



Clements Contract Terms and Conditions for Commercial Works (12 April 2012)

Tel: 02 4932 3833 Fax: 02 4932 3834

Web: www.clementsairconditioning.com.au Email: care@clemfrig.com.au

These terms and conditions are the terms on which Clements is prepared to perform work on your behalf. If you agree to use Clements then you agree to the terms and conditions below. Words used in these terms and conditions are defined at clause 32.

1. WORKS

Clements shall carry out and complete the Works in accordance with this Contract.

2. EXCLUDED ITEMS

The Client and Clements agree that the items set out as Exclusions, if any, are excluded from this Contract.

3. WARRANTIES

3.1 Clements warrants:

- (a) that the Works will be carried out in a proper and workmanlike manner and in accordance with the Contract Documents,
- (b) that all materials supplied by Clements will be good and suitable for the purpose for which they are used and that, unless otherwise stated in this Contract, those materials will be new,
- (c) that the Works will be carried out in accordance with the Specific Warranties, if any, and
- (d) that it holds all licenses, if any, required to carry out the Works.

3.2 Clements will rectify defects in relation to the Works or Equipment supplied by Clements that are Clements' responsibility and which are notified to Clements in writing during the Defects Liability Period.

3.3 The Defects Liability Period is a period of six (6) calendar months commencing on and including the date of Practical Completion.

4. HEALTH AND SAFETY

In carrying out the Works, Clements and its agents and employees shall observe all relevant Occupational Health and Safety Laws.

5. COMMENCEMENT OF WORKS

5.1 Clements shall not be required to commence the Works until:

- (a) the Client:
 - (i) provides evidence that it is the owner of the Site or contracted contractor of the works to be carried out on the Site,
 - (ii) provides a copy of the Development Approval required in respect of Works, if any,
 - (iii) has paid the Deposit, if any, in accordance with clause 9,
- (b) the Supplementary Works, if any, are completed or have been arranged to be performed in conjunction with the Works, and
- (c) the Equipment, if any, is available.

6. ACCURACY OF CONTRACT DOCUMENTS

6.1 The party responsible for the preparation of a Contract Document warrants that it is accurate and correct.

6.2 In the event of any inconsistency between the Contract Documents, or any detail not being given, Clements shall give notice to the Client detailing the problem. The Client must within two (2) Business Days of receiving such notice give written instructions as to how Clements is to proceed with the Works.

6.3 In the event that the Client refuses or fails to give written instructions to Clements within two (2) Business Days of a notice pursuant to Clause 6.2, the Client authorises Clements to determine the required detail necessary to resolve the error, ambiguity or inconsistency.

6.4 If the required detail, as determined by the Client or Clements necessitates a change to the scope of the Works, that work is deemed to be a Variation.

6.5 In relation to a document that is; supplied by, prepared under the instruction of, or prepared from sketches provided by, the Client, the Client indemnifies Clements from all costs, expenses, losses or damages that are incurred by Clements relating to or as a consequence of any claim for breach of copyright arising from Clements carrying out the Works in accordance with that document.

7. BUILDING APPROVALS

- 7.1 The Client must obtain and pay for all building approvals necessary for the Works.
- 7.2 The Client must obtain and give copies of the building approvals to Clements promptly.
- 7.3 If the requirements of any statutory or other Authority necessitate a change to the Works Clements must carry out the works to effect that change and that work is deemed to be a Variation.

8. CONTRACT PRICE

8.1 The Client shall pay the Contract Price and other money that becomes payable under this Contract in the manner and at the times stated in this Contract.

9. DEPOSIT

9.1 The Client must pay to Clements a deposit equal to 10% of the Contract Price plus GST or such other amount stated in the Quotation at least seven (7) days before the Works are due to commence.

10. GST

- 10.1 The Contract Price and all other monies payable by the Client pursuant to this Contract are exclusive of GST unless otherwise stated.
- 10.2 If Clements incurs a liability to pay GST in connection with a supply to the Client pursuant to this Contract, the consideration that the Client must pay to Clements for the supply is increased by an amount equal to the GST liability that Clements incurs in making the supply and the amount of the GST liability is payable at the same time and in the same manner as the consideration in respect of the supply is payable.
- 10.3 Clements shall provide the Client with a tax invoice for any GST included in any payment made pursuant to this Contract.

