

# Terms and Conditions of Purchase Order

## 1. General

1.1 Unless the contrary intention appears, the following terms have the specified meanings:

**Actual Completion Date** means the date the Supplier actually completes its Works under the PO, except for minor omissions and minor defects:

- (a) which do not prevent the Works from being reasonably capable of being used for their intended purpose;
- (b) which the Purchaser determines the Supplier has reasonable grounds for not promptly rectifying; and
- (c) rectification of which will not prejudice the convenient use of the Works;
- (d) those tests which are required by the PO to be carried out and passed before the Works reach completion have been carried out and passed; and
- (e) documents and other information required under the PO which, in the opinion of the Purchaser are essential for the use, operation and maintenance of the Works have been supplied.

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

**Claim** means any claim however arising including:

- (a) under, arising out of, or in connection with, this PO, the Project or the Works;
- (b) by statute;
- (c) in tort for negligence or otherwise, including negligent misrepresentation; or
- (d) restitution including restitution based on unjust enrichment.

**Payment Claim Date** means the date specified in item 4 of Annexure A upon which the Supplier must submit its payment claim to the Purchaser, and where no date is specified, the last day of the month.

**Commencement Date** means the date that is stated in the Principal's Schedule for the commencement of the Supplier's Works.

**Completion Date** means the date that is date stated in the Principal's Schedule for the completion of the final activity comprising the Supplier's Works, as adjusted by the Purchaser in accordance with the Terms and Conditions of this PO.

**Contracts Administrator** means any one of the following of the Purchaser's persons:

- (a) Contracts Administrator;
- (b) Project Manager; or
- (c) Construction Manager.

**Contract Sum** means the price paid for the Works, excluding GST, as adjusted in accordance with the Terms and Conditions of this PO.

**Confidential Information** means information of a non-public or secret nature including commercial, financial and technical information and project, customer, supplier, product and production related information.

**Contract Variation** means the notice issued by the Purchaser to the Supplier in accordance with clause 11.3, confirming the Variation to the Works.

**Contract Documents** means the Purchase Order, these Terms and Conditions of Purchase Order, Schedule, Annexure A to the Terms and Conditions of PO (and any documents referred to therein) and Specifications and Drawings, provided by the Purchaser in relation to the Works.

**Goods and Services Tax (GST)** has the meaning given to it by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Instruction** means any direction, approval, decision, instruction, notice or requirement issued from the Purchaser to the Supplier.

**Insurance Policy** means an agreement that is current and enforceable to provide indemnification and insurance for particular classes of risk.

**Law** means the law of Western Australia, which is the governing law of all matters arising out of or in connection with this PO and the Project.

**Liquidated Damages** has the meaning given to it in Clause 3.13.

**Liability** means any debt, obligation, cost (including legal costs, deductibles or increased premiums), expense, loss, damage, compensation, charge or liability of any kind, actual, prospective or contingent and whether or not currently ascertainable and whether arising under or for breach of contract, in tort, warranty or indemnity (including negligence), in restitution, pursuant to statute or otherwise at law.

**Loss** means any cost, expense, damage or liability (including any fine or penalty) whether direct or indirect or consequential, present or future, fixed or unascertained, actual or contingent and whether arising under contract (including any breach of Contract), in equity (including breach of an equitable duty, breach of confidentiality or breach of fiduciary duty), under statute (including breach of statutory duty to the maximum extent possible), in tort (including for negligence or negligent misstatement) or otherwise (including in restitution).

**Personnel** means:

- (a) in relation to the Supplier, any of its past or present employees, sub-contractors (including sub-contractors' personnel), agents and representatives involved either directly or indirectly in the performance of the Works; and
- (b) in relation to the Purchaser, any of its past or present officers, employees or agents.

**Principal Agreement** means the head contract or main agreement between the Purchaser and its principal pursuant to which the Purchaser has been engaged in relation to the Project.

**Project** means the project and Works referred to in item 3 of Annexure A to the Terms and Conditions of PO.

**Purchaser** refers to FIRM Construction Pty Ltd.

**Purchase Order (PO)** means this agreement to purchase Works from the Supplier and/or for the Supplier to engage in the Works specified including all Contract Documents.

**Schedule** means any one or more of the following:

- (a) Supply delivery and installation schedule;
- (b) Manufacturing schedule. The manufacturing schedule is to include all major milestones, the critical path, and the delivery/installation date; or
- (c) Construction programmes.

**Site** means, insofar as the Works are for the provision of services, where the Works are to be performed.

**Supplier** refers to the manufacturer, supplier, or group supplying the Works and includes sub-contractors providing Works (to whom this PO is issued).

**Variation** means any change to the scope of the original Works.

**Variation Quotation** means the document or notice given by the Supplier to the Purchaser as provided in clause 11.2.

**Works** means the work which the Supplier is required to undertake in relation to this PO, and includes as appropriate, the supply or manufacture of goods, and their installation and/or the provision of services, as described in the PO, including Variations.

