to carry out the Landscaping Works on the Site;

(b) the Client has all necessary third party (such as mortgagees or tenants) consents for the completion of the Landscaping Works;

(c) the Contractor shall have free and unimpeded access to the Site for the purpose of carrying out the Landscaping Works from the Commencement Date; and

(d) (except where agreed otherwise) the Site is or will be level and cleared of all debris prior to the Commencement Date.

3.2 The Client shall ensure that, if other contractors are to be allowed access to the Site during the term of this Agreement, this shall be by agreement with the Contractor. The Client shall ensure that such other contractors are co-ordinated to allow maximum continuity of the Landscaping Works by the Contractor and cause as little inconvenience or delay as possible. The Client acknowledges that the Contractor shall have no responsibility for such other contractors and indemnifies the Contractor from and against any costs, losses, expenses or damage the Contractor suffers as a result of any act or omission on the part of such other contractors.

3.3 The Client indemnifies the Contractor for any costs, damages or losses suffered by the Contractor arising out of any works carried out by the Client or anyone else where such construction is not strictly in accordance with the terms of any statutory or local authority consent, or where any act or omission by the Client means that such works (including the Landscaping Works) are not carried out in compliance with all relevant building or engineering laws, regulations or codes in force at the relevant time.

3.4 The Client agrees to provide such material and/or assistance to the Contractor as is specified in schedule 1.

3.5 The Client shall be responsible for obtaining any necessary resource or building consents for the Landscaping Works, unless specified otherwise in schedule 1.

3.6 The Client acknowledges that if:

(a) the Contractor is not given access or the Site is not level or clear of debris by the Commencement Date;

(b) any necessary resource or building consents for the Landscaping Works are not granted by the Commencement Date; and/or

(c) other contractors either interfere with the Contractor's performance under this Agreement or cause alterations or damage to the Landscaping Works,

then the Contractor shall, without limiting or waiving the indemnity in clause 3.2, be entitled to a reasonable extension of time to complete the Landscaping Works and/or to charge additional costs, having regard to the loss of time, interference or other costs or damage suffered.

4. COMMENCEMENT

4.1 The Client shall give the Contractor access to the Site on the Commencement Date and the Contractor shall use all reasonable endeavours to commence Landscaping Works within 5 Business Days of the later of the Commencement Date or the date on which access is granted. To this end, the Contractor shall advise the Client of any decision or instruction which needs to be made or given prior to the Contractor being able to proceed with the Landscaping Works.

4.2 The Contractor may erect signage at appropriate locations on the Site advertising its involvement in the carrying out of the Landscape Works. Such signage must be of a

professional standard and the size and in a location approved by the Client, such approval not to be unreasonably withheld.

5. CONTRACT SUM AND PAYMENT

5.1 The Client shall pay to the Contractor the Contract Sum in the manner, at the rate and at the times provided in schedule 1.

5.2 The Contract Sum may be adjusted in accordance with clauses 6.1, 7.1 or 10.

5.3 Unless schedule 1 otherwise requires, the Client shall pay a deposit of 20% of the Contract Sum on the execution of this Agreement.

5.4 The Contractor will invoice the Client mid month and end of month and upon completion from the Commencement Date (or as determined by the Contractor at its sole discretion) for amounts due under clause **5.1**. The Client shall pay the Contractor the amounts due under each invoice within 5 Business Days. All payments must be made without deduction, withholding or set off.

5.5 Where any money owing under this Agreement is not paid by the due date, the Client shall pay:

(a) interest at the Default Rate on a monthly basis from the due date to the date of payment; and

(b) the Contractor's reasonable costs of recovering the debt.

5.6 All materials supplied by the Contractor including materials incorporated into the Landscaping Works shall remain the property of the Contractor until the Contract Sum has been paid in full. The Contractor may enter the Site to dismantle and remove all Landscaping Works and associated materials if payment is not made in accordance with this Agreement.

5.7 If the Contractor for the purposes of the Landscaping Works arranges or procures materials from a subcontractor or any other third party and the terms of the arrangements between the Contractor and the subcontractor or third party require payment by the Contractor, then the Contractor shall be entitled to request payment forthwith by the Client regardless of whether the work or materials are yet located on the Site.

5.8 All prices referred to in this Agreement are stated inclusive of GST. GST shall be payable at the then current rate applicable at the time of supply under the GST Act on each invoice and at the same time as the invoiced amount is due.

6. VARIATIONS

6.1 The Client may request modifications or amendments to the Landscaping Works (including the Drawings and Specifications) at any reasonable time during the term of this Agreement, and the Contractor shall use all reasonable endeavours to comply with all such requests. Following the Client's request, the parties shall immediately negotiate

in good faith to determine whether any such modifications or amendments are practicable and (where applicable) negotiate to agree upon an amended Contract Sum and consequential adjustment to the completion date of the Landscaping Works, if applicable.

