

Terms and Conditions of Order

1 Performance

- 1.1 The Supplier agrees to perform its Supply obligations in accordance with and subject to this Order.
- 1.2 The method of Installation of the Goods is at the sole discretion of the Supplier.
- 1.3 The Purchaser agrees to pay the Supplier the Price in accordance with and subject to this Order.

2 Warranties

- 2.1 To the extent that the Goods are manufactured by the Supplier, the Supplier warrants that when the Goods are supplied to the Purchaser they will:
 - (a) comply with the description in this Order (including any quality assurance requirements set out in the Details);
 - (b) be of good and merchantable quality; and
 - (c) be free from all Encumbrances.
- 2.2 The requirements in **clause 2.1** are in addition to any warranties which are or may be implied under the *Sale of Goods Act 1895 (WA)*, the *Trade Practices Act 1974 (Cth)* and any other legislation or law applicable to the Goods.
- 2.3 The Supplier does not warrant or guarantee any products or parts comprising the Goods that are not manufactured by the Supplier, unless the Supplier can enforce a warranty or guarantee against the manufacturer of those products or parts, and then only to the extent of such warranty or guarantee.
- 2.4 The Supplier does not warrant or guarantee any manila cordage, wire rope or second-hand goods comprising the Goods.

3 Investigations

- 3.1 The Purchaser is taken to have carefully examined all documents and other information relevant to the Supply or provided to the Supplier, and to have fully satisfied itself of all conditions, risks, contingencies and other circumstances which might affect the Supply, including:
 - (a) the availability of labour, equipment, parts, consumables, procurement items, fuel, water, electric power and other utilities needed for the performance of the Supply; and
 - (b) any applicable legal requirements.
- 3.2 The Supplier is entitled to compensation or extensions of time as a result of any changes in circumstances regarding the matters set out in **clauses 3.1(a)** and **3.1(b)** between the date of this Order and completion of the Supply.
- 3.3 The Purchaser warrants that all information provided to the Supplier in connection with this Order is accurate and complete.

4 This Order

- 4.1 The documents comprising this Order constitute the entire agreement between the parties and supersede all previous oral or written communications between the parties.
- 4.2 The provisions in this Order will be taken as being mutually explanatory and anything contained in one provision but not in another will be treated as if contained in all.
- 4.3 If the Purchaser finds any discrepancy, error or ambiguity in this Order, it must immediately inform the Supplier's Representative.
- 4.4 All of the terms of the *United Nations Convention on Contracts for the International Sale of Goods* (adopted in Vienna, Austria on 10 April 1980) are expressly excluded from this Order.

5 Authority, laws, safety and environment

- 5.1 The Purchaser grants the Supplier and its Personnel, or must procure the grant to the Supplier and its Personnel of an unconditional licence to enter the Site to perform the Supply and to rectify the Goods (if required).
- 5.2 The Purchaser is liable for all issues arising out of or in connection with the Site, including any environmental claims, payment of all costs and expenses, and obtaining any approvals required for the Supply.
- 5.3 The Purchaser must:
 - (a) comply with the provisions of all acts of parliament, ordinances, regulations, by-laws and requirements of all Authorities affecting or in any way relating to the Site, the Goods or the Supply;
 - (b) obtain all permits and pay all fees required for the performance of the Installation and keep the Supplier indemnified against all fines, penalties, losses or damages incurred by reason of a breach of this **clause 5.1**;
 - (c) ensure the Site is in a condition that enables the Supplier to perform the Supply without delay or interference;
 - (d) arrange and pay for any Site induction required for the Supplier and its Personnel; and
 - (e) comply with, and ensure its Personnel comply with, all lawful and reasonable directions by the Supplier or its Personnel regarding the delivery of the Goods at the Site, the Installation and safety and the environment.

6 Administration

- 6.1 The Supplier's Representative is the agent of the Supplier and the Supplier is not obliged to ensure that the Supplier's Representative acts as an independent certifier, assessor, determiner or valuer. Unless specified in this Order, the Supplier and the Supplier's Representative are not obliged to:
 - (a) act reasonably; or
 - (b) exercise any discretionary power or right in the interests of the Purchaser (including to overcome a failure of the Supplier to comply with any provision of this Order).
- 6.2 The Purchaser must comply with all lawful directions given by the Supplier's Representative in accordance with this Order.
- 6.3 A direction given by the Supplier's Representative under **clause 6.2** does not relieve the Purchaser of its obligations under this Order.
- 6.4 The Purchaser must keep the Supplier's Representative informed of all circumstances which may affect the Supply, including the Site conditions.
- 6.5 The Supplier may (at its own cost), at any time, engage consultants to review and advise the Supplier in relation to the performance of the Supply. The Purchaser must at its cost co-operate fully and unconditionally with those consultants.
- 6.6 The Purchaser must at no time act as the agent of the Supplier or hold itself out as being the agent of the Supplier.
- 6.7 If directed by the Supplier's Representative, the Purchaser must attend any meetings to discuss any aspect of the Supply.
- 6.8 The Purchaser warrants and must ensure that the Purchaser's Representative:

- (a) has the authority to receive directions on behalf of the Purchaser from the Supplier; and
- (b) is competent.