- 1.2 This PO does not establish any right of exclusivity between the parties or any agreement to or requirement for a minimum order.
- 1.3 The Supplier is an independent contractor and is not entitled to bind the Purchaser or otherwise act as its representative.
- 1.4 The Supplier warrants that it has carefully examined all Contract Documents provided by the Purchaser in relation to this PO and the Project and satisfied itself regarding all conditions, risks, contingencies, safety and management plans, OHS requirements and other circumstances which might affect the supply or provision of the Works.
- 1.5 If the Supplier discovers or becomes aware of any potential ambiguity in the PO, it shall immediately notify the Purchaser in writing within 10 Business Days. The Purchaser may direct the Supplier as to the resolution of the ambiguity, and the Supplier shall not be entitled to make any Claim for additional payment or extension of time (as defined in Clause 3) in relation to any direction issued by the Purchaser under this Clause.
- 1.6 This PO becomes the overriding contractual document between the Supplier and Purchaser and represents the entire agreement between the parties. No prior representations or statements by any employee or agent not expressly stated in the PO shall be binding upon the Purchaser. Any changes to the Terms and Conditions of this PO is not binding on either party unless the parties expressly and specifically agree in writing to the changes. Only a Contracts Administrator has the power to bind the Purchaser to a change in the Terms and Conditions with the Supplier.

- 1.7 Unless otherwise stated in the PO, prices shall be fixed and not subject to any adjustment, including but not limited to fluctuations in the cost of labour, materials, packing, testing, plant, transport or exchange rates.
- 1.8 It is the responsibility of the Supplier to pay all GST. All pricing is to be in Australian dollars. All prices are to be shown as "GST exclusive".
- 1.9 The Supplier must undertake all Works in accordance with the terms of this PO, the Contract Documents and Purchaser's HSE Management and Operating Standards for the Project. A copy of the Project Safety Management Plan can be obtained from a Contracts Administrator.
- 1.10 Prior to commencement, the Supplier is to submit all relevant documentation proving appropriate levels and types of insurance coverage for the Works the subject of the PO with a reputable insurer to the Purchaser. The insurance policies required, unless otherwise stated in the Contract Documents, or confirmed in writing by the Purchaser, should include but are not limited to:
- (a) Construction Liability Insurance;
  - (b) Workers Compensation and Employer's Liability Insurance;
  - (c) Constructional Plant Insurance;
  - (d) Goods in Transit Insurance;
  - (e) Motor Vehicle and Automotive Third Party Liability Insurance, providing for full replacement value;
  - (f) Public Product Liability Insurance; and
  - (g) Professional Indemnity Insurance.
- 1.11 The Purchaser shall perform all purchasing and procurement procedures in accordance with FC-HSE-COR-PRO-5.3 Procurement, Purchasing & Non-Conforming Products.
- 1.12 The Supplier will be deemed to have accepted the PO on the earlier date of the date they sign and return the PO to Firm, or the date that the Supplier commences to perform any of the Works under the PO, and will remain on foot, unless terminated earlier in accordance with Clause 21, or until the Supplier fulfils all of its obligations under this PO. The Supplier must perform the Works pursuant to the Terms and Conditions of this PO and in consideration of the payment of the Contract Sum by the Purchaser.

## **2. Performances and Quality**

- 2.1 The Supplier shall comply with the standards of quality specified in the PO/specification. Where the Supplier has an option between two items of differing quality that meet the PO/specifications and one is a higher quality item, the Supplier must supply the better quality item and if the item is a higher price option, it must allow for it in its pricing. All Works shall be suitable for the purpose for which they are required. The Supplier shall use new and undamaged materials, unless otherwise specified in the PO. Workmanship shall be of the highest quality and standard. Equipment shall be in safe working condition. The Work shall be carried out with due care, diligence and skill, be in accordance with good engineering practice, comply with all applicable Australian Standards and/or other reference codes, any standards in the Principal Agreement, and the requirements of the relevant statutory authorities and the Law.

- 2.2 The Supplier represents and warrants to the Purchaser it has the necessary skills, approvals, licences, resources and experience to supply the Works in accordance with the requirements of the PO/specification. The Supplier will be required to complete the Purchaser's Subcontractor Evaluation form FC-HSE-FRM-5.1.2 prior to the commencement of Works.
- 2.3 It is a condition precedent to payment that the Supplier must provide all Schedules requested by the Purchaser and evidence that all approvals and licences required for the performance of the Works have been obtained, or are held.
- 2.4 Goods provided under this PO must be tested by the Supplier at its cost in accordance with the requirements of the specification unless otherwise set out elsewhere in the PO. Any test results shall be promptly supplied to the Purchaser.
- 2.5 Where the Supplier is providing equipment, components, plant or machinery which will foreseeably require maintenance or replacement parts, the Supplier is to provide free of charge to the Purchaser before the Actual Completion Date three (3) hard copies and one (1) electronic copy of all relevant shop drawings, lists of spare parts, operation manuals, lists of relevant software, instructions and other engineering data and an equipment warranty list showing warranty expiry dates.

