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Purchaser: Pilgangoora Operations Pty Ltd

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Supplier: [Insert supplier entity]

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# Supply Contract - No Installation

Contract No.: [insert]

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Date

## Parties

**Purchaser** Pilgangoora Operations Pty Ltd ABN 75 616 560 395 of  
Level 2, 146 Colin Street, West Perth, WA, 6005

**(Purchaser)**

**Supplier** [insert supplier entity name] ACN/ABN [insert] of

[insert address]

**(Supplier)**

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## Background

- A The Supplier has represented to the Purchaser that it has the skill, personnel, material and equipment to perform the Work under the Contract in accordance with this Contract.
- B In reliance on the Supplier's representations, the Purchaser has agreed to appoint the Supplier to perform the Work under the Contract on the terms set out in this Contract.
- 

## General Conditions

### 1 Definitions

In this Contract these terms have the following meanings:

**Acceptable**

When:

- (a) all of the Equipment has been Delivered to the Point of Delivery;
- (b) all of the Equipment substantially complies with the Contract except for minor Defects which do not prevent the Equipment from being reasonably capable of being used for the purposes for which it is intended;
- (c) all tests:
  - (i) required under this Contract to be undertaken prior to or as part of Acceptance, or otherwise required so that the Equipment is ready for use, and safe operation for the purpose for which it is intended; or
  - (ii) where no such tests are specified, tests which a competent supplier experienced in supply of equipment similar to the Equipment would have

performed,

have been carried out and passed and the Supplier has provided evidence, to the reasonable satisfaction of the Purchaser, that those tests have been carried out and passed;

- (d) all manuals, documents, training and other information required to be provided by the Supplier under the Contract or at law or which are required for the operation and maintenance of the Equipment, have been supplied to the Purchaser; and
- (e) all conditions set out in **clause 21** have been satisfied.

**Acceptance**

That stage in the carrying out and completion of the Work under the Contract when the Equipment is Acceptable, as evidenced by a Certificate of Acceptance issued by the Purchaser's Representative under **clause 21**.

**Acceptance Period**

The period which expires 20 Business Days after the last to occur of:

- (a) Delivery of all of the Equipment to the Point of Delivery or where the Point of Delivery is not the Site, the Equipment having been received at Site;
- (b) the completion of any tests including performance tests which are required by the Contract or by the Purchaser's Representative to be carried out prior to Acceptance (whether by the Purchaser, or by or under the supervision of the Supplier); or
- (c) if, in the opinion of the Purchaser's Representative, it is not possible to determine whether the Equipment is or is not Acceptable, the date that the Purchaser's Representative is of the opinion it becomes possible to make the determination (which the Supplier acknowledges may be after the Equipment has been Installed and Commissioned).

**Authority**

A governmental, semi-governmental, local or other authority that exercises jurisdiction over the Work under the Contract or the Site.

**Business Day**

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

**Certificate of Acceptance**

A certificate issued by the Purchaser's Representative under **clause 21.1(a)**.

**Commencement Date**

The date specified in **Item 1 schedule 1**.

**Compensable Cause**

Means any breach of the Contract by the Purchaser, its consultants, agents or other contractors (not being the Supplier or any person engaged or employed by the Supplier).

**Confidential Information**

Means any ideas, concepts, drawings, specifications, data or information which:

- (a) relates to the operation or business of the Purchaser; and
- (b) have been produced by the Purchaser, the Supplier, any



subcontractor or any third party; and

- (c) have only been obtained or produced by the Supplier as an incident to the performance of the Work under the Contract.

**Consequential Loss**

Any:

- (a) loss of profit;
- (b) loss of revenue;
- (c) loss of use;
- (d) loss of production; or
- (e) loss of opportunity.

**Contract**

This document, including the "General Conditions" and all Schedules, together with the documents listed in **Item 2 of schedule 1** which, in the event of any inconsistencies, must be construed in the order of priority specified in **Item 2 of schedule 1**.

**Contract Price**

- (a) Where there is a lump sum in **Item 3 of schedule 1**, that lump sum; or
  - (b) where there are rates in **schedule 6**, the sum ascertained by multiplying those rates by the quantities properly supplied in accordance with this Contract; or
  - (c) where there are both rates in **schedule 6** and lump sums in **Item 3 of schedule 1**, the aggregate of the sums referred to in paragraphs (a) and (b),
- as adjusted under the Contract.

