



## PURCHASE ORDER TERMS AND CONDITIONS

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### 1. AGREEMENT TO SUPPLY GOODS

**1.1** These Terms and Conditions shall apply to all Purchase Orders issued by the Purchaser. The Supplier by its written acceptance of the Purchase Order or part performance of the Purchase Order is deemed to have accepted all these Terms and Conditions in full. All other prior representations (written or oral) and any terms and conditions contained in the Supplier's quotations, confirmations, invoices or delivery notes and any other such document unless accepted in writing by the Purchaser are hereby excluded.

**1.2** The agreement between the Purchaser and Supplier is comprised of the following documents:

- (a) Purchase Order;
- (b) Any attached schedule
- (c) these Terms and Conditions, and
- (d) any terms and conditions of the Supplier (if accepted by the Purchaser in writing).

**1.3** To the extent of any inconsistency or discrepancy between any or all of the documents listed in clause 1.2, they shall be relied upon and interpreted in descending order of precedence from clause 1.2(a) to (d).

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### 2. PRICE

**2.1** The Purchaser agrees to pay the Price specified in the Purchase Order for the full and proper supply of the Goods or Services the subject of the Purchase Order.

**2.2** Unless otherwise provided in the Purchase Order, the Price is fixed at the amount in the Purchase Order.

**2.3** The Price is payable in Australian Dollars unless otherwise provided in the Purchase Order.

**2.4** Payment of the Price by the Purchaser is subject to receipt of the Goods in good order and on the basis

that conditions precedent to payment in clauses 3.1, 6.4 and 8, have been complied with.

**2.5** The Price is deemed to be fully inclusive of all Delivery, Taxes, insurance, packaging and transport costs unless otherwise specifically stated in the Purchase Order.

**2.6** If the amount of GST recovered by the Supplier from the Purchaser in prospect of the Purchase Order differs from the amount of GST payable at law by the Purchaser in respect of the supply, the relevant price payable by the Purchaser will be adjusted accordingly.

**2.7** The Supplier must provide any further information or documentation stipulated in any applicable GST legislation or regulation, or by the Purchaser, so that the Purchaser will receive the benefit of any input tax credit in relation to the supply under the Purchase Order.

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### 3. PAYMENT AND DEDUCTIONS

**3.1** The Supplier shall submit its tax invoice or credit note in respect of the delivered Goods or Services, which correctly identifies the Purchase Order, shows the quantity of Goods or Services supplied, the Price applying to those Goods or Services and the Order Number.

**3.2** All invoices are to be forwarded to the address set out in the Purchase Order or such other address as may be notified to the Supplier by the Purchaser.

**3.3** Subject to clauses 3.4 and 3.5, the Purchaser shall pay the amount properly invoiced by the Supplier (except to the extent that the invoice is in dispute) within 60 days from the end of the month in which the invoice is submitted, unless other payment terms have been agreed between the Purchaser and the Supplier and specifically noted in the Purchase Order.

**3.4** Payment of a tax invoice may be withheld if the Supplier is in breach of any terms of this Agreement until the breach is resolved.

**3.5** In addition to any other rights that it may have under these terms and conditions or otherwise, and without prejudice to its rights to recover damages or costs under this Agreement, the Purchaser may deduct from any monies due or that become due to the Supplier:

- (a) all costs, damages and expenses which the Purchaser may have paid or incurred or is likely to incur in connection with the supply of Goods or Services for which the Supplier is liable and which remain unpaid by the Supplier; and
- (b) all debts owed by the Supplier to the Purchaser and which remain unpaid on any account whatsoever.

**3.6** The Purchaser shall be entitled to return to the Supplier unpaid any invoice that fails to contain the information described in clause 3.1 and the Supplier must submit a replacement invoice.

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#### **4. RISK, TITLE AND PROPERTY**

**4.1** Subject to clause 6.8, property and risk in the Goods will not pass to the Purchaser until:

- (a) the Goods are delivered to, and (subject to clause 6.4) accepted by the Purchaser at the Delivery Point; or
- (b) where the Goods are held by the Supplier at a particular place, until the Supplier issues the Goods to the Purchaser from the relevant place and Goods are, inspected by, and accepted by the Purchaser.

**4.2** Subject to clause 6.8 and notwithstanding clause 4.1, title in the Goods will pass to the Purchaser upon payment of the Price however risk will remain with the Supplier while the goods remain in possession of the Supplier.