### **3. Time for Performance**

- 3.1 The Supplier is to commence the Works on the Commencement Date and perform all Works required under this PO, including any Variations approved under Clause 11, by the Completion Date.
- 3.2 The Supplier, unless otherwise notified by the Purchaser in writing, shall within 10 Business Days of the PO being issued, provide the Purchaser with a Supplier's schedule.
- 3.3 The Supplier shall submit a revised Supplier's schedule if requested by the Purchaser. The Purchaser may request that any revised Supplier's schedule contain a microschedule with a detailed breakdown of the tasks.
- 3.4 The Purchaser reserves its rights to revise and update the Schedule at any time, including when the Supplier defaults in its obligations under this clause 3.
- 3.5 The exercise of the right in clause 3.4 does not provide the Supplier with the right to an adjustment to the Completion Date or Claim, and will not be construed as written approval for an adjustment to the Completion Date or Claim in accordance with clause 3.11.
- 3.6 The Supplier will be liable to the Purchaser for any unliquidated damages the Purchaser has incurred as a result of the Supplier's breach of this PO, including the Supplier's delay to the Works such that the Works are not delivered by the Completion Date, which damages may be set off against the Contract Sum.
- 3.7 The Supplier shall, within 5 Business Days of becoming aware of the occurrence or likelihood of any event which may require an adjustment of the Completion Date, notify the Purchaser in writing of the occurrence or likelihood of the event (Delay Notice). The Delay Notice must, as a minimum requirement, specify:
  - (a) The nature of the delay;
  - (b) The cause of the delay;
  - (c) The activities impacted or likely to be impacted by the delay;

- (d) The expected length of the delay, including the basis of that calculation and the impact on the critical path;
- (e) The expected cost of the delay; and
- (f) Steps taken to mitigate the delay.

The Delay Notice shall ONLY be given to a Contracts Administrator.

- 3.8 Within 10 Business Days of the conclusion of the delay, and if the cause was a Qualifying Delay, the Supplier must submit a Claim for an adjustment to the Completion Date. It is a condition precedent to a Claim for an adjustment to the Completion Date that a Delay Notice which is compliant with Clause 3.7 has been submitted by the Supplier. A Claim for an adjustment to the Completion Date must, as a minimum requirement, specify:
- (a) The nature of the delay;
  - (b) The cause of the delay;
  - (c) The activities impacted by the delay;
  - (d) The period of time claimed, including the basis of that calculation and the impact on the critical path;
  - (e) The claimed cost of the delay; and
  - (f) Steps taken to mitigate the delay.
- 3.9 For the purpose of this clause a Qualifying Delay means an act or omission of the Purchaser or their employees, consultants or other contractors.
- 3.10 If the Supplier does not strictly comply with the requirements in clauses 3.7 and 3.8, its Claim for an adjustment to the Completion Date will be barred and the Purchaser shall have no liability in respect of such a Claim or delay.
- 3.11 On the condition that the Supplier has complied with clause 3.7 and 3.8, the Purchaser shall assess and respond to the Claim for an adjustment to the Completion Date within 10 Business Days of the Claim being received, providing it has all the relevant information to make such an assessment. The Supplier must provide the Purchaser with all additional information it requires in order to be in a position to make an assessment. Works to the original Project scope shall continue whilst the Claim for an adjustment to the Completion Date is being assessed and a formalised written response has been issued by the Purchaser to the Supplier. If appropriate, the Purchaser will grant an adjustment to the Completion Date.
- 3.12 If the event or cause that gives rise to the Claim for an adjustment to the Completion Date lasts longer than 5 Business Days, then the Supplier must provide updated information and schedules to the Purchaser to keep it informed of the continuing impact of the delay every 10 Business Days until the delay ceases. The need for any additional adjustment to the Completion Date for each additional period of delay will be assessed by the Purchaser within 10 Business Days of the updated information being provided in accordance with this clause.
- 3.13 This clause 3.13 applies where stated in item 5 in Annexure A of the Purchase Order Terms and Conditions. In the event of delay such that Works are not delivered by the Completion Date, the Supplier shall be liable to pay the Purchaser Liquidated Damages at the rate stated in item 5 of Annexure A up to the cap stated in Item 6 of Annexure A

for each and every day of delay beyond the Completion Date up to and including the Actual Completion Date.

