

**J&M Building Co. – TERMS AND CONDITIONS OF TRADE**

**1. Definitions**

- 1.1 "Client" means the person/s buying the Services as specified in any invoice, document or order, and if there is more than one Client is a reference to each Client jointly and severally.
- 1.2 "Services" means all goods or services supplied by J&M to the Client at the Client's request from time to time.
- 1.3 "J&M" means JMC Melbourne Tiling Group Pty Ltd A.C.N. 653 815 760 as Trustee for The Parks Family Trust ABN 92 40 661 484, trading as J&M Building Co., its successors and assigns or any person acting on behalf of and with the authority of J&M.
- 1.4 "Price" means the Price payable for the Services, as agreed between J&M and the Client in accordance with clause 4 below.
- 1.5 "Terms" means the terms and conditions contained in this document.

**2. Acceptance**

- 2.1 J&M agrees to supply the Services to the Client in accordance with the Terms of this document, subject to any other special conditions, caveats or provisos that may be notified to the Client relating to the Services, or particular quotation.
- 2.2 The Client is deemed to have accepted and is immediately bound, jointly and severally by these Terms, and J&M's quotation on these Terms along with any supplemental conditions contained in the quotation or otherwise notified to the Client, if it does any of the following:
  - (a) places an order for Good or Services;
  - (b) Communicates acceptance of a quotation in writing (whether any requested deposit has been paid or not);
  - (c) allows the Services to be undertaken;
  - (d) Pays any deposit to J&M required in a quotation; or
  - (e) Makes any request or does any other action to cause J&M to proceed with providing the Services.
- 2.3 These Terms may only be amended with J&M's consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and J&M.

**3. Quotation and Deposits**

- 3.1 Where J&M provides a quotation for the supply of Services to the Client, the scope of the Services is limited to those described in the quotation only. J&M may provide an amended quotation if the Client requests a change to the scope of the Services.
- 3.2 J&M may at any time vary the quotation for increases in tax, duty or any other Government charges relating to the Services sold which come into effect after the date of the quotation. In the event such increases in tax, duty or government charges become applicable after acceptance of a quotation then the quotation and Price are deemed to be varied such that the Price is increase to include all such increases.
- 3.3 The Client must pay a deposit on terms indicated in the quotation, which is non-refundable unless otherwise indicated in the quotation.
- 3.4 J&M is not obligated to supply the Services until the deposit is paid by the Client and J&M confirms acceptance to the Client in writing.
- 3.5 Unless otherwise stated within a quotation or via direct communication to the Client, a quotation is only valid for 30 days from the date of its issue and may be withdrawn any time at J&M's discretion.

**4. Price and Payment**

- 4.1 At J&M's sole discretion the Price shall be either:
  - (a) as indicated on any invoice provided by J&M to the Client; or
  - (b) J&M's quoted price (subject to clause 4.2).
- 4.2 J&M reserves the right to change the Price if:
  - (a) a variation to J&M's quotation is requested by the Client;
  - (b) the availability or cost of materials or labour changes compared to those prevailing as at the date of the quotation;
  - (c) if the complexity of circumstances underlying the need for the Services requested to be performed have not been reasonably and properly disclosed to J&M;
  - (d) other circumstances outside of J&M's control.
- 4.3 A Deposit equal to 30% of the total Price is required unless otherwise agreed, at J&M's sole discretion. Deposit amount is subject to increase at J&M's discretion and for jobs over \$10,000 larger deposits may be required.
- 4.4 Time for payment of the Services is of the essence. The Price will be payable by the Client on the date/s determined by J&M, which may be:
  - (a) on completion of Services;

- (b) before commencement of Services;
- (c) by way of instalments/progress payments in accordance with J&M's payment schedule determined by J&M under any quotation or agreed by J&M in communication supplementing a quotation (typical for jobs over \$10,000);
- (d) the date specified on any invoice or other form as being the date for payment; or
- (e) failing any notice to the contrary, the date which is fourteen (14) days following the date of any invoice given to the Client by J&M.