11. VARIATIONS

- 11.1 A Variation occurs if:
 - (a) this Contract deems a Variation,
 - (b) the Client requests Clements to perform a Variation and subsequently Clements performs the Variation in accordance with the Client's direction, or
 - (c) the Client and Clements agree in writing to a Variation, including agreement as to the price of the Variation.
- 11.2 If there is insufficient time to calculate the price of a Variation, or this Contract deems a Variation, the price of the Variation will be charged to the Client at invoice cost plus a margin of 25%. The price of a Variation is due and payable at the next Progress Payment after it is carried out unless a different time is agreed.
- 11.3 If the Client has requested Clements to perform a Variation and Clements has provided the Client with a cost proposal in respect of the Variation, unless the cost proposal is rejected by the Client in writing within five (5) business days the amount of the cost proposal is deemed to be the price of the Variation for the purposes of clause 11.1(b).
- 11.4 Notwithstanding any other clause herein, Clements is under no obligation to carry out any Variation requested by the Client.

12. ACKNOWLEDGEMENT OF POSSIBLE DELAYS

- 12.1 The Client acknowledges that completion of the Works may be suspended by Clements pursuant to Clause 20 or delayed by any cause beyond the control of Clements including:
 - (a) a Variation or a request by the Client for a Variation,
 - (b) an act of God, fire, explosion, earthquake or civil commotion,
 - (c) any weather condition that, in the reasonable opinion of Clements, prevents work from being carried out in the usual manner,
 - (d) an industrial dispute,
 - (e) anything done or not done by the Client,
 - (f) delays in getting any approvals,
 - (g) the delay in the supply of materials,
 - (h) the period known as "Building Industry Shutdown" being a five (5) week period commencing on or about 22 December in each year,