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#### **5. DELIVERY OF GOODS**

**5.1** Unless indicated to the contrary on the Purchase Order, the Goods must be delivered to the Delivery Point on or before the Delivery Date specified in the Purchase Order.

**5.2** The Supplier is to provide a detailed delivery docket with every shipment. The delivery docket must contain as a minimum, the following information: the Purchaser's Order Number, date, Supplier's details (including the name and telephone number of the packer), quantity dispatched, item description and part number, whether or not the delivery is part or whole of the total order and details of any items on back order.

**5.3** All Goods shall be packed, marked and transported as specified in the Purchase Order, but if not specified then in a proper and suitable manner to prevent damage and deterioration during transit and storage. In the case of dangerous or hazardous Goods the Supplier shall provide the carrier with the relevant emergency procedure guidelines and dangerous or hazardous goods shipping documents.

**5.4** The Supplier shall be liable for any difference in freight charges arising from its failure to follow any transport instructions in the Purchase Order or properly describe the Goods transported.

**5.5** The Purchaser and Supplier shall assist each other in obtaining documents and other information necessary for the prosecution of Claims against the carrier (if any).

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#### **6. INSPECTION**

**6.1** The Supplier agrees that the Purchaser, its client or their designated agents may enter upon the premises of the Supplier (or its supplier's subcontractors) at any time for the purpose of inspection and expediting of all work on Goods or Services contained in the Purchase Order. The Supplier shall make this a condition of any subcontracted works.

**6.2** Upon inspection under clause 6.1, the Purchaser or its designated agent may reject any Goods or Services performed or being performed that does not conform with the Purchase Order, whereupon the Goods and Services rejected shall be replaced or re-performed at no additional cost to the Purchaser.

**6.3** Any inspection and expediting done by the Purchaser or its designated agent shall not relieve the Supplier or any obligations contained in the Purchase Order.

- 6.4** The Purchaser shall not be deemed to have accepted the Goods unless and until:
- (a) the Purchaser has had a reasonable opportunity of examining the Goods and to conduct appropriate acceptance testing for the purpose of ascertaining whether they are in conformity with the Purchase order; and
  - (b) the Purchaser notifies the Supplier that the Purchaser has accepted the Goods.

**6.5** Signed Delivery documents shall not mean acceptance by the Purchaser of the Goods delivered. Any monies paid by the Purchaser to the Supplier prior to inspection of the Goods shall be deemed to have been paid conditional upon, and subject to, the Goods being complete, free of any defects and to the complete satisfaction of the Purchaser following inspection and acceptance under clause 6.4.

**6.6** Acceptance by the Purchaser of any specimens, samples, moulds, templates, materials or the like shall not constitute acceptance of the final Goods.

**6.7** The Purchaser will promptly after inspection notify the Supplier of any defects in or damage to the Goods and hold any Goods found to be defective or damaged ("Defective Goods") for the Supplier's instructions for a reasonable period not exceeding 30 days. If the Supplier's instructions are not received within such a period, the Purchaser may:

- (a) return the Defective Goods at the Supplier's expense and risk, and any expense incurred by the Purchaser constitute a debt due and payable by the Supplier to the Purchaser; or
- (b) sell the Defective Goods (at the Purchaser's discretion) as agent of the Supplier and forward the proceeds of the sale, after making due deductions for the Purchaser's costs in effecting the sale, to the Supplier; or
- (c) at the Purchaser's election, undertake a combination of sub-clauses (a) and (b) in the proportion determined by the Purchaser.

**6.8** Notwithstanding clause 4 of these terms and conditions, in the case of Defective Goods to which clause 6.7 applies:

- (a) acceptance and ownership of and title to the Defective Goods will not pass to the Purchaser;
- (b) the Purchaser shall be under no liability to accept or pay for the Defective Goods or their costs of delivery;
- (c) property and risk in respect of those Defective Goods shall remain with the Supplier; and
- (d) the Purchaser reserves the right to make a Claim against the Supplier in respect of any such Defective Goods.

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## **7. SECURITY**

**7.1** If required by the Purchaser, the Supplier agrees to provide security for the Supplier's performance of its obligations under this Agreement in an amount equal to 10% of the Price or such other amount as provided by the Purchase Order (**Security**), in accordance with clause 7.2. Any and all costs associated with the provision of the Security will be deemed to be included in the Price.