- 3.14 The Supplier acknowledges that the amount of Liquidated damages payable per day is a genuine pre-estimate of loss faced by the Purchaser as a result of a delay in the delivery or provision of the Works.
- 3.15 Clause 3.13, where applicable, does not prejudice the right of the Purchaser to bring an action for general damages for breach of contract or for delay, though any amount of Liquidated Damages paid by the Supplier will be set-off against any judgment in favour of the Purchaser.

#### **4. Warranties and Certification**

4.1 The Supplier warrants that all Works provided shall (as applicable):

- (a) Be carried out in accordance with the:
  - (i) Contract Documents and
  - (ii) All Specifications and Drawings issued by the Purchaser in relation to the Works (and all revisions thereto).
- (b) Be free from liens, charges, encumbrances, mortgages or other caveats;
- (c) Be free from defects in the design, materials and workmanship and be of merchantable quality;
- (d) Conform to the conditions and specifications of the PO;
- (e) Conform to all applicable laws and regulations to which the Works are subject to;
- (f) Be new and made to the specified quality and in accordance with all specifications; and
- (g) Be complete in volume and/or quantity.

These warranties are in addition to any statutory warranties applicable to the Works.

- 4.2 The Supplier's liability for defects commences on Actual Completion Date, and ends on the date that is 12 months after the date of practical completion under the Principal Agreement (Defects Liability Period).
- 4.3 During the Defects Liability Period, in the event of any failure or defect in the Works the Purchaser shall give written notice to the Supplier setting out the nature of the failure or defect and directing the Supplier to undertake the necessary rectification works and the time limit for doing so. The Supplier shall, without delay and within the given time frame of the Defects Liability Period at no cost to the Purchaser, correct any defect or failure in the Works as notified, by way of repair, replacement, modification or any other means acceptable to the Purchaser. The Supplier warrants that any replacement parts comply with the warranties in clause 4.1 for the remaining duration of the Defects Liability Period.
- 4.4 All rectification works are to be completed by the Supplier at the Supplier's cost and are not grounds for Variation, dayworks or delay.

- 4.5 If the Supplier fails to correct any defects, of which it has been notified by the Purchaser, within the time specified in the notice (which shall not be unreasonable), the Purchaser shall have the right to rectify the Works itself or have the rectification undertaken by a third party. All costs incurred by the Purchaser under this clause shall be a debt due and payable by the Supplier and may be deducted from any monies otherwise owing to the Supplier. The Defects Liability Period in respect of any Works rectified by the Purchaser, or a third party engaged by the Purchaser, that were repairable under the Supplier's warranty may be subject to a further Defects Liability Period of 12 months, if notified as being required by the Purchaser, commencing on the date of completion of any such repair.
- 4.6 It is a precondition to final payment (unless otherwise specified in the PO) that the Supplier must provide any and all related certificates, licences, copyright approvals and manufacture warranty documents to the Purchaser.

## **5. Inspections and testing**

- 5.1 The Purchaser (and its Personnel) retains the right to inspect and either approve/reject the Works if they are not in accordance with the relevant specifications for the Works, including those stated in this PO. Inspection is at the discretion of the Purchaser and may take place at any time, including but not limited to:
- (a) during manufacture;
  - (b) prior to transport;
  - (c) on delivery;
  - (d) during installation; and
  - (e) on completion.
- 5.2 The Supplier must provide access to its premises in order to allow for inspection of the Works. The inspection is to be completed by a suitably qualified person. The Purchaser shall be the sole judge of whether obligations under the PO have been complied with. If the inspector determines that the Works contain defects or otherwise require rectification, the rectification works shall be undertaken in accordance with clauses 4.4 and 4.5. Inspection shall neither relieve the Supplier of its obligations under the PO or otherwise, nor waive the Purchaser's rights or remedies provided under this PO or otherwise at Law.
- 5.3 Subject to Clause 5.4, if the Works have already been constructed or assembled and the Purchaser or their representatives must dismantle the Works in order to inspect them, then the costs of inspection will be as follows:
- (a) in the case that the Works are found to be in accordance with the PO and specifications, the costs of inspection are borne by the Purchaser; or
  - (b) in the case that the Works are not found to be in accordance with the PO and specifications, the costs of inspection and any further costs of making the Works compliant, are to be borne by the Supplier.
- 5.4 If the Purchaser gives the Supplier reasonable notice that it wishes to inspect unfinished Works and the Supplier continues to assemble or construct the Works without giving the Purchaser an opportunity to inspect the Works in its unfinished state, such that the Works must be dismantled, the Supplier will bear the cost of inspection, dismantling and making good the Works.

- 5.5 The Purchaser will issue a copy of the Inspection Test Plans (ITPs) to the Supplier. ITPs will be completed at the time of inspection and submitted to a Contracts Administrator. All information provided by the Supplier on the ITPs will be completed and certified as being accurate, true and correct by suitably qualified Supplier Personnel. ITPs will be completed to the satisfaction of the Purchaser and/or its Personnel.

