

1. Definitions and interpretation

Active means Active Green Services Pty Ltd (ACN 079 090 181) and any related body corporate of that entity.

Agreement means these terms and conditions of engagement.

Client means the entity or person identified in the Quotation and any related body corporate of that entity.

Defect means an error, omission, deficiency or discrepancy in the Services, or a failure of the Services to comply with the Specifications.

GST has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

IP Right means any copyright, trade mark, moral right, patent, registered design, confidential information or trade secret.

Fee means the fee for the Services identified in the Quotation, excluding any applicable GST, as adjusted in accordance with this Agreement.

Purpose means the purpose for which the Services are provided as identified in the Quotation or client-supplied documents.

Report means a report prepared by Active in the performance of the Services (including any expert Report used, or intended for use, in court proceedings or dispute resolution).

SOP Act means, if the Services are being performed in:

- (a) New South Wales, *Building and Construction Industry Security of Payment Act 1999* (NSW);
- (b) Victoria, *Building and Construction Industry Security of Payment Act 2002* (Vic);
- (c) South Australia, *Building and Construction Industry Security of Payment Act 2009* (SA);
- (d) Tasmania, *Building and Construction Industry Security of Payment Act 2009* (Tas);
- (e) Queensland, *Building Industry Fairness (Security of Payment) Act 2017* (Qld); or
- (f) Northern Territory, *Construction Contracts (Security of Payments) Regulations 2005* (NT).

Quotation means the quote for the Services provided by Active to the Client.

Services means the services offered to be performed by Active as stated in the Quotation, as varied by agreement between Active and the Client in writing.

Site means the place at which the Services will be performed as identified in the Quotation.

Specifications means the Services specifications as identified in the Quotation.

2. Terms of Engagement

2.1 Unless otherwise stated in the Quotation, the Quotation is valid for a period of 30 days.

2.2 Active agrees to provide to the Client the Services in accordance with the terms identified in the Quotation and the Agreement.

2.3 In consideration for Active's performance of the Services, the Client will pay the Fee.

2.4 The Client may accept the Quotation and this Agreement by email or by continuing to instruct Active in respect of the Services.

2.5 In performing the Services, Active will exercise the degree of skill, care and diligence generally employed by professionals performing services similar to the Services.

2.6 Information contained in the Quotation is confidential and not to be disclosed to any third party or used for any purpose other than in connection with the Services without the prior written consent of Active.

2.7 Quotations are valid for existing Site conditions at time of assessment and the assumptions stated are not exclusive. Any works carried out at a Site prior to commencement of the Services or other changes to circumstances and conditions under which this quotation was provided permit Active to vary or void this quotation at Active's sole discretion.

2.8 In providing the Quotation, Active assumes the Site complies with all applicable laws and the Client holds and maintains all permits, approvals and consents required to enable Active to access the Site and carry out the Services.

2.9 If Active is or reasonably considers it may be delayed in performing the Services due to a matter beyond the control of either party (including a pandemic or natural disaster), the Client must extend the time by which the Services (or part thereof) must be completed by Active by a period of time that reflects that delay.

3. Acceptance of Services

3.1 The Client will be deemed to have accepted the Services within 14 days of completion of the Services, unless clause 3.2 applies.

3.2 If the Client identifies any Defect in the Services, it must within no later than 14 days after completion of the Services, notify Active of the Defect and identify what is required (acting reasonably) to rectify the Defect.

3.3 If the Client fails to strictly comply with clause 3.2, it will have no claim against Active for the Defect.

4. Client-supplied documents

4.1 The Services are informed by the information and documentation provided by the Client prior to the date of the Quotation.

4.2 The Client acknowledges and agrees that in its performance of the Services, Active relies upon the information and documentation provided by the Client.

4.3 Active is not responsible or liable for the information provided by any third parties engaged by the Client and relied upon by Active in performing the Services.

4.4 Active is not responsible for any error, deficiency, Defect or inconsistency in the Services or the Specifications arising from Active's reliance upon the information or documentation provided by the Client prior to or after the date of this Agreement, whether or not those documents or information are included or referenced in the Quotation.

5. Client's Representative

5.1 The Client must notify Active at the time of commencement of the Services, of the name and contact details of the Client's nominated representative (**Client's Representative**).

5.2 All communication between Active and the Client will be directed to the Client's Representative. Any notice or other

communication issued to the Client's Representative will be deemed to have been received by the Client.

5.3 The Client agrees that the Client's Representative has the authority to act and issue all approvals and consents on behalf of the Client in all matters concerning the Services.

6. Access to Site

6.1 The Client must provide Active with sufficient access to the Site to enable Active to carry out and perform the Services.