- (i) the Contract Documents not being fully completed or made available to Clements by the date of this Agreement.
- 12.2 Where the costs of the Works has increased due to any delay beyond the control of Clements, Clements is entitled to a reasonable increase in the Contract Price.
- 13. SITE POSSESSION, ACCESS, SERVICES AND MATERIALS**
- 13.1 The Client warrants that it has exclusive possession of the Site to carry out works including the Works.
- 13.2 The Client must provide all weather access to the Site for delivery of materials. If the Client does not provide all weather access, Clements may carry out any work required to achieve such access and that work is deemed to be a Variation.
- 13.3 The Client must not:
- (a) hinder Clements' access or possession of the Site for the purposes of carrying out the Works,
 - (b) hinder the progress of the Works, or
 - (c) make inquiry of, issue directions to, or give instructions to, Clements' workers or subcontractors. Communications must only be with Clements' nominated person.
- 13.4 The Client may only have access to the Works at reasonable times and after giving reasonable prior notice for the purposes of inspecting the progress of the Works.
- 13.5 The Client must supply electricity and water, at its expense, for Clements to use in carrying out the Works.
- 13.6 All materials delivered to site by Clements and not required for the Works will remain the property of Clements.
- 14. PROGRESS CLAIMS**
- 14.1 Clements may issue a Progress Claim in respect of work carried out by Clements to the relevant date in accordance with this contract on or after:
- (a) the last day of each month, and
 - (b) when in Clements' opinion the Works have reached the stage of Practical Completion.
- 14.2 The Client must pay the Contract Price progressively as claimed by Clements within seven (7) days of service of a Progress Claim on the Client.
- 14.3 Clements may serve a Progress Claim on the Client by any method that it is entitled to give notice under this Contract.
- 14.4 The Client may only provide Clements with a Payment Schedule in relation to Progress Claim within five (5) Business Days of the date of service of the Progress Claim.
- 14.5 If the Client fails to pay any Progress Claim when due, the Client must pay interest on the amount of such Progress Claim at the rate of 15% per annum calculated from the due date for payment of the relevant Progress Claim up to and including the day that the Progress Claim is paid and compounding on the first day of each calendar month.
- 15. WORKING HOURS**
- 15.1 The Contract Price has been agreed on the basis of Clements performing the Works during the following times:
- (a) 7.30am to 3.30pm Monday to Friday
- 15.2 Where no construction program was provided to Clements prior to the date of the Quotation, Clements will be entitled to a Variation if the Works are required to be carried out outside the above working hours to comply with any subsequent construction program.
- 16. INSURANCES**
- 16.1 Clements must take out prior to commencing, and maintain until completion of the Works, insurance against:
- (a) Public Liability for an amount of not less than \$5,000,000.00, and
 - (b) All other losses in respect of which Clements is required to maintain insurances by law.
- 16.2 Clements must comply with all obligations under Workers Compensation Legislation.
- 16.3 Clements must, when asked by the Client, produce evidence of the existence and currency of any of the above insurance policies.
- 17. PRACTICAL COMPLETION**
- 17.1 Clements will give notice to the Client of Practical Completion of the Works within five (5) Business Days of Practical Completion. A Progress Claim claiming the total Contract Price or the unclaimed balance of the Contract Price shall be deemed to be notice of Practical Completion of the Works.
- 17.2 If the Client disagrees that the Works have reached the stage of Practical Completion the Client must notify Clements in writing within five (5) Business Days of the notice of Practical Completion stating the reasons why the Works are not practically complete. Clements shall as soon as practicable after receipt of such notice:
- (a) complete those things as may be necessary to bring the Works to the stage of Practical Completion and give the Client a further notice of Practical Completion, or
 - (b) reject the Client's notice and/or initiate dispute resolution procedures.
- 17.3 If the Client fails to give a notice pursuant to Clause 17.2, the Client is deemed to have acknowledged that the Works have reached the stage of Practical Completion.
- 17.4 Clements is not required to obtain any Certificate of Occupancy or Construction Certificate relating to the Works.
- 18. DEFECTS LIABILITY PERIOD**
- 18.1 The Defects Liability Period is a period of six (6) calendar months commencing on and including the date of Practical Completion.
- 18.2 The Client may, before the end of the Defects Liability Period, give Clements one (1) list of defects in the Works that appear after the date of Practical Completion.
- 18.3 Clements must rectify defects that are Clements' responsibility and which are notified to Clements during the Defects Liability Period.
- 19. SUBCONTRACTING AND ASSIGNMENT**
- 19.1 Clements may subcontract the whole or any part of the Works but remains responsible for all of the Works.
- 19.2 Clements may assign this Contract without the prior written consent of the Client.
- 20. SUSPENSION**
- 20.1 If the Client is in breach of this Contract Clements may suspend the carrying out of the Works.
- 20.2 Clements must give to the Client written notice of the suspension and details of the breach.
- 20.3 Clements must recommence the carrying out of the Works within a reasonable time after the Client remedies the breach and gives Clements written notice of that fact.
- 21. RETENTION OF TITLE**
- 21.1 Notwithstanding the delivery of the Equipment to the Client, until the Client has effected full payment of the Contract Price:
- (a) legal title to the Equipment will remain with Clements;
 - (b) the relationship between Clements and the Client will be fiduciary;
 - (c) the Client will:
 - (i) hold the Equipment as bailee for Clements; and
 - (ii) keep the Equipment separate from other Equipment.
- 21.2 The risk in the Equipment will pass to the Client on delivery to the Client or its agent.
- 21.3 If the Client is in default of this Contract or if this Contract is terminated, Clements may without demand retake possession of the Equipment and may without notice sell the Equipment on such terms and in such manner as it determines and will be entitled to deduct all expenses incurred.
- 21.4 For the purposes of recovering possession of the Equipment and without limiting the generality of this clause 21, the Client irrevocably authorises and licenses Clements and its servants and agents to enter any premises where any Equipment may be stored and to take possession of the Equipment.
- 22. DISPUTE RESOLUTION**
- 22.1 If a dispute arises then a party may give written notice to the other party setting out the matter in dispute.
- 22.2 Clements and the Client must meet within ten (10) Business Days of the giving of a notice pursuant to Clause 22.1 to attempt to resolve the dispute or to agree on methods of doing so.
- 22.3 If the dispute is resolved the parties must write down the resolution and sign it.
- 22.4 The parties agree that anything done or said in the negotiations cannot be revealed in any other proceedings.
- 22.5 Nothing in this clause affects the rights of the parties pursuant to *The Building and Construction Industry Security of Payments Act 1999*.
- 23. TERMINATION OF CONTRACT**