**Deed of Guarantee and Indemnity**

The deed in **schedule 8**.

**Defect**

Means any defect, fault or omission in the Equipment or any aspect which is not in accordance with this Contract.

**Deliver**

Means in respect of the Equipment that state when:

- (a) the Equipment has been manufactured or fabricated, delivered to (and where the Supplier is the party nominated in **schedule 1** as responsible for loading or unloading the Equipment, the Equipment has been loaded or unloaded at) the Point of Delivery;
- (b) all testing required in respect of the Equipment:
  - (i) prior to or as part of Delivery under this Contract; or
  - (ii) where no such tests are specified, tests which a competent supplier experienced in supply of equipment similar to the Equipment would have performed including factory acceptance tests, have been carried out and passed and the Supplier has provided evidence, to the reasonable satisfaction of the Purchaser, that those tests have been carried out and passed;
- (c) the Supplier has done everything which this Contract

requires it to do as a condition precedent to Deliver the Equipment (including any assembly).

<b>Dispute</b>	The meaning given to it in <b>clause 31.1</b> .
<b>Documentation</b>	All documentation whether in hard form, digital form or in any other media which the Supplier is required to produce or provide to the Purchaser pursuant to this Contract including plans, drawings, specifications, calculations, models, information, recommendations, reports, records and designs.
<b>Drawings</b>	The drawings set out in <b>schedule 3</b> and any further drawings issued by the Purchaser to the Supplier.
<b>Entitlement</b>	An entitlement of the Supplier to: <ul style="list-style-type: none"><li>(a) an extension of time;</li><li>(b) a declaration to the effect that time is at large;</li><li>(c) any adjustment to the Contract Price or valuation under <b>clause 16</b>;</li><li>(d) recover any Loss of any kind arising:<ul style="list-style-type: none"><li>(i) under the Contract; or</li><li>(ii) out of or in connection with the supply of the Equipment.</li></ul></li></ul>
<b>Environmental Legislation</b>	Means all applicable environmental laws, regulations, guidelines and codes of practice including, without limitation, the <i>Mining Act 1978 (WA)</i> , <i>Environmental Protection and Biodiversity Conservation Act 1999 (Cth)</i> , <i>Environmental Protection Act 1986 (WA)</i> and <i>Environmental Protection (Clearing of Native Vegetation) Regulations 2004 (WA)</i> .
<b>Equipment</b>	The equipment or other goods to be supplied under this Contract, described in <b>Item 4 of schedule 1</b> and more particularly in the Drawings and Specification, including provision of all manuals, spare parts and operating instructions needed by the Purchaser for the proper use of the equipment and any other things which can reasonably be inferred from the description of the equipment in the Contract.
<b>Existing Operations</b>	Means all improvements on or about the Site and operations of the Purchaser, or any related entity of the Purchaser, carried out on or about the Site (whether before or after the date of the Contract).
<b>Final Payment Schedule</b>	The payment schedule issued under <b>clause 23.2</b> .
<b>Hold Point</b>	The hold points specified in <b>schedule 9</b> or elsewhere in this Contract.
<b>Information Documents</b>	<ul style="list-style-type: none"><li>(a) any document specification, drawing, calculation, information, data, report or sample (whatever its form) marked or described as being 'site information' or marked or described in a similar fashion and made available or provided to the Supplier by or on behalf of the Purchaser prior to the date of the Contract;</li><li>(b) any document, specification, drawing, calculation,</li></ul>

information, data, report or sample (whatever its form) made available or provided to the Supplier by or on behalf of the Purchaser, whether prior to or after the date of the Contract, regarding site conditions; and

- (c) any other document or information issued or made available:
  - (i) on, before or after the date of submission of the tender; or
  - (ii) on, before or after the date of execution of this Contract (other than any information, data, or document which the Purchaser is obliged by the terms of the Contract to provide to the Supplier and the Supplier is expressly obliged by the terms of the Contract to rely on),

to the Supplier in respect of Work under the Contract which is marked, called, or otherwise described as, an “information document” or as being “for tendering purposes” or “for tenderers’ information only” or similar phrase.

