



## Experience makes a difference

### EARTHLIFT Terms and Conditions

These terms and conditions are the terms on which Hibar Court Pty Ltd ACN 073 890 016 trading as Earthlift Excavations (**Earthlift**) will supply excavation and other similar services to you (**Terms**). By accepting the Quote and the Purchase Order, or otherwise engaging Earthlift to provide the Services, you agree that you are bound by these Terms.

#### 1 Definitions

**Authorised Person** means any of your directors, secretaries, partners, public officers, any employee carrying the title 'Manager' or the word 'Senior' in their title, or any person who has actual or implied authority to act on your behalf.

**Business Day** means a day other than Saturday, Sunday or a public holiday in the state of Victoria.

**Dry Clean Fill** means clean fill as defined in the *Industrial Waste Resource Guidelines* published by EPA Victoria.

**Fees Schedule** means the fees schedule provided by Earthlift, as amended from time to time, which sets out certain additional fees Earthlift may charge you in certain circumstances.

**GST** has the meaning given to it by the GST Act.

**GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) as amended, varied or modified from time to time.

**Insolvency Event** means in relation to a body corporate, a liquidation or winding up or the appointment of a voluntary administrator, receiver, manager or similar insolvency administrator to a party or any substantial part of its assets; or in relation to an individual or partnership, the act of bankruptcy, or entering into a scheme of arrangement with creditors or the occurrence of any event that has substantially the same effect to any of the above events.

**Loss** means any loss, liability, cost, expense, damage, charge, penalty, outgoing or payment.

**Melbourne Metropolitan Area** means the area agreed between the parties as being the Melbourne Metropolitan Area or failing agreement, the area nominated by Earthlift as being the Melbourne Metropolitan Area.

**No Start Fee** means the No Start Fee set out in the Fees Schedule or such other amount which Earthlift notifies you of from time to time.

**Purchase Order** means any purchase order or request by or for you to Earthlift to supply you with the Services.

**Quote** means a quote provided by Earthlift to you for the provision of the Services.

**Rock** has the meaning given to it in the Australian Standards AS2870- 2011: Clause 1.8.47, including any material that cannot readily be excavated using a standard digging bucket on an Earthlift 12-tonne excavator.

**Rolled Fill** has the meaning given to it in the Australian Standards AS2879-2011: Clause 6.4.2(b).

**Scheduled Date** means the date on which Earthlift will commence the provision of Services that is specified in the Purchase Order.

**Services** means excavation or other similar services as specified in the relevant Quote or Purchase Order or otherwise provided to you by Earthlift.

#### 2 How contract is formed

2.1 Within seven (7) Business Days of receiving your request for Services or request for a Quote and all necessary documentation (including the

documentation described in clause 2.3), Earthlift will provide you with a Quote.

2.2 The Quote will be based on the documentation provided by you to Earthlift at the time of your request for Services.

2.3 In order for Earthlift to provide you with a Quote, you must provide Earthlift with the following documents either at the time of you submitting a request for Services or subsequently:

- (a) the proposed site plans;
- (b) the site assessment and survey report (including the soil report); and
- (c) the engineer's designs.

2.4 You must also provide any other documentation as requested by Earthlift in connection with a Quote.

2.5 Earthlift may, on some occasions, require the inspection of the relevant site prior to providing you with the Quote and you must co-operate fully with Earthlift in respect of such inspections, including the provision of all necessary access to the relevant site.

2.6 The Quote is an offer by Earthlift to you for the provision of the Services on these Terms.

2.7 You will be taken to have accepted the Quote if you:

- (a) accept the Quote in writing, or where acceptance may be implied in the circumstances;
- (b) complete and issue to Earthlift a Purchase Order; or
- (c) if required by Earthlift, pay to Earthlift the deposit in accordance with clause 4 prior to the Scheduled Date.

2.8 The Purchase Order may specify:

- (a) the extent of earthworks and the Services to be provided;
- (b) the costs of providing the Services and performing the earthworks;
- (c) special or further requirements or specifications (if any); and
- (d) the Scheduled Date.

2.9 Terms and conditions included in a Purchase Order prepared by you will only be binding on the parties if Earthlift provides you with written acceptance of the relevant terms.

#### 3 Amendments and cancellations

3.1 Any cancellations or amendments to a Purchase Order, including any alteration of the extent of earthworks, any specifications or plans, must be provided to Earthlift in writing at least 24 hours prior to the Scheduled Date.

3.2 If you amend a Purchase Order, you agree that Earthlift may revise the Quote and may increase the fees for providing you the Services.