- 6.9 If the Purchaser's Representative knows of a matter, that knowledge is taken to also be within the knowledge of the Purchaser.
- 6.10 The Supplier may, either itself or by a third party, perform any obligation which the Purchaser was obliged to perform under this Order but which it failed to perform (including complying with a direction of the Supplier's Representative). The costs, expenses and damages suffered or incurred by the Supplier in performing such an obligation will be a debt due from the Purchaser to the Supplier.

7 Assignment and subcontracting

- 7.1 The Purchaser must not assign, subcontract or deal with its interest under this Order without the prior consent of the Supplier. Any purported dealing by the Purchaser in breach of this **clause 7.1** is of no effect.
- 7.2 Without limiting **clause 7.3** or **7.4**, the Supplier may assign or deal with its interest under this Order at any time by notice to the Purchaser.
- 7.3 The Supplier may subcontract any part or all of the Supply without the prior approval of the Purchaser.
- 7.4 The Supplier may grant or create any mortgage, pledge, lien, charge, assignment, hypothecation, security interest, title retention, preferential right or trust arrangement or any other security agreement or arrangement (**Security**) over this Order and any rights under this Order.
- 7.5 If requested by the Supplier, the Purchaser must enter into a deed (**Side Deed**) with any person in whose favour Security is granted or created (**Financier**) and the Supplier, imposing conditions which are reasonable and mutually agreeable to all parties to the Side Deed, acting reasonably, to protect the interests of the Purchaser and the Financier. The Side Deed must incorporate such provisions as are commercial and appropriate and the Supplier and the Purchaser must each act reasonably in respect of the negotiation and finalisation of the Side Deed having regard to the matters specified in this **clause 7**.

8 Price and payment

- 8.1 The Supplier may require the Purchaser to pay a deposit as a condition precedent to the Supplier's performance of any part or the whole of the Supplier's obligations under this Order, in the amount specified in the Details.
- 8.2 The Purchaser must pay the Supplier the Price as consideration for the Supplier entering into this Order.
- 8.3 If the Details specify the timing of invoicing, the Supplier will provide the Purchaser with invoices in respect of the Supply at those times, which will show the quantity of Goods supplied, the Installation work completed, that part of the Price applicable to the Goods supplied and the Installation work completed, and the Order Number. The determination by the Supplier's Representative regarding the Price applicable to the Goods supplied and the Installation work completed is final and conclusive evidence of those matters.
- 8.4 If the Details do not specify the timing of invoicing, the Supplier may provide the Purchaser with invoices from time to time in respect of the Supply, which will show the quantity of Goods supplied, the Installation work completed, that part of the Price applicable to the Goods supplied and the Installation work completed, and the Order Number. The determination by the Supplier's Representative regarding the Price applicable to the Goods supplied and the Installation work completed is final and conclusive evidence of those matters.
- 8.5 For the avoidance of doubt, the Purchaser must pay all taxes, levies and fees in relation to the Supply.
- 8.6 The Purchaser must pay the full amount shown on any invoice provided by the Supplier within 30 Business Days of receipt, unless other payment terms have been agreed and expressly noted in this Order.
- 8.7 If the Purchaser fails to pay any money due to the Supplier by the due date for payment, the Purchaser must immediately on demand by the Supplier pay interest at the Default Rate on the moneys due but unpaid from the date when the moneys become due until the moneys are paid in full.
- 8.8 The Purchaser may pay the Price by bank cheque, electronic funds transfer or cash payment or in any other manner agreed in writing by the parties.

9 Time and Delivery

- 9.1 The Supplier must use all reasonable endeavours to deliver the Goods to the Point of Delivery on the Date for Delivery during the Delivery Hours and to Install the Goods in accordance with the requirements specified in the Details, but will not be liable for any Loss suffered by the Purchaser arising out of any delay in completing the Supply.
- 9.2 The Supplier may deliver the Goods to the Supplier or Install the Goods at any time prior to the Date for Delivery or outside the Delivery Hours, after giving notice to the Purchaser's Representative.
- 9.3 The Supplier may extend the Date for Delivery by any reasonable period, at any time and for any reason by notice to the Purchaser's Representative.
- 9.4 The Purchaser indemnifies the Supplier against any Loss suffered by the Supplier as a result of the Purchaser's failure to take delivery of the Goods at the Point of Delivery.