## **6. Invoicing**

- 6.1 The Supplier will provide to the Purchaser a complete and accurate payment claim on the Payment Claim Date for all Works completed prior to the Payment Claim Date. The payment claim must include, as a minimum:
- (a) Full description of Works/item supplied in sufficient detail to assess the payment claim, including all necessary supporting documentation;
  - (b) The Supplier's ABN, full registered trading name and full contact details;
  - (c) PO number;
  - (d) Correct Date;
  - (e) Sub-total of Works Ex GST;
  - (f) Reflection of GST to be paid;
  - (g) Total including GST; and
  - (h) Supplier Banking Details.

The Supplier may only claim payment for Works that have been completed and are fixed and in position on site at the time of the payment claim submission. The Supplier may not make any claim for payment for Works which are off-site, including shop drawings.

- 6.2 The Purchaser will provide a written assessment of the payment claim to the Supplier within 14 days from the receipt of the payment claim. Where the payment claim, or any part thereof, is disputed or rejected by the Purchaser, the Purchaser will provide written notice setting out the basis of its rejection or dispute to the Supplier including the part/sum rejected or disputed and the reason for such rejection or dispute. Where the Purchaser does not provide a response to the payment claim, it will be deemed to be disputed.
- 6.3 Within 5 days of receiving the Purchaser's assessment, or the day such assessment was due, the Supplier must issue an invoice to the Purchaser for the approved portion of the assessed payment claim.
- 6.4 If the Supplier fails to perform or observe any obligation, term, condition or stipulation contained in the PO or specification, the Purchaser may, without limiting any other right it may have under the PO or at Law and without giving prior notice to the Supplier, withhold payment of all or part of any amount payable to the Supplier under the PO until the matter has been remedied or until such earlier time as the Purchaser may determine in its sole discretion.
- 6.5 Unless otherwise stated in item 7 in Annexure A, the Supplier's invoice will be paid, less any disputed sum, within 40 days from the end of the month in which the payment claim was received. Interest is not payable by the Purchaser in respect of any late payment.

6.6 Payment by the Purchaser to the Supplier shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only.

## 7. Security

7.1 Security, retention moneys and performance undertakings are for the purpose of ensuring the due and proper performance of the PO.

7.2 This clause 7 applies if stated in item 8 in Annexure A of the Purchase Order Terms and Conditions. The Supplier shall provide security in the amount stated in item 9 of Annexure A and in the form stated in item 8 in Annexure A to the Terms and Conditions of Purchase Order and in accordance with this clause.

7.3 Where applicable, the security shall be in the form of cash, bonds or an approved unconditional and irrevocable bank guarantee or security bond in the amount set out in clause 7.2, undertaking given by an approved financial institution or insurance company, or other form approved by the Purchaser. Security provided by a financial institution or insurance company shall be:

- (a) in the approved form and given by a financial institution or insurance company that:
  - (i) has an office open for business in Australia;
  - (ii) is registered in Australia;
  - (iii) is regulated by the Australian Prudential Regulatory Authority (APRA); and
  - (iv) meets a credit rating not less than:
    - (A) A (where the Contract Sum is less than \$800,000);
    - (B) A + (where the Contract Sum is equal to or greater than \$800,000); or
- (b) (b) in such other form or given by such other institution, as the Purchaser reasonably approves in its discretion.

7.4 The Purchaser shall have the discretion to approve or disapprove the form of the security and the financial institution or insurance company giving it or other form of security offered.

7.5 If the security is not transferable by delivery, it shall be accompanied by an executed transfer or such other documentation as is necessary to effect a transfer of the security. The costs (including all stamp duty or other taxes) of and incidental to the procuring and transfer of the security, shall be borne by the Supplier.

7.6 Where the value of security held by the Purchaser under clause 7.3, for any reason, falls below the amount required under clause 7.2, the Supplier shall within 10 days of a written request by the Purchaser provide to the Purchaser such additional security (in the form required by clause 7.3) as is necessary to ensure the Purchaser holds security in the amount required under clause 7.2.

7.7 Security shall be lodged within 28 days of the acknowledgement of receipt of the PO or commencement of the Works by the Supplier, whichever occurs first.

## 8. Retention Moneys

8.1 This clause 8 applies where selected in item 8 in Annexure A of the Purchase Order Terms and Conditions. Where the Supplier provides security in the form of retention (as referred to in item 8 of Annexure A to the Terms and Conditions of the PO), The Purchaser will retain the amount stated in item 10 of Annexure A of moneys otherwise due to the Supplier, until the item stated in item 9 of Annexure A of the Terms and Conditions of the PO is reached.