**7.2** The Supplier may, at the Purchaser's discretion, provide Security by either:

- (a) agreeing that the Purchaser retains the amount of the Security in cash; or
- (b) providing to the Customer single or multiple bank guarantees for the amount of the Security.

**7.3** The Purchaser may have recourse to the Security only where the Supplier has committed a breach of its obligations under this Agreement and has failed to remedy that breach within 30 days' notice from the Customer.

**7.4** Within 14 days of the completion of the services and delivery of the Goods by the Supplier, the Purchaser will either release any retained amounts under clause 7.2(a), or return any bank guarantees provided under clause 7.2(b).

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- 8. INFORMATION**
- 8.1** During the manufacture of the Goods or provision of the Services the Supplier must provide to the Purchaser, when reasonably requested to do so, all drawings, manufacturing data, progress reports, test certificates, QA data and any other information to ascertain the quality and progress of the work.
- 8.2** The Supplier must provide to the Purchaser at the Delivery Point at the time of Delivery such other information as may be required by Federal or State law, Australian Government standards (including Standards Australia standards) and all requirements of local authorities or other competent bodies and/or requested by the Purchaser, including but not limited to material data sheets, material safety data, test certificates, heat certificates and the like.
- 8.3** The provision of all required documentation is a condition precedent to payment and all costs associated with providing the documentation are deemed to have been included in the Price.

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**9. CONFIDENTIAL INFORMATION**

- 9.1** The Supplier must:
- (a) keep confidential all information relating to the Goods and Services;
  - (b) ensure that each of its officers, employees suppliers and subcontractors and agents comply with the terms of clause 9.1(a).
- 9.2** The Supplier is obliged to keep confidential any information relating to the Goods and Services unless:
- (a) it is otherwise in the public domain through no default of the Supplier; or
  - (b) the disclosure is:
    - (1) strictly and necessarily required for the performance of the Purchase Order;
    - (2) in connection with legal proceedings relating to this Agreement; or

(3) given with the written consent of the Purchaser.

**9.3** The obligations of this clause shall survive termination or completion of this Agreement.

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**10. SUPPLIER'S WARRANTIES**

- 10.1** The Supplier represents and warrants to the Purchaser that where the Purchase Order relates to Goods:
- (a) it has the right to sell the Goods to the Purchaser on these terms and conditions and, subject to clause 6, upon payment of the Price the Purchaser will have good title to the Goods, free and clear of all mortgages, liens, encumbrances and third party claims and other restrictions on title;
  - (b) the Goods delivered to the Purchaser will correspond in all respects with the Specification and the representations made by the Supplier and any sample provided by or on behalf of the Supplier;
  - (c) the Purchaser shall have the full benefit of any manufacturer's warranties that may be applicable to the Goods or any part of the Goods;
  - (d) the Goods will be free from defects in design and workmanship;
  - (e) the Goods will be fit and safe for purpose and use;
  - (f) the Goods will meet any other standards specified by the Purchaser;
  - (g) the Goods will comply with all laws, by-laws, statutes, regulations and standards in force in the jurisdiction in which they are supplied.
- 10.2** The Supplier represents and warrants to the Purchaser that where the Purchase Order relates to Services that the Services:
- (a) will correspond in all respects with the Specification and the representations made by the Supplier;

- (b) will be performed with due care and diligence by suitably trained and competent personnel;
- (c) will meet any other standards specified by the Purchaser;
- (d) will comply with all laws, by-laws, statutes, regulations and standards in force in the jurisdiction in which they are supplied.

**10.3** The warranties set out under clauses 10.1 and 10.2 for a period of 12 months from the Delivery Date. This warranty is given in addition to other rights and remedies of the Purchaser at law in relation to the Goods or Services.

**10.4** The Purchaser may make a claim under the warranties set out under clauses 10.1 and 10.2 by notice in writing to the Supplier's registered office.

**10.5** Where the Supplier repairs or replaces any Goods or re-performs any Services pursuant to any warranty, the Supplier shall bear all the costs occasioned thereby including removal and transportation costs of the Goods from and return to the premises from which they are removed, labour costs for re-performing the Services and the costs of replacing or providing new parts for the Goods.

**10.6** If the Supplier fails to repair or replace any Goods pursuant to any warranty within a reasonable time, then the Purchaser may carry out the replacement or repair in which case any or all costs associated with the replacement or repair shall become a debt due and payable from the Supplier to the Purchaser.