10 Risk and title

- 10.1 The Supplier warrants at the date of this Order that:
 - (a) it will have full title in the Goods, without Encumbrance, and will have the right to sell the Goods to the Purchaser; and
 - (b) the Purchaser will have quiet possession of the Goods from the date that title passes under **clause 10.2**.
- 10.2 Title in the Goods will pass to the Purchaser when the Price is paid in full.
- 10.3 Risk in each part of the Goods will pass to the Purchaser at the earlier to occur of:
 - (a) delivery of that part of the Goods to the Point of Delivery; or
 - (b) when payment is made for that part of the Goods.

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- 10.4 The Purchaser must at its cost make good any damage to the Goods which occurs after risk passes under **clause 10.3**, including any damage to the Goods before the Installation is completed.
- 11 Delivery and carriage of Goods**
- 11.1 The Purchaser must obtain all licenses, authorisations and customs formalities necessary for the delivery of the Goods to the Point of Delivery, including all customs formalities relating to export and import of the Goods (where applicable).
- 11.2 Unless otherwise agreed, the Goods will be supplied by the Supplier Ex Works so that the cost of carriage of the Goods will be borne by the Supplier only until the Goods are placed at the Purchaser's disposal at the Point of Delivery. For avoidance of doubt, such costs do not include payment of any freight or port handling fees and charges, and excludes all costs of loading the Goods at the Point of Delivery.
- 11.3 Where the Goods are to be delivered progressively and there is more than one date specified as the Date for Delivery, then the interpretation of "Date for Delivery" and the provisions of this Order will, unless the context otherwise requires, apply separately to each delivery and references to the Goods will mean so much of the Goods as is comprised by the relevant delivery.
- 11.4 Where the Goods are to be delivered progressively but there is only one date specified as the Date for Delivery, only the first delivery of Goods must be completed by the Date for Delivery and the remaining Goods will be delivered progressively at the dates and times determined by the Supplier's Representative, acting reasonably.
- 11.5 Any statement in a bill of lading that the Goods are delivered to the Point of Delivery in good order, or apparent good order, is conclusive evidence that the Goods were delivered to the Point of Delivery in good order in accordance with this Order.
- 12 Acceptance of Goods**
- 12.1 The Goods are Acceptable if they substantially comply with this Order, except for minor omissions or defects which do not prevent the Goods from being reasonably capable of being used for the purposes for which they are intended.
- 12.2 If the Goods are not Acceptable, before the expiry of the Acceptance Period the Purchaser's Representative must issue a notice of non-acceptance identifying the reasons why the Goods are not Acceptable. Follow receipt of any such notice, the Supplier must either, at its election:
- take whatever steps are required to rectify the Supply; or
 - replace the Goods so that they comply with this Order.
- 12.3 If the Supplier does not receive a notice under **clause 12.2** the Supplier is relieved of all further obligations with respect to the Supply.
- 12.4 If the Goods are replaced by the Supplier:
- title and risk in the new Goods will pass to the Purchaser in accordance with **clauses 10.2** and **10.3**; and
 - the Time of Delivery of the new Goods will be the time that the replacement Goods are delivered to the Point of Delivery.
- 12.5 If the Goods are rectified by the Supplier, the Time of Delivery of the Goods will be the date when the Supplier confirms to the Purchaser, acting reasonably, that the Goods have been satisfactorily rectified.
- 13 Defects liability period**
- 13.1 The defects liability period will commence at the Time of Delivery for any of the Goods and will continue for the period prescribed in the Details. If no time is prescribed in the Details, then there is no defects liability period.
- 13.2 At any time up to ten Business Days after the expiry of the defects liability period, the Purchaser's Representative may direct the Supplier to rectify a material omission or defect in the Goods. The Supplier must comply with any such direction within a reasonable time of receipt.
- 14 Liability**
- 14.1 Subject to **clause 14.2**, the Purchaser indemnifies the Supplier and its Personnel against:
- all Loss in respect of the Supplier's property;
 - any Loss suffered or incurred by the Supplier or any claim, demand, action, suit or proceeding that may be brought by any person against the Supplier, its Personnel or the Supplier's Representative;
 - any Loss suffered or incurred by the Supplier in respect of personal injury to or death of any person; and
 - loss of or damage to any property (including any suit for an injunction in respect of any loss, apprehended loss or interference with enjoyment of any property), arising out of or as a consequence of any act or omission (including any breach of this Order) of the Purchaser, its Personnel or the Purchaser's Representative.
- 14.2 The indemnity in **clause 14.1** does not apply to the extent that the Loss is caused directly by any negligent act or omission of the Supplier, its Personnel or the Supplier's Representative.
- 14.3 The parties agree that the provisions of Part 1F of the *Civil Liability Act 2002* (WA) are expressly excluded from application with respect to this Order and excluded from operation with respect to any claim brought by a party against the other.
- 15 Insurance**
- 15.1 If specified in the Details, the Purchaser must take out, prior to the Goods being ready for transit, appropriate transit insurance of the Goods for the greater of the full replacement value of the Goods or the amount specified in the Details, including materials ordered for inclusion into the Goods (whether or not such items are owned by the Supplier, ownership has passed to the Purchaser or such items are complete or incomplete) against loss or damage of the goods in the ordinary course of transit.