**Insolvency  
Event**

Any of the following:

- (a) a person is or states that the person is unable to pay from the person’s own money all the person’s debts as and when they become due and payable;
- (b) a person is taken or must be presumed to be insolvent or unable to pay its debts under any applicable legislation;
- (c) an application or order is made for the winding up or dissolution, or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution, of a corporation;
- (d) an administrator, provisional liquidator, liquidator or person having a similar or analogous function under the laws of Western Australia is appointed in respect of a corporation or any action is taken to appoint any such person and the action is not stayed, withdrawn or dismissed within 5 Business Days;
- (e) a receiver, or receiver and manager, is appointed in respect of any property of a corporation;
- (f) a corporation is deregistered under the *Corporations Act 2001* (Cth) or notice of its proposed deregistration is given to the corporation;
- (g) a distress, attachment or execution is levied or becomes enforceable against any property of a person;
- (h) a person enters into or takes any action to enter into an arrangement (including a scheme of arrangement or deed of company arrangement), composition or compromise with, or assignment for the benefit of, all or any class of the person’s creditors or members or a moratorium involving any of them;
- (i) a petition for the making of a sequestration order against

	<p>the estate of a person is presented and the petition is not stayed, withdrawn or dismissed within 5 Business Days or a person presents a petition against himself or herself;</p> <p>(j) a person presents a declaration of intention under section 54A of the <i>Bankruptcy Act 1966</i> (Cth); or</p> <p>(k) anything analogous to or of a similar effect to anything described above under the law of Western Australia occurs in respect of a person.</p>
<b>Installed and Commissioned</b>	<p>Means, where:</p> <p>(a) the purpose of the relevant Equipment is to incorporate it into anything such as a piece of plant, building or structure, the Equipment has been so incorporated and all pre-commissioning and commissioning tests and any trial operation has been carried out to ensure that the incorporated Equipment is ready for operation; or</p> <p>(b) the Equipment is not for the purpose set out in (a) above, the Equipment has been fully assembled and all commissioning and other tests have been successfully completed so the Equipment is ready for use by the Purchaser.</p>
<b>Intellectual Property Right</b>	Any patent, design, trade mark or name, copyright, circuit layout rights or other protected right.
<b>Legal Opinion</b>	<p>A legal opinion:</p> <p>(a) from legal advisers to the person named in <b>Item 5 of schedule 1</b> authorised to practice in the place of incorporation of that person, stating that the Deed of Guarantee and Indemnity is binding and enforceable against that person;</p> <p>(b) in favour of the Purchaser; and</p> <p>which is in a form reasonably satisfactory to the Purchaser.</p>
<b>Lenders</b>	means collectively, all of the entities (if any), including multilaterals and export credit agencies if applicable, providing financing under financing agreements or otherwise and any trustee or agent on those entities' behalf.
<b>Lenders' Representative</b>	means an engineering firm or independent technical person of recognised expertise appointed by the Lenders.
<b>Longstop Date</b>	The longstop date set out in <b>Item 6 of schedule 1</b> .
<b>Loss</b>	Any loss (including Consequential Loss), demand, claim, action, liability, damage, cost, charge, expense, outgoing, payment, diminution in value or deficiency of any kind or character.
<b>Minimum Performance Criteria</b>	The minimum performance criteria (if any) set out in the Performance Criteria.
<b>Performance Criteria</b>	The performance criteria for the Equipment which are set out in <b>schedule 2</b> .
<b>Performance Liquidated</b>	The liquidated damages in the amounts specified in <b>Item 7 of schedule 1</b> for a failure to achieve the Performance Criteria

