

S J Gillam T/A All Weather Mini Diggers – Terms & Conditions of Trade

- Definitions**
 - "AWMD" shall mean S J Gillam T/A All Weather Mini Diggers, its successors or assigns or any person acting on behalf of and with the authority of S J Gillam T/A All Weather Mini Diggers.
 - "Client" shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by AWMD to the Client.
 - "Guarantor" means that person (or persons) who agrees to be liable for the debts of the Client on a principal debtor basis.
 - "Materials" shall mean all Materials supplied by AWMD to the Client (and where the context so permits shall include any supply of Works as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by AWMD to the Client.
 - "Equipment" shall mean all Equipment including any accessories supplied on hire by AWMD to the Client (and where the context so permits shall include any supply of services). The Equipment shall be as described on the invoices, quotation, authority to hire, or any other work authorisation form provided by AWMD to the Client.
 - "Works" shall mean all Works supplied by AWMD to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Materials as defined above).
 - "Price" shall mean the Price payable for the Materials as agreed between AWMD and the Client in accordance with clause 4 of this contract.
- The Competition and Consumer Act 2010 ("CCA") and Fair Trading Acts ("FTA")**
 - Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the CCA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.
- Acceptance**
 - Any instructions received by AWMD from the Client for the supply of Materials and/or the Client's acceptance of Materials supplied by AWMD shall constitute acceptance of the terms and conditions contained herein.
 - Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
 - Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of AWMD.
 - The Client shall give AWMD not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any loss incurred by AWMD as a result of the Client's failure to comply with this clause.
 - Materials are supplied by AWMD only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
- Price and Payment**
 - At AWMD's sole discretion the Price shall be either:
 - as indicated on invoices provided by AWMD to the Client in respect of Materials supplied; or
 - AWMD's quoted Price (subject to clause 4.2) which shall be binding upon AWMD provided that the Client shall accept AWMD's quotation in writing within thirty (30) days.
 - AWMD reserves the right to change the Price in the event of a variation to AWMD's quotation. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation as a result of additional works required due to hidden or unidentifiable difficulties beyond the reasonable control of AWMD, such as hard rock barriers below the surface or iron reinforcing rods in concrete or soft spots that may need compacting or as a result of increases to Materials and labour) will be detailed in writing and charged for on the basis of AWMD's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
 - At AWMD's sole discretion:
 - a non-refundable deposit may be required; or
 - payment shall be due on delivery of the Materials; or
 - payment shall be due before delivery of the Materials; or
 - detailed progress payment claims may be submitted by AWMD, in accordance with AWMD's specified payment schedule at intervals not less than monthly for work performed up to the end of each month. Such payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the site but not yet installed.
 - No allowance has been made in the Price for the deduction of retentions. In the event that retentions are made, AWMD reserves the right to treat retentions as plating the Client's account into default.
 - Time for payment for the Materials shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
 - Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Client and AWMD.
 - GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.
- Delivery of Materials**
 - At AWMD's sole discretion delivery of the Materials shall take place when:
 - the Client takes possession of the Materials at AWMD's address; or
 - the Client takes possession of the Materials at the Client's nominated address (in the event that the Materials are delivered by AWMD or AWMD's nominated carrier).
 - At AWMD's sole discretion the costs of delivery are:
 - included in the Price; or
 - in addition to the Price.
 - The Client shall make all arrangements necessary to take delivery of the Materials whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Materials as arranged then AWMD shall be entitled to charge a reasonable fee for redelivery.
 - Delivery of the Materials to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
 - The failure of AWMD to deliver shall not entitle either party to treat this contract as repudiated.
 - AWMD shall not be liable for any loss or damage whatsoever due to failure by AWMD to deliver the Materials (or any of them) promptly or at all, where due to circumstances beyond the control of AWMD.
- Equipment Hire**
 - The Equipment shall at all times remain the property of AWMD and is returnable on demand by AWMD. In the event that the Equipment is not returned to AWMD in the condition in which it was delivered AWMD retains the right to charge the Price of repair or replacement of the Equipment.