- 15.2 The insurance under **clause 15.1**:
- must be effected and maintained with Reputable Insurers or insurers otherwise agreed between the parties; and
 - name more than one insured must include a waiver and cross-liability clause in which the insurer agrees (other than where an insured commits a fraudulent, criminal, wilfully reckless, malicious or dishonest act):
 - to waive all the rights of subrogation or action that it may have or acquire against all or any of the persons comprising the insured;
- that the term "insured" applies to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject to the insurers total liability under the policy not exceeding the limit of indemnity specified in **clause 15**); and
 - that any non-disclosure, breach of any duty or act of omission of any one insured does not prejudice the right of any other insured to claim under the insurance.
- 15.3 If requested, the Purchaser must furnish to the Supplier certificates of currency evidencing the effecting and maintaining of the insurances required by **clause 15**.
- 15.4 The Purchaser must:
- not do or permit, or omit to do, anything which prejudices any insurance;
 - rectify anything which might, if not rectified, prejudice any insurance;
 - fully and promptly disclose all material information to insurers relating to the insurances where failure to do so may prejudice or invalidate an insurance; and
 - comply at all times with the terms of each insurance.
- 15.5 The cost of providing or making any claim under any insurance under this clause will be borne solely by the Purchaser and the Price will not be altered in any way to incorporate such cost.
- 16 Confidentiality and media releases**
- 16.1 Subject to **clause 16.2** the Purchaser must not, and must ensure that its Personnel do not, without the prior approval of the Supplier, at any time (including after the termination or expiry of this Order):
- disclose or give to any person any Confidential Information; or
 - use or reproduce, or permit or allow any other person to use or reproduce the Documentation or Confidential Information.
- 16.2 **Clause 16.1** does not apply to the extent that the Confidential Information is:
- required by law to be disclosed or given; or
 - used for the Permitted Purpose.
- 16.3 The Purchaser must refer to the Supplier any enquiries from the media concerning the Supply or the Supplier's business, activities and Confidential Information.
- 16.4 Subject to **clause 16.5**, within ten Business Days after the Supplier performs all its obligations under this Order or the earlier termination of this Order, the Purchaser must destroy or return all the Supplier's Confidential Information (including any Confidential Information which it disclosed to any other person).
- 16.5 The Purchaser may retain board papers, board presentations, board minutes, and any reports containing Confidential Information to the extent that the Purchaser is required to do so by law or any professional standard applicable to the Purchaser, but must ensure that it keeps that information confidential and uses it for the Permitted Purpose only.
- 17 Intellectual Property Rights**
- 17.1 As between the parties the Supplier owns all Intellectual Property Rights associated with the Supply (including the Goods) and those Intellectual Property Rights do not pass to the Purchaser under this Order.
- 17.2 The Supplier grants to the Purchaser a royalty free, perpetual and irrevocable licence to use the Intellectual Property Rights associated with the Goods and Documentation for the purpose of using and maintaining the Goods for the purpose for which they were supplied by the Supplier under this Order, but (for the avoidance of doubt) excludes alterations of the Goods.
- 17.3 The Purchaser must pay any royalty or other payments to third parties in respect of the Intellectual Property Rights associated with the Goods and Documentation which the Purchaser uses under **clause 17.2**.
- 17.4 The Purchaser indemnifies the Supplier against any Loss suffered or incurred by the Supplier in connection with any infringement or alleged infringement by the Purchaser of any Intellectual Property Right associated with the Goods and Documentation.
- 18 Termination**
- 18.1 The Supplier may terminate this Order at its convenience by giving the Purchaser 20 Business Days notice.
- 18.2 The Purchaser may request the Supplier to agree to terminate this Order. The Supplier will use all reasonable endeavours to respond to any termination request within 5 Business Days, and its response will be at its sole discretion.
- 18.3 If the Supplier terminates this Order under **clause 18.1** or **18.2**:
- where any Goods (including any Goods containing special adaptations ordered by the Purchaser) have been completed or manufactured, the Purchaser must pay the Supplier the higher of either the sum certified by the Supplier's Representative as being due to the Supplier to reflect the costs of completed Goods provided up to the date of termination plus 20% of such amount, or the Price (if any) listed in the Purchase Order for the completed Goods;
 - where at the date of termination any Goods (including any Goods containing special adaptations ordered by the Purchaser) have been partially completed or manufactured, or any components of any Goods have been completed, manufactured or accumulated by the Supplier for the purpose of the Supply, the Supplier may:
 - supply those Goods or components in the condition they are in at the date of termination, in which case the Purchaser must pay the Supplier the sum certified by the Supplier's Representative to reflect the cost of Supply of Goods or components as at the date of termination, plus 20% of such amount; or
 - choose to retain those Goods or components, in which case the Purchaser is not required to make any payment with respect to the those Goods or components; and
 - the Supplier will be released of all its obligations in relation to this Order and the performance of the Supply.