- 23.1 If the Client purports to cancel this Contract prior to Clements commencing the Works, such conduct shall constitute a repudiation of this Contract which shall entitle Clements to:
- (a) terminate the Contract without prior notice, and
 - (b) damages including on account of loss of profit in respect of orders and opportunities foregone as a result of the scheduling of the Works the subject of this Contract.
- 23.2 If a party is in default of this Contract the other party may give the party in breach a written notice stating:
- (a) details of the breach, and
 - (b) that, if the breach is not remedied within ten (10) Business Days, the party is entitled to terminate this Contract.
- 23.3 If the breach is not remedied by the party in breach within ten (10) Business Days of notice of default being given, the party giving the notice of default may end this Contract by giving a further written notice to that effect.
- 23.4 If Clements ends this Contract pursuant to this clause then, at the election of Clements, the Client must pay as a debt due and payable either:
- (a) the greater of the costs of or the market value of the Works to the date of termination (including the costs of any materials on the Site or already ordered from suppliers) and the costs of quitting the Site less any amount already paid by the Client, or
 - (b) Damages including, but not limited to, loss of profit from other orders foregone as a result of the scheduling of the Works the subject of this Contract.
- 23.5 A party is in default of this Contract if it:
- (a) is in substantial breach of this Contract,
 - (b) becomes insolvent, bankrupt or makes an assignment of that party's estate for the benefit of creditors,
 - (c) makes an arrangement or composition with creditors, or
 - (d) being a company goes into liquidation.
- 24. SECURITY**
- 24.1 The Client and the Guarantor, if any, hereby charges all its right, title and interest in any property, including land, that they hereafter own either solely or jointly, in favour of Clements as security for the Client's obligations pursuant to this Contract and authorises Clements to register a Caveat over the Title of any such land in the event of a default by the Client under this Contract.
- 25. PERSONAL PROPERTIES SECURITIES ACT 2009**
- 25.1 The Client acknowledges that this Contract constitutes a 'security agreement' for the purposes of section 20 of the *Personal Property Securities Act 2009* ("PPSA") and that a 'security interest' exists in all Equipment (and their proceeds) previously supplied by Clements to the Client (if any) and in all future Equipment (and their proceeds).
- 25.2 The Client will execute all documents and do such further acts as may be required by Clements to register the 'security interest' granted to Clements under this Contract.
- 25.3 Until ownership of the Equipment passes, the Client waives the Client's rights under the following provisions of Part 4 of the PPSA:
- (a) To receive a notice of intention of removal of an accession (section 95),
 - (b) To receive a notice that Clements decides to enforce its security interest in accordance with land law (section 118),
 - (c) To receive a notice of enforcement action against liquid assets (section 121(4)),
 - (d) To receive a notice of disposal of Equipment by Clements purchasing the Equipment (section 129),
 - (e) To receive a notice to dispose of Equipment (section 130),
 - (f) To receive a statement of account following disposal of Equipment (section 132(2)),
 - (g) To receive a statement of account if no disposal of Equipment for each 6 month period (section 132(4)),
 - (h) To receive notice of any proposal of Clements to retain Equipment (section 135),
 - (i) To object to any proposal of Clements to either retain or dispose of goods (section 137(2)),
 - (j) To redeem the Equipment (section 142),
 - (k) To reinstate the security agreement (section 143), or
- (l) To receive a notice of any verification statement (section 157(1) and section 157(3)),
- 25.4 The Client further agrees that where Clements has rights in addition to those under Part 4 of the PPSA, those rights will continue to apply.
- 25.5 Until ownership of the Equipment passes, the Client must not give Clements a written demand or allow any other person to give Clements a written demand requiring Clements to register a 'financing change statement' under the PPSA or enter into or allow any other person to enter into the register of personal property securities a 'financing change statement' under the PPSA.
- 25.6 The Client acknowledges that is has received value as at the date of first delivery of the Equipment and has not agreed to postpone the time for attachment of the 'security interest' (as defined in the PPSA) granted to us under these terms and conditions.
- 25.7 The Client irrevocably grants to Clements the right to enter upon the Client's property or premises, without notice, and without being in any way liable to the Client or to any third party, if Clements has cause to exercise any of Clements' rights under section 123 and/or section 128 of the PPSA, and the Client shall indemnify Clements from any claims made by any third party as a result of such exercise.
- 25.8 Clements and the Client agree to treat information of the kind referred to in Section 275(1) of the PPSA as confidential. Neither Clements or the Client will disclose, send or make available any of the information referred to in section 275(1) of the PPSA to any person except as required by law or this Contract.
- 25.9 Clements and the Client acknowledge and agree that clause 25.8 constitutes a confidentiality agreement pursuant to section 275(6) of the PPSA.
- 26. GUARANTEE**
- 26.1 In consideration for Clements entering into this Contract at the request of the Guarantor, the Guarantor guarantees to Clements the performance by the Client of all of the Client's obligations under this Contract including any variation.
- 26.2 If the Client does not pay any money due under this Contract the Guarantor must pay that money to Clements on demand without deduction, set-off or counterclaim even if Clements has not tried to recover payment from the Client.
- 26.3 Even if Clements gives the Client extra time to comply with an obligation under this Contract or does not insist on strict compliance with the terms of this Contract the Guarantor's obligations will not be affected.
- 26.4 Where a payment made by the Client or the Guarantor to Clements is set aside by law, the parties are restored to their respective positions prior to the payment being made and are entitled to exercise all rights which they had under this Contract.
- 26.5 If there is more than one Guarantor:
- (a) this guarantee shall be binding on each of them jointly and severally, and
 - (b) the release by Clements of any Guarantor from this guarantee does not affect the liability of any other Guarantor.
- 26.6 The Guarantor's liability under this clause is unlimited.
- 26.7 This guarantee is a continuing guarantee.
- 27. LIMITATION OF LIABILITY**
- 27.1 Clements liability to the Client (and any party claiming through the Client against Clements) for any claim for loss or damage (including legal expenses), whether arising in contract, tort or otherwise, in connection with this Contract shall be as follows:
- (a) where the liability relates to the supply of Equipment, Clements' liability shall be limited to the lesser of the cost of:
 - (i) replacement of the Equipment or the supply of equivalent Equipment,
 - (ii) repair of the Equipment,
 - (iii) payment of the costs of replacing the Equipment or acquiring equivalent Equipment, or
 - (iv) payment of the costs of having the Equipment repaired, or
 - (b) where the liability relates to the supply of services, Clements' liability shall be limited to the lesser of the costs of:
 - (i) supplying the services again, or
 - (ii) payment of the costs of having the services supplied again.
- 27.2 Clements shall not be liable for any indirect, special or consequential loss or damage of any nature whatsoever resulting from or caused in any way by the carrying out of the Works.