- 4.5 J&M will render its final tax invoice for the Services provided to the Client upon completion of the Services.
- 4.6 Payment may be made by cash, bank cheque, electronic/on-line banking, or by any other method as agreed to between the Client and J&M. All payments must be made free from any set-off, deduction, exchange or claim whatsoever.
- 4.7 Unless otherwise stated the Price does not include GST. In addition to the Price the Client must pay to J&M an amount equal to any GST J&M must pay for any supply by J&M under this or any other agreement for the sale of the Services. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition the Client must pay any other taxes in accordance with clause 3.2 that may be applicable in addition to the Price, except where they are expressly included in the Price.
- 4.8 The Client acknowledges that the Services and materials associated with Services may be of substantial size/quantity and that storage of the same may be a significant burden to J&M. Accordingly, the Client hereby authorises J&M to utilise third party storage facilities to store the materials if storage is required under this clause and the Client agrees to be responsible for all reasonable costs incurred as a result of storage and freight of the materials. The Client agrees it is liable to pay for storage and freight costs charged to J&M, at rates determined by J&M if:
  - (a) the Services are not able to be undertaken for any reason arising due to the actions of the Client;
  - (b) materials required for the performance of the Services are not utilised by the anticipated time due to delay in performing the Services caused by the Client.
- 4.9 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 J&M nor to withhold payment of any invoice because part of that invoice is in dispute.

**5. Completion of Services**

- 5.1 In relation to completion of Services, these are deemed to have been delivered and finalised for the Client upon notification by J&M to the Client once J&M considers the Services to have been completed and fully performed as set down in a quotation ("Delivery").
- 5.2 J&M may perform the Services incrementally or in stages, as set down in a quotation or communication by J&M to the Client. Each separate instalment/increment/stage shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 5.3 Any time or date given by J&M to the Client is an estimate only. The Client must still accept or facilitate Delivery of the Services even if late, and J&M will not be liable for any loss or damage incurred by the Client as a result of Delivery being late.
- 5.4 The Client must:
  - (a) Take and acknowledge Delivery whenever they are notified as being delivered by J&M;
  - (b) ensure all surfaces to which Services are to be performed/applied are free from defect, including (without limitation) water ingress or rising damp;
  - (c) facilitate Delivery and provide uninterrupted and exclusive access and occupation to the physical locations where Services are required to be performed;
  - (d) remove from the physical location where Services are to be Delivered any rubbish, furniture, personal effects or other property or peoples likely to impede J&M's performance in Delivery,
 in order to minimise delays, risk of injury or any possible damage. In the event that the Client is unable to take delivery of the Services as arranged, then J&M shall be entitled to charge a reasonable fee for redelivery and/or storage as described in clause 5.5.

