

# SHIRLEY CONSULTING ENGINEERS PTY LTD [ABN 65 001 224 728] : TERMS OF ENGAGEMENT

## 1. Definitions & General Items

In these Terms of Engagement:

The 'Company' shall mean Shirley Consulting Engineers Pty Limited, its staff and consultants, other related entities, servants and agents, which is providing the Services.

The 'Client' shall mean and include the body, or person with whom the Company contracts in relation to the performance of functions or the provision of goods or services. In the event that the Client is an incorporated body, the term 'Client' shall include all related & associated corporations.

The 'Agent' is the person / organisation appointed by the Client to act for the Client in relation to a particular project or matter.

An 'Account' client shall mean a Client whom the Company has decided to accept payment "in arrears" of invoices issued by the Company for any Services rendered.

A 'Non-Account' client shall mean a Client whom the Company has decided not to extend credit, nor allow invoices issued by the Company to be paid "in arrears".

A 'Sub-contractor' shall mean and include:

- A professional or non-professional person, firm or company with whom the Company arranges for any work to be undertaken for the Client;
- any person who is now or hereafter a servant, agent or sub-contractor of any of the persons referred to above.

The 'Letter of Offer', and / or 'Fee Proposal' shall mean the Budget Estimate of Fees, Schedule, letter or email with attached schedule(s), or letter provided to the Client by the Company setting out the basis on which the Company is prepared to undertake work, and / or provide services to the Client, in relation to the particular project stated in the Letter of Offer.

'Budget Estimate' shall mean any 'Budget Estimate of Fees' or 'Quote' provided by the Company that is either attached to, or included in, a Letter of Offer to the Client.

'Disbursements' shall mean any 'out-of-pocket' expenses incurred by the Company in relation to a Client's project, and includes both the Company's internal disbursements [e.g. photocopies, computing & vehicle expenses], and the Company's external disbursements [e.g. sub-contract driller charges, airline & other fares, hotel / motel costs, etc.], including any additional Administration Fee.

'Terms' shall mean these Terms of Engagement.

The 'Services' shall mean the various goods, professional work & services stipulated in the Letter of Offer to be provided by the Company to the Client. The Services to be provided by the Company shall also be limited to the scope of work set out in the Schedule(s) incorporated in, or attached to, the Letter of Offer / Fee Proposal.

The 'Project' shall mean the physical construction, and / or the Services, defined in the Letter of Offer to which these Terms apply.

The 'Agreement', or contract for the provision of Services between the Company and the Client, shall comprise these Terms of Engagement, any associated Schedule, the Letter of Offer & attached / related schedules, any agreed variations and the letter of acceptance, purchase order, or other communication [written or otherwise] authorising the Company to proceed with the provision of the Services to the Client.

'Documents' shall mean any drawings, reports, expert reports, specifications, bills of quantity, digital images, video tapes, sketches, calculations [computer aided, or otherwise], electronic files, memoranda, etc., held or created by the Company during the course of work on the Project.

Where there is an inconsistency between these Terms, and any terms stated in the Company's Letter of Offer and / or Schedule(s), the terms stated in the Letter of Offer shall prevail to the extent of the inconsistency. These Terms shall apply to the exclusion of any contrary provisions which may appear on any order form, purchase order, email or other document issued by the Client to form the Agreement between the Company and the Client.

Unless specifically agreed otherwise, all work undertaken by the Company will be in accordance with the Agreement. No other term or condition shall be incorporated into the Agreement unless specifically agreed to in writing by the Company. The relationship between the Company and the Client, and any relationship arising pursuant to the Services provided by the Company, shall be governed by the laws of the State of New South Wales, Australia.

## 2. Performance & Communications

In providing the Services, the Company only undertakes to exercise the degree of skill, care and diligence normally exercised by consulting engineers and companies in similar circumstances. There shall be no liability whatsoever in respect of any failure to exercise any degree of skill, or level of care beyond the skill, care and diligence normally exercised by consulting engineers and companies in similar circumstances.