 - The Client shall;
 - keep the Equipment in their own possession and control and shall not assign the benefit of the Equipment nor be entitled to lien over the Equipment.
 - not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment.
 - keep the Equipment, complete with all parts and accessories, clean and in good order as delivered, and shall comply with any maintenance schedule as advised by AWMD to the Client.
 - The Client accepts full responsibility for the safekeeping of the Equipment and the Client agrees to insure, or self insure, AWMD's interest in the Equipment and agrees to indemnify AWMD against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property or persons arising out of the use of the Equipment. Further the Client will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.
- Risk**
 - If AWMD retains ownership of the Materials nonetheless, all risk for the Materials passes to the Client on delivery.
 - Where the Client expressly requests AWMD to leave Materials outside AWMD's premises for collection or to deliver the Materials to an unattended location then such Materials shall be left at the Client's sole risk and it shall be the Client's responsibility to ensure the Materials are insured adequately or at all.
 - If any of the Materials are damaged or destroyed following delivery but prior to ownership passing to the Client, AWMD is entitled to receive all insurance proceeds payable for the Materials. The production of these terms and conditions by AWMD is sufficient evidence of AWMD's rights to receive the insurance proceeds without the need for any person dealing with AWMD to make further enquiries.
 - In the event that AWMD is instructed by the Client to carry out Works within five (5) metres of any building, then it shall be the Client's responsibility to ensure that the building is adequately insured and all premiums due are paid. AWMD reserves the right to request confirmation of such insurance prior to commencement of the Works.
 - It is acknowledged between the parties that AWMD will carry out in a reasonable way the clean up after the Works have been completed with the removal of any debris, but it is acknowledged between both parties that it is unreasonable for such clean up and/or removal of such debris to restore the property to its pre-existing condition. Some debris may remain, which will be the Client's responsibility.
- Access/Damages**
 - The Client shall ensure that AWMD has clear and free access to the work site at all times to enable them to undertake the Works. AWMD shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of AWMD.
- Underground Locations**
 - Prior to AWMD commencing any work the Client must advise AWMD of the precise location of all underground services on the site and clearly mark the same. The underground mains & services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site and/or adjacent to the site within a fifteen (15) metre radius of the work site.
 - Whilst AWMD will take all care to avoid damage to any underground services the Client agrees to indemnify AWMD in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 9.1.
- Insurance**
 - AWMD shall have public liability insurance of at least \$5m. It is the Client's responsibility to ensure that they are similarly insured.
- Title**
 - AWMD and the Client agree that ownership of the Materials shall not pass until:
 - the Client has paid AWMD all amounts owing for the particular Materials; and
 - the Client has met all other obligations due by the Client to AWMD in respect of all contracts between AWMD and the Client.
 - Receipt by AWMD of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then AWMD's ownership or rights in respect of the Materials shall continue.
 - It is further agreed that:
 - where practicable the Materials shall be kept separate and identifiable until AWMD shall have received payment and all other obligations of the Client are met; and
 - until such time as ownership of the Materials shall pass from AWMD to the Client AWMD may give notice in writing to the Client to return the Materials or any of them to AWMD. Upon such notice the rights of the Client to obtain ownership or any other interest in the Materials shall cease; and
 - AWMD shall have the right of stopping the Materials in transit whether or not delivery has been made; and
 - if the Client fails to return the Materials to AWMD then AWMD or AWMD's agent may (as the invitee of the Client) enter upon and into land and premises owned, occupied or used by the Client, or any premises where the Materials are situated and take possession of the Materials; and
 - the Client is only a bailee of the Materials and until such time as AWMD has received payment in full for the Materials then the Client shall hold any proceeds from the sale or disposal of the Materials, up to and including the amount the Client owes to AWMD for the Materials, on trust for AWMD; and
 - the Client shall not deal with the money of AWMD in any way which may be adverse to AWMD; and
 - the Client shall not charge the Materials in any way nor grant nor otherwise give any interest in the Materials while they remain the property of AWMD; and
 - AWMD can issue proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials may not have passed to the Client; and
 - until such time that ownership in the Materials passes to the Client, if the Materials are converted into other products, the parties agree that AWMD will be the owner of the end products.