**10.7** The Supplier irrevocably undertakes, and shall ensure that each of its suppliers and subcontractors irrevocably undertake, to assign all benefits to any warranty to the Purchasers if requested in writing to do so by the Purchaser.

**10.8** By law the following text must be stated in this Agreement by the Supplier:

“Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired

or replaced if goods fail to be of acceptable quality and the failure does not amount to be a major failure.”

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**11. SERVICES ON PURCHASER PREMISES OR SITE**

**11.1** In addition to the warranties set out in clause 10.2, the following conditions also apply where the Supplier, under the terms of the Purchase Order or to enable its performance of the Services, is required to be present or perform work on or near the premises or sites of the Purchaser:

- (a) all work shall be performed in a good and workmanlike manner;
- (b) the Supplier shall supply all labour, tools, equipment and materials necessary to complete the work and to perform the Purchase Order;
- (c) the Supplier shall not impede work in progress by the Purchaser or third parties;
- (d) subject to any applicable law, the Supplier Personnel enter upon the Purchaser's premises, installations, vehicles and sites (“Purchaser's Property”) at the Supplier's own risk and the Supplier indemnifies the Purchaser against any Claims arising out of or in connection with the presence of the Supplier Personnel and any other invitees of the Supplier on the Purchaser's Property including Claims against the Purchaser whether alleging negligence on the part of the Purchaser or otherwise; and
- (e) the Supplier Personnel and any other invitees of the Supplier shall comply with all safety and other regulations applicable to the Purchaser's Property and shall obey all instructions of the Purchaser, its manager, supervisor or authorised officer.

**11.2** The conditions of this clause 11 shall apply equally where the Supplier may be required to enter upon the premises of a client or subcontractor of the Purchaser.

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## 12. INDEMNITY

**12.1** Unless due solely to the negligence of the Purchaser, the Supplier shall be liable for and must indemnify the Purchaser, its directors, officers, employees, contractors and agents against any and all Claims arising whether at common law, in equity, or under statute and caused or contributed to, whether wholly or in part, directly or indirectly by:

- (a) the performance, purported performance or non-performance of the Goods or Services;
- (b) any breach of the Supplier's warranties or other terms of this Agreement; and
- (c) acts of negligence, omissions or wilful misconduct of the Supplier Personnel resulting in:
  - (1) injury to or death of any person;
  - (2) loss or damage to any property; or
  - (3) any other loss whatsoever.

**12.2** Without limiting clause 12.1 and to the maximum extent permitted by law:

- (a) the Supplier agrees that the Liability Act will may have any application to this Agreement, the performance of the Services or the provision of the Goods or any of the obligations of the Supplier under this Agreement or at law;
- (b) despite the provisions of the Liability Act, the Supplier acknowledges that the Supplier is solely responsible for and indemnifies the Purchaser in respect of any loss, damage, claim or expense the Purchaser suffers or incurs arising out of or in connection with any wrongful or negligent act or omission on the part of the Supplier, its respective officers, employees, agents suppliers and contractors in performance of the Services and supply of the Goods; and
- (c) the parties agree that their rights, obligations and liabilities will be those

which would exist if the Liability Act did not apply.

**12.3** If despite clause 12.2, the Liability Act or Part 2, Chapter 2 of the Civil Liability Act 2003 (Qld) applies, then to the maximum extent permitted by law, the Supplier agrees to indemnify the Purchaser against the difference (if any) between:

- (a) the amount of any loss, damage, cost and expense suffered by the Purchaser for which, but for the Liability Act, the Purchaser would otherwise have been entitled to recover from the Supplier; and
- (b) the liability to the Purchaser of the Supplier as determined under the Liability Act.

**12.4** Under no circumstances will the Purchaser be liable to the Supplier for any indirect or consequential loss, which shall include, but not be limited to, loss of profit, loss of earnings, loss of use, loss of overheads, loss or reputation or loss of opportunity (other than Claims relating to injury to or death of any person or loss or damage to any property).

**12.5** This clause 12 survives expiration or termination of this Agreement.

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## 13. INSURANCE

**13.1** Before commencing work, the Supplier must at its own expense procure and maintain with reputable insurers, on terms and conditions approved by the Purchaser:

- (a) product liability insurance with a total aggregate cover of not less than \$5,000,000 per annum which includes the Goods and the activities of the Supplier Personnel in relation to the Goods;
- (b) plant and motor vehicle insurance;
- (c) where required by the Purchaser, professional indemnity insurance for the Services with a total aggregate cover of not less than \$5,000,000 per claim. The policy shall include provisions for automatic reinstatement for the sum insured and for loss of documents. The policy and such

level of cover shall be maintained until the Supplier completes carrying out the Services and thereafter for a period of 5 years;

(d) public liability insurance.