The Client shall nominate, in writing the person, who is to act as the Client's representative for the project. The Client shall also provide in a timely manner the Company with all necessary information & documents concerning the Client's requirements for the Project.

The Client acknowledges that:

- the Company does not supervise the work of others;
- the Company does not accept any liability for Documents supplied electronically by the Company to the Client or a third party; only original versions of Documents, or other information represents the professional advice provided by the Company;
- the Client will not show / supply to a third party any Documents prepared by the Company, unless agreed to in writing by the Company;
- investigative, remedial and forensic engineering projects are by their nature engineering investigations into matters which are currently not known; as such, during the course of provision of the Services, it is likely that significant alterations to the scope of service to be provided by the Consultant will be necessary.

Where the Company provides site inspection or testing services during construction, such inspections and services are aimed at ensuring or documenting compliance with the specification and / or appropriate engineering standards. The provision of these Services, including the provision of verbal advice by site personnel shall not in any way relieve a contractor of its responsibilities under any contract.

Where verbal advice or approval is given 'on-site' by personnel employed by the Company, and whilst such advice or approval may be given in good faith, the Company will not accept any responsibility or liability for any 'on-site' advice unless the advice is subsequently confirmed in writing.

## 3. Sub-contractors

If the Company considers it appropriate to do so, the Company may engage a Sub-contractor to assist the Company in undertaking part of the work, and / or provision of the Services to the Client. In some cases, and where the Company considers it appropriate to do so, the Company may seek the Client's prior approval [which shall not be unreasonably withheld] to engage the Sub-contractor.

The Client shall also accept responsibility for the payment of all monies payable to such Sub-contractor after certification from the Company; where the Company includes the Sub-contractor's costs / charges in its invoices to the Client, then the Company reserves the right to charge an 'Administration Fee' of 12.5% of the Sub-contractor's fees.

## 4. Documents & Information

The Client shall provide to the Company all necessary briefing and information concerning the Client's requirements for the provision of the Services, and the undertaking of work by the Company. Any costs incurred by the Company as a result of any delays in the provision of the Documents to the Company shall be a legitimate charge to the Client. The Client also recognises that the Company has relied on, and will rely on, the information provided by the Client.



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## 4.1. *Electronic Copies of Documents*

Unless specifically agreed otherwise, electronic versions of any Documents will only be provided in PDF format, with security applied to not permit manipulation. In addition, Documents shall remain the property of the Company and will not be supplied to the Client / third party without the specific agreement of the Company.

Further, where electronic versions of any Documents produced by the Company are provided, the same are supplied in good faith and on the basis that the Client / recipient will not use, or distribute copies [or parts thereof] of the Documents without specific permission from the Company.

Any unauthorised distribution of the Documents, or parts thereof, will be considered a breach of the Company's copyright and / or confidentiality.

The Company does NOT accept any responsibility, or liability, for any Documents electronically transmitted.

## 4.2. *Diaries and Documents*

The originals of any Documents held by the Company will not be surrendered to a court under any circumstances and only copies of Documents or records will be provided in response to a subpoena. Where copies of the Company's Documents or records are provided to a court [under a subpoena or otherwise], the Company will obliterate any material which, in the Company's opinion, does not directly relate to the matter in hand.

All expenses [including all fees & disbursements] associated with the provision of the Company's records and / or Documents to a court shall be paid to the Company by the Client, or person / organisation issuing the subpoena. Where the quantum of the expenses cannot be determined prior to the provision of the documents referred to in the subpoena, the person / organisation issuing the subpoena shall provide the Company with an irrevocable undertaking to pay the Company's expenses / estimated fees, before the records and / or Documents are provided to the court.