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- 5.5 If the Client does not comply with clause 5.4, then J&M may at its discretion:
- delay Delivery and charge a re-delivery / re-booking fee of \$ \_\_\_ plus GST (or such other reasonable amount notified by J&M to the Client having regard to the nature of the Services, the staff that were otherwise required to have been ready to complete the Services and whether storage is required in the meantime) to the Client, which shall be payable in addition to the Price; or
  - remain on-site and await for uninterrupted access to be provided and/or remove items or rubbish from the Delivery location and, unless such tasks or delay were specifically included in the scope of the Services, charge the Client a delay / preparation fee which shall be payable in addition to the Price and be calculated by multiplying the time of the delay or that such preparation takes by J&M's hourly rate of \$85 plus GST with a minimum charge of 1 hour.
- 5.6 Unless agreed otherwise in writing, all Services are performed during J&M's normal business hours, Monday to Friday between 7am and 6pm.
- 6. Risk & Liability**
- 6.1 Risk of damage to or loss of the finalised product of Services shall at no time pass to J&M and to the extent which J&M is required to take on any such risk then this shall re-pass to the Client on Delivery. Upon request by the Client, J&M may at its discretion repair any staining, scratches and/or holes not specifically associated with the Services at the expense of the Client.
- 6.2 If there is any damage or destruction to materials utilised in Services but prior to Delivery, J&M is entitled to receive all insurance proceeds payable for the Services and/or materials utilised in performance of Services. The production of these terms and conditions by J&M is sufficient evidence of J&M's rights to receive the insurance proceeds without the need for any person dealing with J&M to make further enquiries.
- 6.3 If the Client requests J&M to:
- leave materials outside J&M's premises for collection; or
  - deliver the materials to or perform Services at an unattended or unsupervised location,
- then such materials shall be deemed Delivered once left at and shall be at the Client's sole risk and all Services performed shall be deemed performed once J&M undertakes them and gives notice to the Client. J&M shall in no event be liable for damage or loss which occurs once Delivered at an unattended or unsupervised location.
- 6.4 The Client acknowledges that J&M shall not be responsible for any defects in the materials used in the Services, or any loss or damage howsoever arising, from the Client not adhering to:
- The manufacturer's recommended maintenance methods and regimes; and
  - Any of J&M's recommendations via written communications or terms sheets.
- 6.5 J&M is not liable for and offers no guarantee against cracking and/or lifting of the Services which may result from structural movement, poor substrates or other pre-existing defects whether they are readily apparent or not and the Client releases J&M from any such liability or claim on this basis.
- 6.6 Excluding the negligence of J&M, the Client releases J&M from all liability to the Client for any cost, loss or damage (direct, indirect, consequential, economic, physical or otherwise, including loss of profits) of any nature arising in any way:
- from any defect or failure of the Services which are supplied to the Client.
  - incurred by the Client or any third party by reason of any delay in Delivery of the Services.
- 6.7 Should J&M be delayed in or prevented from Delivering due to any cause beyond its control, J&M shall be entitled to cancel or suspend Delivery without incurring any liability to the Client for any cost, loss or damage whatsoever arising therefrom.
- 6.8 Notwithstanding anything to the contrary, the liability of J&M for any cost, loss, damage, or injury whatsoever shall be limited to the Price of the Services, and J&M shall not be liable for any consequential or indirect damage or loss of any kind whatsoever.
- 6.9 Where guards are included in the Services quoted for, there is no express or implied term or warranty given by J&M that such guards will comply with any safety requirements which may be applicable, and it shall be the sole responsibility of the Client to ensure that the guards meet those safety requirements.
- 6.10 The Client indemnifies J&M against all and any claims including all costs and expenses associated with, made by any third persons for any loss, injury or damage of any nature whatsoever arising from the use of those things arising from the Services on and from Delivery, including use in any manner in contravention of any recommendation made by the manufacturer or J&M.
- 7. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 7.1 The Client must inspect the Delivered product on Delivery and must within seven (7) days of delivery notify J&M in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Services as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow J&M to inspect the Services.
- 7.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 7.3 J&M acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees, which shall prevail to the extent of any inconsistency.
- 7.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, J&M makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Services requested. J&M's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 7.5 If the Client is a consumer within the meaning of the CCA, J&M's liability is limited to the extent permitted by section 64A of Schedule 2.
- 7.6 If J&M is required to replace the items associated with Services performed under this clause or the CCA, but is unable to do so, J&M may refund any money the Client has paid for the Services.
- 7.7 If the Client is not a consumer within the meaning of the CCA, J&M's liability for any defect or damage in the products Delivered by the Services is:
- limited to the value of any express warranty or warranty card provided to the Client by J&M at J&M's sole discretion;
  - limited to any warranty to which J&M is entitled, if J&M did not manufacture the materials utilised in performance of the Services;
  - otherwise negated absolutely.
- 7.8 Subject to this clause 7, J&M is not liable to provide remediation unless:
- the Client has complied with the provisions of clause 7.1; and
  - J&M has agreed that the Services performed are defective; and
  - Notification of the defective Services is made within a reasonably time of Delivery;
- 7.9 Notwithstanding clauses 7.1 to 7.8 but subject to the CCA, J&M shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- the Client failing to properly maintain the finished products arising from the Services;
  - the Client using the finished product arising from the Services for any purpose other than that for which they were designed;
  - the Client continuing the use of the finished product arising from the Services after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
  - the Client failing to follow any instructions or guidelines provided by J&M or any manufacturer's specifications or recommendations;
  - fair wear and tear, any accident, or act of God or any other such act or other thing outside of the control of J&M.
- 7.10 Notwithstanding anything contained in this clause if J&M is required by a law to provide remedial services then J&M will only do so on the conditions imposed by that law.
- 8. Default and Consequences of Default**
- 8.1 Notwithstanding any other right of J&M under these Terms or at law, if the Client fails to make payment of J&M's tax invoice by its due date then J&M is entitled to charge default interest to the