<b>Damages</b>	payable by the Supplier pursuant to <b>schedule 2</b> .
<b>Point of Delivery</b>	The point of delivery set out in <b>Item 8</b> of <b>schedule 1</b> .
<b>Policies</b>	Any policies or procedures of the Purchaser: <ul style="list-style-type: none"> <li>(a) available on the Purchaser's website;</li> <li>(b) listed or set out in <b>schedule 10</b>; or</li> <li>(c) as notified by the Purchaser to the Supplier from time to time,</li> </ul> as updated from time to time.
<b>PPS Act</b>	The <i>Personal Property Securities Act 2009</i> (Cth).
<b>Program</b>	The program approved by the Purchaser's Representative from time to time and includes all approved versions.
<b>Project</b>	means the Purchaser's Pilgangoora Lithium-Tantalum Project, 120km south of Port Hedland in the Pilbara Region of Western Australia.
<b>Purchaser's Representative</b>	The person identified in <b>Item 9</b> of <b>schedule 1</b> or a replacement notified in writing by the Purchaser to the Supplier.
<b>Qualifying Cause of Delay</b>	Means: <ul style="list-style-type: none"> <li>(a) any of the following causes whether happening before, on or after the Time for Delivery: <ul style="list-style-type: none"> <li>(i) a Compensable Cause;</li> <li>(ii) a direction for a Variation under <b>clause 11.1</b>; or</li> <li>(iii) a direction to suspend under <b>clause 17.3</b>, provided that the suspension was not necessary because of an act, default or omission of the Supplier;</li> </ul> </li> <li>(b) any of the following causes that happen on or before the Time for Delivery (as applicable): <ul style="list-style-type: none"> <li>(i) a cyclone at the Point of Delivery that has been named by the Bureau of Meteorology and for which the Bureau of Meteorology has issued a "cyclone warning" applicable to the Point of Delivery;</li> <li>(ii) a catastrophic natural event at the Point of Delivery consisting of an earthquake, flood (other than as a consequence of a cyclone) or a fire; or</li> <li>(iii) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,</li> </ul> but in each case, only to the extent that the cause or delay: <ul style="list-style-type: none"> <li>(c) is not due to an act, default or omission of the Supplier, its subcontractors, employees or agents or any employee or agent of any of them;</li> <li>(d) is beyond the reasonable control of the Supplier, its subcontractors, employees or agents; and</li> <li>(e) could not have been prevented by the Supplier, its subcontractors, employees or agents exercising reasonable diligence.</li> </ul> </li> </ul>

<b>Safety Legislation</b>	The <i>Work Health and Safety Act 2020 (WA)</i> and regulations made thereunder applicable to mining operations, such as the <i>Work Health and Safety (Mines) Regulations 2022 (WA)</i> (collectively 'mine safety legislation'), to the extent the mine safety legislation applies to the Site or the Work under the Contract and, to the extent the mine safety legislation does not apply to the Site or the Work under the Contract, the <i>Work Health and Safety Act 2020 (WA)</i> and any regulations made thereunder, such as the <i>Work Health and Safety (General) Regulations 2022 (WA)</i> .
<b>Security Interest</b>	A mortgage, caveat, charge, lien, pledge, security, interest, title retention arrangement, preferential right, trust arrangement, encumbrance, contractual right of set off, any security arrangement in favour of any person or any security arrangement which is deemed to be a security interest for the purposes of the PPS Act.
<b>Separate Contractors</b>	Contractors or consultants, other than the Supplier, engaged by the Purchaser to perform any work or services at, or in the vicinity of, the Site.
<b>Serious Breach</b>	Serious breach includes: <ul style="list-style-type: none"> <li>(a) an Insolvency Event occurring in relation to the Supplier;</li> <li>(b) the Supplier ceasing or threatening to cease to carry on its business or a substantial part of its business;</li> <li>(c) if the Supplier is a natural person, he or she dies;</li> <li>(d) if the Supplier breaches a material obligation under this Contract, which is not capable of remedy;</li> <li>(e) if the Supplier breaches <b>clause 38.4</b>;</li> <li>(f) if the Supplier is liable to the Purchaser for delay liquidated damages up to the limit of liability for delay liquidated damages (if any);</li> <li>(g) if the Supplier is liable to the Purchaser for Performance Liquidated Damages up to the limit of liability for Performance Liquidated Damages (if any);</li> <li>(h) if the Supplier fails to obtain or maintain any licenses or registrations necessary to perform the Work under the Contract; or</li> <li>(i) if the Supplier abandons the whole or a substantial part of the Work under the Contract.</li> </ul>
<b>Services</b>	means the services set out in <b>Schedule 12</b> of the Contract and any other ancillary services ordinarily provided by a supplier in the supply of equipment similar to the Equipment.
<b>Site</b>	The place set out in <b>Item 10 of schedule 1</b> and any other lands and other places to be made available to the Supplier by the Purchaser for the purposes of this Contract.
<b>Specification</b>	The documents set out in <b>schedule 4</b> and all further specifications issued by the Purchaser to the Supplier.
<b>Statutory</b>	The person appointed by the Purchaser as a site senior executive or exploration manager under the <i>Work Health and</i>

