

Terms of Order

1 Performance

- 1.1 The Contractor must supply and/or perform the Contractor's Activities for the Client to and/or at the Site in accordance with this Order, the Policies and the directions of the Company's Authorised Representative, for the Fee.
- 1.2 The Contractor is taken to have carefully examined all documents and other information furnished by the Client relating to the performance of the Contractor's Activities and to have fully satisfied itself of all conditions, risks, contingencies and other circumstances which might affect the performance of the Contractor's Activities, including conditions at the Site, and to have made due allowance for these in the Fee.
- 1.3 The Contractor must not subcontract any part of the Contractor's Activities without the prior written approval of the Client, which may be given or withheld in the Client's absolute discretion.
- 1.4 If the Client or any of its representatives signs a docket or other document required by the Contractor to acknowledge performance of the Contractor's Activities, the Client will not be taken to have accepted the Contractor's Activities as being in accordance with this Order (whether as to quality or quantity). This applies notwithstanding any terms and conditions appearing on any such acknowledgment of performance.

2 Inspection

- 2.1 The Client may at any time enter the premises where the Contractor's Activities are being performed to inspect, examine or test the Contractor's Activities. The Contractor must at its cost procure access for the Client. No inspection, examination or testing of the Contractor's Activities by the Client relieves the Contractor of its obligations under this Order.
- 2.2 If following any inspection, examination or testing of the Contractor's Activities the Client anticipates or suspects that the Contractor's Activities may be defective or otherwise in breach of this Order, the Client may give the Contractor a notice requiring the defect or breach to be remedied within the reasonable time identified in the notice and the Contractor must comply with that notice.
- 2.3 If the Contractor does not remedy a defect in the Contractor's Activities or other breach of this Order within the time identified in a notice under **clause 2.2**, the Client may immediately terminate this Order by giving notice to the Contractor.
- 2.4 The Contractor must ensure that the Contractor's Activities are performed in accordance with this Order, all laws and any quality assurance requirements prescribed in this Order. Where no quality assurance requirements are specified, the Contractor's Activities must comply with the best standards applicable to goods and/or services of that type.

3 Goods and Services Tax

- 3.1 Unless expressly stated otherwise in this Order, the Fee does not include GST. The Client is not required to pay the GST component of the Fee until the Client receives a tax invoice from the Contractor in respect of the taxable supply.
- 3.2 If an *adjustment event* occurs, the Contractor 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.
- 3.3 The GST payable on a taxable supply must be paid in Australian dollars regardless of whether the Fee is paid in Australian dollars or any other currency. If the Fee is payable in a currency other than Australian dollars:
 - (a) for the purposes of calculating the GST payable, the Fee will be converted into Australian dollars, using the daily exchange rate as published on the Reserve Bank of Australia's website on the date prior to or the date that a tax invoice for the taxable supply is issued, in accordance with the Australian Taxation Office Guidelines; and
 - (b) the relevant tax invoice must specify the exchange rate used and the date of conversion, the GST payable in Australian dollars and the account details into which the GST payable must be paid.
- 3.4 Italicised expressions used in this **clause 3** have the meaning given to them in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

4 Fee

- 4.1 The Fee is fixed and will not be subject to adjustment for rise and fall, exchange rate variations or any other reason, except as provided in this Order.
- 4.2 Except in the case of an Order for the supply of Goods, in which case no invoice may be given until the Goods have been delivered to the Site, once Contractor's Activities are performed under this Order, the Contractor may give the Client a valid tax invoice for the performed Contractor's Activities (**Invoice**). An Invoice must include:
 - (a) a reference to this Order, including the line item numbers on the order and the Order number;
 - (b) a detailed description of the delivered Goods or performed Services, including the date of delivery and/or period of Services in respect of which the Invoice relates and the relevant quantity;
 - (c) an individual reference number for the Client to quote with remittance of payment; and

- (d) the Fee relating to the Goods and/or Services, broken down to reflect the Fee components on the Order.