- Personal Property Securities Act 2009 ("PPSA")**
 - In this clause:
 - financing statement has the meaning given to it by the PPSA;
 - financing change statement has the meaning given to it by the PPSA;
 - security agreement means the security agreement under the PPSA created between the Client and AWMD by these terms and conditions; and
 - security interest has the meaning given to it by the PPSA.
 - Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions:
 - constitute a security agreement for the purposes of the PPSA; and
 - create a security interest in:
 - all Goods previously supplied by AWMD to the Client (if any);
 - all Goods that will be supplied in the future by AWMD to the Client.
 - The Client undertakes to:
 - promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which AWMD may reasonably require to:
 - register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - register any other document required to be registered by the PPSA; or
 - correct a defect in a statement referred to in clause 12.3(a)(i) or 12.3(a)(ii);
 - indemnify, and upon demand reimburse, AWMD for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
 - not register a financing change statement in respect of a security interest without the prior written consent of AWMD;
 - not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods in favour of a third party without the prior written consent of AWMD; and
 - immediately advise AWMD of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
 - AWMD and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
 - The Client hereby waives its rights to receive notices under sections 96, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
 - The Client waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
 - Unless otherwise agreed to in writing by AWMD, the Client waives its right to receive a verification statement in accordance with section 157 of the PPSA.
 - The Client shall unconditionally ratify any actions taken by AWMD under clauses 12.3 to 12.5.
- Defects, Errors and Omissions**
 - The Client shall inspect the Works on completion (or Materials on delivery) and shall within seven (7) days of delivery (time being of the essence) notify AWMD of any alleged defect, shortage in quantity, errors, omissions or failure to comply with the description or quote. The Client shall afford AWMD an opportunity to inspect the Works (Materials) within a reasonable time following delivery (if the Client believes the Works (Materials) are defective in any way, if the Client shall fail to comply with these provisions, the Works (Materials) shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage. For defective Works (Materials), which AWMD has agreed in writing that the Client is entitled to reject, AWMD's liability is limited to either (at AWMD's discretion) replacing the Works (Materials) or rectifying the Works, except where the Client has acquired Works (Materials) as a consumer within the meaning of The Competition and Consumer Act 2010 (Cwth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Works (Materials), rectification of the Works, replacement of the Works (Materials), or repair of the Materials.
 - At the sole discretion of AWMD, Materials will not be accepted for return other than in accordance with 13.1 above.
- Warranty**
 - For Materials not manufactured by AWMD, the warranty shall be the current warranty provided by the manufacturer of the Materials. AWMD shall not be bound by or responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Materials.
- Intellectual Property**
 - Where AWMD has designed, drawn or written Materials for the Client, then the copyright in those designs and drawings and documents shall remain vested in AWMD, and shall only be used by the Client at AWMD's discretion.
 - The Client warrants that all designs or instructions to AWMD will not cause AWMD to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify AWMD against any action taken by a third party against AWMD in respect of any such infringement.
 - The Client agrees that AWMD may use any documents, designs, drawings or Materials created by AWMD for the purposes of advertising, marketing, or entry into any competition.
- Default and Consequences of Default**
 - Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at AWMD's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
 - In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by AWMD.
 - If the Client defaults in payment of any invoice when due, the Client shall indemnify AWMD from and against all costs and disbursements incurred by AWMD in pursuing the debt including legal costs on a solicitor and own client basis and AWMD's collection agency costs.
 - Without prejudice to any other remedies AWMD may have, if at any time the Client is in breach of any obligation (including those relating to payment) AWMD may suspend or terminate the supply of Materials to the Client and any of its other obligations under the terms and conditions. AWMD will not be liable to the Client for any loss or damage the Client suffers because AWMD has exercised its rights under this clause.