8.2 The Purchaser may make a demand on the retention moneys and/or other security under this PO:

- (a) whenever the Purchaser reasonably believes it may be entitled under the PO or otherwise to:
  - (i) payment of monies by the Supplier; or
  - (ii) reimbursement by the Supplier of any money paid by the Purchaser to others;
- (b) for any loss or liability incurred by the Purchaser for which, in the reasonable opinion of the Purchaser, the Supplier is liable to the Purchaser, whether or not such amount of Loss or Liability is disputed by the Supplier;
- (c) for any loss or liability which the Purchaser has incurred, or reasonably considers it is likely to incur in the future, as a consequence of any act or omission of the Supplier, whether or not such amount of Loss or Liability is disputed by the Supplier;
- (d) to secure the proper performance by the Supplier of its obligations under the PO;
- (e) to satisfy the Purchaser's entitlements under the PO,

and for such purpose the Purchaser may convert into money any security which does not consist of money.

Unless permitted at law, Principal will not be liable for any loss or liability incurred by the Contractor caused by conversion of the security.

The Contractor must not take any steps to hinder, obstruct, injunct or otherwise restrain:

- (i) any issuer of any security from paying the Principal pursuant to the security;
- (ii) the Principal from taking any steps for the purpose of obtaining payment pursuant to the security; or
- (iii) the Principal from applying the proceeds of any security.

The Contractor's sole remedy arising from conversion of security, which is later found to be wrongful conversion, is the repayment of such security with interest. The Contractor shall have no entitlement to any other forms of damage or compensation.

8.3 The Supplier shall be at liberty at any time to provide in lieu of retention moneys, security in any of the forms permitted in Clause 7.3. To the extent that such security is provided, the Purchaser shall not deduct retention moneys and shall forthwith release retention moneys.

- 8.4 Upon the parties signing a deed of release following the Completion Date, subject to the Purchaser's right to have recourse to the security, the Purchaser's entitlement to security and retention moneys shall be reduced to 50 per cent thereof.
- 8.5 On a date that is 12 months after the date of practical completion under the Principal Agreement, provided that the Works are completed to the satisfaction of the Purchaser, the Purchaser will, subject to the Purchaser's right to have recourse to the security and clause 8.6, release the remaining 50 percent of the security and/or retention moneys to the Supplier.
- 8.6 Notwithstanding any other Clause of this PO, the Purchaser has a right to retain from the security a reasonable amount sufficient to cover any unresolved claim by the Purchaser against the Supplier under or in connection with the PO.
- 8.7 Any interest earned on the security and retention moneys shall be retained by the Purchaser. The Purchaser shall not hold the retention moneys, security or the proceeds of the security on trust.

## **9. Deed of Guarantee and Indemnity, Undertaking and Substitution**

9.1 Where:

- (a) the Supplier is a corporation that is related to or is a subsidiary of another corporation as defined in the Corporations Law as amended from time to time; and
- (b) the Purchaser has included in the PO or tender documents a form of Deed of Guarantee and Indemnity, Undertaking and Substitution;

the Supplier shall, if requested by the other party in writing within 7 days after the Date of Acceptance of Tender provide lodge with the Principal, within 14 days of the Contract Date after that request having been made, a Deed of Guarantee and Indemnity, Undertaking and Substitution in the form included in the Contract or tender documents duly executed by the Contractor and that other corporation for the performance of the obligations and the discharge of the liabilities of the Contractor under the Contract.

For the purpose of this Clause 9, the terms 'corporation' and 'subsidiary' have the meanings defined in the Corporations Act 2001 (Cth).

## **10. No charge, encumbrance or lien over Site**

The Supplier and the Purchaser covenant and agree that neither the PO, nor any provision hereof, shall constitute a charge, encumbrance or lien of any nature or description whatsoever in respect of the Site as and by way of security for the performance of any obligation whatsoever on the part of the Principal to be observed or performed thereunder.

## **11. Variations**

- 11.1 The Supplier shall not vary the Works under the PO except as directed and approved by the Purchaser in writing. No Variations shall invalidate the PO. A claim for any Variation by the Supplier is not a valid reason to suspend or cease Works, or fail to follow Instructions from the Purchaser.
- 11.2 The Supplier is to immediately notify the Purchaser in writing of any potential Variation to the PO. Within 5 Business Days of notification, the Supplier must provide the Purchaser with a Variation Quotation setting out its estimated cost for the proposed

Variation including the impact on any Schedule and details of why it considers the work to be a Variation. The Supplier is not to continue with the proposed Variation without written confirmation from a Contracts Administrator. The Purchaser is not liable to cover the cost of any subsequent Work required to rectify or correct any Works alleged to be a Variation that were performed by the Supplier without the consent of the Purchaser. If the Supplier does not strictly comply with the requirement in this clause 11.2 its Variation Quotation will be barred and the Purchaser shall have no liability in respect of such a Variation Quotation.

- 11.3 The Supplier is to continue with the Works, and follow any Instruction from the Purchaser whilst the Variation Quotation is being assessed. The Purchaser will assess the Variation Quotation and issue its response or a written Contract Variation or Instruction to the Supplier within a reasonable time, subject to the Purchaser having received all information necessary to enable it to assess the Variation Quotation.