## 5. *Proposals & Fees*

GST [Goods & Services Tax] is generally payable on the Services provided by the Company. As such, unless the Letter of Offer specifically states that GST has been included in any Budget Estimate provided, then GST has NOT been included in the Budget Estimate.

### 5.1. *Time / Rates*

Where the Letter of Offer states that the Company's offer is on a 'Time / Rates' basis, the charges made by the Company to the Client will be based on the Company's current rates for personnel & equipment, the actual quantities of work performed, the time expended by the Company and / or its Sub-contractors in providing the Services and any 'out-of-pocket' expenses [or Disbursements] incurred, plus an administrative charge where relevant.

The Client acknowledges that the Company's computer & other records of the amount of time expended and costs incurred during the provision of the Services shall be proof of the work undertaken and the charges made by the Company.

Any Budget Estimate provided on a 'Time / Rates' basis is NOT a Lump Sum, or Fixed Price amount. The Budget Estimate may also need revision [sometimes extensively] during the progress of the work and the provision of the Services.

Any Budget Estimate provided by the Company is based on the Company's perception of the Client's requirements and limited Services required at the time of preparing the estimate; as such, the Budget Estimate provided is only a 'supposition' of the actual Services, or Services required to be provided.

### 5.2. *Lump Sum*

Where the Letter of Offer states that the fee is a 'Lump Sum' amount [or a series of 'Lump Sum' amounts], the 'Lump Sum' fee offered to the Client assumes that:

- the various materials, services, plans, etc., specified in the Letter of Offer are supplied by the Client at the time and place designated, and at no cost to the Company;
- the Lump Sum is only for the provision of the particular Services and work set out in the Letter of Offer.

Should any activity, or work, be required in addition to the Services set out in the Letter of Offer, the Company will charge for such additional work at either varied 'Lump Sum' amounts [after agreement between the Company & the Client], or on a 'Time / Rates' basis as set out above.

The Lump Sum does not apply to any Disbursements incurred by the Company on behalf of a Client.

### 5.3. *Authorisation of Work & Fee Deposit*

The Agreement shall be deemed to be established once the Client, or its Agent, provides to the Company a letter of acceptance, purchase order, or other communication [written or otherwise] that refers to the Company's Letter of Offer and, where requested, payment of any Retainer or 'Fee Deposit'.

The Company reserves the right to require a 'Fee Deposit' to be paid by a 'Non-Account' Client prior to the Company commencing work on the Project; such 'Fee Deposit' shall be treated as an 'advance' on the fees / costs to be incurred by the Company and is NOT refundable. The 'fee deposit' shall also be maintained for the duration of the project, and may need to be varied in accordance with the Services to be undertaken by the Company.

### 5.4. *Variations*

Should the Client vary the Services, and / or scope of work required [either orally, or in writing], and the Company agrees to undertake the varied work, then all such work will be considered as a 'Variation' to the original Agreement. Similarly, should the Company find it necessary to vary the Services, and / or the amount of professional time required to complete the work and / or to provide the Services, the Company shall be entitled to a 'Variation'.

The Company will charge the Client for any 'Variation' at the Company's current rates for personnel & equipment, together with any additional Disbursements.

### 5.5. *Authorisation of Variations*

Where the Company finds it necessary to vary the Services and / or scope of work, the Company will endeavour to advise the Client within a reasonable time [usually 7 days] of the need for the 'Variation'. There may however be occasions where the Company cannot provide the 7 days notice.

The Client's formal instruction to proceed with the 'Variation' shall be assumed from either:

- the Client issuing a letter of acceptance, purchase order, email, or other communication [either verbally or in writing] that refers to, and accepts the Company's request for a 'Variation';
- the Client's Agent providing the Company with an instruction, either verbally or in writing, to proceed with the additional and / or varied work.

The Client also acknowledges that the Company's computer & other records [including phone records] of a Client's instruction to carry out the varied work, shall be proof of the Client's instruction for the Company to proceed with the 'Variation'.