 - If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- Without prejudice to AWMD's other remedies at law AWMD shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to AWMD shall, whether or not due for payment, become immediately payable in the event that:
 - any money payable to AWMD becomes overdue, or in AWMD's opinion the Client will be unable to meet its payments as they fall due; or
 - 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.
- Security and Charge**
 - Despite anything to the contrary contained herein or any other rights which AWMD may have however:
 - where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to AWMD or AWMD's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that AWMD (or AWMD's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - should AWMD elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify AWMD from and against all AWMD's costs and disbursements including legal costs on a solicitor and own client basis.
 - the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint AWMD or AWMD's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 17.1.
- Compliance with Laws**
 - The Client and AWMD shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works.
 - The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.
 - The Client agrees that the site will comply with any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.
- Dispute Resolution**
 - If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
 - referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
 - conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.
 - Cancellation**
 - AWMD may cancel any contract to which these terms and conditions apply or cancel delivery of Materials at any time before the Materials are delivered by giving written notice to the Client. On giving such notice AWMD shall repay to the Client any sums paid in respect of the Price. AWMD shall not be liable for any loss or damage whatsoever arising from such cancellation.
 - In the event that the Client cancels delivery of Materials the Client shall be liable for any loss incurred by AWMD (including, but not limited to, any loss of profits) up to the time of cancellation.
 - Privacy Act 1988**
 - The Client and/or the Guarantor's (herein referred to as the Client) agree for AWMD to obtain from a credit reporting agency a credit report containing personal credit information about the Client in relation to credit provided by AWMD.
 - The Client agrees that AWMD may exchange information about the Client with those credit providers either named as trade references by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
 - to assess an application by the Client; and/or
 - to notify other credit providers of a default by the Client; and/or
 - 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
 - to assess the creditworthiness of the Client.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.
 - The Client consents to AWMD being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
 - The Client agrees that personal credit information provided may be used and retained by AWMD for the following purposes (and for other purposes as shall be agreed between the Client and AWMD or required by law from time to time):
 - the provision of Materials; and/or
 - the marketing of Materials by AWMD, its agents or distributors; and/or
 - analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Materials; and/or
 - processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
 - enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Materials.
 - AWMD may give information about the Client to a credit reporting agency for the following purposes:
 - to obtain a consumer credit report about the Client;
 - allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
 - The information given to the credit reporting agency may include:
 - personal particulars (the Client's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number);
 - details concerning the Client's application for credit or commercial credit and the amount requested;
 - advice that AWMD is a current credit provider to the Client;
 - 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;
 - 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;
 - information that, in the opinion of AWMD, the Client has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Client's credit obligations);
 - advice that cheques drawn by the Client for one hundred dollars (\$100) or more, have been dishonoured more than once;
 - that credit provided to the Client by AWMD has been paid or otherwise discharged.
 - Building and Construction Industry Security of Payment Act 2002**
 - At AWMD's sole discretion, if there are any disputes or claims for unpaid Materials and/or Works then the provisions of the Building and Construction Industry Security of Payment Act 2002 may apply.
 - Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payment Act 2002 of Victoria, except to the extent permitted by the Act where applicable.
 - General**
 - 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.
 - These terms and conditions and any contract to which they apply shall be governed by the laws of Victoria and are subject to the jurisdiction of the courts of Victoria.
 - AWMD shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by AWMD of these terms and conditions.
 - In the event of any breach of this contract by AWMD the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Materials.
 - 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 AWMD nor to withhold payment of any invoice because part of that invoice is in dispute.
 - AWMD may license or sub-contract all or any part of its rights and obligations without the Client's consent.
 - The Client agrees that AWMD may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which AWMD notifies the Client of such change.
 - 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.
 - The failure by AWMD to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect AWMD's right to subsequently enforce that provision.