## **12. Dayworks**

- 12.1 Dayworks shall only be permitted when specifically directed in writing by the Purchaser prior to commencement of the affected Works. The Supplier will have no entitlement to, and will be barred from making any claim for, payment on a dayworks basis in the absence of the Purchaser's prior written direction to undertake works on a dayworks basis.
- 12.2 Confirmation of dayworks commencement and the applicable rate must be given in writing by a Contracts Administrator prior to commencing dayworks. Once the Supplier has submitted a written notice of their intent to commence dayworks and detailing the affected portion of the Works, the proposed rate and the duration of the dayworks, the Purchaser will respond in writing either confirming or rejecting the Supplier's Claim to commence dayworks. Dayworks sheets are required to be signed off daily by a Contracts Administrator and provided with the payment claim seeking payment for dayworks. The Supplier will have no entitlement to, and will be barred from making any claim for payment on a dayworks basis in the absence of signed dayworks sheets.
- 12.3 The Purchaser retains the rights to vary and omit the Works or dayworks by issuing a Contract Variation or Instruction to the Supplier at any time for any reason, including to have the Works completed by a third party.

## **13. Access to Site**

- 13.1 The Supplier shall not have exclusive possession of the Site, but only access to the areas allocated by the Purchaser. The Supplier may have to coordinate its Works with and/or around others. Where reasonable, the Purchaser will inform the Supplier in writing of such situations.
- 13.2 The Supplier will be given access to the Site after a comprehensive Site induction by the Purchaser's Site Supervisor (or their appointed HSE Advisor), at the Supplier's cost, and a confirmation of understanding of the Site Conditions has been received by the Purchaser from the Supplier. The Supplier will comply with all Instructions given by the Purchaser's Site Supervisors and HSE Advisors at all times.
- 13.3 Access to Site will be given once all items have been provided to the Purchaser by the Supplier as listed in Clause 14.1.

## **14. Supplier to Provide**

- 14.1 Before commencement of Works and/or access to Site the Supplier is to provide to the Purchaser the Completed form: the Purchaser "Sub Contractor Evaluation Form" FC-

HSE-FRM-5.1.2. The Supplier must also provide the following completed additional documents and requirements referred to therein:

- (a) Safe Work Method Statements (SWMS) for the task;
- (b) Training Matrix extract - All Personnel induction paperwork including tickets, licenses;
- (c) Verifications of Competency (VOC) and certifications;
- (d) Insurance Certificates;
- (e) Material Safety Data Sheets (MSDS);
- (f) Health, Safety and Environment Policies (HSE);
- (g) Job Hazard Analysis (JHA);
- (h) Inspection & Test Plans (ITP); and
- (i) Plant Machinery and Vehicle (PMV).

14.2 The Supplier is to nominate the following positions among its staff, these positions are transferable but are to be occupied at all times:

- (a) Project Manager;
- (b) Supervisor;
- (c) Leading Hand; and
- (d) OH&S Representative.

These positions are to be held by a person capable of being contacted during the normal working hours of the Project and who are appropriately qualified and experienced to perform the role.

14.3 The Supplier is also to specify the number of Personnel nominated for this PO and Project prior to commencement of Works. The Purchaser may object in its sole discretion to the appointment of or continued engagement of any of the Supplier's Personnel on the Project at any time.

## **15. Supplier-Vendor Supplied Data**

15.1 The Supplier is required to provide the following documentation for the Project:

- (a) Shop Drawings – in the relevant format;
- (b) Installation & Operation Manuals for ALL goods supplied;
- (c) Weld & NDT Test certification on all manufactured products;
- (d) Traceability of materials;
- (e) Critical Spares List;
- (f) Repair Manuals;

- (g) Commissioning Requirements; and
- (h) Performance Data & Design Specifications.

It is a precondition to the first interim payment under the PO that the Supplier must provide the requested documentation listed above.

## **16. Working Hours**

- 16.1 The definition of "Site Work Hours" under this PO is 7.00am to 5.00pm Monday - Friday unless otherwise agreed or directed by the Contracts Administrator.

## **17. Industrial Relations**

- 17.1 The Supplier must conduct all industrial relations activities internally, as an independent contractor. The Purchaser will not provide consultation to the Supplier's Personnel in regards to industrial relations matters. The work Site may fall under a site agreement, union agreement or other agreement in relation to wages and conditions. It is understood on the acceptance of Works that all allowances have been made for these conditions and that industrial relations matters do not constitute a valid Variation under the PO.