Where the Company is unable to provide the 7 days notice, the Company will endeavour to advise the Client verbally, and / or by email / facsimile, of the need for a 'Variation'.

Where the Client decides to not authorise the 'Variation', then the Company reserves the right to either:

- complete the work already authorised which can be completed, with any reports / Documents incorporating any appropriate limitation clauses, or
- immediately cease work and require the Client to immediately pay all costs incurred to the date of cessation of work.

### 5.6. *Stand By & Retainer Fees*

The Company reserves the right to charge a 'Stand By' fee or rate, where a staff member is required to hold themselves available on particular days for meetings, conferences and court attendances. Unless specifically varied in the Company's Letter of Offer, the 'Stand By' rate will be charged for the number of days the staff member is on call, irrespective of any other charges made by the Company.

Where a lump sum 'Retainer' is stated in the Company's Letter of Offer, the 'Retainer' is payable 'in advance', and:

- only the purchase of an 'option' on the part of a Client to use the Company's services;
- separate to, and not discounted against, any other 'Time / Rates', or 'Lump Sum' charges by the Company.



## 6. Copyright & Licence

Copyright in all Documents prepared by the Company, including those prepared at the request or direction of the Client, shall remain the property of the Company. The Company also reserves the right to only supply to the Client the Documents specifically stated in the Letter of Offer, and to refuse to supply any other Documents [either electronic, or hard copy] held, or created by the Company during the course of the work on the Client's project.

The Client alone shall have a licence to use the Documents referred to above in connection with the particular Project for which the Documents were prepared. This licence is non-transferable, and shall NOT apply to any 'draft' version of any Document prepared by the Company.

The Client shall not use, nor tender any version of any report prepared by the Company in legal proceedings, nor make copies of the Documents referred to above in connection with any other work, or project, without the prior written approval by the Company.

If the Client is in breach of any obligation to make payment to the Company, the Company may revoke the licence referred to above; in such a case, the Client shall cause to be returned to the Company all the Documents and all copies thereof. The Client shall also remove from its computer systems & files any electronic copies of any of the Company's Documents / files.

In the event that the Client is in breach of its obligation to the Company to return the Documents as stated above, then such breach will be considered an 'act of theft', and the Company will be entitled to seek compensation for the theft.

## 7. Payment & Company Invoices

The Client shall pay the Company the Fees and Disbursements in respect of the Services agreed to be provided, and as set out in the various invoices prepared by the Company and forwarded to the Client.

All of the Company's invoices are due and payable within seven [7] days of date of the invoice. Interest is charged on overdue accounts at the compound rate of 1.5% per month. Unless otherwise agreed, or specifically stated in the Letter of Offer:

- the Company's invoices shall be paid on a progressive basis throughout the Project;
- payment shall be made by electronic funds transfer, bank cheque, or cash.

Where the Company is engaged by an Agent for the Client, with the Company understanding that a particular Client / organisation is responsible for payment of the Company's invoices, it is the responsibility of the Agent to **immediately** inform the Company of any changes to the client / organisation responsible for payment of the Company's invoices. If the Agent does not immediately inform the Company, and make arrangements for a new agreement to be formed between the Company and the new client, then the Agent is responsible for payment of the Company's fees in accordance with the original Agreement.

Where designs and specifications are provided to the Client, and unless otherwise agreed in writing, the entire design fee [as invoiced] must be paid prior to commencement of work on-site, or utilisation of the design information prepared by the Company. Similarly, where the Company prepares 'expert reports' for use in legal proceedings, and unless otherwise specifically agreed, full payment for the completed report shall be made before the final & signed version of the report is issued.

Should the Client fail to pay any of the Company's invoices in a timely manner, and / or in accordance with the agreed payment schedule, then the Company reserves the right to withhold Documents, and / or cease work on the project. In such case, the Company shall be entitled to recover from the Client, any costs, legal fees and expenses [on solicitor / client basis], court costs, etc., incurred by the Company as a result of the Client's default.

