

TERMS AND CONDITIONS OF PURCHASE

1. DEFINITIONS

In these terms and conditions:

- (1) **“Agreement”** means an agreement between the Purchaser and Supplier for the supply of the Goods or Services constituted by an Order, these Conditions and any agreed variation;
- (2) **“Conditions”** means these terms and conditions of purchase and any agreed variations;
- (3) **“Goods”** means the goods described in the Order;
- (4) **“GST”** means any tax including any additional tax imposed on the supply of or payment for goods or services which is imposed or assessed under any GST Law;
- (5) **“GST Law”** means *A New Tax System (Goods and Services Tax) Act 1999*, and all related and auxiliary legislation;
- (6) **“Loss”** means any loss, liability, cost (including legal costs as the higher of an indemnity or solicitor-client basis) or expense incurred by the Purchaser relating to this Agreement;
- (7) **“Order”** means any Purchaser’s order that references these Conditions;
- (8) **“Purchaser”** means Port Authority of New South Wales ABN 50 825 884 846 and any related body corporate (within the meaning of section 50 of the *Corporations Act 2001*) as specified in the Order;
- (9) **“Representative”** of a party means that party's director, officer, employee or agent;
- (10) **“Services”** means the services described in the Order;
- (11) **“Specifications”** means any technical or other specification relating to the Goods or Services referred to in the Order and details of which have been supplied by the Purchaser or its Representative to the Supplier; and
- (12) **“Supplier”** means the person who sells the Goods or provides the Services to the Purchaser;

2. BINDING TERMS AND CONDITIONS

2.1 Entire Agreement

The entire Agreement between the Purchaser and the Supplier for the purchase of the Goods or Services by the Purchaser from the Supplier is:

- (1) the Order and any other terms and conditions (including Specifications) incorporated by reference in the Order as long as the Supplier has details of those terms and conditions;
- (2) these Conditions;
- (3) any other terms and conditions which are imposed by law and which cannot be excluded; and
- (4) any agreed written variation.

2.2 Precedence

These Conditions shall apply to all Orders for the purchase of Goods or Services by the Purchaser from the Supplier to the exclusion of any terms and conditions or any other materials which the Supplier may purport to apply or which are endorsed upon any correspondence or documents issued by the Supplier irrespective of their date of communication to the Purchaser. The Supplier may not rely on any representations by the Purchaser that are not included in the Agreement.

2.3 Acceptance

Acceptance of an Order by the Supplier constitutes acceptance of these Conditions.

3. PRICE

3.1 Price of Goods or Services Supplied

The price specified in the Order is firm, and is not subject to increase. The price includes all costs payable by the Purchaser in respect of the Goods or Services (excluding GST but including, and not limited to all taxes, duties, on-costs, disbursements, statutory charges, charges for freight and delivery to and offloading at the destination specified in the Order).

3.2 GST

The price at which the Goods or Services are provided by the Supplier to the Purchaser does not (unless otherwise stated or agreed in writing) include GST, which must be added to the price and paid by the Purchaser as part of the price.

3.3 Freight

Unless otherwise stated or agreed in writing, the Supplier is responsible for freight and delivery to the destination specified in the Order.

4. PAYMENT

4.1 Payment Terms

Payment for Goods or Services supplied by the Supplier to the Purchaser will be tendered 30 days from the invoice date, subject to receipt of goods or services. Payment of the invoice does not constitute acceptance of the Goods or Services and shall be subject to adjustment for errors, shortages or defects in the Goods or Services, or any other failure of the Supplier to meet the requirements of the Order.

4.2 Invoices

In addition to any other information specified in the Order or elsewhere in these Conditions, invoices must contain the following information: Purchase Order Number, Description of Goods or Services, Quantities, Unit Prices, GST Payable and Extended Totals. The Purchaser has no obligation and is not liable for a failure to pay invoices which do not contain the specified information.

5. TIMING AND LOCATION OF DELIVERY & PERFORMANCE

The Goods must be received and Services must be performed on the dates and at the destination specified in the Order. Time is of the essence. If the Supplier fails to meet any such delivery date, the Purchaser may, without limiting its other rights and remedies, cancel all or part of the Order.

6. TITLE AND QUALITY

6.1 Title

Property in the Goods passes to the Purchaser on delivery and signing of a delivery note by an authorised Representative of the Purchaser.

6.2 Risk

The Supplier bears all risks of loss and damage to the Goods until final acceptance by the Purchaser in accordance with clause 6.3.

6.3 Final Inspection and Acceptance

Notwithstanding any prior inspections or payments, all Goods shall be subject to:

- (1) final inspection which may include measurement, testing or examination; and
- (2) acceptance at the Purchaser's facility within a reasonable time (but not more than 30 days) after receipt of the Goods.