**13.2** The Supplier shall insure the Goods for not less than their full replacement value against loss or damage for the period that the Goods are in the Supplier's care and until acceptance of the Goods by the Purchaser under clause 6.4.

**13.3** The Supplier shall, where required by the Purchaser, provide evidence that all insurances required are current and fulfil the obligations of this Agreement.

**13.4** The Supplier will pay all Work Cover and workers compensation levies and premiums as required by the relevant legislation in the jurisdiction in which the Goods and Services are supplied.

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**14. INTELLECTUAL PROPERTY RIGHTS AND ROYALTIES**

**14.1** The Supplier warrants that the supply of the Goods and Services under these Terms and Conditions and any use of them by the Purchaser or any other person for any purpose, will not infringe any Intellectual Property Rights. The Supplier undertakes at its expense to defend, protect and hold harmless the Purchaser and the users of the Purchaser's products or services from and against any claim for infringement of any Intellectual Property Rights arising by reason of the supply and/or use of the Goods or Services.

**14.2** The Goods or Services are for the use of or resale by the Purchaser or its associated entities and may be incorporated in the manufacture of other products. In no event shall any claim for royalties or other additional compensation be made by the Supplier by reason of such use, resale or manufacture. The Supplier must bear the cost of any third party royalties or compensation payable for the use, resale or manufacture by the Purchaser of the Goods or Services and indemnifies the Purchaser in respect of any liability for them that the Purchaser incurs.

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**15. SUBCONTRACTING**

The Supplier shall not subcontract or assign work under this Agreement without the written consent of the Purchaser, which will not be unreasonably withheld.

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**16. CANCELLATION**

**16.1** The Purchaser may at its option and at any time, and without cause, cancel any unshipped Goods or unperformed Services by written notice to the Supplier.

**16.2** If the Purchase Order relates to any Services, the Purchaser's only obligation shall be to pay for Services performed prior to the notice of cancellation.

**16.3** If the Purchase Order covers any Goods, the Purchaser's only obligation shall be to pay for Goods shipped and accepted prior to the notice of cancellation.

**16.4** If the Purchase Order covers Goods manufactured or fabricated to the Purchaser's Specifications or Specifications prepared by the Supplier for the Purchaser, then upon receipt of a notice of cancellation the Supplier shall immediately cease manufacture, supply or work in accordance with and to the extent specified in the notice and shall immediately do everything possible to mitigate any cost after such cancellation. Provided then that the Supplier is not in default, the Purchaser shall pay to the Supplier the reasonable cost incurred by the Supplier in connection with the Purchase Order prior to the date of notice of cancellation. Upon such payments, title to and property in any material or incomplete Goods shall pass to the Purchaser.

**16.5** Any payments made by the Purchaser to the Supplier pursuant to this clause 16 shall not in any event exceed the Price.

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**17. TERMINATION**

**17.1** The Purchaser may terminate this Agreement without prejudice to its rights to recover damages or costs under this Agreement if the Supplier:

(a) is in breach of the terms, conditions or warranties contained in this Agreement;

- (b) indicates it is unwilling to perform any of its obligations under this Agreement;
- (c) fails to remedy any default within a time frame acceptable to the Purchaser;
- (d) fails to commence performance or proceed at a rate of progress to ensure the due and proper completion of the Purchaser Order;
- (e) takes any action or there is reason to anticipate that the Supplier will take any action or any steps are taken or legal proceedings started for:
  - (1) the Supplier's winding-up, dissolution, liquidation or reorganisation other than to reconstruct or amalgamate while solvent on terms approved by the Purchaser (which approval shall not be unreasonably withheld);
  - (2) the appointment of a controller, administrator, receiver, official manager, trustee or similar officer over the Supplier or any of its revenues and assets; or
- (f) makes any assignment or arrangement for the benefit of its creditors,

**17.2** On the occurrence of any of the events set out in clause 17.1, the Purchaser may cancel any undelivered Goods or unperformed Services and shall not be obliged to make any further payment therefore or in respect of such cancellation.