3.3 If you wish to cancel or amend a Purchase Order less than 24 hours prior to the Scheduled Date, Earthlift may charge you a No Start Fee and/or any delay fees in accordance with clause 15 for such cancellation or amendment.

#### **4 Deposit**

If an upfront deposit or the full quoted price is specified in a Quote as being payable upfront, or if Earthlift notifies you that it requires a payment of an amount, you must pay the amount at least 24 hours prior to the Scheduled Date. If the amount is not paid, Earthlift may, without liability to you, delay the provision of the Services until a time reasonably determined by Earthlift after the amount is paid.

#### **5 Fees**

Unless Earthlift advises otherwise in writing, the fees set out in the Quote are based on Dry Clean Fill (excluding Rock) only. If the relevant site contains wet or contaminated fill, or any Rock, you may incur an additional fee in accordance with clause 7.

#### **6 Payment of fees**

- 6.1 Earthlift will issue to you a tax invoice upon or after completion of the earthworks.
- 6.2 If you dispute a tax invoice, you must notify Earthlift of your dispute within seven (7) days of receiving the relevant invoice, otherwise, the invoice is deemed to be accepted and agreed to by you.
- 6.3 Unless you dispute the tax invoice, you must pay to Earthlift the amount stipulated in the invoice (less any upfront deposit or amount paid) within the time frame as specified in the invoice or as notified to you by Earthlift.
- 6.4 If you do not pay to Earthlift within the requisite time frame of receiving the relevant invoice, Earthlift may suspend its provision of Services to you and including, without limitation, Services commenced but not finished, without liability to you.
- 6.5 Interest will accrue on a daily basis on the overdue amounts owing to Earthlift:
  - (a) from the time the amount is due until that amount is paid in full; and
  - (b) at the rate fixed from time to time by the Attorney General under the *Penalty Interest Rates Act 1983* (Vic).
- 6.6 You may also be charged fees incurred by Earthlift in any recovery action in respect of outstanding amounts.

#### **7 Additional Fees**

- 7.1 You acknowledge and agree that Earthlift may charge you additional fees for carrying out the earthworks and providing the Services under certain circumstances, which additional fees are set out in the Fees Schedule. These circumstances include but are not limited to:
  - (a) where there are abnormal site conditions, including but not limited to, excessive grass, wet soil profile, or contaminated fill;
  - (b) where the relevant site is located outside the Melbourne Metropolitan Area;
  - (c) where Rock is encountered at the site (see clause 10);
  - (d) where incorrect or misleading information regarding the site is provided to Earthlift (see clause 12); or
  - (e) where there is a delay in the provision of the Services (see clause 15).

#### **8 Site requirements**

- 8.1 You must ensure that:
  - (a) the survey pegs identifying the site boundaries have been accurately installed prior to the Scheduled Date; and
  - (b) any pre-commencement or preparation works which are specified in a Quote or the

Purchase Order are completed prior to the Scheduled Date; and

- 8.2 You must also ensure that, at all times during Earthlift's operations at the site:
  - (a) the site access is suitable for all weather and the required earthwork equipments;
  - (b) the site access is safe, unimpeded, and continuous;
  - (c) the working platform is firm, stable and safe with no height restriction for the required earthworks equipment;
  - (d) there are adequate water and site amenities to perform the earthworks;
  - (e) you manage the traffic at the site;
  - (f) all permits necessary for Earthlift to undertake the earthworks at the site have been sought and obtained;
  - (g) you comply with all council regulations for your operations at the site, including the earthworks to be performed by Earthlift; and
  - (h) where there are weak soil profiles or deep excavations at the site, you have provided for soil stabilization, such as retaining walls or soldier piers.
- 8.3 If you fail to comply with any of the above site requirements, or if for any reason, Earthlift considers the site unsafe to carry out the earthworks, Earthlift will endeavour to consult and work with you to rectify the situation. However, Earthlift may, in its sole discretion without liability to you, suspend the provision of the Services until the relevant issue is resolved to Earthlift's satisfaction.

#### **9 Utility services and fixed property**

You acknowledge that it is your responsibility to locate and advise Earthlift prior to the commencement of earthworks, of all utility services and fixed property (including but not limited to water, sewer, drainage, power and telephone services) at the site, including by providing Earthlift with 'dial before you dig' or other similar reports. Earthlift will take all reasonable care not to damage any utility service or fixed property that Earthlift is aware of. However, Earthlift does not guarantee and is in no way responsible for any damages to these services and/or fixed property as a result of Earthlift's access to the site and/or performance of the earthworks.