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19 Price adjustment

- 19.1 The Supplier may adjust the Price by giving 20 Business Days notice to the Purchaser, if there is any increase in the Supplier's costs (including costs of labour and materials) of Supply of the Goods.
- 19.2 The Price will be adjusted by being increased by no more than the same percentage by which the Supplier's costs of Supply of the Goods has increased.
- 19.3 If the Purchaser disputes the increase to the Price, it may issue a Dispute Notice and refer the matter to expert determination in accordance with **clause 22**. The Expert will have the power to determine the increase based on evidence supplied by the Supplier, provided that the Purchaser may not view the information contained in the evidence, and the Expert must keep that evidence confidential and provide the parties with an opportunity to make submissions regarding the basis on which the Expert will make its determination.

20 Default and insolvency

- 20.1 If the Purchaser commits a breach of this Order, including failing to:
- make payment for the Supply in accordance with this Order;
 - carry out a direction of the Supplier or the Supplier's Representative within the time specified, or if no time is specified, within a reasonable time; or
 - allow or procure access to enable delivery of the Goods to the Point of Delivery or Installation of the Goods,
- the Supplier may give the Purchaser notice specify the breach and requiring the Purchaser to give reasons why the Supplier should not take further action.
- 20.2 If the Purchaser either fails to give a response within five Business Days of receiving a notice under **clause 20.1** or gives a response that fails to give reasons satisfactory to the Supplier, then the Supplier may by notice to the Purchaser:
- suspend the Supply; and
 - in addition to or instead of suspending the Supply under **clause 20.2(a)**, terminate this Order, in which case the respective rights and liabilities of the parties will be the same as they would be at common law if the Purchaser had wrongfully repudiated this Order.
- 20.3 The Supplier may exercise any power under **clauses 20.2(a)** and **20.2(b)** if:
- the Purchaser is or states that it is unable to pay from its own money all its debts as and when they become due and payable;
 - the Purchaser is taken or must be presumed to be insolvent or unable to pay its debts under any applicable legislation;
 - an application or order is made for the winding up or dissolution or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the Purchaser;
 - an administrator, provisional liquidator, liquidator or person having a similar or analogous function under the laws of any relevant jurisdiction is appointed in respect of the Purchaser or any action is taken to appoint any such person and the action is not stayed, withdrawn or dismissed within five Business Days;
 - a receiver or receiver and manager is appointed in respect of any property of the Purchaser;
 - the Purchaser is deregistered under the *Corporations Act 2001* (Cth) or notice of its proposed deregistration is given to the corporation;
 - a distress, attachment or execution is levied or becomes enforceable against any property of the Purchaser;
 - the Purchaser enters into or takes any action to enter into an arrangement (including a scheme of arrangement or deed of company arrangement), composition or compromise with, or assignment for the benefit of, all or any class of the Purchaser's creditors or members or a moratorium involving any of them;
 - a petition for the making of a sequestration order against the estate of the Purchaser is presented and the petition is not stayed, withdrawn or dismissed within five Business Days or the Purchaser presents a petition against itself;
 - the Purchaser presents a declaration of intention under section 54A of the *Bankruptcy Act 1966*; or
 - anything analogous to or of a similar effect to anything described above under the law of any relevant jurisdiction occurs in respect of the Supplier.