<b>Position</b>	<i>Safety (Mines) Regulations 2022 (WA)</i> for the Site.
<b>Supplier's Representative</b>	The person identified in <b>Item 11</b> of <b>schedule 1</b> or a replacement approved by the Purchaser.
<b>Time for Delivery</b>	The time for Delivery of the Equipment in <b>Item 12</b> of <b>schedule 1</b> as it may be extended under <b>clause 17</b> .
<b>Time of Acceptance</b>	The date that the Equipment is Acceptable, as evidence in a Certificate of Acceptance issued by the Purchaser's Representative under <b>clause 21</b> .
<b>Time of Delivery</b>	Subject to <b>clause 21.1</b> , the date that Delivery of the Equipment is effected by the Supplier at the Point of Delivery.
<b>Variation</b>	<p>Means:</p> <ul style="list-style-type: none"> <li>(a) additional work;</li> <li>(b) a change in the character or quality of the Work under the Contract;</li> <li>(c) an increase or decrease in the scope of the Work under the Contract;</li> <li>(d) a change to the levels, lines, positions or dimensions of any part of the Work under the Contract; or</li> <li>(e) an omission from the scope of the Work under the Contract, including for the purpose of retaining a third party to perform the part of the Work under the Contract omitted (in which case there will be no liability to the Supplier for loss of profit),</li> </ul> <p>but does not include any work to overcome a breach, to remedy a Defect, or to overcome an act or omission of the Supplier.</p>
<b>Warranty Period</b>	<ul style="list-style-type: none"> <li>(a) The period, which: <ul style="list-style-type: none"> <li>(i) commences on the Time of Acceptance of all of the Equipment; and</li> <li>(ii) ends at the expiry of the timeframe stated in <b>schedule 1</b>; and</li> </ul> </li> <li>(b) any further Warranty Period created under <b>clause 22.1(b)</b>.</li> </ul>
<b>Work under the Contract</b>	<p>All of the activities and the work to be performed by the Supplier under the Contract, including:</p> <ul style="list-style-type: none"> <li>(a) the supply and Delivery of the Equipment;</li> <li>(b) Variations and remedial work;</li> <li>(c) provision of the warranties required by the Contract;</li> <li>(d) performance of the Services; and</li> <li>(e) all things incidental to the satisfactory performance and completion of the things listed in paragraphs (a) to (d) above.</li> </ul>

## 2 Performance

### 2.1 Supplier obligations

The Supplier must perform the Work under the Contract in accordance with and subject to the Contract. The Supplier must Deliver the Equipment to the Point of Delivery by the Time for Delivery and do all things under the Contract to ensure that when Delivered, the Equipment is Acceptable.

### 2.2 Payment

The Purchaser agrees to pay the Supplier the Contract Price in accordance with and subject to the Contract.

### 2.3 Performance Criteria

**Schedule 2** applies if **Item 13** of **schedule 1** specifies it applies.

## 3 The Contract

### 3.1 Entire understanding

The documents comprising this Contract constitute the entire agreement between the parties and supersede all previous oral or written communications between the parties.

### 3.2 Mutually explanatory

The provisions in this Contract will be taken as being mutually explanatory and anything contained in one but not in another will be treated as if contained in all.

### 3.3 Discrepancies, errors and ambiguities

If the Supplier finds any discrepancy, error or ambiguity in the Contract, it must inform the Purchaser's Representative immediately and follow the directions of the Purchaser's Representative. The Supplier will have no Entitlement as a result of complying with any such direction.

### 3.4 Excluded terms

All of the terms of the *United Nations Convention on Contracts for the International Sale of Goods* (adopted in Vienna, Austria on 10 April 1980) are expressly excluded from this Contract.

### 3.5 Application of Contract

The Contract applies to the Work under the Contract whether commenced before, on or after the date of the Contract. The Supplier agrees that any payment in connection with the Work under the Contract made prior to the date of the Contract is a payment under the Contract and any such payment will be accounted for against the payment due to the Supplier under the Contract.