#### **10 Earthworks near structures**

- 10.1 Where earthworks are performed near existing structures at the site, such as buildings and fences, Earthlift will:
  - (a) not be responsible for moving or removing any structures such as temporary fences, site amenities, building materials or the like at the site, due to OH&S regulations; and
  - (b) provide its Services and excavate as far as practically possible whilst maintaining the stability and structural integrity of the nearby structures (which are not removed prior to the commencement of the earthworks);
- 10.2 You agree that Earthlift will not be responsible for any additional earthworks you require for construction purposes, which Earthlift considers (in its sole discretion), will compromise the stability and structural integrity of the nearby existing structures.

#### **11 Rocks**

- 11.1 If the site involves filled or soft grounds, Earthlift may require the placement of concrete or additional crushed rock or the like at access points

or other similar areas. If Earthlift places such concrete, crushed rock or the like at the site, it may charge you a fee for doing so, which fee will be notified to you by Earthlift.

- 11.2 Unless expressly stated otherwise, the Quote and/or the Purchase Order, do not include any allowances for the excavation, hammering and/or blasting of Rock.
- 11.3 If Earthlift encounters Rock at the site, Earthlift will charge you an additional fee for breaking and/or removing Rock, which fee is set out in the Fees Schedule, unless Earthlift has agreed to an additional fee with you for breaking and/or removing Rock.
- 11.4 Where blasting of the Rock is required at the site, Earthlift will advise you prior to proceeding with the blasting.

## **12 Incorrect or misleading information**

If you provide Earthlift incorrect or misleading information regarding the site, or in Earthlift's reasonable opinion, Earthlift is unable to complete the earthworks in a proper manner due to site conditions beyond its control, Earthlift may charge you any additional costs it incurs, or fees payable, as a result of the incorrect or misleading information, which fees or costs Earthlift will notify you of from time to time and/or terminate the provision of Services to you in accordance with clause 17.

## **13 Placement of Fill**

- 13.1 Unless specified otherwise in the Quote or Purchase Order, or as agreed between the parties, Earthlift will place site-excavated soil and/or imported fill by spreading it in maximum 200mm thick loose layers and then track rolling it in orthogonal directions using a minimum 11 tonne excavator to elevate the fill area to the required level and for the placed fill to comply as Rolled Fill.
- 13.2 As Rolled Fill does not require compaction to a specified insitu density and/or moisture content, Earthlift does not and will not adjust the moisture content in the fill when placing the Rolled Fill.
- 13.3 As the degree of compaction of the placed fill achievable is related to the moisture condition of the soil at the time of placement and the number of machinery passes applied to each layer, you acknowledge and agree that Earthlift may not be able to achieve adequate compaction of the placed fill to support the slab construction if placed fill is excessively wet or dry as compared to its optimum moisture condition. Earthlift strongly recommends that site conditions be reassessed by an appropriately experienced geotechnical authority after the completion of the earthworks and prior to construction.

## **14 Additional equipment**

Earthlift may, at your cost, hire any equipment as it considers necessary to satisfactorily perform the Services. If Earthlift is required to hire additional equipment, Earthlift will notify you prior to hiring such equipment.

## **15 Delays**

If delays in the provision of the Services are caused as a result of:

- (a) your failure to comply with the site requirements as set out in clause 8.1 or 8.2;
- (b) inclement weather;
- (c) other tradespeople or third parties working or operating at the site impeding or preventing the provision of the Services; or

- (d) the site, in Earthlift's reasonable opinion, being deemed unsafe for Earthlift to carry out the earthworks,

Earthlift may, at its sole discretion, charge you one or more of the fees set out in the Fees Schedule.

## **16 GST**

All amounts payable by you in connection with the supply of the Services under these Terms do not include an amount for GST. If GST is payable on any supply made by Earthlift in connection with the Services under these Terms, you must pay to Earthlift, in addition to and at the same time as the payment for the supply, an amount equal to the amount of GST on the supply. Where you are required by these Terms to reimburse or indemnify Earthlift for any Loss or other amount incurred, the amount to be reimbursed or paid will be reduced by the amount of any input tax credit that Earthlift will be entitled to claim for the Loss or amount incurred and increased by the amount of any GST payable by Earthlift in respect of the reimbursement or payment. This clause does not merge on completion or termination of any Purchase Order. In this clause, words and expressions which are defined in the GST Act have the same meaning given to them by the GST Act.

