

The Seller and the Customer agree as follows:

1. Definitions

- 1.1 "Seller" shall mean Total Rockbreaking Solutions Pty Ltd (ABN 50 163 642 233) its successors and assigns or any person acting on behalf of and with the authority of Total Rockbreaking Solutions Pty Ltd (ABN 50 163 642 233)
- 1.2 "Customer" shall mean the Customer or any person acting on behalf of and with the authority of the Customer.
- 1.3 "Goods" shall mean Goods supplied by the Seller to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, construction schedules, quotations, work authorisations or any other forms as provided by the Seller to the Customer.
- 1.4 "Services" shall mean all Services supplied by the Seller to the Customer and includes any advice or recommendations.
- 1.5 "Price" shall mean the price payable for the Goods as agreed between the Seller and the Customer in accordance with clause 3 of this contract.

2. Acceptance

- 2.1 Any instructions (verbally or in writing) received by the Seller from the Customer for the supply of Goods and/or the Customer's acceptance of Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Customer has entered into these terms and conditions, the Customers shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Customer the terms and conditions are binding and can only be amended with the signed, written consent of the Seller.
- 2.4 None of the Seller's agents or representatives are authorised to make any representations, statements or agreements unless these are specifically expressed in writing by the Seller. The Seller is not bound by any unauthorised statements, representations or agreements.
- 2.5 The Customer shall give the Seller not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer or any change in the Customer's name and/or any other change in the Customer's details (including but not limited to, changes in the Customer's address, facsimile number, or business practice).

3. Price And Payment

- 3.1 At the Seller's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by the Seller to the Customer in respect of Goods supplied; or
 - (b) the Seller's most recent quoted Price (subject to clause 3.2) which shall be binding upon the Seller provided that the Customer shall accept the Seller's quotation in writing within fourteen (14) days, or such longer validity period as stated in the Seller's quotation.
- 3.2 The Seller reserves the right to change the Price in the event of a variation from the planned scope of supply or schedule of work or a change in required specifications.
- 3.3 At the Seller's sole discretion a deposit may be required. The deposit amount shall become immediately due and payable at the time of order placement.
- 3.4 At the Seller's sole discretion (that will be specified to the Customer in writing):
 - (a) payment shall be due before delivery of the Goods to the Customer; or
 - (b) payment shall be due on delivery of the Goods to the Customer; or
 - (c) payment for approved Customers shall be made by instalments in accordance with the Seller's payment schedule agreed in writing.
- 3.5 Time for payment for the Goods 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 thirty (30) days following the date of the invoice.
- 3.6 The Seller reserves the right to suspend further works or withhold delivery if payment is not made on time. Late payment by the Customer will entitle the Seller to an extension of time for delivery.
- 3.7 Payment will be made by cash, or by cheque, or by bank cheque, or bank transfer or by any other method as agreed to between the Customer and the Seller.
- 3.8 GST and other taxes, duties and charges that may be applicable shall be added to the Price except when they are expressly included in the Price.
- 3.9 In the case of export sales;
 - (a) The Customer must comply with the Seller's other requirements where requested (including the provision of Letters of Credit or additional security) unless the goods have been fully paid prior to despatch
 - (b) The Customer warrants that the sale transactions comply with all applicable international laws, including import, export and exchange control regulations.
- 3.10 Where the Customer is a Trustee:
 - (a) The Customer warrants that it has full power and authority for the benefit purposes and objects of the trust to agree to these terms and conditions on behalf of the trust and that it shall be bound by the terms of these terms and conditions both personally and as trustee; and

(b) The Customer confirms that the Trustees shall be liable for the account and that in addition the assets of the trust shall be available to meet payment under these terms and conditions.

4. Delivery Of Goods

4.1 Delivery of the Goods shall take place when the Customer takes possession of the Goods, either at the Customer's nominated delivery point (in the event that the Goods are delivered by the Seller) or at the Seller's premises. The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Customer is unable to take delivery of the Goods as arranged then the Seller shall be entitled to charge a reasonable fee for redelivery.

4.2 At the Seller's sole discretion the costs of delivery are:

(a) included in the Price; or

(b) in addition to the Price

as stipulated in writing at the time of quotation.

4.3 The Seller may deliver the Goods by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.

4.4 The failure of the Seller to deliver shall not entitle either party to treat these terms and conditions as repudiated.

4.5 The Seller shall not be liable for any loss or damage (including consequential losses or loss of profits) whatever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.

4.6 Covid-19. In view of the current and rapidly evolving events surrounding the outbreak of the Corona virus (below referred to as 'Covid-19', but which also includes any current and future mutations and variants of Covid-19 and other Corona strain viruses), there is considerable uncertainty as to the extent of their potential impact, e.g. on society, communications and otherwise, and what consequences these events may have on the provision of goods and services.