6.2 Where any modifications or amendments to the Landscaping Works are agreed between the parties in accordance with clause 6.1, they shall be recorded in writing and signed by both parties, whereupon they shall be deemed to be incorporated into this Agreement. No modifications or amendments shall be binding unless and until they are so written and signed.

6.3 Where the parties do not reach agreement in accordance with clause 6.1, this Agreement shall remain unchanged and shall continue to be binding on both parties.

7. UNFORESEEN DIFFICULTIES

7.1 Where the Contractor encounters unforeseen difficulties in respect of the Site, including such matters as hidden rock, underground services, fill or toxic materials (which could not previously have been detected by the Contractor by a visual inspection of the Site), the Contractor shall immediately consult the Client and:

(a) the parties may negotiate to determine the extent of the additional work and/or time required, and any resulting variation to the Agreement; and

(b) until agreement under clause 7.1(a) is reached, either party may immediately terminate the Agreement in accordance with clause 14.4.

8. UNDERGROUND AND OVERGROUND SERVICES

8.1 The Contractor shall be responsible for physically locating the position of and protecting all utilities and survey marks that have been identified by the Client and shall arrange with the controlling authorities for any necessary exploratory work, location, protection, isolation, offsetting, reinstatement or alteration required. The Contractor shall record any alteration which it makes to such utilities. The Contractor will work with the Insurer to cover reasonable costs for any repairs to any damage to the underground utilities, whether previously identified or not.

8.2 Where a utility is not indicated or is not substantially in the position indicated by the Client, any extra work in physically locating its position or altering or protecting or offsetting or reinstating it shall be paid for by the Client.

9. PLANTS

9.1 As natural growing matter, the health of plants (including trees and shrubs) is influenced by many factors outside the Contractor's control. Where the Landscaping Works includes any planting and/or the relocating of plants, this clause 9 applies.

9.2 For the avoidance of doubt, if the Contractor plants a planting plan prepared for the site by another party, the Contractor takes no responsibility for the suitability of plants specified on any design. A suitability analysis should be carried out by the persons engaged to implement any design or plans.

9.3 Supply & Planting

- (a) Every reasonable effort will be made to source best quality specimens.
- (b) The Contractor will plant in accordance with best horticultural practice.
- (c) The Contractor will provide written instructions on how best to maintain any planting carried out.

9.4 Relocating Plants

If the Contractor is engaged to relocate plants as part of the Landscaping Works, the Contractor will undertake all such relocation to the appropriate horticultural standard. However, the Contractor does not guarantee the continued health and viability of the relocated plants.

9.5 Contractor's Plants Guarantee

(a) **Evergreen Trees:**

The Contractor will replace any evergreen trees supplied and planted by it, if found to be dead or dying within three months of planting (subject to clause 9.5(d) below).

(b) **Deciduous Trees:**

The Contractor will replace any deciduous trees supplied and planted by it, that does not

'come into leaf' during the first growing season following planting (subject to clause 9.5(d) below).

(c) Shrubs:

The Contractor does not guarantee the continued health and viability of any shrub. However in the event of any shrub death during the first growing season following planting, the Contractor will assess on Site and may (at its sole discretion) replace the shrub at its cost (subject to clause 9.5(d) below).

(d) Limitations of Guarantees:

The guarantees in this clause 9.5 exclude plant death resulting from exposure to drought conditions, high winds, abnormal winter conditions, under-watering, over-watering, adverse soil conditions, over-fertilizing, pest or stock damage, or any other condition or act over which the Contractor has no control.

10. ESTIMATES

10.1 Notwithstanding anything else in this Agreement, all Aspects detailed in the Specifications as "estimated" will be invoiced on a 'time and materials' basis and the Contract Sum may be adjusted accordingly.

11. SITE SECURITY AND INSURANCE

11.1 The Contractor shall maintain public liability insurance for an appropriate sum.

11.2 The Client shall be responsible for security of the Site and all completed Landscaping Works at all times outside the hours during which the Contractor is present on the Site. If the Client requires the Contractor to provide security, stock and/or pest proof fencing, the Contractor shall include the costs of such works in the Contract Sum.

12. LIABILITY

12.1 The Contractor's liability under this Agreement shall not exceed the Contract Sum. The Contractor shall not be liable for any indirect or consequential damage or loss.

13. CONFIDENTIALITY AND INTELLECTUAL PROPERTY

13.1 The Contractor retains copyright in all plans and documents prepared by the Contractor for the Site, including (without limitation) the Specifications and Drawings.

13.2 The Client must not use, copy or reproduce (or allow anyone else to use, copy or reproduce) any documents the Contractor supplies to the Client for any purpose other than:

(a) for the purpose of performing the Client's obligations and enjoying the Client's rights as licensee of the plans; or

(b) after the construction of the Landscaping Works, for the use, maintenance, alteration or demolition of the Landscaping Works.

13.3 Without disclosing the Client's name and the Site address, the Contractor may publish any plans, designs or photographs or other images in respect of the Landscaping Works.