## **17 Termination**

- 17.1 Without limiting Earthlift's other rights under these Terms, Earthlift may terminate the provision of Services to you effective immediately upon providing written notice of the termination, if:
  - (a) you fail to pay an amount due to Earthlift by the due date for payment;
  - (b) you are subject to an Insolvency Event;
  - (c) you breach any provision of these Terms and do not remedy the breach within five (5) Business Days of Earthlift providing you with written notice specifying the breach and the remedy required; or
  - (d) you commit a breach of these Terms which, in Earthlift's reasonably held opinion, cannot be remedied.
- 17.2 On termination, you must immediately pay to Earthlift all invoiced amounts for completed services and fees for Services commenced but not completed on a pro rata basis.

## **18 Discrepancies in site levels**

- 18.1 Earthlift will use its best endeavours to comply with current Australian Standards AS 3798 – 2007 in respect of its provision of the Services. However, you acknowledge and agree that Earthlift cannot guarantee that exact tolerances (whether set out in these standards or otherwise) will be achieved.
- 18.2 If there is a discrepancy of at least +/- 30 mm between the site level stated in the proposed site plan (of which the Quote and Purchase Order is based on) and the achieved site level following completion of the earthworks, you must:
  - (a) notify Earthlift of the discrepancy within five (5) Business Days after the completion of the earthworks and prior to the commencement of work by other tradespeople or third parties; and
  - (b) provide Earthlift the opportunity to investigate and (if Earthlift agrees that the discrepancy exists and was caused by Earthlift) rectify the discrepancy, within five (5) Business Days of receiving the discrepancy notice.
- 18.3 In the event that Earthlift provides you any agreed rectification earthworks, and you are not reasonably satisfied with the results following the rectification, Earthlift may pay for the costs incurred

by you to engage a third party to rectify the site levels, provided that:

- (a) Earthlift is unable to provide you with a reasonable alternative to rectify the site;
- (b) you provide Earthlift written notice of your intention to engage a third party and the written fixed price quotation for the third party's services, at least three (3) Business Days prior to the third party's commencement of earthworks on site; and
- (c) Earthlift (in its sole discretion) provides you written authorisation to engage the third party.

18.4 Notice of the discrepancy and/or of your intention to engage a third party to rectify the site will be deemed provided only if Earthlift has issued you a unique job number for the project and you have included the job number in your claim regarding site rectification.

## 19 Disclaimers

You acknowledge and agree that:

- (a) where there are weak soil profiles or deep excavations at the site, accurate works for deepened rebates may be difficult to achieve, and it is your responsibility to make allowances for any costs to rectify the soil conditions by adding concrete or dewatering;
- (b) notwithstanding clause 10, where the Services are to be provided near existing structures at the site, Earthlift is not responsible for any damages caused to these structures as a result of the earthworks conducted by Earthlift;
- (c) Earthlift is not responsible for any consequences due to differential movements that may occur in the slab between piled and non-piled areas. Earthlift recommends that you engage an engineer to review the situation following Earthlift's provision of the Services;
- (d) Earthlift does not guarantee the accuracy and finish of the earthworks:
  - (i) where the Services were provided under difficult conditions (including but not limited to heavy rain, the site ground being unstable or dangerous conditions); or
  - (ii) after the commencement of work by other tradespeople or third parties at the site; and
- (e) it is your responsibility to verify the achieved site levels and extent of earthworks upon completion of Earthlift's earthworks. Any claims or issues regarding the earthworks conducted by Earthlift must be made to Earthlift prior to the commencement of work by other tradespeople or third parties at the site.

## 20 Consumer guarantees

Under the Australian Consumer Law (ACL), certain consumer guarantees may apply in respect of the supply of the Services, if you acquire the Services as a 'consumer' within the definitions of section 3 of the ACL. Nothing in these Terms should be interpreted as an attempt to exclude, restrict or modify the application of any applicable provision of the ACL, any liability of Earthlift for failing to comply with these provisions of the ACL or your right to make a claim in respect of these guarantees or under any other provision of the ACL.

20.1 Our services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the Service, you are entitled:

- (a) to cancel your Service contract with us; and
- (b) to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to be compensated for any other reasonably foreseeable loss or damage. If the failures does not amount to a major failure you are entitled to have problems with the Service rectified in a reasonable time and, if this is not done, to cancel your contract and obtain a refund for the unused portion of the contract.