6.2 If the Client fails to provide sufficient access to the Site to Active, the additional costs incurred by Active as a result of the inadequate possession will be added to the Fee.

6.3 The Client must ensure that there is adequate power, water and other utilities reasonably required by Active at the Site to enable Active to perform the Services. Any specific utilities required by Active will be identified in the Quotation.

6.4 The Client must notify Active of any safety requirements, regulations and sources of danger that are present or may be encountered at the Site. If Active is not notified of these requirements, regulations or sources of danger prior to providing the Quotation, the additional costs incurred by Active in carrying out the Services will be added to the Fee.

7. Reports prepared by Active

7.1 Alteration of a Report by any person other than those authorised in writing by Active invalidates the Report in its entirety.

7.2 The contents of a Report represent the professional opinion of the consultant. Active's Fee for the preparation of a Report is in no way contingent upon the consultant reporting a particular conclusion of fact, nor upon the occurrence of a subsequent event.

7.3 All tree inspections, unless otherwise stated, are based upon Visual Tree Assessment (VTA) techniques, industry best practice and applied knowledge. No internal diagnostic testing or below ground investigation has been carried out, unless otherwise stated in the Report.

7.4 Any tree inspections or assessments which have been carried out for the purposes of a Report are valid only at the time of inspection and are based on what could reasonably be seen or diagnosed from a visual inspection carried out from ground level.

7.5 Trees are a living organism and as such they have a finite lifespan the end of which cannot always be predicted or understood. Even apparently healthy trees can die suddenly or fall without warning. As such there is no warranty or guarantee given, whether express or implied, regarding the future risks associated with any tree (or part thereof).

7.6 Sketches, diagrams, graphs and photographs in a Report are intended as visual aids, are not to scale unless stated to be so, and cannot be construed as engineering or architectural reports or as surveys.

7.7 Unless expressly stated otherwise:

(a) the information in a Report covers only those items which were examined and will reflect the condition of those items at the time of the inspection.

(b) inspection of the Site is limited to visual examination of accessible components without dissection, excavation or probing. There is no warranty or guarantee, express or implied, that because problems or defects were not present during Active's inspection, that

problems or defects may not arise in the future or following an invasive examination process.

8. Expert Witness Services

8.1 This clause applies if the Client requires Active to attend Court to give evidence, prepare an expert Report or assist in the preparation for a hearing associated with a report prepared by Active in carrying out the Services or for any other reason (**Expert Witness Services**).

8.2 Unless expressly stated, the Fee excludes any Expert Witness Services.

8.3 All Expert Witness Services will be charged on the basis of hourly rates.

8.4 If Active personnel are required to 'stand by' for attendance at Court or an expert conclave, the Client agrees to pay a 'stand by' fee on an hourly rates basis for the relevant Active employee, irrespective of whether that person is ultimately required by the Court to attend the hearing or conclave.

8.5 Before a Report is provided, the Client must provide a formal letter of instruction identifying the issues and questions for Active to respond to, together with any special requirements for the documents or reports to be prepared by Active.

8.6 If the Client requires that legal privilege be noted on any documents or Report prepared by Active, it must expressly direct Active and provide the wording required.

8.7 If the Client does not provide the documents to be considered by Active in preparation of any Report in a suitable format, the Client will be charged the additional costs in converting or printing documentation to the required format.

8.8 Active will consider grammatical or factual changes required to any Report prepared that are necessary to ensure the accuracy and legibility of the report. Any request to change or vary Active's professional opinion will not be adopted.

8.9 Active accepts no liability for the Client's failure to meet any Court timetable.

9. Change to the Services or Fee

9.1 If the Client becomes aware of any change that may affect the Services, including in respect of conditions of the Site or the timing for the provision of the Services, it must notify Active in writing as soon as possible.

9.2 The Client acknowledges and agrees that any change to the Site or nature or timing of the Services may result in a change to the Fee.

9.3 Any additional costs that have been or are likely to be incurred by Active as a result of any change to the Services will be added to the Fee.

9.4 Any change to the Fee will be calculated in accordance with the pre-disclosed rates of charge included in the Quotation (as updated and notified to the Client from time to time).

10. Additional fees and expenses

10.1 Unless otherwise stated in the Quotation, all authority fees and charges are excluded from the Fee.

10.2 Active may, with the prior agreement of the Client (which must not be unreasonably withheld), engage other specialist consultants or third parties which Active considers appropriate to carry out and perform the Services.

10.3 If Active engages a specialist consultant or third party under clause 10.2 the Client agrees that it will be solely liable for the payment of the fees associated with that engagement.

