

DELIVERY OF BUILDING SURVEYING SERVICES



1. FEE

- 1.1 The Fees and Charges payable for the Building Surveying Services are as per the fee proposal offered to which this Terms of Engagement is attached.
- 1.2 The Building Surveyor reserves the right to change the Fee in the event of a variation to the scope of work for the Building Surveying Services. Any variation from the plan of scheduled works or specifications or building plans (including, but not limited to, any variation due to unforeseen circumstances, or as a result of increases to the Building Surveyor in the cost of materials and labour) will be charged for on the basis of the Building Surveyor's fee proposal and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 1.3 Payment of an invoice is required within 14 days of issue.
 - 1.3.1 Essential Safety Measure Annual Programs (as applicable) and related services are charged 6 monthly in advance unless otherwise agreed
- 1.4 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 the Building Surveyor.
- 1.5 Receipt by the Building Surveyor of any form of payment other than cash does not constitute payment until that payment has been honoured, cleared or recognised by the building surveyor.
- 1.6 GST, other taxes, duties, disbursements and applicable government and council fees and charges will be added to the Fee other than where they are expressly included in the Fee.
- 1.7 We reserve the right to:
 - 1.7.1 charge interest on outstanding invoices
 - 1.7.2 offset payments against older invoices
 - 1.7.3 correct any errors or omissions on quotes, invoices, proposals or submissions
- 1.8 Payment of state government levies shall be paid by the nominated payee prior to obtaining building permit number from the Victorian Building Authority.
- 1.9 Novation of our contract with the owner or developer to a builder or other party is not permitted in accordance with the current Building Surveyor Code of Conduct set down by the Victorian Building Authority.

2. INTELLECTUAL PROPERTY AND DATA

- 2.1 Nothing in this agreement affects the Intellectual Property Rights of either party, except as set out in this clause.
- 2.2 The Client grants the Building Surveyor an unrestricted, royalty free licence to use and manipulate, and disclose as necessary to comply with the law, all Intellectual Property Rights in any Data which the Client provides to the Building Surveyor to the extent reasonably necessary for the Building Surveyor to perform Building Surveying Services.
- 2.3 The Client warrants that any Data provided by it to the Building Surveyor will not infringe the Intellectual Property Rights of any person. The Client indemnifies the Building Surveyor against any direct loss, costs, expenses, demands or liability arising out of a claim by a third party against the Building Surveyor alleging that such provision of Data or use or necessary disclosure of Data by the Building Surveyor infringes any such Intellectual Property Rights.

3. INDEMNITY AND EXCLUSION OF LIABILITY

- 3.1 The Building Surveyor is not liable for and the Client indemnifies the Building Surveyor for:
 - (a) any defect in Building Quality; or
 - (b) the issuing of a temporary approval or conditional occupancy permit requested by the Client and the Client or its customer does not comply with conditions attached to the approval or permit; or
 - (c) the use of any building product whether non deemed cladding or otherwise, which is non approved or becomes un-approved under section 14 of the Act.
- 3.2 If a problem involving the building surveying services develops in relation to the building project on which the Building Surveyor is engaged, the parties will cooperate to minimize loss to the owner of the property and negotiate in good faith toward that end.
- 3.3 Except to the extent there is fault on the part of the Client contributing to loss or injury to the Building Surveyor, the Building Surveyor must perform the Building Surveying Services at its own risk in all things and releases the Client and its employees, officers, members and contractors from all claims, actions, proceedings, costs, expenses, losses, suffering, illness and liabilities incurred by the Building Surveyor or its employees, agents, subcontractors, third parties, and customers which arise from the performance of the Building Surveying Services.
- 3.4 Notwithstanding any other provision in this agreement, the Building Surveyor is not liable to the Client, nor is it required to indemnify the Client, for any loss or damage suffered by the Client or for any claim against the Client (howsoever arising) for economic, indirect or consequential losses of any kind whatsoever.
- 3.5 The Client indemnifies the Building Surveyor and its employees, officers and contractors against all claims, demands, expenses, loss or damage in respect of:
 - (a) loss or damage to any property, or the death of or personal injury to any person, caused or contributed to by the Client;
 - (b) the Client's breach of this agreement, including a wilful, unlawful or negligent act or omission of the Client;
 - (c) use by the Client of a "non-deemed" cladding on a building, or any other product not accredited under section 14 of the Act, including any indirect or consequential loss in relation to such cladding or a shortfall in Building Quality; and
 - (d) any claim action or proceeding by a third party, including an insurer, against the Building Surveyor or its employees officers and contractors caused or contributed to by the Client, including but not limited to use by the Client of a "non-deemed" cladding.
- 3.6 The Client releases and holds harmless the Building Surveyor against all claims, demands, expenses, loss or damage arising in connection with the Client's reliance on, or use of, any aspect of the Building Surveying Services, including advice, given to the Client by the Building Surveyor in a manner which is not contemplated or authorised by the Act or otherwise not in accordance with any exclusions or assumptions given by the Building Surveyor.
- 3.7 The Client may, at its cost, or the cost of its customer and at all times with an indemnity to the Building Surveyor for its costs and expenses in participating in the process, elect to instruct the Building Surveyor to refer to the Resolution Institute, a matter in relation to use of particular building products in the Project to obtain a declaration or

ruling that the product is, for all time, an accredited building product within section 14 of the Act to eliminate the indemnity contained in clauses 3.1 or 3.5. The Client warrants that it will inform its customer of this option at the time in the Project it becomes relevant, and that failing to take up the option in this subclause, constitutes binding agreement and confirmation of the indemnities which will then apply.

4. MUTUAL WARRANTIES

Each party represents and warrants to the other that as at the date of this agreement:

- 4.1 all actions, conditions and things required to be taken, fulfilled and done by it in order to enable it to enter into, exercise its rights and perform its obligations under this agreement have been done;
- 4.2 all Authorisations required for its entry into, exercise of its rights under, and performance of its obligations under this agreement have been obtained; and
- 4.3 this agreement is validly signed by a corporate Client, if signed by a director or employee with management/supervision of employee responsibilities with the Client and, if signed by a director, combines the director as guarantor of the corporate Client.

5. CLIENT WARRANTIES AND OBLIGATIONS

5.1 The Client warrants that the Building Surveyor has been exclusively appointed to perform building surveying services on the Project, has authority to bind the Client to courses of action deemed necessary by the Building Surveyor in how the Project is completed and all data provided to the Building Surveyor is accurate and complete:

5.2 The Client must:

- 5.2.1 provide all information required by the Building Surveyor within the time specified by the Building Surveyor to enable the Building Surveyor to perform the Building Surveying Services;
- 5.2.2 give the Building Surveyor such access to the Project and any relevant site as is required by the Building Surveyor to perform the Building Surveying Services.

6. FORCE MAJEURE

6.1 If a Force Majeure Event ("the Event") causes delay or failure by a party to perform its obligations under this agreement:

- 6.1.1 neither party is liable for such delay or failure; and
- 6.1.2 all obligations of a party under this agreement are suspended until the Force Majeure Event ceases to apply

Provided that the party affected by the Event promptly notifies the other, giving full particulars of it, its timing (commencement and expected end, if known) and the proposed means to mitigate it and pursues those means, to the extent they can be controlled, diligently. The affected party must promptly resume full performance of this agreement on the ending of the Event (providing written notice of such ending of the Event) and continue to perform such aspects of this agreement as it can, in the meantime.

6.2 If a delay or failure under this clause exceeds 60 days, either party may immediately terminate this agreement by notice to the other party.

7. TERMINATION

7.1 This agreement can only be terminated in accordance with sections 80C (if there is a deemed termination) or 81 of the Act.

7.2 Notwithstanding any other provision of this agreement, the Client must pay the Building Surveyor the Fee within 14 days of the termination of this agreement, or such part of the Fee which is, at that time, unpaid.

7.3 Termination of this agreement under this clause does not affect any accrued rights or remedies of either party.

7.4 Termination of this agreement under this clause does not constitute termination or a transfer of function under the Building Act.

7.5 Notice period of 45 days applies for a cancellation of Essential Safety Measures services by the Client

8. CONFIDENTIAL INFORMATION

8.1 Subject to the Act, each party agrees that it will not use any Confidential Information of the other party or allow any Confidential Information of the other party to be used for any purpose, except for the purposes of and in the manner contemplated by this agreement, and agrees that it will:

- 8.1.1 keep confidential;
- 8.1.2 take reasonable steps to ensure that the party's officers and employees do not unnecessarily disclose to a third party;
- 8.1.3 maintain proper and secure custody of; and
- 8.1.4 not use or reproduce in any form, any Confidential Information belonging to the other party without consent from that party.
- 8.1.5 not reproduce without the parties consent

9. INSURANCE

9.1 The Building Surveyor must maintain at all times during the Term all insurances required by Law or this agreement.

9.2 The Building Surveyor must produce evidence of those insurances to the Client upon reasonable request.

9.3 The Building Surveyor must take all reasonable steps, consistent with the Client's instructions to avoid any act or omission which would make any such policy of insurance void or unenforceable.

10. DISPUTE RESOLUTION

10.1 General

10.1.1 A party must not commence arbitration or court proceedings (except for urgent equitable or injunctive relief) in respect of a dispute under this agreement, unless it first attempts to resolve the dispute by negotiation and mediation under this clause.

10.1.2 A party claiming that a dispute has arisen under this agreement must give written notice to the other party specifying the nature and details of the dispute.

10.2 Negotiation

10.2.1 On receipt of that notice by the other party, the parties must negotiate in good faith to resolve the dispute.

10.2.2 If the parties are unable to resolve the dispute within 10 Business Days, they must promptly refer the dispute:

- 10.2.2.1 in the case of the Client to the Client's Representative; and

10.2.2.2 in the case of the Building Surveyor to the Building Surveyor's Representative.

10.2.3 Those persons must meet to resolve the dispute and must be authorised to resolve the dispute. A meeting may be in the form agreeable to both parties.

10.2.3 not withhold payment of outstanding invoices that do not relate to the matter in dispute.

10.3 Mediation

10.3.1 If those persons are unable to resolve the dispute within 10 Business days of referral, a party may refer the dispute for mediation under the mediation rules of the Resolution Institute to:

10.3.1.1 a mediator agreed by the parties; or

10.3.1.2 if the parties are unable to agree a mediator within five Business Days, a mediator nominated by the President for the time being of the Law Institute of Victoria.

10.3.2 The role of a mediator is to assist in negotiating a resolution of the dispute. The parties will abide by procedural directions of the mediator prior to and during the mediation.

10.3.3 Any information or documents disclosed by a party under this clause:

10.3.3.1 must be kept confidential; and

10.3.3.2 may not be used except to attempt to resolve the dispute.

10.3.4 Each party must bear its own mediation costs. The parties must bear equally the costs of any mediator.

10.4 Performance

If possible, each party must perform its obligations under this agreement during negotiations, mediation and arbitration proceedings.

11. MISCELLANEOUS

11.1 Entire agreement

This agreement:

11.1.1 constitutes the entire agreement between the parties about its subject matter;

11.1.2 supersedes any prior understanding, agreement, condition, warranty, indemnity, or representation about its subject matter.

11.2 Waiver

A waiver of a provision of or right under this agreement must be in writing signed by the party giving the waiver and is effective only to the extent set out in the written waiver.

11.3 Exercise of power

11.3.1 The failure, delay, relaxation, or indulgence by a party in exercising a power or right under this agreement is not a waiver of that power or right.

11.3.2 An exercise of a power or right under this agreement does not preclude a further exercise of it or the exercise of another right or power.

11.4 Survival

Each indemnity, obligation of confidence and other term capable of taking effect after the expiration or termination of this agreement, remains in force after the expiration or termination of this agreement.

11.5 Governing law

This agreement is governed by the law in Victoria and is subject to the jurisdiction of the Courts in Victoria.

11.6 Consumer Law

11.6.1 To the extent that guarantees are implied into this contract for services by any applicable provisions of the Competition and Consumer Act 2010 (Cth) or the Australian Consumer Law and Fair Trading Act 2012 (Vic), those are the only implied terms as to the quality of the services and all other common law implied terms are negated.

11.6.2 Notwithstanding the above, where the Client buys Building Surveying Services as a consumer other than because the services were of a kind ordinarily acquired for personal, domestic or household use or consumption, the Client's damages flowing from any breach of this agreement are limited to the cost of supplying the services again, or payment of the cost of having the services supplied again subject to the limitations in section 64A of the Australian Consumer Law. Nothing in these terms and conditions shall be construed so as to contravene, so as to lead to penalty or invalidity, laws or legislation governing the rights of consumers.

12. NOTICES

12.1 A notice, demand, consent, approval or communication under this agreement (Notice) must be:

12.1.1 in writing, in English and signed, or in the case of email, sent by a person authorised by the party or in a position of authority with the party; and

12.1.2 hand delivered or sent by prepaid post or email to the recipient's address or email address specified in the Schedule, as varied by any Notice given by the recipient to the sender.

12.2 A Notice is deemed to be received:

12.2.1 if hand delivered, on delivery;

12.2.2 if sent by prepaid post, three Business Days after posting (or seven Business Days after posting if posting to or from a place outside Australia);

12.2.3 if sent by email, at the time deemed to be the time of receipt under the Electronic Transactions (Victoria) Act 2000 or Electronic Transactions Act 1999 (Cth), if the notice was being given under a law of the Commonwealth of Australia.

However, if the Notice is deemed to be received on a day that is not a Business Day or after 5:00pm, the Notice is deemed to be received at 9:00am on the next Business Day.