Such consequences may vary from delivery to delivery and depend on the circumstances in each case. The customer acknowledges that it is not possible for the supplier to foresee, plan for, or mitigate all the consequences that the existence and spread of the Covid-19 virus may have, or which may otherwise be caused thereby, (e.g. the actions or recommendations by authorities).

Consequently, the customer acknowledges

(i) that supplier's obligations and ability to perform under this contract may be affected thereby,

(ii) that challenges and/or disruptions in the delivery may occur, and/or

(iii) that changes and amendments to the contract and the delivery may be necessary, on a case by case basis.

In a situation where the delivery is hindered or negatively affected by circumstances directly or indirectly related to Covid-19, it is agreed that the supplier will not be liable and the parties agree that they will work together in good faith to agree on possible amendments and mitigations with a view of securing as little disturbance or interruption to the goods/service delivery as practically reasonable.

It is noted that the supplier reserves the right to make equitable adjustments to e.g. delivery times and/or prices, to the extent necessary to compensate for the consequences of the Covid-19 outbreak.

5. Risk

5.1 If the Seller retains ownership of the Goods nonetheless, all risk for the Goods passes to the Customer on delivery.

5.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership (as referred to in clause 6) passing to the Customer, the Seller is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

6. Title

6.1 The Seller and Customer agree that ownership of the Goods shall not pass until:

(a) the Customer has paid the Seller all amounts owing for the particular Goods; and

(b) the Customer has met all other obligations due by the Customer to the Seller in respect of all contracts between the Seller and the Customer.

6.2 Receipt by the Seller 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 the Seller's ownership or rights in respect of the Goods shall continue.

6.3 It is further agreed that:

(a) where practicable the Goods shall be kept separate and identifiable until the Seller shall have received payment and all other obligations of the Customer are met; and

(b) until such time as ownership of the Goods shall pass from the Seller to the Customer the Seller may give notice in writing to the Customer to return the Goods or any of them to the Seller. Upon such notice the rights of the Customer to obtain ownership or any other interest in the Goods shall cease; and

(c) the Seller shall have the right of stopping the Goods in transit whether or not delivery has been made; and

- (d) if the Customer fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Customer, or any premises as the invitee of the Customer, where the Goods are situated and take possession of the Goods; and
- (e) the Customer is only a bailee of the Goods and until such time as the Seller has received payment in full for the Goods then the Customer shall hold any proceeds from the sale or disposal of the Goods on trust for the Seller; and
- (f) the Customer shall not deal with the money of the Seller in any way which may be adverse to the Seller; and
- (g) the Customer shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of the Seller; and
- (h) the Seller can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Customer; and
- (i) The Seller claims a purchase money security interest, as defined in the Personal Property Securities Act 2009 (Commonwealth) in the Goods so as to secure payment of the full purchase price of such items as are delivered from time to time; and
- (j) the Customer (the Grantor) grants a security interest in the Goods to the Seller (the Secured Party) to secure payment of the Secured Money and waives its right to receive notice of verification statements upon registration.

7. Customer's Disclaimer

- 7.1 The Customer hereby disclaims any right to rescind or cancel any contract with the Seller or to sue for damages or to claim restitution arising out of any misrepresentation made to the Customer by the Seller and the Customer acknowledges that the Goods are bought relying solely upon the Customer's skill and judgement regarding the suitability of the Goods for its intended purpose.
- 7.2 The Seller shall not be bound by nor responsible for any term, condition, representation or warranty other than the warranty given by the Manufacturer which warranty shall be personal to the Customer and shall not be transferrable to any subsequent Customer.
- 7.3 Where the Seller provided Services to the Customer relating to testing, process development, Goods selection, design, detailing, contract supervision and management, the Seller shall exercise its best skill, competence and experience to undertake such services but except as otherwise provided by State and Federal law makes no warranty with respect to such Services.

8. Defects

- 8.1 The Customer shall inspect the Goods on delivery and shall within five (5) normal days of delivery (time being of the essence) notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery if the Customer believes the Goods are defective in any way. If the Customer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Seller has agreed in writing that the Customer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods. Where the Customer is a consumer as defined in the *Trade Practices Act* (1974) then the Customer shall also be entitled to a refund (and the Goods being returned) instead of the Goods being repaired or replaced.

9. Returns

- 9.1 Goods will not be accepted for return other than in accordance with 8.1 above.