If notice is not given by the Client to the contrary within fourteen [14] days of the date of issue of an invoice by the Company, it will be taken that the quantum of the invoice is accepted by the Client without dispute. If the Client wishes to dispute an invoice, the Client shall give written notice to the Company of the reasons for such dispute within fourteen [14] days of the date of issue of the invoice.

At the Company's sole discretion, any dispute or claim for unpaid Services may be the subject of a claim under the provisions of the NSW Building & Construction Industry Security of Payment Act 1999.

## 8. Disputes, Applicable Law & Consumer Protection / Fair Trading Acts

This Agreement, and any disputes, mediation, arbitration & litigation arising out of it shall be governed by the laws of New South Wales, Australia.

Any dispute between the Client and the Company shall first be the subject of discussions of between the Company and the Client. Subsequently, a dispute that has not been resolved by discussions between the Company and the Client shall be the subject of mediation in accordance with either the procedures detailed in the approved Limitation of Liability Scheme covering the Company, or other mediation agreed to by the Company.

Any mediation process shall not prevent the Company from instituting legal action at any time to recover monies owing to the Company by the Client.

Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Competition and Consumer Act 2010, or the Fair Trading Acts in each of the States and Territories of Australia (including any substitute to those Acts or re-enactment thereof), except to the extent permitted by those Acts where applicable.

## 9. Insurance and Liability

The maximum liability of the Company to the Client arising out of the performance or non-performance of the Services, shall be limited to either the cost of rectifying the works which are the subject of advice provided by the Company, or \$ 5,000,000. The Client also acknowledges that it is aware that the Company's professional liability [both in tort and otherwise] is limited by a scheme approved under Professional Standards legislation, with the Company having a statutory limit to its liability of 10 years and \$ 5,000,000. The Company's public liability is also limited to \$ 20,000,000.

The Client shall indemnify and hold the Company harmless against all claims, costs and demands by third parties [including the Agent, or the Client's other agents, contractors, or sub-contractors] in respect of the Services provided by the Company.

The Client acknowledges that the Company's liability to the Client or its Agent, if any, shall be absolutely extinguished after the expiration of twelve [12] months from the date of the Company's final invoice in respect of the Services. Under no circumstances, whether as a result of any act, neglect, default or otherwise, shall the Company have any liability for, or in relation to, any work, reports, information, plans, designs or specifications, supplied or performed by any third party, including a third party engaged by, or at the suggestion of the Company.

## 10. Termination

The Agreement between the Company and the Client may be terminated by either party by the giving of fourteen [14] days written notice in the event of substantial failure by the other party to perform in accordance with the Agreement. Such termination shall not be effective if the failure has been remedied before the expiration of the period specified in the written notice.

If the Agreement is terminated before the conclusion of all work or Services for which the Company has been engaged, the Company shall be entitled to be paid by the Client for all work and reimbursable expenses [i.e. Disbursements] in respect of work performed as at the date of termination, plus a 'Termination Payment' to cover the Company's reasonable project termination expenses [e.g. consolidation & archiving files, unproductive time related to the re-allocation of staff and resources to other projects].

This 'Termination Payment' shall be in addition to all fees invoiced by the Company for Services provided up to, and including the date of termination by the Client to provide compensation to the Company for disruption of activities in arranging for the originally planned continued provision of the Services. The 'Termination Payment' shall not be discounted against further work in the event of a resumption of the provision of the Services.

## 11. Death / Insolvency of Client

The Agreement shall survive the death or insolvency of the Client; the Client's rights and obligations shall pass to its successors, receiver, administrator or liquidator. Despite the foregoing, the Company shall be entitled to immediately terminate work on the Project and the provision of the Services. In such event, all the Company's fees and costs to the date of termination shall become due and payable as a 'secured creditor' against the tangible assets of the Client.