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## **18. VARIATIONS**

The Purchaser may at any time prior to acceptance of the Goods or Services make any change(s) to any or all of the Purchase Order. If such change(s) cause an increase or decrease in the Price or change to the Delivery Date, a fair and equitable variation of the Price and Delivery Date shall be mutually agreed, or in the absence of agreement, as may be reasonably determined by the Purchaser.

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## **19. FORCE MAJEURE**

**19.1** Where a circumstance or event beyond the reasonable control of the Purchaser or Supplier

causes a delay to the Delivery Date ("Force Majeure Event"), the Purchaser may, at its sole discretion, extend the Delivery Date. Force Majeure Events shall include fire, tempest, government intervention and acts of God. A Force Majeure Event shall not include shortage of material, labour or utilities of the Supplier or its subcontractors or suppliers. An extension to the Delivery Date shall be the Supplier's sole remedy for a Force Majeure event.

**19.2** If a Force Majeure Event continues for 90 days or longer, the Purchaser may cancel any undelivered Goods or unperformed Services and shall not be obliged to make any payment therefore or in respect of such cancellation.

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## **20. DISPUTE RESOLUTION**

**20.1** In the event of a dispute arising between the parties, both parties shall genuinely attempt amicable resolution by conference between authorised representatives of the parties,

**20.2** If the parties fail to resolve their dispute in accordance with clause 20.1, the dispute shall be referred to mediation.

**20.3** The choice of a mediator shall be mutually agreed between the parties or, failing agreement, chosen by the President of Engineers Australia in the State of the Delivery Point.

**20.4** The parties must each pay half the costs of the mediator incurred by the mediation.

**20.5** The parties must each provide all information and assistance reasonably requested by the mediator.

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## **21. TIME**

**21.1** Time is of the essence in this Agreement. The Supplier shall maintain a rate of progress that will ensure achievement of the Delivery Date.

**21.2** Where the Supplier has been delayed in the performances of the Services or supply of the Goods by reason of any acts of the Purchaser or omissions of something required to be done by the Purchaser, the Purchaser may at its sole discretion agree to extend the Delivery Date but such extension shall be the Supplier's sole remedy in respect of any delay caused by the Purchaser and



nothing done or failed to be done by the Purchaser shall cause time to be set at large.

**21.3** The Purchaser reserves the right to return for credit (at no penalty to the Purchaser) any Goods received after the Delivery Date. Delivery costs for such returned items will constitute a debt due and payable by the Supplier to the Purchaser.

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## **22. GENERAL**

### **22.1 Governing Law**

This agreement shall be deemed to have been made in the State of the Delivery Point, and shall be subject to the laws of that State. The parties shall be subject to the non-exclusive jurisdiction of the State and any courts that may hear appeals from those courts in relation to any proceedings concerning this Agreement.

### **22.2 Severability**

Any provision in these Terms and Conditions which is or becomes invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid and enforceable and is otherwise capable of being severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions of these Terms and Conditions in any other jurisdiction.

### **22.3 Taxes**

Subject to clause 2.6, the Supplier is and remains liable for payment of any Taxes. If any exemptions, reductions, allowances, rebates or other privileges in relation to Taxes may be available to the Supplier or the Purchaser, the Supplier shall use to its best endeavours to enable the Purchaser to benefit from any such savings or refunds (including interest awarded) to the maximum allowable extent.

### **22.4 Notices**

Any notice or document required by this Agreement shall be deemed to have been given and received by:

- (a) if hand delivered to the party, on the date of receipt;

- (b) in the case of facsimile, on production of a confirmation of correct transmission of facsimile but if the facsimile is received after 4.00pm, it is deemed received on the next business day;

- (c) in the case posting within Australia, 3 Business Days after posting, or

- (d) in the case posting outside Australia, 10 Business Days after posting,

and provided where faxed under sub-clause (b) above or posted under sub-clause (c) or (d) above, it is to the correct address in the Purchase Order or the address last communicated in writing, to the person giving the notice. A transmission by e-mail shall not be regarded as a notice under this clause 22.4.

### **22.5 Amendment**

No amendment or variation of this Agreement is valid or binding on the Purchaser unless accepted in writing by the Purchaser.

### **22.6 Waiver**

A party's failure or delay to exercise a power or right is not a waiver of that right. A waiver by the Purchaser is only effective if it is in writing and then only in relation to the particular obligation or breach in respect of which it was given and not in respect of any other breach or of any other provision.