10. The Commonwealth Trade Practices Act 1974 ("TPA") and Fair Trading Acts ("FTA")

- 10.1 Nothing in these terms and conditions is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

11. Warranty

- 11.1 Subject to the conditions of warranty set out in clause 11.2 the Seller warrants that if any defect in workmanship or materials is reported to the Seller within twelve (12) months from the date of delivery (time being of the essence), the Seller will, at its sole discretion, repair the defect or replace the affected Good(s).
- 11.2 The conditions applicable to the warranty given by clause 11.1 are:
 - (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - (i) failure on the part of the Customer to properly maintain any Goods; or
 - (ii) failure on the part of the Customer to follow any instructions or guidelines provided by the Seller; or
 - (iii) any use of any Goods otherwise than for any application specified on a quote or order form; or
 - (iv) the continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or

- (v) fair wear and tear, any accident or act of God.
 - (b) the warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Seller's consent.
 - (c) in respect of all claims the Seller shall not be liable to compensate the Customer for any delay in either replacing or remedying the workmanship or in properly assessing the Customer's claim.
 - (d) Warranties are conditional upon the Goods being correctly installed and commissioned, with a duly completed warranty registration card submitted as evidence of correct installation and commissioning prior to putting the Goods into service.
 - (e) The Warranty is conditional on the Customer only using genuine spare parts to service and maintain the Goods. The use of non-genuine parts will void all warranties.
- 11.3 For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.
- 11.4 For Goods sold by the Seller that are used and/or refurbished:
- (a) the Seller will advise the Customer in writing, before payment for the Goods, that the relevant Goods are used and/or refurbished; and
 - (b) no warranties shall apply (unless a warranty is specifically given and detailed by the Seller in writing) to that used and/or refurbished Good.
- 11.5 The Customer expressly agrees and acknowledges that the Goods are bought relying solely upon the Customer's own skill and judgement regarding the suitability of the Goods for its intended purpose.
- 11.6 The Seller will not be liable or responsible for any losses, costs, expenses, liabilities and damages (including loss of profits, liabilities of the Customer to third-parties, and any other consequential damages) whether direct or indirect and whether or not resulting from or contributed to by the default or negligence of the Seller, its agents, employees and subcontractors, which might be claimed as a result of the use or failure of the Goods and/or Services supplied by the Seller.

12. Default & Consequences of Default

- 12.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at twelve percent (18%) per calendar year (1.5% per calendar month) and such interest shall compound daily at such a rate after as well as before any judgement.
- 12.2 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in pursuing the debt including legal costs on a solicitor and own Customer basis and the Seller's collection agency costs.
- 12.3 Without prejudice to any other remedies the Seller may have, if at any time the Customer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Customer and any of its other obligations under the terms and conditions. The Seller will not be liable to the Customer for any loss or damage (including consequential losses or loss of profits) the Customer suffers because the Seller has exercised its rights under this clause and the Seller will be entitled to an extension of time for delivery. The Seller reserves the right to request full payment prior to delivery in the event the Customer defaults on any payments due.
- 12.4 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable in the event that:
- (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Customer will be unable to meet its payments as they fall due; or
 - (b) the Customer 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
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

13. Variation and Cancellation

- 13.1 Any order may be varied or cancelled only if such variation or cancellation is accepted by the Seller in writing and any variation or cancellation by the Customer (whether or not it has been agreed to by the Seller) may only occur on terms which will provide for the Seller to be indemnified by the Customer for all costs incurred by the Seller to the date of cancellation. In the event of any variation being requested by the Customer during manufacture and agreed to by the Seller the contract price shall be adjusted accordingly by the agreed value of any such variation. The Seller reserves the right to extend the original delivery date by a reasonable period commensurate with the time deemed necessary to incorporate the variation(s) requested by the Customer. Cancellation charges shall be payable by the Customer in any case where the Seller agrees to the cancellation of any order in whole or in part.

14. Privacy Act 1988

- 14.1 The Customer agrees for the Seller to give information about the Customer for the purpose of obtaining from a credit reporting agency a credit report containing personal credit information about the Customer in relation to credit provided by the Seller.
- 14.2 The Customer agrees that the Seller may exchange information about the Customer with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- a) to assess an application by Customer; and/or
 - b) to notify other credit providers of a default by the Customer; and/or
 - c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
 - d) to assess the credit worthiness of Customer.
- 15. Remote monitoring and storing information**
- a) All Rammer rockbreakers are supplied with the RD3 monitoring device that collects real time data including the location of the rock breaker, operating hours, service intervals and how the rockbreaker is being operated.
 - b) The client consents to any rockbreaker purchased or hired being fitted with the RD3 monitoring device and the collection of the data as stated in a)
- 16. General**
- 16.1 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.
- 16.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Western Australia and are subject to the jurisdiction of the courts of Western Australia.
- 16.3 The Seller shall be under no liability whatever to the Customer for any indirect loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by the Seller of these terms and conditions.
- 16.4 In the event of any breach of these terms and conditions by the Seller the remedies of the Customer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 16.5 The Customer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Customer by the Seller.
- 16.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 16.7 The Seller reserves the right to 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 the Seller notifies the Customer of such change in writing.
- 16.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 16.9 The failure by the Seller to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision.