Terms and Conditions of Hire

1. DEFINITIONS

In this Subcontract, except where the context otherwise requires:
"Claim" means any claim, action, proceeding, demand, liability, obligation, costs (including legal costs on a full indemnity basis), losses, damages and expenses including those arising out of the terms of any settlement, at law, in equity or under statute, brought or incurred by any person;
"COD" means cash on delivery;
"Constructional Plant" means plant, equipment, materials and other things used (or intended to be used) in the execution of the Work under the Subcontract;
"EAE" means Eagle Alliance Earthmoving Pty Ltd (A.C.N. 141 206 591) (A.B.N. 41 149 364 727) its successors and assigns;
"Equipment" means trucks, plant and/or machinery used in the performance of the Work under the Subcontract;
"GST" means Goods and Services Tax under the GST ACT;
"GST ACT" means the *A New Tax System (Goods and Services Tax) Act 1999 (Cth);*
"Hirer" means the individual and/or entity (customer) receiving the earthmoving services and/or earthmoving equipment and/or related services from the Subcontractor pursuant to arrangement by EAE;
"Losses" means liabilities, losses, damages, expenses and costs (including legal costs on a full indemnity basis) of any kind or nature including:
(a) loss of profits, loss of revenue, loss of anticipated savings, loss of opportunity and pure economic loss;
(b) any other special or indirect loss;
"Secondary Subcontractor" means the subcontractor(s) engaged by the Subcontractor;
"Site" means the place where the Subcontractor carries out the Work under this Subcontract;
"Subcontract" means the agreement between EAE and the Hirer;
"Subcontractor" means the earthmoving subcontractor and equipment owner operator;
"Subcontract Works" means the whole of the Work to be executed in accordance with the Subcontract;
"WHS Act" means the *Work Health and Safety Act 2011* (Qld);
"Work" means the earthmoving services and/or earthmoving equipment and or related services supplied by the Subcontractor under this Subcontract;
"Work Order" means the request for earthmoving services and/or earthmoving equipment and/or related services received by EAE from the Hirer.

2. INTERPRETATION

Headings and subheadings do not form part of these Terms and Conditions of Hire and shall not be used in interpretation of the Subcontract.
Words in the singular include the plural and words in the plural include the singular, according to the requirements of the context.
Any reference to gender means all genders.
A reference to any legislation or to any section or provision of it includes any amendments to it or any statutory provision substituted for it and all regulations, ordinances, bylaws, rules or other statutory instruments issued under it.

3. EAE AND THE HIRER

3.1 EAE:
(a) is an independent contractor that provides booking and invoicing services as an intermediary between the Hirer and Subcontractor and;
(b) is not a principal, agent, related entity or body corporate, employee, partner or affiliate of the Hirer or Subcontractor.
3.2 The Hirer:
(a) is a customer of EAE;
(b) is provided earthmoving equipment and/or earthmoving services and/or related services by the Subcontractor by arrangement with EAE;
(c) is independent to EAE and is not an agent, related entity, employee, partner of affiliate of EAE.

4. JOINT AND SEVERAL

If the Hirer comprises more than one person:
(a) the obligations of those persons are joint and several;
(b) EAE may proceed against any or all of those persons in respect of any failure by the Hirer to comply with its obligations under these Terms and Conditions of Hire or otherwise.

5. HIRE PERIODS AND CHARGES

5.1 Hire Periods
5.1.1 The hire rate is based upon the Equipment being hired for a minimum period as specified in EAE's current price list.
5.1.2 The hire shall commence from the time and date the Equipment arrives at the Hirer's site plus applicable travel and/or float charges as specified in clause 5.2 (c).
5.1.3 The Hirer shall pay EAE a surcharge to allow for overtime costs (rates on application) should the hire period and/or Work performed by the Subcontractor include night work, weekends, statutory or gazetted public holidays.
5.2 Hire Charges
The Hirer shall pay EAE on completion of the Hire Period for the following:
(a) the rate/s specified in EAE's current price list or job docket for the full Hire Period that the Equipment is at the Hirer's site plus applicable travel and/or float charges;
(b) all hiring charges and any other amounts payable in accordance with these Conditions of Hire within the time specified in the job docket, Tax Invoice, Credit Account Application and/or Work Authorisation;
(c) all charges including and not limited to all freight and other charges incurred by the Subcontractor in transporting the Equipment or loading and unloading the Equipment at the Site. Travel and/or float charges are also applicable.
(d) where the Hirer is responsible for the loss or damage to the Equipment the whole or part of the cost of replacement or repair of the Equipment which will be added to the invoice total;
(e) the amount of levies, offences (traffic/parking) or like charges paid or payable by the Subcontractor to any Government body in respect of use of the Equipment; and
(f) tolls, tipping fees and material supplies charged to EAE's account(s).

6. CREDIT CARD PAYMENTS

Eagle Alliance will accept payments by MasterCard, Visa and Amex. MasterCard and Visa attract a 1% (one percent) surcharge; Amex attracts a 3% (three percent) surcharge.

7. MATERIAL SUPPLY

Supply of sand, soil or gravel will be at EAE's current price at the time of the order and subject to availability.

8. THE HIRER'S RESPONSIBILITIES

8.1 Prior to the use of the Equipment, the Hirer shall:
(a) consult with EAE or the Subcontractor to determine the condition and suitability of the Equipment hired for the purpose required; and
(b) obtain all necessary permits and/or plans and pay any fees payable to any local or government authority in relation to the hire.
8.1.1 The Hirer will indemnify EAE for any additional cost, expenses or losses incurred by EAE arising from the Hirer's failure to comply in full with Clause 8.1.
8.2 During the Hire Period the Hirer shall:
(a) at all times exercise due care that the Equipment is not driven or operated by any person not duly authorised under all relevant laws, by-laws and regulations to be driving or operating such Equipment for the purpose for which it is being used;
(b) The Hirer shall take all reasonable precautions to prevent bodily injury or damage to property and to comply with all statutory obligations and by-laws and regulations imposed by any Public Authority for the safety of persons and property as though the Hirer was the Subcontractor;
(c) clearly mark the exact location and identify all services above and below ground at the Site, including, but not limited to drains, pipes, sewers, mains and telephone and data cables, to enable the Subcontractor's equipment operator to prevent damage to all such services. These plans can be requested from the BYDA (Before You Dig Australia) website at www.dyba.com.au. Should the Hirer fail to provide the Subcontractor with the appropriate plans for the Site as specified, and clearly mark the exact location of all services, the Hirer shall indemnify the Subcontractor and EAE from any claim for costs, expenses or losses;
(d) be responsible for any loss or damage to the Equipment if such loss is caused by the negligence of the Hirer or any persons under his control;
(e) accept full responsibility for, and indemnify the Subcontractor and EAE against all claims in respect of any injury to persons, or loss or damage to property, arising out of the delivery, servicing, storage, possession or use of the Equipment by the Hirer, or any persons under his control during the Period of Hire;
(f) not alter, make any additions to, deface or erase any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment;
(g) be liable for any costs should the Equipment, as a result of instructions given by the Hirer, become bogged. Costs referred to being the agreed hire and the additional hire of whatever equipment is necessary to recover the machine or vehicle;
(h) keep all persons, including the Hirer, away from the Equipment, whilst in operation; and
(i) not repair or attempt to repair or cause any repair to be made to the Equipment without the prior consent of the Subcontractor.

9. THE SUBCONTRACTOR

If the Subcontractor determines that it would be dangerous or otherwise detrimental to the Equipment to operate the Equipment in the site conditions, the Subcontractor has the right to refuse to operate the Equipment in such conditions.

10. BREAKDOWN

(a) If Equipment is hired without the Subcontractor's driver/operator The Hirer will, as soon as practicable, notify EAE by email about any Equipment breakdown, malfunction or any unsatisfactory performance of any part of the Equipment;
(b) Any claim by the Hirer for breakdown time will only be considered by EAE from the date and time of the email sent by the Hirer pursuant to Clause 10(a); and
(c) The Hirer will indemnify the Subcontractor and EAE from any claim for costs, expenses or losses the Hirer incurs, as a result of any Equipment breakdown.

11. DISPUTES

The Hirer shall, within seven (7) days from the completion of the Work, notify EAE in writing of any alleged dispute. If the Hirer fails to comply with this provision, the Work shall be conclusively presumed to have been completed satisfactorily and free from any disputes.

12. INSURANCE

12.1 Prior to the Subcontractor commencing Work at the Site or the Hirer obtaining the Equipment, the Hirer shall purchase and maintain insurance for the following:
(a) General Public and Products Liability insurance covering the Hirer's legal liability to pay for personal injury and property damage out of or in connection with the execution of the Work under the Subcontract with a limit of cover not less than AUD 20,000,000.00;

(b) Where applicable, Motor Vehicle insurance covering the Hirer's own motor vehicles or other mobile equipment, for any personal and property damage arising from the use of such motor vehicles or mobile equipment in or about the execution of the Work;
(c) Where applicable, Workers Compensation insurance covering the Hirer's liability for any loss or claim by any person employed or otherwise engaged by it in or about the execution of work at the Site;
(d) Where applicable, personal accident insurance covering the Hirer for any personal injury sustained by them arising from or in connection with the work at the Site; and
(e) Where applicable, Plant and Equipment insurance covering the Hirer's own Constructional Plant and Equipment for its replacement value against loss or damage, including loss or damage in transit to the delivery place and its unloading.

12.2 Without in any way limiting its other obligations under this Agreement, if the Hirer fails to effect and maintain the insurance referred to in Clause 12.1 above the Hirer shall indemnify EAE against any and all Claims and Losses arising out of or in connection with, or as a consequence of, the carrying out of the Work under the Subcontract by the Hirer, Subcontractor or its Secondary Subcontractors.

13. INDEMNITY BY HIRER

The Hirer shall indemnify EAE and each of its officers, agents and employees against any and all Losses and Claims arising from any breach, act, omission or default of the Hirer or its employees, servants and /or agents including:

(a) loss of or damage to the property of any person and any existing property in or upon which the Work is being carried out;
(b) claims by any person against EAE in respect of personal injury or death or loss of or damage to any property; and
(c) all losses suffered by EAE (including legal costs on a full indemnity basis);

arising from or in connection with the execution of the Work by the Subcontractor and/or its Secondary Subcontractor(s) and/or use of the Equipment by the Hirer.

The Hirer's liability to indemnify EAE under Clause 13 will be reduced proportionally to the extent only that a negligent act or omission on the part of EAE has caused or contributed to its loss or damage.

This Clause 13 shall not apply to exclude any other right of EAE to be indemnified by the Hirer.

14. NO CLAIM

The Hirer shall not be entitled to make, and waives its right to, any Claim against EAE in relation to arising from or in connection with any Site conditions, any information concerning Site conditions or any failure to provide information concerning Site conditions to the Subcontractor.

15. DAMAGES

15.1 Recoverable Costs

The Hirer must pay to EAE any costs, expenses or losses incurred by EAE as a result of the Hirer's failure to pay to EAE all sums outstanding as owed by the Hirer to EAE including without limiting the generality of the forgoing any debt collection and legal costs incurred in enforcing payment on a solicitor and own client basis.

15.2 Interest

EAE may charge interest at 2% (two percent) above the commercial lending rate of the Westpac Banking Corporation calculated on a daily basis on amounts not paid within the time specified in EAE's invoice.

16. RETENTION OF TITLE

16.1 Title

The Equipment shall remain the property of the Subcontractor at all times. The Hirer is not entitled to sell, transfer, mortgage, charge or encumber in any way the Equipment nor part with possession of the Equipment or assign the benefit of the Hire Agreement.

16.2 Repossession

If the Hirer commits an act of bankruptcy, enters into any form of administration or liquidation, makes any composition or arrangement with its creditors, ceases to carry on business or breaches any fundamental clause of this Agreement, then the Subcontractor may repossess any Equipment and EAE may, without prejudice to any other remedies it may have, commence proceedings to recover the balance of any monies owing to EAE by the Hirer.

17. PERSONAL PROPERTY SECURITIES ACT 2009 (CTH)

(a) "PPSA" means
  i. the *Personal Property Security Act 2009* (Cth) (PPS Act) and any regulation made at any time under the PPS Act (each as amended from time to time); and
  ii. any amendment made at any time to any other legislation as a consequence of the PPS Act.
(b) The Hirer acknowledges and agree that these terms and conditions constitute a security agreement for the purposes of the PPSA ("Security Agreement") and create a security interest in the Equipment supplied by EAE from time to time and any proceeds of the supply of the Equipment to secure payment for the Equipment ("Security Interest").
(c) Each supply of Equipment by EAE under these terms and conditions is subject to the Security Agreement for the purposes of the PPSA.
(d) EAE may lodge a financing statement on the Personal Property Securities Register ("PPSR") in respect of the Security Interest in the Equipment and the proceeds of supply of the Equipment, including as a purchase money security interest (as that term is defined in the PPSA) ("PMSI"), pursuant to these terms and conditions.

Assurances

(e) The Hirer must do all things, provide all information and sign all documents that are necessary and reasonably required to enable EAE to acquire a perfected Security Interest in the Equipment, including for the purposes of:
  i. Ensuring that any Security Interest created under, or provided for, by these terms and conditions:
    1. Attaches to the Equipment that are intended to be covered by that Security Interest; and
    2. Is enforceable, perfected and otherwise effective; and
    3. Has the priority required by EAE.
  ii. Enabling EAE to prepare and register a financing statement or financing change statement;
  iii. Enabling EAE to register a PMSI pursuant to the PPSA, if applicable; and
  iv. Enabling EAE to exercise and maintain any of the EAE's rights or powers in connection with any such Security Interest.
(f) The Hirer must never dispose of the Equipment, but if the Hirer does dispose of the Equipment in any way, the Hirer must:
  i. Ensure that the Hirer receives cash proceeds for the Equipment of at least equal to the market value of the Equipment; and
  ii. Immediately pay those proceeds to EAE. EAE may apply the proceeds in such order as specified by subsection 14(6)(c) of the PPSA, unless otherwise specified by EAE in writing; and
  iii. Not allow any other charge or security interest to exist over those proceeds without EAE's written consent if that security interest could rank ahead of EAE's Security Interest.
(g) If a higher-priority security interest does arise in the Equipment despite the Hirer's obligations under this section, the Hirer must:
  i. Ensure that the Hirer receives cash proceeds for the Equipment of at least equal to the market value of the Equipment; and
  ii. Immediately pay those proceeds to EAE, which EAE may apply in such order as EAE sees fit.
(h) The Hirer must not change the Hirer's name, structure, status or partnership, or assign or sell the Hirer's business to another party, or initiate any change to any registered documentation, or act in any other manner which would impact on EAE's registered Security Interest without EAE's prior written consent. The Hirer agrees that the Hirer's liability under these terms and conditions is not affected by such an event until a new application for credit in the Hirer's new entity name as restructured or changed is made and approved by EAE in writing.

Exclusion of Notices and Other Obligations

(i) To the extent permitted by law and for the purposes of sections 115(1) and 115(7) of the PPSA:
  i. EAE does not need to comply with sections 95, 118, 121(4), 125, 129(2), 129(3), 130, 132(3)(d) or 132(4);
  ii. Sections 142 and 143 are excluded; and
  iii. For the purposes of section 115(7) of the PPSA, EAE does not need to comply with sections 132 and 137(3).
(j) To the extent permitted by law, the Hirer agrees to waive:
  i. The Hirer's rights to receive any notice that is required by any provision of the PPSA (including a notice of a verification statement) or any other law before a secured party or a receiver exercises a right, power or remedy; and
  ii. Any time period that must otherwise lapse under any law before a secured party or a receiver exercises a right, power or remedy.
(k) If the law that requires a period of notice or a lapse of time cannot be excluded, but the law provides that the period of notice or lapse of time may be agreed, that period or lapse is one day or the minimum period the law allows to be agreed (whichever is the longer).

Provision of Information

(l) The Hirer agrees not to exercise the Hirer's rights to make any request of EAE under section 275(6) of the PPSA, to authorise the disclosure of any information under that section or to waive any duty of confidence that would otherwise permit non-disclosure under that section.
(m) The parties must not disclose information of the kind mentioned in section 275(1) of the PPSA, except in the circumstances where:
  i. Disclosure is required by sections 275(7)(b) to (e) of the PPSA; and/or
  ii. EAE discloses information of a kind mentioned in section 275(1) of the PPSA to the extent that EAE is not doing so in response to a request made by an "interested person" (as defined in section 275(9) of the PPSA) pursuant to section 275(1) of the PPSA.
(n) Notwithstanding the obligations of this section, the Hirer shall only authorise the disclosure of information for the purposes of section 275(7)(c) of the PPSA, or request information under section 275(7)(d) of the PPSA, if EAE approves such disclosure or request for information in writing.
(o) Nothing in this part prevents any disclosure of information by EAE that EAE believes is reasonably necessary to comply with any other obligations that EAE may have under the PPSA.