- To the extent any of those fees are paid directly by Active, the Client must reimburse Active for that payment.
- 10.4 If Active is delayed in performing, or prevented from performing, the Services by the Client or a third party under the direction or control of the Client, the additional costs incurred by Active will be charged on an hourly rates basis and added to the Fee.
- 10.5 Any expenses incurred by Active will be added to the Fee.
- 11. Payment**
- 11.1 Unless otherwise stated in the Quotation, Active will issue invoices to the Client:
- (a) on a monthly basis for all work done up to and including the date of the invoice; or
 - (b) upon completion of the Services,
- as identified in the Quotation (**Payment Claim**). The amount of the Fee claimed in each Payment Claim will be:
- (c) if the Fee is a lump sum, based upon a percentage of completion of the Services as at that date; or
 - (d) if the Fee for the Services is being charged on the basis of hourly rates, details of the personnel who performed the work, the number of hours of work performed, the associated hourly rate, a list of tasks undertaken, and a statement of any additional expenses under clause 10.
- 11.2 Payment Claims are due and payable:
- (a) if the SOP Act applies to the Services and the Services are being carried out in New South Wales, 15 business days after the date of issue; or
 - (b) if the SOP Act does not apply to the Services or if the Services are being carried out in a State or Territory other than New South Wales, 30 business days from the end of the month in which the Payment Claim is issued.
- 11.3 If the Client has any objection to a Payment Claim issued by Active, the Client must notify Active in writing within the time required under the relevant SOP Act.
- 11.4 Any objection made by the Client under clause 11.3 does not relieve it of its obligation to make payment of the Payment Claim.
- 11.5 For each day after the due date for payment up until payment is receipted into Active's nominated account, interest will be applied to the amount due for payment at the rate of Active's nominated bank's overdraft lending rate plus 3% per annum and applied to the next Payment Claim. If there are no further payment claims, Active may issue a further claim for payment of interest and the Client must make payment of that invoice within 7 days of receipt of same.
- 11.6 If the Client fails to make payment of a Payment Claim (or an invoice for payment of interest under clause 11.5), the Client acknowledges and agrees:
- (a) Active will be entitled to suspend the performance of the Services until payment is made; and
 - (b) it will be liable to make payment of all costs on an indemnity basis (including legal costs, collection agents' fees and disbursements) incurred by Active in suspending the Services and taking any action whatsoever to recover the debt.
- 11.7 For the avoidance of doubt, all invoices or claims for payment issued are pursuant to and treated as being a claim for payment under and pursuant to the SOP Act.
- 11.8 If the Client cancels the Services within 12 hours of a scheduled Site inspection or commencement of the Services, a cancellation fee, being the amount that is 50% of the Fee will be a debt due payable by the Client to Active.
- 11.9 Payment may be made by way of:
- (a) credit or debit card via the phone, by calling +61 2 9979 0400 or +61 2 9979 0428;
 - (b) by post sending the payment slip at the bottom of an invoice to PO Box 1332, Mona Vale NSW 2103; or
 - (c) by way of electronic funds transfer to Active:
- ABN: 88 079 090 181
Email: accountspayable@active.com.au
Account Name: Active Green Services
BSB: 062 205
Account Number: 10347068
Payment reference: Invoice number
- 12. Retention of Documents**
- Until payment of the Fee in full is made by the Client, Active:
- (a) retains all right, title, possession and ownership in; and
 - (b) may withhold in its sole and absolute discretion,
- all documentation (including Reports) prepared by Active in its performance of the Services or otherwise.
- 13. Intellectual Property**
- 13.1 All IP Rights in any documentation, including drawings, calculations, specifications, sketches, Reports and other intellectual property used or prepared by Active in the performance of the Services shall remain the property of Active.
- 13.2 Upon receipt of payment of the Fee in full by the Client, Active grants to the Client a licence to use the documentation prepared by Active for the Purpose.
- 13.3 The Client shall not distribute or disseminate any information or documentation provided or disclosed to the Client by Active to any third parties without the prior written consent of Active.
- 14. Insurance**
- 14.1 Active will hold and maintain professional indemnity insurance in the amount of \$10,000,000 for any one claim and in the aggregate.
- 14.2 Active will maintain its insurance under this clause for a period of 6 years following the date of completion of the Services.
- 15. Risk and Liability**
- 15.1 The total liability of Active arising under or in connection with this Agreement, whether in contract, tort (including negligence), under any statute, common law, equity or otherwise is limited (to the extent permitted at law) to the lesser of:
- (a) the cost of reperforming the Services (not exceeding the Fee); or
 - (b) the total amount of the Fee paid as at the date on which the claim arose.