14. TERMINATION

14.1 An event of default under these terms occurs if:

(a) the Client fails to pay the Contractor any amounts owing within 20 Business Days of the due date for payment;

(b) either party breaches its obligations under these terms and, where that breach is capable of remedy, fail to remedy it within 5 Business Days of becoming aware of it; or

(c) either party becomes insolvent, bankrupt or unable to pay its debts as they fall due.

14.2 If the Contractor commits an event of default, the Client may terminate the Agreement without prejudice to either party's rights and remedies under this Agreement.

14.3 If the Client commits an event of default, the Contractor may, without prejudice to any other rights the Contractor may have, take any or all of the following actions:

(a) suspend the carrying out of Landscaping Works until further notice;

(b) require the Client to pay the costs of remedying any breach of this Agreement;

(c) terminate this Agreement without prejudice to either party's rights and remedies under this Agreement; and/or

(d) require the Client to pay all costs and expenses incurred as a consequence of termination or suspension.

14.4 If this Agreement is terminated prior to its full completion, including without limitation under clauses 2.2(b), 7.1(b) or 14 then, in addition to any payments due and owing by the Client to the Contractor in terms of those provisions, the Client shall also reimburse the Contractor for:

(a) any out of pocket expenses or advance payments made by the Contractor for goods or services to third parties which are in respect of the Landscaping Works carried out or to be carried out; and

(b) any of the Contractor's own costs for planning, designing or administering the Landscaping Works which have not been paid and which relate to either works already carried out or yet to be carried out.

15. DISPUTE RESOLUTION

15.1 If any dispute arises between the Client and the Contractor as to any matter or thing arising in connection with this Agreement the parties shall refer the matter to Adjudication.

16. PROVISIONAL STAGES

16.1 The Landscaping Works may be designed to be carried out in stages, in which case the commencement date and costs of each stage after the first stage will be estimated only and may be subject to change.

16.2 The stages will be as set out in the Specifications and Drawings.

16.3 Where in a relevant stage set out in the Specifications and Drawings it is indicated that the Specifications and Drawings are “provisional”:

(a) the Contractor shall use all reasonable endeavours to finalise or complete the provisional Specifications and Drawings (and update all related costing estimates) in a timely manner in order to ensure the continued implementation of the Landscaping Works;

(b) any material change or modification to the provisional Specifications and Drawings shall be agreed upon in writing before it is accepted as part of this Agreement;

(c) if the parties acting in good faith cannot agree on the changes, then the provisions of clause 15 shall apply; and

(d) if the process in clause 16.3(c) fails to resolve the matter then the Agreement in so far as it relates to that stage shall be at an end in accordance with clause 4.

17. CONSUMER GUARANTEES ACT

17.1 If the Client is a business, the Client is deemed to have acknowledged that the supply of goods and services under this Agreement is a supply for business purposes and that the Consumer Guarantees Act 1993 shall not apply. Nothing in this Agreement is intended to limit the rights of a consumer under the Consumer Guarantees Act 1993.

18. INTERPRETATION

18.1 Definitions: In this Agreement, unless the context indicates otherwise:

“Adjudication” has the meaning given to that term by the Construction Contracts Act 2002;

“Agreement” means this Landscaping Works Agreement including the Terms and Conditions, the Schedules and any other variations agreed under clause 7.2;

“Aspect” means a discrete part of the Landscape Works as identified in the Specifications;

“Business Day” means a day on which banks are open for business in Christchurch;

“Commencement Date” means the date on which the Client will provide access to the Site as specified in schedule 1;

“Contract Documents” means this Agreement and the documents referred to in and forming part of this Agreement;

“Contract Sum” means the amount stated in schedule 1 which is payable for the completion of the Landscaping Works subject to such adjustments as are provided for in the Contract Documents;

“Contractor” means Goom Landscape Limited and its agents, employees and subcontractors;

“Default Rate” means an interest rate of 1.5 times the monthly interest rate payable by the Contractor for overdraft facilities;

“Drawings” means all drawings set out in schedule 3 together with any modification of such drawings approved in writing by the Client;

“GST” means the goods and services tax applicable under the Goods and Services Tax Act 1985 (“GST Act”);

“Landscaping Works” means all the work to be executed in accordance with this Agreement and as more particularly set out in schedules 2 and 3;

“Site” means the land, buildings or other places made available by the Client to the Contractor for the purpose of carrying out the Landscaping Works; and

“Specifications” means the written description of works set out in schedule 2 together with any modifications of such specifications approved in writing by the Client.

18.2 Headings: headings of clauses and other headings are for ease of reference only and shall not be deemed to form any part of the context or to affect the interpretation of this Agreement.

18.3 Plural and Singular: words importing the singular number shall include the plural and vice versa.

18.4 Schedules: the schedules to this Agreement and the provisions and conditions contained in such schedules shall have the same effect as if set out in the body of this Agreement.

18.5 Parties: references to parties are references to parties to this Agreement.