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- Client. The Client is liable to pay such default interest and acknowledges that the default interest will be a rate of 2.5% per calendar month or, should that be determined not to be enforceable by a court of competent jurisdiction then at the rate charged by J&M's financier for overdraft interest rate for unsecured overdrafts in excess of \$100,000 plus 2% per annum.
- 8.2 Interest shall be calculated on a daily basis from the due date to the date of payment in full.
- 8.3 Interest will capitalise at the end of each calendar month such that the interest then forms part of the monies owed and will itself bear interest in addition to the monies already unpaid. This clause does not merge upon any judgment obtained by J&M against the Client, unless waived by J&M in its sole and absolute discretion. Interest is immediately due and payable as a liquidated debt to J&M from the date that it accumulates.
- 8.4 If the Client owes J&M any money the Client shall indemnify J&M from and against all costs and disbursements incurred by J&M in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, J&M's contract default fees, and bank dishonour fees).
- 8.5 Without prejudice to any other remedies J&M may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions J&M may suspend or terminate the supply of the Services to the Client. J&M will not be liable to the Client for any loss or damage the Client suffers because J&M has exercised its rights under this clause.
- 8.6 Without prejudice to J&M's other remedies at law J&M shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to J&M shall, whether or not due for payment, become immediately payable if:
- any money payable to J&M becomes overdue, or in J&M's opinion the Client will be unable to make a payment when it falls due;
  - the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 9. Cancellation**
- 9.1 J&M may cancel any contract to which these terms and conditions apply or cancel Delivery of Services:
- at any time before Services are commenced; or
  - in the event of default by the Client then from the date of such default,
- by giving written notice to the Client. On giving such notice J&M shall repay to the Client any money paid by the Client for the Services. J&M shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 9.2 The Client may only cancel orders if they have not yet accepted a quotation. Cancellation of orders for Services made to the Client's specifications, or for non-stocklist items, cannot not be accepted once production has commenced, or an order has been placed.
- 9.3 In the event that the Client cancels delivery or clause 9.1(b) applies, the Client shall be liable for any and all loss incurred (whether direct or indirect) by J&M as a direct result of the cancellation and supply of the Services to the date of cancellation, including but not limited to any loss of profits, expenditure on wages and other business expenses and materials that were allocated to the Services. J&M shall be entitled to deduct all such costs from any deposit paid.
- 10. Building Industry Fairness (Security of Payment) Act 2017 (QLD) / Building and Construction Industry Security of Payment Act 1999 (NSW) / Building and Construction Industry Security of Payment Act 2002 (VIC)**
- 10.1 At J&M's sole discretion, if there are any disputes or claims for unpaid Services then the provisions of the Building Industry Fairness (Security of Payment) Act 2017 (Qld) and/or Building and Construction Industry Security of Payment Act 1999 (NSW) and/or Building and Construction Industry Security of Payment Act 2002 (VIC) may apply.
- 10.2 Nothing in this agreement is intended to have the affect of contracting out of any applicable provisions of the Building Industry Fairness (Security of Payment) Act 2017 (Qld) or Building and Construction Industry Security of Payment Act 1999 (NSW) or Building and Construction Industry Security of Payment Act 2002 (VIC), except to the extent permitted by the Act where applicable.
- 11. Security and Charge**
- 11.1 In consideration of J&M agreeing to supply the Services, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 11.2 The Client indemnifies J&M from and against all J&M's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising J&M's rights under this clause.
- 11.3 The Client irrevocably appoints J&M and each director of J&M as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 12 including, but not limited to, signing any document on the Client's behalf.
- 12. General**
- 12.1 The failure by J&M to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect J&M's right to subsequently enforce that provision. 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.
- 12.2 These terms and conditions and any contract to which they apply shall be governed by the laws of the territory or state in which J&M has its principal place of business, and are subject to the jurisdiction of the courts in that state.
- 12.3 J&M may license or sub-contract all or any part of its rights and obligations without the Client's consent how this does not reduce or diminish J&M's obligations under these Terms.
- 12.4 The Client agrees that J&M may amend these terms and conditions at any time. If J&M makes a change to these terms and conditions, then that change will take effect from the date on which J&M notifies the Client of such change. The Client will be taken to have accepted such changes if the Client makes a further request for J&M to provide Services to the Client.
- 12.5 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.
- 12.6 The Client warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.
- 12.7 The Client shall give J&M not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, or business practice) should the Services not yet have been Delivered. The Client shall be liable for any loss incurred by J&M as a result of the Client's failure to comply with this clause.
- 13. Title**
- 13.1 It is agreed that ownership of the any goods or materials stored at the site where the Services are to be performed shall remain with J&M at all times, and that if the Client enters into control of such items then:
- the Client is only a bailee of such items and must return them to the Contractor on request;
  - the Client holds the benefit of the Client's insurance of the items on trust for the Contractor and must pay to the Contractor the proceeds of any insurance in the event of the items being lost, damaged or destroyed;
  - the Client must not sell, dispose, or otherwise part with possession of any goods or materials utilised in the performance of the Services;
  - the Client must not convert or process the items or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of the Contractor and must sell, dispose of or return the resulting product to the Contractor as it so directs;
  - the Client irrevocably authorises the Contractor to enter any premises where the Contractor believes the items are kept and recover possession of them;