21 Force Majeure Event

- 21.1 If a party (**Affected Party**) is prevented or hindered by a Force Majeure Event from fully or partly complying with any obligation (except for the payment of money) under this Order, that obligation is suspended for the duration of such Force Majeure Event.
- 21.2 If the Affected Party wishes to claim the benefit of this **clause 21**, it must give prompt notice of the Force Majeure Event to the other parties including reasonable details of:
- the Force Majeure Event;
 - the effect of the Force Majeure Event on the performance of the Affected Party's obligations; and
 - the likely duration of the delay in performance of those obligations.
- 21.3 The Affected Party must use reasonable endeavours to remove the cause and/or effect of the Force Majeure Event, but is not obliged to settle any strike or other labour dispute contrary to its best judgment if it has used reasonable endeavours to settle that strike or dispute.
- 21.4 If a delay caused by Force Majeure Event continues for more than 20 Business Days, the Supplier may terminate this Order by giving 10 Business Days notice to the Purchaser.

22 Dispute resolution

- 22.1 Subject to **clause 22.2**, any dispute arising in relation to this Order (**Dispute**) must be determined in accordance with this **clause 22**.
- 22.2 **Clause 22.1** does not prevent either party from applying to a court in Western Australia for urgent injunctive relief in relation to this Order.
- 22.3 If a party alleges a Dispute has arisen it must give notice of that fact to the other party (**Dispute Notice**). Within five Business Days of a Dispute Notice being given the parties must meet in good faith and use their reasonable endeavours to resolve the Dispute.
- 22.4 If the parties do not resolve the Dispute within ten Business Days of the Dispute Notice, either or both parties may apply to the President of the Law Society of

Western Australia to appoint an expert to determine the Dispute (**Expert**). The Expert must be a person experienced in determining disputes of the kind specified in the Dispute Notice.

- 22.5 Within 20 Business Days of the appointment of the Expert the parties and the Expert must meet to determine the Dispute. The terms of the Expert's appointment must require the Expert to proceed as quickly as is possible in determining the Dispute, use his or her reasonable endeavours to resolve the Dispute within 40 Business Days of being appointed, and determine the Dispute in accordance with the guidelines of the Institute of Arbitrators and Mediators Australia applicable to expert determinations.
- 22.6 The costs of the Expert's determination of the Dispute will be borne by the parties as determined by the Expert. The Expert's determination of the Dispute will be final and binding on the parties, provided that either of them may appeal to a court in Western Australia on the grounds that the Expert's determination involved fraud, an error of law or manifest error.

23 Notices

- 23.1 A notice, demand, consent, approval, certification, process or other communication relating to this Order must be in writing in English and may be given by an agent of the sender.
- 23.2 In addition to any other lawful means, a communication may be given by being personally delivered, left at the party's current address for notices, sent to the party's current address for notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail; or sent by fax to the party's current fax number for notices. The particulars for delivery of notices are initially as set out in the Details. Each party may change its particulars for delivery of notices by notice to each other party.
- 23.3 Subject to **clause 23.5**, a communication is given if posted within Australia to an Australian address, three Business Days after posting or in any other case, ten Business Days after posting.
- 23.4 Subject to **clause 23.5**, a communication is given if sent by fax, when the sender's fax machine produces a report that the fax was sent in full to the addressee. That report is conclusive evidence that the addressee received the fax in full at the time indicated on that report.
- 23.5 If a communication is given after 5.00 pm in the place of receipt, or on a day which is a Saturday, Sunday or bank or public holiday in the place of receipt, it is taken as having been given at 9.00am on the next day which is not a Saturday, Sunday or bank or public holiday in that place.
- 23.6 Any process or other document relating to litigation, administrative or arbitral proceedings relating to this Order may be served by any method contemplated by this **clause 23** or in accordance with any applicable law.
- 23.7 Notices to be given by the Purchaser must be given within the time provided for in this Order. If the Purchaser fails to give a notice in that time, the Purchaser will be barred from making any claim or raising any dispute in relation to the matters which were or should have been the subject of the notice and releases and must indemnify the Supplier against those claims.
- 23.8 Notices given by the Purchaser must include all details required under this Order. For the purposes of this **clause 23**, a notice will be taken to have not been given in time if it does not contain all of the information required by this Order.
- 23.9 The requirement to give a notice including all of the detail required under this Order cannot be waived by the Supplier's Representative and can only be expressly waived by the Supplier by notice.