If the Client requests, the Contractor must provide the Client with all relevant records to calculate and verify the amount set out in any Invoice.

- 4.3 The Client must pay the Contractor the amount determined by the Client as the appropriate proportion of the Fee for the performed Contractor's Activities (having regard to the provisions of this Order and the proportion of the total Contractor's Activities performed) within 30 days of the end of the month in which the Invoice was received by the Client. If the Client proposes to pay an amount less than that claimed in the Invoice, on or before the due date for payment the Client will issue to the Contractor a payment schedule identifying the amount (if any) which the Client believes to be then payable, and which the Client proposes to pay, to the Contractor and the reasons why it is less than the amount claimed. The Contractor must then provide an adjustment notice or revised valid tax invoice.
 - 4.4 All Invoices must be itemised and be in a form which clearly indicates any GST component already paid by the Contractor for which the Client may claim an input credit.
 - 4.5 The Fee includes all taxes, levies and fees (excluding GST) which are payable in relation to the performance of the Contractor's Activities. For the avoidance of doubt, the Contractor must pay all such taxes, levies and fees.
 - 4.6 The Fee includes all costs associated with the transport, loading and unloading of the Goods. For the avoidance of doubt, the Contractor must pay all such costs.
 - 4.7 The Fee cannot be varied for any reason except where expressly agreed in writing, signed by an Authorised Representative of the Client.
 - 4.8 The Client may, by notice to the Contractor and signed by an Authorised Representative of the Client, vary the quantity, quality or description of the Contractor's Activities, the Delivery Date, the Term or any other aspect of the performance of the Contractor's Activities. The Fee will be altered by a reasonable amount determined by the Client for that variation.
 - 4.9 The Client may deduct from any amount owing to the Contractor, including any part payment of the Fee, any amount which the Client determines is or may become payable by the Contractor to the Client including amounts by way of damages.
 - 4.10 The Client may pay the Fee by cheque, bank cheque, electronic funds transfer, or cash payment or in any other manner agreed in writing by the parties.
 - 4.11 All payments by the Client will be on account only and will not be an admission that the Contractor's Activities comply with this Order.
 - 4.12 The provisions of this Order do not prevent a party from seeking adjudication under the *Construction Contracts Act 2004* (WA) in respect of a payment dispute, or prevent a party from contending that this Order does not constitute a construction contract, as those terms are defined in that *Construction Contracts Act 2004* (WA).
 - 4.13 The adjudicator for any payment dispute under the *Construction Contracts Act 2004* (WA) shall be appointed by the Chair of the Western Australia Chapter Committee of the Resolution Institution.
- ## 5 Time
- 5.1 The Contractor must perform the Services from the Commencement Date:
 - (a) if there is a Term, for the Term during the Service Hours; or
 - (b) if there is no Term:
 - (i) until completion of the Services; and
 - (ii) complete the Services by the Delivery Date.
 - 5.2 The Contractor must deliver the Goods to the Site by the Delivery Date.
 - 5.3 The Client is not obliged to accept early performance of the Contractor's Activities including delivery of the Goods prior to the Delivery Date.
 - 5.4 The Contractor must notify the Client immediately upon the Contractor becoming aware or having reasonable grounds to believe that it will not be able to:
 - (a) deliver the Goods to the Site by the Delivery Date; or
 - (b) complete the Services by the Delivery Date, or in the time otherwise required by this Order.
 - 5.5 The Delivery Date and/or Term may be extended where the Contractor is delayed in the performance of the Contractor's Activities by an act, omission or default of the Client (or its agents or employees), or for the Client's sole convenience. The period of an extension to the Delivery Date and/or Term will be determined by the Client in its sole discretion.

6 Risk title and Indemnity

- 6.1 The Contractor must comply with all the Client's safety requirements relating to the Contractor's conduct at the Site. If required by the Client, any person entering the Site must undergo a site induction at the Contractor's cost.