## 21 Exclusion of warranties

Subject to clause 20, to the maximum extent permitted by law, Earthlift expressly excludes all conditions, warranties and guarantees which may be implied with respect to the Services, or imposed by statute, custom, general law or any applicable international conventions.

## 22 Limitation of liability

22.1 Earthlift is not responsible for any Loss incurred by you as a result of:

- (a) your failure to comply with the site requirements set out in clause 4;
- (b) any damage to caused to the site's utility services and/or fixed property;
- (c) any damage to council assets due to earthworks machinery movements to access the site via the legal entry point or an entry point as directed by you;
- (d) any damage to the concrete platform or crossing due to Earthlift's access to the site; and
- (e) except for any discrepancies provided for in clause 17, any rectification that you make or are required to make to the site.

22.2 Subject to clauses 20 and 22.1, the maximum liability for any Loss incurred by you in connection with these Terms or the provision of the Services is limited to the total amount of fees for the Services specified in the relevant Purchase Order.

## 23 Exclusion of consequential loss

23.1 Without limiting clause 22, and subject to clause 20, Earthlift expressly excludes all liability to you or any Consequential Loss (as defined in clause 23.2) arising out of or in connection with these Terms or the provision of the Services to you, regardless whether Earthlift knew or ought to have known that it was possible or foreseeable that you would incur such Consequential Loss.

23.2 Consequential Loss means Loss beyond the normal measure of damages and includes, without limitation, indirect Loss, Loss of revenue, Loss of reputation, Loss of profits, Loss of actual or anticipated savings, Loss of bargain, lost opportunities, including opportunities to enter into arrangements with third parties, Loss of use, cost of capital or costs of substitute goods, facilities or services.

## 24 Indemnity

You indemnify Earthlift and hold Earthlift harmless from and against all Losses (including all legal costs, and any other associated fees and costs) for which Earthlift incurs as a direct or indirect result of:

- (a) recovering any amounts you owe to Earthlift;
- (b) you not obtaining the necessary site permits in accordance with clause 8.2(f);
- (c) any breach of these Terms by you; and
- (d) any negligent or willful act or omission by you, your employees, agents, servants, contractors or others for whom you are legally responsible.

## **25 No representations**

Subject to clause 20, you acknowledge and agree that you have not relied on any representations, inducements or statements made to you by Earthlift regarding the provision of the Services and you have satisfied yourself that the Services are fit for the purpose you require them for.

## **26 Relationship between parties**

You acknowledge and agree that these Terms do not create a relationship of employment, agency, partnership or joint venture between you and Earthlift, and that the relationship is at all times one of principal and independent contractor.

## **27 Continued performance**

In the event of any disputes or claims, you agree to continue to perform your obligations set out in these Terms including paying all amounts due to Earthlift without any deductions or set off, while attempts are made to resolve the dispute or claim.

## **28 Authorised persons**

You agree that your Authorised Persons have the authority to bind you in respect of all matters relating to provision of the Services under the accepted Quote and Purchase Order, including without limitation, requesting for Services, amending and cancelling a Purchase Order.

## **29 General provisions**

- 29.1 You must not assign or otherwise deal with any of your rights or obligations under these Terms without Earthlift's prior written consent. Earthlift may assign or deal with any of its rights or obligations under these Terms at any time and without any requirement to notify you.
- 29.2 Earthlift may vary these Terms from time to time, and a variation is effective as soon as Earthlift provide you notice of the variation. If Earthlift varies these Terms, any Quotes or Purchase Orders accepted by you, after the date of a notice from Earthlift, will be subject to the new terms.
- 29.3 A failure to exercise or delay in exercising any right under these Terms does not constitute a waiver and any right may be exercised in the future. Waiver of any of these Terms must be in writing and is only effective to the extent set out in that written waiver.
- 29.4 If any provision of these Terms is void, unenforceable or illegal and would not be so if words were omitted, then those words are to be severed and if this cannot be done, the entire provision is to be severed from these Terms without affecting the validity or enforceability of the remaining provisions.
- 29.5 These Terms, the accepted Quote, and the Purchase Order constitute the entire agreement between you and Earthlift in respect of the provision of the Services and supersede all previous communications, representations, understandings or agreements.
- 29.6 In the event of any inconsistency between these Terms, the accepted Quote and the Purchase Order, the documents will, to the extent of the inconsistency, prevail in the following order of priority:
  - (a) these Terms;
  - (b) the Quote; and
  - (c) the Purchase Order.
- 29.7 These Terms are governed by the laws in force in Victoria, and you and Earthlift submit to the non-exclusive jurisdiction of the courts of Victoria.