28. DEBT COLLECTION AND OTHER COSTS

- 28.1 The Client must pay to Clements any debt collection costs, including legal fees and costs associated with recovery or attempted recovery, of any money payable under this Contract.
- 28.2 If, after this Contract is entered into, a statutory or other Authority introduces or increases:
- (a) any tax, charge, levy or other regulation, or
 - (b) any requirement that affects the Works,
- that causes any increase in the costs of the Works then the Contract Price shall be adjusted accordingly.
- 28.3 Where extra cost in materials, labour and overhead is occasioned to Clements by virtue of acceleration of the agreed work schedule or of the presence of obstructions or conditions which could not reasonably have been anticipated by Clements the Contract Price shall be adjusted accordingly.

29. INFORMATION AND PRIVACY

- 29.1 The Client and the Guarantor, if any, consent to Clements obtaining a Credit Report for any purpose contemplated under section 18K of the *Privacy Act 1988*.
- 29.2 The Client and Guarantor agree that Clements may exchange information about the Client or Guarantor with those credit providers named in a Credit Report issued by a reporting agency for the following purposes:
- (a) to assess an application for commercial credit by the Client,
 - (b) to notify other credit providers of a default by the Client,
 - (c) to exchange information with other credit providers, where the Client is in default with other credit providers, and
 - (d) to assess the credit worthiness of the Client.
- 29.3 The Client and the Guarantor, if any, consent to Clements using any personal information collected by Clements for the following purposes and for any other purposes as shall be agreed to between the parties in writing or as required by law:
- (a) the provision of Equipment and/or services by Clements,
 - (b) the marketing of Equipment and/or services by Clements,
 - (c) analysing, verifying and checking the Client's credit and/or payment status in relation to the provision of Equipment and/or services,
 - (d) the processing of any payment instructions, direct debit facilities or credit facilities, and
 - (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 Equipment and/or services.
- 29.4 Clements 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, or
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.