### **22.7 Assignment**

The Supplier may not assign this Agreement in whole or in part without the Purchaser's prior written consent, which may be granted at the Purchaser's sole discretion.

### **22.8 Relationship**

The Supplier provides all Goods and Services under this Agreement as an independent contractor. The Supplier and the Purchaser are not principal and agent, partners, trustee and beneficiary, or employer and employee.

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## **23. DEFINITIONS AND INTERPRETATION**

### **23.1 Definitions**

In these Terms and Conditions unless the context otherwise requires:

**Agreement** means the agreement between the Purchaser and Supplier specified in clause 1.2 of these Terms and Conditions;

**Business Day** means a day that is not a Saturday, Sunday or public holiday in the State of the Delivery Point;

**Claim** means any claim, action, proceeding, demand, cost, damage, loss, fine, judgement, expense, liability or other outgoing howsoever incurred or suffered by, or brought or made or recovered howsoever arising (whether or not presently ascertained, immediate, future or contingent);

**Delivery** means the delivery of the Goods by the Supplier to the Purchaser at the Delivery Point;

**Delivery Date** means the date(s) upon which the Supplier has undertaken to deliver the Goods or Services to the Purchaser at the Delivery Point;

**Delivery Point** means the delivery address set out in the Purchase Order or such other address that may be advised from time to time by the Purchaser;

**Goods** means the goods specified in the Purchase Order;

**GST** has the meaning given within the A New Tax System (Goods and Services Tax) Act 1999;

**Intellectual Property Rights** means letters patent, a pending patent; registered and unregistered, trade marks, copyright, design, trade secrets, confidential information or similar protection whether granted by Australia or any foreign state or the common law;

**Liability Act** means any one or more of the following legislative acts insofar as they are applicable to the Agreement:

- (a) Part 4 of the Civil Liability Act 2002 (NSW);
- (b) Part IVAA of the Wrongs Act 1958 (Vic);
- (c) Part 3 of the Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)

- (d) Part 1F of the Civil Liability Act 2002 (WA);
- (e) Part 9A of the Civil Liability Act 2002 (Tas);
- (f) Proportionate Liability Act 2005 (NT);
- (g) Part 7A of the Civil Law (Wrongs) Act 2002 (ACT);
- (h) Part 2, Division 2, Subdivision GA of the Australian Securities and Investments Commission Act 2001 (Cth);
- (i) Chapter 7, Part 7.10, Division 2A of the Corporations Act 2002 (Cth); or
- (j) Part VIA of the Australian Consumer Law.

**Order Number** means the identifying order number so set out in the Purchase Order;

**Price** means the amount specified in the Purchase Order for the Goods and Services;

**Purchase Order** means the document issued by the Purchaser to the Supplier to order the Goods or Services and includes any specifications, drawings or other documents that may be contained therein or annexed thereto;

**Purchaser** means the Nilsen entity purchasing the Goods and Services and identified as such on the Purchase Order to which the Agreement applies;

**Services** means the services specified in the Purchase Order;

**Specification** means the specification for the Goods or Services (if any) as set out in the Purchase Order or specifications or drawings as provided by the Supplier to the Purchaser;

**State** means the State or Territory in Australia in which Delivery is to be made;

**Supplier** means the company, firm or person identified in the Purchase Order as the supplier of the Goods and Services

**Supplier Personnel** means the Supplier; its subcontractors and the directors, officers, employees and agents of each of them;

**Taxes** means all taxes, fees, levies, duties and charges imposed or assessed in respect of the Goods or Services by all local, state or national government authorities including but not limited to, customs duty, excise tax, stamp duty and goods and services tax (or equivalent) but excludes taxes imposed on the income of the Supplier.

## 23.2 Interpretation

In these Terms and Conditions unless the context otherwise requires:

- (a) the singular shall include the plural and vice versa;
- (b) words importing persons shall include corporations and words importing the masculine gender shall include the feminine gender;
- (c) the headings shall not affect the interpretation of these Terms and Conditions;
- (d) reference to any statute shall mean that statute as amended, modified or replaced from time to time and includes orders, ordinances, regulations and rules and by-laws made in terms of or pursuant to the relevant legislation;
- (e) reference to a party or parties includes a reference to its successors and permitted assigns in accordance with these terms and conditions; and
- (f) "including" means "including (without limitation)".