- 15.2 For the avoidance of doubt, Active will not be liable to the Client for any loss of use, loss of production, loss of profit, loss of revenue, loss of rent, loss of business, loss of contract or loss of anticipated saving or increase in operating costs arising out of or in connection with this Agreement whether under statute, the law of contract, tort, equity, or otherwise.
- 15.3 The Client indemnifies Active against:
- (a) a breach or non-performance of any of the obligations or warranties of the Client under this Agreement whether express or implied;
 - (b) any negligent, wrongful or unlawful act or omission of the Client;
 - (c) any personal injury or death to any person or damage to property caused or contributed to by the Client;
 - (d) any claims in respect of the Client's right to have the Services carried out at the Site;
 - (e) loss, costs or damage suffered by Active as a result of Active or its personnel accessing the Site.
- 16. Disputes**
- 16.1 If any dispute or difference arises between the Client and Active under or in relation to this Agreement, the party claiming in respect of the dispute must issue a notice of dispute to the other party identifying the dispute and the amount (if any) claimed in relation to that dispute (**Notice of Dispute**).
- 16.2 Within 10 business days of receipt the Notice of Dispute, appropriate representatives of the parties must meet and endeavour to resolve the dispute by way of negotiation.
- 16.3 Neither party may commence proceedings in respect of a dispute:
- (a) until the negotiation under clause 16.2 has taken place; and
 - (b) only if the dispute remains unresolved for a period of 15 business days following that negotiation.
- 17. Termination**
- 17.1 Without limiting any other rights under this Agreement or at law, Active may suspend performance of the Services and provide written notice of breach if:
- (a) the Client fails to make payment of a Payment Claim or invoice by the due date;
 - (b) the Client fails to provide adequate information to allow Active to perform the Services;
 - (c) the Client changes the scope of the Services and the parties cannot agree to an appropriate increase to the Fee; or
 - (d) the Client's instructions are contrary to the Agreement or are, in the reasonable opinion of Active, in breach of any law, statute or regulation,
- and Active may terminate the Agreement and cease performance of the Services if the Client has not remedied that breach or the reasons for suspension within fourteen (14) days written notice.
- 17.2 The Client may only terminate the Agreement:
- (a) in circumstances where Active is in breach of an essential term of the Agreement, provided the Client has provided written notice of that breach and its intention to terminate for that breach and Active has failed to show reasonable cause why that right should not be exercised within fourteen (14) days; or
 - (b) for its convenience, provided it gives Active sixty (60) days' notice of its intention to terminate.
- 17.3 Upon termination of this Agreement for either reason in clause 17.2, clause 17.4 will apply. If the Client terminates for the reasons in clause 17.2(b), then in addition to Active's entitlement under clause 17.4, Active will also be entitled to be paid:
- (a) its costs associated with the termination; and
 - (b) the amount that is 10% of the unpaid Fee, as compensation for Active's loss of profit,
- up to a maximum amount of the balance of the Fee unpaid as at the date of termination.
- 17.4 Upon termination of this Agreement by Active or the Client, Active may render a Payment Claim for the Services performed up to and including the date of termination, which will be payable by the Client in accordance with clause 11.
- 17.5 Irrespective of whether the Agreement is terminated by the Client or Active, Active has no obligation to provide, and may in its absolute discretion retain, any documentation or information until payment of any Payment Claim has been paid in full by the Client.
- 17.6 Active is not liable and accepts no responsibility for costs, damages, collection agent's fees or loss associated with the suspension or termination of the Services under this clause 17 or otherwise.
- 18. General**
- 18.1 Each party warrants that it has the capacity to enter into and perform the obligations under this Agreement.
- 18.2 The Agreement cannot be varied unless agreed in writing by Active.
- 18.3 This Agreement is to be read together with the Quotation. If there is any conflict between the Quotation and this Agreement, the Quotation will prevail to the extent of the conflict.
- 18.4 This Agreement constitutes the whole agreement between the parties and supersedes all previous agreements between the parties relating to its subject matter. The Client acknowledges that, in entering into this Agreement it has not relied on and will have no right or remedy against Active in respect of, any statement, representation, misrepresentation, assurance or warranty other than as expressly set out in this Agreement.
- 18.5 If any clause or part of a clause in this Agreement is found by a Court of competent jurisdiction to be illegal, unenforceable or invalid, that clause or part thereof, shall be severed from this Agreement and the remainder of this Agreement shall not be affected.
- 18.6 This Agreement is governed by the laws, and each party irrevocably submits to the jurisdiction of the State or Territory in which the Site is located.
- 18.7 The person entering into this Agreement on behalf of the Client warrants that it has the relevant authority to bind the Client to the terms of this Agreement.