24 GST

- 24.1 Unless expressly stated otherwise in this Order, the Price does not include GST. The Purchaser is not required to pay the GST component of the Price until the Purchaser receives a *tax invoice* from the Supplier in respect of the *taxable supply*.
- 24.2 If an *adjustment event* occurs, the Supplier must issue an *adjustment note* and a payment must be made as between the parties to reflect the adjusted amount of the GST on the *taxable supply*.
- 24.3 Italicised expressions used in this **clause 24** have the meaning given to them in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

25 Taxes and duties

- 25.1 The Purchaser must pay any and all taxes, duties, excises, and levies, assessments and other charges, penalties or fines of any kind levied by any Australian or foreign Authority on or in connection with this Order, the performance of the Supplier's and Purchaser's obligations under this Order or the subject matter of this Order and all such matters will be deemed to be excluded from the Price unless otherwise specified in this Order.
- 25.2 The parties acknowledge and agree that the Purchaser will conduct the relevant custom clearance procedure for Goods imported to any port outside of Australia in its name and will be responsible for the tax (if any).
- 25.3 Where the Purchaser is required by law to withhold or deduct from any payment due to the Supplier any amount with respect to or which relates to any tax, levy or duty, the amount payable by the Purchaser for the Supply must be increased by an amount sufficient to ensure that the Supplier receives the Price.
- 25.4 The Supplier must use all reasonable endeavours to cooperate with any custom clearance procedures in relation to the Supply, at the Purchaser's sole cost and expense.

26 General

- 26.1 Where this Order allows the Supplier a discretion as to whether to do or not to do any act, matter or thing of any kind, or confers on the Supplier a power of determination or right of opinion, approval or the like, that discretion, power or right is absolute, unless this Order states otherwise, and the Supplier is not obliged to give its reasons.
- 26.2 No waiver by the Supplier of a breach of this Order by the Purchaser constitutes a waiver for any subsequent or continuing breach by the Purchaser.
- 26.3 If any of the provisions of this Order are held by a court of competent jurisdiction to be invalid or otherwise unenforceable that provision may be

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severed from this Order and the remainder of this Order will continue to be effective and valid notwithstanding such severance.

- 26.4 Except as expressly stated otherwise in this Order, each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Order.
- 26.5 This Order may only be varied or replaced by a document duly executed by the parties.
- 26.6 A single or partial exercise or waiver by a party of a right relating to this Order does not prevent any other exercise of that right or the exercise of any other right. A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.
- 26.7 Except as expressly stated otherwise in this Order, the rights of a party under this Order are cumulative and are in addition to any other rights of that party.
- 26.8 Each party must promptly do whatever any other party reasonably requires of it to give effect to this Order and to perform its obligations under it.
- 26.9 This Order is governed by and is to be construed in accordance with the laws applicable in Western Australia. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Western Australia and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.
- 26.10 This Order may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.
- 26.11 This Order is not intended to create a partnership, joint venture or agency relationship between the parties.

27 Interpretation

27.1 In this Order:

Acceptance Period means the date that is two Business Days after the first to occur of:

- where the Supply does not include Installation, delivery of the Goods to the Point of Delivery; or
- where the Supply includes Installation, completion of the Installation as notified by the Supplier to the Purchaser; or
- the date set out by the Supplier's Representative, acting reasonably, in a notice to the Purchaser.

Acceptable means is defined in **clause 12.1**.

Authority means a governmental, semi-governmental, local or other authority that exercises jurisdiction over the Supply or the Site.

Business Day means a day which is not a Saturday, Sunday or bank or public holiday in Perth, Western Australia.

Commencement Date means the date prescribed in the Details, or if no date is so prescribed, the date on which the Supplier signs the Purchase Order.

Confidential Information means the following information in whatever form (whether in writing, verbal or any other form):

- the existence, terms and subject matter of this Order;
- information relating to this Order, the Supply, the Supplier or its Related Bodies Corporate or Related Entities, or which is by its nature confidential or which is designated by the Supplier, its Related Bodies Corporate or its Related Entities, as being confidential; and
- without prejudice to paragraph (a) of this definition, information created or derived from the information described in paragraph (a) and (b) of this definition, including any such information included in any board papers or minutes, analysis or report (including any due diligence report);

other than information that:

- at the date of this document, was generally and publicly available, or subsequently becomes so available other than by breach of any duty or obligation;
- at the time it was disclosed to the Purchaser, was in the possession of the Purchaser lawfully and without breach of any duty or obligation; or
- has been disclosed to the Purchaser and was not generally and publicly available at the date of disclosure, but subsequently, through no act or omission of the Purchaser (or any person to whom it disclosed that information), becomes so available from another source, not subject to any duty or obligation as to confidence.

Date for Delivery means the time for delivery of the Goods prescribed in the Details as it may be extended under **clause 16**.

Default Rate means the rate per annum which is the sum of 4% per annum and the Commonwealth Bank of Australia's Overdraft Reference Rate for Corporate Borrowers per annum on the day prior to payment.

Delivery Hours means the hours prescribed in the Details.

Details means the details prescribed in the Purchase Order to which these Terms and Conditions of Order are attached.

Dispute Notice means a notice provided pursuant to **clause 22.3**.