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- 6.2 Risk in Goods passes to the Client when the Goods are delivered to the Site and accepted by the Client. The Contractor must ensure that the Goods are suitably packed to avoid damage in transit or storage.
- 6.3 Title in Goods passes to the Client on the earlier of risk passing to the Client and payment of the Fee.
- 6.4 The Contractor indemnifies the Client and its officers, employees, agents and contractors against any action, claim or proceeding brought or threatened to be brought against the Client (including all costs and expenses which the Client may suffer or incur in disputing any such action, claim or proceeding) and any liability, cost, damage, liability or expense, whatsoever and howsoever, whether directly or indirectly, and whether or not foreseeable, suffered or incurred by the Client, including any injury to any person or damage to any property, in respect of, in relation to or in connection with a breach of this Order by the Contractor, the performance of the Contractor's Activities and any activity directly or indirectly associated with the performance of the Contractor's Activities, and any negligent act or failure to act by the Contractor or its officers, employees, agents and contractors.
- 7 Insurance**
- 7.1 Prior to the Contractor performing any work pursuant to this agreement, the Contractor must effect (or cause to be effected) and thereafter maintain (or cause to be maintained) the following insurances for amounts not less than and deductibles not more than those specified:
- (a) Motor Vehicle insurance:
- (i) in respect of third party property damage and death or injury to persons for all plant, equipment and motor vehicles to be used in connection with the Contractor's Activities;
- (ii) with a limit of indemnity in respect of third party property damage of \$20,000,000 any one claim and unlimited in the aggregate;
- (iii) for compulsory third party insurance covering death or injury to persons, as required by applicable law; and
- (iv) with a maximum deductible of \$50,000 in respect of third party property damage cover.
- (b) Public and product liability insurance of \$20,000,000;
- (c) Plant and Equipment insurance:
- (i) in respect of all plant, equipment and supplies, including any temporary work and materials not for incorporation into any work to be handed over to the Client by the Contractor, used or to be used by the Contractor in connection with the Contractor's Activities;
- (ii) for a sum equivalent to the full replacement value of all such plant, equipment and supplies; and
- (iii) with a maximum deductible of \$100,000.
- (d) Employers liability and workers compensation insurance against any liability for death of, or injury to persons employed (or deemed to be employed) by the Contractor in the performance of Contractor's Activities whether under statute or common law. Where permitted by law, the Contractor must procure an extension to this policy to indemnify the Client as principal for the Client's liability under statute and at common law to person's engaged by the Contractor.
- (e) Where required by this Order, professional Indemnity insurance, with a level of cover not less than \$5,000,000.
- 7.2 The Contractor must maintain, or cause to be maintained, the insurances referred to in **clause 7.1** until the date of completion of the Contractor's Activities, except in respect of professional indemnity insurance which must be maintained for 7 years after completion of the Contractor's Activities.
- 7.3 The Contractor must furnish to the Client certificates of currency evidencing the effecting and maintaining of the insurances required by **clause 7.1**;
- 7.4 If the Contractor fails to provide to the Client certificates of currency as required by **clause 7.3**, the Client may effect and maintain the relevant insurances and pay the premium. The costs incurred by the Client in connection with taking such action will be recoverable from the Contractor as a debt due and payable from the Contractor to the Client.
- 7.5 Contractor's general insurance requirements and obligations:
- (a) The Contractor's insurances must be effected and maintained with Reputable Insurers or insurers otherwise agreed between the Client and the Contractor.
- (b) The Contractor must:
- (i) not do or permit, or omit to do, anything which prejudices any insurance; and
- (ii) rectify anything which might, if not rectified, prejudice any insurance; and
- (iii) 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
- (iv) comply at all times with the terms of each insurance.
- 8 Rejection of Contractor's Activities**
- 8.1 Within a reasonable time after the performance of the Contractor's Activities the Client may reject any Contractor's Activities which do not meet the requirements of this Order.