6.4 No Waiver

The Purchaser's acceptance does not waive rights. If the Purchaser accepts any Goods, this does not extinguish any of the Purchaser's rights if the Goods do not comply with a term of the Agreement.

6.5 Supplier's Warranties - Goods

The Supplier warrants that the Goods:

- (1) are safe;
- (2) are free from encumbrances, defect or fault;
- (3) are of merchantable quality;
- (4) include appropriate and correct warnings and instructions;
- (5) are fit for the purpose for which purchased (as communicated by the Purchaser before the Order);
- (6) comply with any representations, descriptions, samples or other specifications (including Specifications) including quality, function, performance or design; and
- (7) include any applicable Supplier's warranty that passes to the consumer from the Purchaser without liability to the Purchaser.

6.6 Suppliers Warranties - Services

The Supplier warrants that the Services will be performed:

- (1) in a good and workmanlike manner and with all due speed, care, skill and diligence
- (2) in accordance with the Agreement and current industry codes of practice; and
- (3) by suitably qualified and licensed personnel and sub-contractors.

6.7 Rejected Goods & Services

Notwithstanding, and without prejudice to, any other right of the Purchaser under the Agreement or any other remedy available to the Purchaser, the Purchaser may give the Supplier written notice that it rejects any Goods or Services which do not comply strictly with the Agreement. The Purchaser may specify in that notice or a further written notice that it requires:

- (1) in the case of either Goods or Services, the Supplier to refund any payment within 7 days; or
- (2) in the case of Goods, replacement of the Goods to the Purchaser's satisfaction; or
- (3) in the case of Services, the re-supply of the Services to the Purchaser's satisfaction.

Risk in the rejected Goods immediately re-vests in the Supplier. Title in rejected goods re-vests in the Supplier on refund of payment or replacement of the rejected Goods. Title in any product or materials used in or resulting from the Services remains with the Purchaser. The Supplier is liable for all Loss incurred by the Purchaser due to the rejection of the Goods. The Supplier must, at its cost, remove from the rejected Goods any of the Purchaser's Intellectual Property or any other distinguishing features such as name or symbols. In the event of a rejection of Goods or Services, the Purchaser's payment obligation shall be suspended immediately and the obligation only re-activates if the Supplier replaces the Goods to Purchaser's satisfaction or re-supplies the Services to the Purchaser's satisfaction.

7. INTELLECTUAL PROPERTY RIGHTS

7.1 Ownership

The Supplier agrees that all writings, specifications, drawings, designs, copyrightable material, inventions (whether or not patentable), improvements, discoveries, developments, and all works of authorship created by the Supplier in performance of Services or the supply of Goods, including all worldwide rights therein under patent, copyright, trade secret, confidential information, or other intellectual property right (collectively "Work Product"), are the sole property of the Purchaser. The Supplier assigns to the Purchaser all right, title and interest in and to all such Work Product, and shall perform such further acts needed to transfer, perfect, and defend the Purchaser's ownership of the Work Product. The Supplier shall require its sub-contractors to execute written assignments of Work Product to effect such assignment.

7.2 Licence

To the extent that the Supplier or third parties retain ownership rights in materials delivered with the Goods whereupon which the Work Product is based, the Supplier grants to the Purchaser an irrevocable, worldwide, non-exclusive, royalty-free right and licence to make, have made, modify, use, distribute, publicly perform or display, sell, offer to sell, and import such materials. The Supplier warrants that it owns or has acquired rights in all such intellectual property necessary to grant the licences and intellectual property rights set out in this clause 7.

7.3 Prohibition

The Supplier may only sell Goods or supply Services containing the Work Product to the Purchaser or as permitted by the Purchaser.

8. CONFIDENTIALITY

8.1 The Supplier agrees to keep confidential all of the Purchaser's information concerning or arising from the performance of the Agreement ("Information"). This clause does not apply to Information which is lawfully obtained from a third party, is public knowledge, is already known or is otherwise independently developed by Representatives of the Supplier who have not been exposed to the Information.

8.2 Information remains the Purchaser's property.

All Information supplied by the Purchaser remains the property of the Purchaser and may only be used by the Supplier in fulfilling its obligations under the Agreement. The Supplier must not disclose any Information without the prior written consent of the Purchaser.

9. WORK ON THE PURCHASER'S PREMISES

If any aspects of the supply of Goods or performance of Services are to be performed on the Purchaser's premises, the Supplier must comply with all applicable environment, occupational health, and safety laws and the Purchaser's then current safety and other applicable policies. The Supplier shall provide the Purchaser with a complete list of all chemicals, hazardous materials, and ingredients in the composition of goods used in the performance of the Services and a copy of the material safety data sheet for such chemicals and hazardous materials. The submission of such list by the Supplier shall not relieve the Supplier of exclusive responsibility for the safe transportation, use, storage, and disposal of such materials prior to acceptance by the Purchaser. All chemicals and hazardous

materials brought by the Supplier to the Purchaser's premises shall bear a label stating the identity of the chemical or material and the hazards associated therewith.