Documentation means all documentation whether in hard form, digital form or in any other media which the Supplier is required to produce or provide to the Purchaser pursuant to this Order including plans, drawings, specifications, calculations, models, information, recommendations, reports, records and designs.

Encumbrance means any charge, lien, mortgage, pledge, assignment by way of security, secured interest, title retention arrangement, preferential right or trust arrangement, any arrangement having the same or equivalent effect, and any other interest or right whatsoever over property.

Ex Works has the meaning given to that term in the International Rules for the Interpretation of Trade Terms (Incoterms 2000).

Force Majeure Event means:

- an act of God;
- a law, rule, regulation or order of any Authority;
- an act of war declared or undeclared;
- an accident, fire, explosion or epidemic;
- a public disorder;
- a riot, civil disturbance, insurrection, rebellion, sabotage or act of terrorists;
- a flood, earthquake, hail, lightning, severe weather conditions or other natural calamity; or
- a strike, boycott, lockout or other labour disturbance which is of state wide or nation wide character to the Supplier or any of its Personnel,

which:

- is beyond the reasonable control of the Affected Party;
- could not have been reasonably foreseen by the Affected Party; and
- was not directly or indirectly caused or contributed to by the Affected Party.

Goods means the goods to be supplied under this Order which are described in the Details.

Installation means, if required by and set out in the Details, the work to be performed by the Supplier to install the Goods at the Site.

Intellectual Property Rights means any and all industrial and intellectual property of any kind (whether or not in a material form) including:

- patents, trade marks, copyright (existing and future) and designs;
- any application or right to apply for registration in respect of any of the rights in **sub-clause (a)**; and
- eligible layout rights, database rights, software developments, computer programs (including both source and object codes), processes, inventions, specifications, formulas, know-how, research data, improvements in procedure, discoveries and similar rights, whether registered or unregistered and whether registrable or not.

Loss means any loss (including loss of profit and loss of expected profit), claim, action, liability, damage, cost, charge, expense, outgoing, payment, diminution in value or deficiency of any kind or character paid, suffered or incurred.

Order means these Terms and Conditions of Order and the Purchase Order together with any other documents prescribed in the Details as forming part of the Order, which, in the event of any inconsistencies, must be construed in that order of priority.

Permitted Purpose means:

- performing any obligation under or discharging any liability under this Order; and
- using and maintaining the Goods for the purpose for which they were supplied by the Supplier under this Order.

Personnel means, in respect of a party, that party's officers, employees, contractors, subcontractors and agents.

Point of Delivery means the point of delivery prescribed in the Details.

Price means:

- where there is a lump sum in the Details, that lump sum; or
- where there are rates in the Details, the sum ascertained by multiplying those rates by the quantities properly supplied in accordance with this Order; or
- where there are both rates and lump sums in the Details, the aggregate of the sums referred to in paragraphs (a) and (b), as adjusted under this Order.

Purchaser's Representative means the person prescribed in the Details or a replacement notified by the Purchaser to the Supplier.

Related Body Corporate has the meaning given to that term under the *Corporations Act 2001* (Cth).

Related Entity has the meaning given to that term under the *Corporations Act 2001* (Cth).

Reputable Insurer means an insurance company having a financial performance rating of at least A- by A M best or a financial strength rating of at least A by Standard and Poors.

Site means the place prescribed in the Details and any other lands and other places to be made available to the Supplier by the Purchaser for the purposes of this Order.

Supplier's Representative means the person prescribed in the Details or a replacement notified by the Supplier to the Purchaser.

Supply means the work to be performed by the Supplier under this Order including the supply and delivery of the Goods and Installation of the Goods at the Site (if required), as set out in the Details.

Time of Delivery means the date that delivery of the Goods is effected by the Supplier at the Point of Delivery or any later time prescribed under **clause 12**.

27.2 In this Order, unless the context requires otherwise:

- a word in this Order that has a capitalised first letter has the meaning given to it by this Order;
- the singular includes the plural and vice versa;
- headings are for reference only and do not affect the interpretation of this Order;
- a reference to any legislation includes a reference to any proclamation, order, amendments or modification made under that legislation;
- where two or more persons are named as the Purchaser, then the obligations on their part will bind and be observed and performed by them jointly and severally;
- "include", "includes" and "including" means "includes without limitation";
- no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or benefits from it;
- a reference to:
 - a person includes that person's legal personal representatives, successors, assigns;
 - time is to local time in Perth, Western Australia;
 - "\$" or "dollars" is a reference to Australian currency unless otherwise agreed; and
 - a clause or schedule is a reference to a clause or schedule of this Order;
- if the date on or by which any act must be done under this Order is not a Business Day, the act must be done on or by the next Business Day; and
- where time is calculated by reference to a day or event, that day or the day of that event is excluded.