- 8.2 If the Client rejects any Contractor's Activities under this **clause 8**, the Contractor must pay the Client all amounts paid by the Client for the rejected Contractor's Activities.
- 9 Warranties and intellectual property**
- 9.1 The Contractor warrants, at the time it accepts this Order and at the time the Contractor's Activities are performed, that:
- (a) the Contractor's Activities will be performed precisely in accordance with:
- (i) their descriptions in this Order (as varied under **clause 4.8**);
- (ii) any relevant patterns or specifications;
- (iii) any other warranties or guarantees contained in this Order;
- (iv) all applicable Australian standards; and
- (v) all laws, including the provisions of any legislation applicable to the Contractor's Activities;
- (b) it has the necessary skills, resources and experience to successfully, effectively and efficiently perform the Contractor's Activities in accordance with this Order; and
- (c) it has all intellectual property rights (including any patents, trade marks and copyright) necessary to perform the Contractor's Activities in accordance with this Order, and that the performance of the Contractor's Activities will not infringe any intellectual property rights.
- 9.2 The warranties in **clause 9.1** are in addition to any warranties which are or may be implied under any legislation applicable to the Contractor's Activities.
- 9.3 The Contractor indemnifies the Client against any loss, cost, damage or expense incurred by the Client as a consequence of or in connection with any claim by a third party that it has a right to any intellectual property right in the Contractor's Activities.
- 9.4 The Contractor grants to the Client a royalty free, perpetual and irrevocable licence to use all intellectual property rights in the Contractor's Activities and any other works which the Client may perform in relation to the Contractor's Activities in the future. The licence will remain vested in the Client despite the termination of this Order and the Client may assign or sublicense the rights granted by the licence without the consent of the Contractor.
- 10 Defective Contractor's Activities**
- 10.1 If at any time during the period of 12 months from the completion of the Contractor's Activities the Client discovers that the Contractor's Activities do not comply with this Order (including any warranty given under **clause 9.1**), the Client may (without limiting any other right available to it):
- (a) rectify or re-perform the Contractor's Activities or have the Contractor's Activities rectified or re-performed and the cost, loss, damage and expense suffered or incurred by the Client will be a debt due and payable from the Contractor to the Client; or
- (b) give the Contractor a notice requiring it to, at its cost and within the reasonable time prescribed in the notice, re-perform the Contractor's Activities.
- 10.2 The Contractor must comply with any notice under **clause 10.1(b)**.
- 11 Confidentiality**
- The Contractor must treat this Order and any information provided by the Client or on its behalf, as confidential and must not disclose the Order or such information, the existence of the Order, the information contained in it or its subject matter to any third party (except as may be required to perform its obligations under this Order, by law, a Court order or the rules of any securities exchange) or use it for advertisement, display or publication without the prior written consent of the Client.
- 12 Drawings and tools**
- All tools, patterns, materials, drawings, specifications and other data provided by the Client to the Contractor in connection with this Order:
- (a) remain the property of the Client (except that the Contractor is responsible for making good any damage done to them while they are in the possession of the Contractor);
- (b) must be used only for the purpose of this Order;
- (c) must not be passed to or divulged to any third party except with the express written consent of the Client;
- (d) must not be reproduced except to the extent necessary and incidental to complete this Order; and
- (e) must be returned, together with any reproductions, to the Client on completion of this Order.
- 13 Suspension and termination**
- 13.1 Any parties' rights to terminate this Order under the terms of this Order are in addition to their rights of termination under statute or at common law.
- 13.2 The Client may suspend all or part of the performance of the Contractor's Activities at any time for any period by notice to the Contractor. The Contractor must comply with such a notice and must recommence performance of the Contractor's Activities when required by notice from the Client. The Contractor will not be entitled to any additional payment arising as a result of any such suspension.