10. INDEMNITY

10.1 Indemnity The Supplier must indemnify the Purchaser, its affiliated companies, and their Representatives, successors, and assigns from and against any and all claims, suits, actions, liabilities, loss, judgments or damages, whether ordinary, special or consequential arising directly or indirectly from or in connection with:

- (1) the negligent acts or omissions or wilful misconduct of the Supplier;
- (2) the Goods or Services supplied;
- (3) a breach of any of the Supplier's warranties or any other term of the Agreement;
- (4) the Supplier's negligent, unauthorised or wrongful acts or omissions with regard to the use or installation of hazardous materials;
- (5) a claim that any Goods or Services supplied to the Purchaser infringe upon or misappropriate any patent, copyright, trademark, trade secret or other intellectual property interest of another; or
- (6) a claim of any lien, security interest or other encumbrance made by a third party.

11. TERMINATION

11.1 Without Cause

The Purchaser may, at any time, terminate the Order, in whole or in part, without cause, upon written notice to the Supplier. Following upon any such termination the Supplier shall, to the extent specified by the Purchaser, stop all work on the Order, and cause its suppliers and subcontractors to stop work. Charges for any such termination of the Order will be limited to actual non-recoverable costs incurred by the Supplier which the Supplier can demonstrate were properly incurred prior to the date of termination. In no event shall such reimbursement include anticipated profits for undelivered Goods or unperformed Services.

11.2 With Cause

The Purchaser may terminate the Order, in whole or in part and without liability for further payment or other performance of its obligations under the agreement, if the Supplier:

- (1) fails to make delivery of the Goods or perform the Services within the time or at the location specified in the Order;
- (2) fails to replace defective Goods or Services in accordance with these Conditions;
- (3) fails to perform any other term specified in the Agreement; or
- (4) becomes insolvent, files or has filed against it a petition in bankruptcy, or makes an assignment for the benefit of creditors, or otherwise has any form of receiver, administrative receiver or similar officer appointed (voluntary or otherwise).

12. THE PURCHASER'S PROPERTY

All product and materials constituting part of or used in the supply of Goods or performance of Services (including all drawings, specifications, artwork, reports, written advice, data, material, supplies, equipment, tooling, dies, moulds, fixtures, and patterns) furnished or paid for by the Purchaser, shall be the Purchaser's exclusive property, and shall be used by the Supplier only in performance of the Order. Such property, while in the Supplier's custody and control, shall be held at the Supplier's sole risk and, upon the Purchaser's request, shall be returned to the Purchaser in good condition, normal wear and tear excepted.

13. POLICIES AND PROCEDURES

The Purchaser shall notify the Supplier of relevant policies/procedures which may be applicable from time to time and which the Supplier must follow in the supply of Goods and/or Services in the Agreement. The Purchaser shall provide copies of such policies/procedures where appropriate.

14. MISCELLANEOUS

14.1 Conditions of Assignment, Subcontracting or Advertising

The Supplier must obtain the Purchaser's consent in writing before it:

- (1) assigns its rights or subcontracts any obligation under the Agreement; or
 - (2) advertises or publishes anything concerning the Agreement,
- and such consent is at the sole discretion of the Purchaser.

14.2 Supplier must maintain insurance

During the period of the Agreement and while the Supplier has the risk in the Goods, the Supplier must, at its expense;

- (1) maintain product liability insurance with a reputable insurer for at least \$10 million or greater amount specified in the Order;
- (2) insure the Goods with a reputable insurer for their full replacement cost.

The Supplier must on the Purchaser's request, produce satisfactory evidence of the insurance. Any limitation in the policy shall not be construed as a limitation on the Supplier's liability.

14.3 Relationship

The Supplier is an independent contractor of the Purchaser. Nothing in this agreement shall constitute any other type of relationship between the parties.

14.4 No Waiver

Failing to insist on strict performance on any terms of the Agreement is not a waiver of any later breach or default.

14.5 Provisions are Severable

Each provision of the Agreement is severable. Severance does not affect any other provision.

14.6 Variation must be Writing and Notified

Any variation to the Agreement must be in writing and agreed by the Supplier and Purchaser.

14.7 Governing Law

The law of New South Wales governs the Agreement. The parties submit to the non-exclusive jurisdiction of any competent court in the State of New South Wales, Australia.

14.8 Compliance with Laws and Standards

The Supplier must ensure that the supply of the Goods and performance of the Services comply with all laws and standards including to ensure the Goods are saleable in Australia, and including those relating to manufacturing, storage, packaging, labelling and transportation.