13. DEFINITIONS AND INTERPRETATION

13.1 Definitions

In this agreement:

13.1.1 Act means the Building Act 1993 (Vic)

13.1.2 Authorisation means any authorisation, agreement approval, licence, permit, consent, qualification, accreditation, filing, registration, certificate, resolution, direction, declaration or exemption and any renewal and variation of them by or with a Governmental Agency.

13.1.3 **Building Quality** means any matter that could or might be a defective item with respect to any contract between the Client and another party which defines the standards of work to be achieved pursuant to that contract with respect to the Project including failure to comply with product technical/application or use standards/recommendations, latent defects or aspects of work hidden from view at a point the

Building Surveyor first inspects them but does not include matters which relate to conformance of the Project to technical standards including the National Construction Code which the Building Surveyor is mandated to inspect under that Code or the Act.

13.1.4 **Building Surveyor** means Culberon Pty Ltd trading as BSA Building Surveyors principally through the employee building surveyor nominated to perform the role.

13.1.5 **Business Day** means a day which is not a weekend or public holiday in Victoria.

13.1.6 **Confidential Information** means any documentation or information of a confidential nature supplied by either party to the other in connection with this agreement and includes all scientific, technical, manufacturing, performance, sales, financial, commercial, contractual or marketing information possessed by a party but excludes any documentation or information which has been previously published or otherwise disclosed to the general public or is required to be disclosed by law.

13.1.7 **Data** means information directly or indirectly relating to this agreement and/or the Building Surveying Services and includes software (including source code and object code versions) manuals, diagrams, graphs, charts, projections, specifications, estimates, records, concepts, documents, accounts, plans, formulae, designs, methods, techniques, processes, supplier lists, price lists, market research, information, correspondence, letters, warranties and manufacturer's information and data sheets, personal identification numbers (PINS) and access codes for security and alarm systems, and papers of every description including all copies of and extracts from them.

13.1.8 **Building Surveying Services** is defined in Clause 1 to this agreement and in the quote for work including services associated with Essential Safety Measures.

13.1.9 **Fee** is defined in clause 3 and as adjusted in accordance with clause 1.2.

13.1.10 **Force Majeure Event** means an event beyond the reasonable control of the parties which precludes a party from performing on time an obligation under this agreement. Such circumstances include:

13.1.10.1 acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires pandemic and any natural disaster; and

13.1.10.2 acts of war, acts of public enemies, industrial strife/dispute or strike terrorism, riots, civil commotion, malicious damage, cyber attacks, sabotage revolution and insurance previously available to the Building Surveyor becoming unavailable at reasonable cost.

13.1.11 **Intellectual Property Rights** includes property and rights in respect of or in connection with copyright (including future copyright and rights in the nature of or analogous to copyright), know-how, trade mark, service mark, design, inventions (including patents), trade, business or company names, or other proprietary rights, or any rights to registration of such rights (including all renewals and extensions) whether created before or on or after this agreement.

13.1.12 **Law** means any statute, regulation, order, rule, subordinate legislation, or other document

enforceable under any statute, regulation, order, rule or subordinate legislation.

13.1.13 **Non-deemed cladding** means any cladding which is not brick, timber, cement sheet or steel/corrugated iron;

13.1.14 **Resolution Institute** means the Building Appeals Board under the Act.

13.1.15 **Term** means the period starting on the date that the client accepts the terms and conditions of this agreement as per clause 1 and concluding upon the completion of the Building Surveying Services or Termination of this agreement, whichever occurs first.

13.2 Interpretation

In this agreement, unless the context otherwise requires:

13.2.1 headings do not affect interpretation;

13.2.2 the Schedule forms part of the agreement and is correct;

13.2.3 singular includes plural and plural includes singular;

13.2.4 words of one gender include any gender;

13.2.5 a reference to a party includes its executors, administrators, successors and permitted assigns;

13.2.6 a reference to a person includes a partnership, corporation, association, government body and any other entity;

13.2.7 a reference to this agreement includes any schedules and annexures to this agreement;

13.2.8 an agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;

13.2.9 an agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;

13.2.10 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;

13.2.12 a provision is not construed against a party only because that party drafted it;

13.2.13 an unenforceable provision or part of a provision may be severed, and the remainder of this agreement continues in force, unless this would materially change the intended effect of this agreement;

13.2.14 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions;

13.2.15 an expression defined in the Act or the Planning and Environment Act 1987 (Vic) has the meaning given by that Act at the date of this agreement;

13.2.16 an expression defined in the Corporations Act 2001 (Cth) or the A New Tax System (Goods and Service Tax) Act 1999 (Cth) has the meaning given by that Act at the date of this agreement



Liability limited by a scheme approved under Professional Standards Legislation.