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- 13.3 The Client may immediately terminate this Order at any time by giving the Contractor notice. Subject to any rights of set off or deduction which the Client may have, on termination of this Order the Client's only obligation will be to pay the Contractor for Contractor's Activities which have been performed in accordance with this Order prior to the date of termination.
- 14 Dispute resolution**
- 14.1 Subject to **clause 14.2**, any dispute arising in relation to this Order (**Dispute**) must be determined in accordance with this **clause 14**.
- 14.2 **Clause 14.1** does not prevent either party from applying to the Supreme Court of Western Australia for urgent injunctive relief in relation to this Order.
- 14.3 If a party alleges a Dispute has arisen it must give notice of that fact to the other party (**Dispute Notice**).
- 14.4 Within 10 Business Days of service of a Dispute Notice, the Client's representative and a senior representative of the Contractor must meet and, confidentially and in good faith, attempt to resolve the Dispute. If the Dispute is not resolved within 10 Business Days of the last date for the meeting of delegates under this clause, the matter will be and is hereby referred to arbitration.
- 14.5 The seat of the arbitration will be Perth, Western Australia and the arbitration is to take place in Perth before 1 arbitrator. The arbitrator will be nominated by the Chair of the Institute of Western Australia Chapter Committee of the Resolution Institution, upon the application of either party. The arbitration will be conducted in accordance with:
- (a) the Resolution Institute Arbitration Rules (as amended from time to time); or
 - (b) if one or more parties are nationals of and habitually resident in, incorporated in, or where the central management and control is exercised in, different countries as between the parties, then the UNCITRAL Arbitration Rules will apply and the appointing authority will be the Chair of the Western Australia Chapter Committee of the Resolution Institute.
- 14.6 To the extent permitted by law, the parties agree that:
- (a) the powers conferred and restrictions imposed on a court by Part 1F of the *Civil Liability Act 2002* (WA) are not conferred or imposed on the arbitrators appointed under this **clause 14**; and
 - (b) any such arbitrators will have no power to make an order or award in respect of a Dispute by applying or considering the provisions of Part 1F of the *Civil Liability Act 2002* (WA) (or any equivalent statutory provisions in any other state or territory) which might, in the absence of this **clause 14.6**, have applied to any Dispute referred to arbitration.
- 15 Assignment**
- 15.1 The Contractor must not assign or deal with the Contractor's interest under this Order without the prior written consent of the Client. Any purported dealing by the Contractor in breach of this **clause 15.1** is of no effect. The Client may assign or deal with its interest under this Order at any time by notice in writing to the Contractor.
- 15.2 The Client 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.
- 15.3 Without limiting **clauses 15.1** or **15.2**, when directed by the Client, the Contractor, without being entitled to compensation, must promptly execute a deed of novation in the form reasonably required by the Client, such deed being between the Client, the Contractor and a suitable substitute for the Client. For the purpose of effecting such novation only, the Contractor hereby irrevocably appoints the Client to be the Contractor's attorney with authority to execute such documents as are necessary to give effect to the novation and to bind the Contractor accordingly.
- 15.4 If requested by the Client, the Contractor must enter into a deed (**Side Deed**) with any person in whose favour Security is granted or created (**Financier**) and the Client, imposing conditions which are reasonable and mutually agreeable to all parties to the Side Deed, acting reasonably, to protect the interests of the Contractor and the Financier. The Side Deed must incorporate such provisions as are commercial and appropriate and the Contractor and the Client must each act reasonably in respect of the negotiation and finalisation of the Side Deed having regard to the matters specified in this **clause 15**.
- 16 General**
- 16.1 Where this Order allows the Client a discretion as to whether to do or not to do any act, matter or thing of any kind, or confers on the Client 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 Client is not obliged to give its reasons.
- 16.2 No waiver by the Client of a breach of this Order by the Contractor constitutes a waiver for any subsequent or continuing breach by the Contractor.
- 16.3 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 severed from this Order and the remainder of this Order will continue to be effective and valid notwithstanding such severance.
- 16.4 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.
- 16.5 This Order may only be varied or replaced by a document duly executed by the parties.
- 16.6 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.