30. NOTICES

- 30.1 A notice is deemed to have been given or serviced if the notice is:
- (a) delivered by hand to the other party,
 - (b) posted by ordinary prepaid mail to the other party's address stated in the Quotation on the second Business Day following the date of posting, or
 - (c) sent by facsimile transmission to the parties' facsimile number stated in the Quotation upon receiving confirmation of delivery of the transmission, or
 - (d) sent by email to the parties' email address stated in the Quotation upon receiving confirmation of delivery of the email without error.

31. MISCELLANEOUS

- 31.1 This Contract may be entered into by any number of counterparts all of which taken together shall constitute one instrument.
- 31.2 This Contract shall be governed by and constructed pursuant to the laws of New South Wales and the parties agree to submit to the jurisdiction of the Courts of New South Wales in connection with any dispute relating to this Contract.
- 31.3 If a provision of this Contract would, but for this clause, be unenforceable:
- (a) the provision must be read down to the extent necessary to avoid that result, or

- (b) if the provision cannot be read down to that extent it must be severed without altering the validity and enforceability of the remainder of the Contract.
- 31.4 Except as otherwise provided elsewhere in this Contract, none of the terms in this Contract may be varied, waived, discharged or released, except with the prior written consent of both parties.

32. DEFINITIONS

In this Contract:

- (a) "*Authority*" means the Local Government, State or Federal Government, or any Government agency that has power to affect the Works;
- (b) "*Business Day*" means any day other than Saturdays, Sundays or public holidays;
- (c) "*Clements*" means Timtrell Pty Limited ABN 41 003 125 200 trading as Clements Airconditioning Refrigeration Electrical, it's successors and assigns;
- (d) "*Client*" means the party named as the Client in the Quotation and includes the Client's agents, employees and invitees;
- (e) "*Contract*" means the Agreement between the Client and the Clements arising from the Client's acceptance of the Quotation and set out in the Contract Documents;
- (f) "*Contract Documents*" means these terms and conditions, the Quotation, the Plans (or measurements) and the Specifications stated in the Quotation;
- (g) "*Contract Price*" means the amount stated as the price in the Quotation plus the price of any Optional Extras;
- (h) "*Equipment*" means any equipment, goods and other parts and components to be supplied by Clements as part of the the Works;
- (i) "*Exclusions*" means the exclusions described in the Quotation;
- (j) "*Guarantor*" means the person or persons who have signed this Contract as guarantor and includes their executors, administrators, successors and assigns;
- (k) "*GST*" has the same meaning as given to it in the A New Tax System (Equipment and Services Tax) Act 1999.
- (l) "*Optional Extras*" means any optional extras specified in the Quotation and selected by the Client;
- (m) "*Payment Schedule*" means a Payment Schedule as defined in *The Building and Construction Industry Security of Payment Act 1999*;
- (n) "*Practical Completion*" means when the Works are complete except for minor omissions and defects that do not prevent the Works from being reasonably capable of being used for their usual purpose;
- (o) "*Progress Claim*" means both a tax invoice as defined in the *A New Tax System (Equipment and Services Tax) Act 1999* and a Payment Claim as defined in *The Building and Construction Industry Security of Payment Act 1999*;
- (p) "*Quotation*" means the estimate provided by Clements and accepted by the Client in respect of the Works;
- (q) "*Scope of Works*" means the scope of works referred to in the Quotation;
- (r) "*Site*" means the address at which the Works are to be carried out as specified in the Quotation;
- (s) "*Specific Warranties*" means those warranties, if any, referred to in the Quotation;
- (t) "*Supplementary Works*" means those supplementary works which need to be carried out by the Client or others, prior to, or in conjunction with, the Works.
- (u) "*Variation*" means to vary the Works by:
 - (i) carrying out additional work,
 - (ii) omitting any part of the Works,
 - (iii) changing the scope of the Works.
- (v) "*Works*" means the works described in the Scope of Works as shown in the Contract Documents and including Variations and Optional Extras, if any, but excluding the Exclusions and Supplementary Works.