## 4 Authority, laws, safety and environment

### 4.1 Comply with laws

The Supplier must:

- (a) comply with the provisions of all acts of parliament, ordinances, regulations, by-laws and requirements of all Authorities affecting or in any way relating to the Site or the Work under the Contract including the Safety Legislation and Environmental Legislation;



- (b) obtain, maintain and comply with all permits and pay all fees required for the performance of the Work under the Contract;
- (c) at a minimum, comply with all relevant Australian Standards; and
- (d) keep the Purchaser indemnified against all fines, penalties, Losses or damages incurred by reason of a breach of **clause 4.1**.

The Supplier will have no Entitlement as a consequence of a change in a requirement of any thing or body referred to in this **clause 4.1**.

## 4.2 Anti-corruption

- (a) The Supplier must not give or offer to give (directly or indirectly) to any person any bribe, gift, gratuity or other thing of value, which would or could be construed as a corrupt practice, as an inducement or reward:
  - (i) for doing or forbearing to do any action in relation to the Contract; or
  - (ii) for showing or for forbearing to show any favour or disfavour to any person in relation to the Contract.
- (b) However nothing in this **clause 4.2** is intended to limit or affect any lawful inducements or rewards to the Supplier's employees, agents and subcontractors that could not reasonably be construed as involving corrupt practices.

## 4.3 Policies

Without limiting any other obligations on the Supplier under this Contract, the Supplier must comply with the Policies.

# 5 Security

## 5.1 Provision of security

As security for the due and proper performance of this Contract by the Supplier:

- (a) within 10 Business Days of the earlier of commencement of the Work under the Contract and the date of the Contract, the Supplier must provide the Purchaser with unconditional and irrevocable undertakings:
  - (i) for the amounts in **Item 14 of schedule 1**;
  - (ii) issued by:
    - (A) a bank authorised under section 9 of the *Banking Act 1959* (Cth), which:
      - (1) has its principal place of business in Australia; and
      - (2) has a Standard & Poor's long-term issuer credit rating of AA minus or better (**Required Rating**); or
    - (B) a financial institution acceptable to the Purchaser in its absolute discretion;
  - (iii) in a form approved by the Purchaser in its absolute discretion (an approved form is in **schedule 7**);
- and
- (b) if specified in **Item 16 of schedule 1**, the Supplier must, within 10 Business Days after the date of the Contract, provide to the Purchaser:
  - (A) the Deed of Guarantee and Indemnity duly executed and enforceable against the person named in **schedule 1**; and

- (B) if the person named in **schedule 1** is incorporated outside of Australia, a Legal Opinion supporting, and in respect of, the relevant Deed of Guarantee and Indemnity.

## 5.2 Replacement

- (a) If at any time when security provided in accordance with **clause 5.1(a)** is effective:
  - (i) the issuer of that security ceases to have the Required Rating; or
  - (ii) the Purchaser assigns, novates or transfers this Contract and the Purchaser's right or obligations under this Contract in accordance with **clause 38.1**,

the Supplier must within 5 Business Days of that event occurring, procure a replacement security in favour of the Purchaser or the relevant assignee (as applicable) from an issuer with the Required Rating, in a form approved by the Purchaser in its absolute discretion (an approved form is set out in **Schedule 7**) and otherwise in accordance with **clause 5.1(a)(ii)** and for the amount then remaining of the security it is replacing. On receipt of the replacement security the Purchaser must cancel and return the security which is being replaced.

- (b) The Supplier must, if required by the Purchaser, provide a replacement bank guarantee in favour of the Purchaser from an issuer with the Required Rating, in the form set out in **Schedule 7** and in accordance with **clause 5.1(a)** for the new Contract Price if the Contract Price is varied and it increases by more than (five percent) 5%. On receipt of the replacement security the Purchaser must cancel and return the security being replaced.

## 5.3 Reduction of security

Subject to **clause 5.6** and **clause 21.1**, within 20 Business Days after the date a Certificate of Acceptance for all of the Equipment is issued by the Purchaser's Representative under **clause 21**, security must be reduced as follows:

- (a) in relation to security provided under **clause 5.1(a)** or **clause 5.2**, security must be reduced to the amount stated in **Item 1514** of **schedule 1**; and
- (b) in relation to security provided under **clause 5.1(a)**, security must be reduced to the amount stated in **Item 15** of **schedule 1**.