- 16.7 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.
- 16.8 Each party must promptly do whatever the other party reasonably requires of it to give effect to this Order and to perform its obligations under it.
- 16.9 This Order is governed by and is to be construed in accordance with the laws applicable in Western Australia. Subject to **clauses 14.1** to **14.5**, 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.
- 16.10 This Order may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.
- 16.11 This Order is not intended to create a partnership, joint venture or agency relationship between the parties.
- 16.12 This Order:
- (a) subject to paragraphs **(b)** and **(c)**, supersedes all other communications and negotiations (whether oral or written) between the Contractor and the Client in relation to the Contractor's Activities and constitutes the entire agreement between the Contractor and the Client in respect of the Contractor's Activities;
 - (b) is to be read subject to any written and signed notice of award or contract between the parties and the terms of any such written and signed notice of award or contract will prevail over the terms of this Order to the extent of any inconsistency; and
 - (c) will be superseded by any subsequent written and signed notice of award or contract between the parties that relates to the Contractor's Activities, which notice of award or contract will apply retrospectively to any such Contractor's Activities
- 17 Interpretation**
- 17.1 In this Order:
- Authorised Representative** means the authorised representative as described in **Schedule 1**.
- Business Days** means a day other than a Saturday, Sunday or public holiday in Perth, Western Australia.
- Contractor** means the vendor as described in this Order.
- Contractor's Activities** means the supply and delivery of the Goods and/or the performance of the Services as the case requires.
- Delivery Date** means the date identified in this Order.
- Fee is:**
- (a) where **Schedule 1** states that the Fee is based on a lump sum or lump sums, that lump sum or the aggregate of the lump sums;
 - (b) where **Schedule 1** states that the Fee is based on rates, the sum ascertained by multiplying those rates by the quantities properly supplied in accordance with this Order;
 - (c) where **Schedule 1** states that the Fee is based on a lump sum or lump sums and rates, the aggregate of the lump sum or lump sums and the sum ascertained by multiplying the rates by the quantities properly supplied in accordance with this Order; or
 - (d) where neither **(a)**, **(b)** nor **(c)** applies, the net amount stated in the purchase order.
- Goods** means the good described or referred to in this Order, if any.
- Invoice** has the meaning in **clause 4.2**.
- Order** means the purchase order, this document and any Schedules to this document together with any other documents prescribed in this Order as forming part of this Order, which, in the event of any inconsistencies, must be construed in that order of priority.
- Policies** means all policies and procedures of the Client identified in **Schedule 1** or notified by the Client to the Contractor from time to time, as updated by the Client from time to time.
- 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.
- Schedule** means a schedule to this document.
- Services** includes all services described or referred to in this Order, if any, and all other things which can reasonably be inferred from the description of the services in this Order.

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Site means the site identified in **Schedule 1** or if there is no site identified therein, the shipping address referred to in this Order.

17.2 In this Order, unless the context requires otherwise:

- (a) a word in this Order that has a capitalised first letter has the meaning given to it by this Order;
- (b) the singular includes the plural and vice versa;
- (c) headings are for reference only and do not affect the interpretation of this Order;
- (d) a reference to any legislation includes a reference to any proclamation, order, amendments or modification made under that legislation;
- (e) where two or more persons are named as the Contractor, then the obligations on their part will bind and be observed and performed by them jointly and severally;
- (f) "include", "includes" and "including" means "includes without limitation";
- (g) 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;
- (h) a reference to:
 - (i) a person includes that person's legal personal representatives, successors, assigns;
 - (ii) time is to local time in Perth, Western Australia;
 - (iii) "\$" or "dollars" is a reference to Australian currency unless otherwise agreed; and
 - (iv) a clause is a reference to a clause of this Order;
- (i) 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;
- (j) where time is calculated by reference to a day or event, that day or the day of that event is excluded; and
- (k) a notice or other communication means a notice or communication in writing in the English language, addressed to the postal addresses of the recipient party.