## **18. Indemnities**

- 18.1 The Supplier acknowledges that if it enters on to the Site, it does so at the Supplier's own risk.
- 18.2 The Supplier will indemnify (and will keep indemnified) the Purchaser from and against all liabilities arising from any one or more of the following:
  - (a) any negligent act or omission (including wilful misconduct) by the Supplier or its Personnel arising out of the performance of the PO;
  - (b) the breach by the Supplier or its Personnel of any of the Supplier's obligations under the PO; or
  - (c) any Claim made against the Purchaser by any of the Supplier's Personnel in respect of relevant workers' legislation concerning income tax, workers' compensation, annual leave, long service leave, superannuation or any applicable award.

## **19. Dispute Resolution**

- 19.1 If the Supplier discovers or becomes aware of any Claim arising out of or in connection with the PO or the Works, it must give notice to Firm within 14 days of becoming aware of the Claim or events giving rise to the Claim.
- 19.2 If the Supplier does not strictly comply with the requirements in clause in 19.1, its Claim will be barred and the Purchaser will have no liability in respect of such a Claim.
- 19.3 Before commencing any court or arbitration proceedings other than for urgent interlocutory relief, the following steps must be taken to attempt to resolve any dispute or Claim that arises in connection with this PO or the project including any dispute or Claim as to the validity, breach or termination of the contract, or as to any Claim in tort, in equity or pursuant to any statute (**dispute**).

- 19.4 Subject to the Supplier complying with 19.1, Notice (**notice of dispute**) must be given in writing by the party claiming that a dispute has arisen to the other party (or parties) to this PO specifying the nature of the dispute and including any amounts claimed.
- 19.5 The parties may nominate representatives who must endeavour to resolve the dispute by written agreement signed by the parties within 10 Business Days of receipt of the notice of dispute.
- 19.6 If the dispute is not resolved or an appropriate alternative dispute resolution process is not agreed within 10 Business Days of receipt of the notice of dispute, then the dispute will be referred to arbitration conducted by an arbitrator who is independent of the parties and appointed by agreement of the parties, or failing agreement within 10 Business Days of receiving any party's notice of dispute, by an arbitrator appointed by the Chair of Resolution Institute, or the Chair's designated representative.
- 19.7 Despite the dispute, the parties must continue to perform this PO to the maximum extent possible.
- 19.8 This clause remains operative after this PO has been performed and despite its termination.

## **20. Waiver**

- 20.1 A failure or delay of the Purchaser to exercise any right, serve any notice to do or show cause for anything does not operate as a waiver of the relevant right. A single or partial exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy. A waiver is not valid or binding on the Purchaser unless made in writing.

## **21. Termination**

- 21.1 The Purchaser may terminate this PO for convenience with immediate effect by providing notice in writing to the Supplier.
- 21.2 If the Supplier fails to perform the Works within the time specified in the PO, delivers Works which are not in conformity with the conditions specified in this PO, fails to make progress so as to endanger the performance of the PO, fails to comply with its confidentiality obligations under this PO, or otherwise fails to perform Works in accordance with the Terms and Conditions of the PO/Contract Documents in any way, the Supplier must within 5 days show cause to the Purchaser by a notice in writing. Upon receiving the notice, or if the Supplier fails to show cause, the Purchaser may terminate the PO by giving notice in writing and the Supplier shall be liable for all costs incurred by the Purchaser in purchasing similar goods elsewhere and/or performing the Works or commissioning similar Works by engagement of a third party recoverable as a debt.
- 21.3 Upon termination of this PO, the Supplier is entitled to payment for the Works completed and fixed and in position on site up to, and including, the termination day, but shall otherwise have no Claim against the Purchaser whatsoever.

## **22. Confidentiality**

- 22.1 Subject to this confidentiality clause, a party must:
- (a) keep confidential the Confidential Information and this PO;

- (b) take all reasonable and necessary precautions to maintain the secrecy and prevent the disclosure of the Confidential Information;
  - (c) use the Confidential Information only for the purposes of this PO; and
  - (d) obtain the written consent of the disclosing party before disclosing Confidential Information or the terms of this agreement to a third party.
- 22.2 Each Party agrees not to disclose, or authorise the disclosure of any terms of this PO to any other person, except to:
- (a) the extent the other Parties consent in writing;
  - (b) the extent it is necessary for the purpose of obtaining legal or financial advice;
  - (c) the extent it is necessary to enforce or to give effect to the provisions and obligations under any term of this PO;
  - (d) the extent it is necessary to comply with legal obligations or;
  - (e) the Party's insurer or reinsurers as may be reasonably necessary.
- 22.3 The Parties agree to forbear from making, causing to be made, publishing, ratifying or endorsing any and all disparaging remarks, derogatory statements or comments made to any other party with respect to either of the Parties.
- 22.4 The Supplier must not, without the Contractor's prior written permission, make any statement concerning this PO or the Project to any media, or in any publication, media release or advertisement.
- 22.5 Failure to comply with this confidentiality clause will amount to a breach of this PO, which will entitle the Purchaser to terminate the PO in accordance with clause 21.