## 5.4 Return of unconditional financial undertaking and retention monies

Subject to **clause 5.6**, the Purchaser must return any remaining security held by it to the Supplier within 10 Business Days of the Purchaser making final payment in accordance with **clause 23**.

## 5.5 Recourse

- (a) The Purchaser may convert all or part of the security provided by the Supplier under this **clause 5** at any time and without notice.
- (b) The Purchaser may use the proceeds of the security in relation to any Loss which the Purchaser has incurred or claims that it has incurred or might in the future incur in connection with any actual or alleged act, default or omission of the Supplier.
- (c) The Supplier must not take any steps to injunct or otherwise restrain:
  - (i) any issuer of any security provided under the Contract from paying the Purchaser pursuant to the security;

- (ii) the Purchaser from taking any steps for the purposes of making a demand under any security provided under the Contract or receiving any payment under any such security; or
  - (iii) the Purchaser using the money received under any security provided under the Contract.
- (d) The Purchaser is not liable for any Loss occasioned to the Supplier by the conversion of security into money or the application of that money.

## **5.6 Outstanding claims**

Notwithstanding the Purchaser is otherwise required under this Contract to release security, the Purchaser has a right to call upon and retain from any security, an amount sufficient to cover any outstanding claim alleged by the Purchaser against the Supplier under or in connection with the Contract (whether or not that claim has at that time been liquidated).

## **5.7 Holding of and interest on security**

- (a) The Purchaser does not hold any security, or any moneys resulting from the conversion of the security, on trust for the Supplier and is not obliged to hold any moneys resulting from the conversion of the security in any particular or defined account.
- (b) Any interest earned on the proceeds of any security will be retained by the Purchaser.

# **6 Administration**

## **6.1 Agent**

The Purchaser's Representative is the agent of the Purchaser and the Purchaser is not obliged to ensure that the Purchaser's Representative acts as an independent certifier, assessor, determiner or valuer. Unless specified in this Contract, the Purchaser and the Purchaser's Representative are not obliged to exercise any discretionary power or right in the interests of the Supplier (including to overcome a failure of the Supplier to comply with any provision of this Contract).

## **6.2 Directions of Purchaser's Representative**

- (a) The Supplier must comply with all directions given by the Purchaser's Representative in accordance with this Contract. If a direction given by the Purchaser's Representative conflicts with the requirements of the Contract, the Supplier must inform the Purchaser's Representative in writing, advising why the direction is contrary to the Contract, before complying with the direction.
- (b) A direction given by the Purchaser's Representative does not relieve the Supplier of its obligations under this Contract.

## **6.3 Informed of progress**

- (a) The Supplier must keep the Purchaser's Representative regularly informed on the state and stages of the performance of the Work under the Contract including as to its obligation to Deliver the Equipment to the Point of Delivery by the Time for Delivery and to do all things under the Contract to ensure that when Delivered the Equipment is Acceptable.
- (b) The Purchaser may, at any time, engage consultants to review and advise the Purchaser in relation to the performance by the Supplier of the Work under the Contract. The Supplier must co-operate with those consultants.

- (c) If directed by the Purchaser's Representative, the Supplier must attend any meetings to discuss any aspect of the Work under the Contract.

## **6.4 No agency**

The Supplier must not act as or represent that it is the agent of the Purchaser or hold itself out as being the agent of the Purchaser.

## **6.5 Purchaser may perform Supplier's obligations**

The Purchaser may, either itself or by a third party, perform any obligation which the Supplier was obliged to perform under this Contract but which it failed to perform (including complying with a direction of the Purchaser's Representative). The Losses, costs, expenses and damages suffered or incurred by the Purchaser in performing such an obligation will be a debt due from the Supplier to the Purchaser.

# **7 Information Documents**

## **7.1 Information documents not warranted**

The Purchaser does not warrant, guarantee, make any representation or assume any duty of care with respect to the completeness, accuracy or adequacy of any Information Documents and is not liable to the Supplier upon Loss arising out of or in connection with the Information Documents.