Other

(p) If the Hirer defaults in the timely performance of any obligation owed to EAE, EAE may enforce the Security Interest by exercising all or any of EAE's rights under these terms and conditions, the general law and the PPSA.

(q) Nothing in this part limits or is limited by any other provision of these terms and conditions or any other agreement between the parties.

18. PRIVACY

18.1 The Hirer hereby authorises EAE to collect, retain, record, use and disclose commercial and/or consumer information about the Hirer, in accordance with the Privacy Act 1988, the Privacy Amendment Act 2012 and subsequent amendments, to persons and/or legal entities who are a solicitor or any other professional consultant engaged by EAE, a debt collector, credit reporting agency and/or any other individual or organisation which maintains credit references and/or default listings.

18.2 EAE may give information about the Hirer to a credit reporting agency for the purposes of obtaining consumer and commercial credit reports and/or lodging consumer and commercial defaults on the Hirer's credit file. This information may be given before, during or after the provision of credit to the Hirer and will be in accordance with the Privacy Act 1988, the Privacy Amendment Act 2012 and subsequent amendments.

19. LIABILITY

19.1 Non-excludable Rights

The parties acknowledge that, under the Australian Consumer Law (Cth), certain conditions and warranties may be implied in these terms and conditions and there are rights and remedies conferred on the Hirer in relation to the provision of the Equipment or Work which cannot be excluded, restricted or modified by the Agreement ("Non-excludable Rights").

19.2 Disclaimer of Liability

EAE disclaims all conditions and warranties expressed or implied, and all rights and remedies conferred on the Hirer, by statute, the common law, equity, trade, custom or usage or otherwise and all those conditions and warranties and all those rights and remedies are excluded other than any Non-excludable Rights. To the extent permitted by law, the liability of EAE for a breach of a non-excludable Right is limited, at EAE's option, to the supplying of the Equipment and/or any Work again or payment of the cost of having the Equipment and/or Work supplied again.

19.3 Indirect Losses

Not withstanding any other provision of these terms and conditions, EAE is in no circumstances (whatever the cause) liable in contract, tort including without limitation, negligence or breach of statutory duty or otherwise to compensate the Hirer for:

(a) any increased costs or expenses;

(b) any loss of profit, revenue, business, contracts or anticipated savings;

(c) any loss or expense resulting from a claim by a third party; or

(d) any special, indirect or consequential loss or damage of any nature whatsoever caused by the Subcontractor's failure to complete or delay in completing the Work.

19.4 Force Majeure

EAE will have no liability to the Hirer in relation to any loss, damage or expense caused by the Subcontractor's failure to complete the Work as a result of fire, flood, tempest, earthquake, riot, civil disturbance, theft, crime, strike, lockout, breakdown, war, the inability of the Subcontractor's normal suppliers to supply necessary material or any other matter beyond the Subcontractor's control.

20. SECURITY AND CHARGE

The Hirer hereby charges all property, both equitable and legal, present or future of the Hirer in respect of any monies that may be owing by the Hirer to EAE under the terms and conditions or otherwise and hereby authorises EAE or its solicitors to execute any consent form as its attorney for the purpose of registering a caveat over any real property owned by the Hirer at any time.

21. SEVERABILITY

Any provision in these terms and conditions which is invalid or unenforceable in any jurisdiction must be read down for the purposes of that jurisdiction, if possible, so as to be valid and enforceable. If that provision cannot be read down then it is capable of being severed to the extent of the invalidity or unenforceability without affecting the remaining provisions of these terms and conditions or affecting the validity or enforceability of that provision in any other jurisdiction.

22. GOVERNING LAW AND JURISDICTION

22.1 This contract shall be governed by the laws of the State of Queensland, and where applicable, the Commonwealth of Australia.

22.2 Any proceeding commenced against EAE by the Hirer and/or Subcontractor must be commenced at the Brisbane Registry of whichever Court or Tribunal which has the appropriate jurisdiction to hear the matter.