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- (f) the Contractor may recover possession of any such items in transit whether or not Delivery has occurred.
  - (g) the Client shall not charge or grant an encumbrance over the items nor grant nor otherwise give away any interest in them while they remain the property of the Contractor.
  - (h) the Contractor may commence proceedings to recover the value of any of these items that have been dealt with by the Client notwithstanding that ownership in them has not passed to the Client.
- 14. Privacy Act 1988**
- 14.1 The Client agrees for J&M to obtain from a credit reporting agency a credit report containing personal credit information about the Client in relation to credit provided by J&M.
- 14.2 The Client agrees that J&M may exchange information about the Client 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 the 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 creditworthiness of the Client.
  - (e) The Client understands that the information exchanged can include anything about the Client's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
- 14.3 The Client consents to J&M being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 14.4 The Client agrees that personal credit information provided may be used and retained by J&M for the following purposes (and for other purposes as shall be agreed between the Client and J&M or required by law from time to time):
- (a) the provision of Services; and/or
  - (b) the marketing of Services by J&M, its agents or distributors; and/or
  - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Services; and/or
  - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the 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 Services.
- 14.5 J&M 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;
  - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
- 14.6 The information given to the credit reporting agency may include:
- (a) personal particulars (the Client's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number);
  - (b) details concerning the Client's application for credit or commercial credit and the amount requested;
  - (c) advice that J&M is a current credit provider to the Client;
  - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
  - (e) that the Client's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
  - (f) information that, in the opinion of J&M, the Client has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Client's credit obligations);
  - (g) advice that cheques drawn by the Client for one hundred dollars (\$100) or more, have been dishonoured more than once;
  - (h) that credit provided to the Client by J&M has been paid or otherwise discharged.