## **7.2 Supplier has informed itself**

The Supplier warrants that it did (and it is deemed to have done) each of the following things before the date of the Contract:

- (a) examined and carefully checked and acquired actual knowledge of the contents of the documents which constitute this Contract;
- (b) informed itself completely as to:
  - (i) the risks, contingencies and other circumstances which might have an effect on the execution or cost of Work under the Contract;
  - (ii) the nature of the Work under the Contract and of the plant, equipment, materials and other necessary items;
  - (iii) the availability and cost of labour, plant, equipment, materials and other items required;
  - (iv) all legislative requirements and requirements of Authorities; and
- (c) satisfied itself as to the correctness and sufficiency of its price for Work under the Contract and that the Contract Price covers the cost of complying with all of its obligations under the Contract and of all matters and things necessary for the due and proper performance and completion of its obligations under the Contract,

and any failure by the Supplier to have done any of those things will not relieve the Supplier of its obligation to perform and complete Work under the Contract in accordance with the Contract.

# **8 Subcontracting**

## **8.1 Approval and liability**

- (a) The Supplier must not subcontract any of the Work under the Contract without the written approval of the Purchaser. When seeking approval of a

Subcontractor, the Supplier must provide any information requested by the Purchaser. The Purchaser may impose any conditions it considers necessary in giving its approval. Approval is given to the subcontractors listed in **schedule 5** for the work identified in **schedule 5**.

- (b) The Supplier will be liable for the acts and omissions of subcontractors as if they were the acts and omissions of the Supplier and will not, by subcontracting the Work under the Contract, be relieved of any of its obligations or liabilities under this Contract.

## 9 The Site

### 9.1 Access to Site

- (a) The Purchaser must provide non-exclusive access to the Site sufficient for the Supplier to perform the Work under the Contract.
- (b) The Supplier must ensure that the Supplier, its employees, agents and subcontractors:
  - (i) without limiting any other provision of the Contract, at all times:
    - (A) keep themselves informed as to the requirements of, comply with and not do anything which may place the Purchaser in breach of laws or legislative requirements applying to the Site;
    - (B) comply with all procedures, policies, or rules adopted from time to time by the Purchaser in connection with the Site; and
    - (C) comply with the directions (if any) given to the Supplier by the Purchaser or others authorised by the Purchaser or any legislative requirement at any time in connection with the Site (including access to and use of the Site);
  - (ii) only access the Site as specified in this Contract or as otherwise directed by the Purchaser's Representative;

### 9.2 Site forms part of Existing Operation

- (a) This **clause 9.2** applies to the extent that the Site forms part of the Existing Operation which will continue to operate during the term of this Contract.
- (b) The Supplier acknowledges and agrees that the Site is critical to the Existing Operation's ongoing day to day operations.
- (c) In particular, the Supplier must:
  - (i) comply with all directions of the Purchaser's Representative in relation to minimising disruption to the conduct of the Existing Operation arising out of the Work under the Contract;
  - (ii) ensure that Work under the Contract does not materially interfere with the Existing Operation except as authorised by the Purchaser;
  - (iii) ensure that Work under the Contract does not materially interfere with the activities of businesses or persons occupying Adjoining Sites or land in the vicinity of the Site;
  - (iv) ensure that the Work under the Contract does not place the Purchaser in breach of its obligations under the relevant Environmental Legislation; and
  - (v) ensure that the Work under the Contract does not place the Purchaser in breach of its obligations under the relevant Safety Legislation.

## 10 Warranties and Intellectual Property

### 10.1 Supplier warranties

The Supplier warrants that:

- (a) the Equipment will:
  - (i) at the Time of Delivery, be new in every respect and in good order and condition;
  - (ii) satisfy the Performance Criteria (if applicable pursuant to **clause 2.3**);
  - (iii) comply with the description in the Contract;
  - (iv) be of good and merchantable quality;
  - (v) be fit for the purposes stated in, and reasonably inferred or ascertainable from, the Contract;
  - (vi) comply with any other warranties or guarantees contained in the Contract;
  - (vii) comply with any warranties or guarantees ordinarily supplied by the Supplier or the manufacturer of the Equipment;
  - (viii) comply with the provisions of any legislation applicable to it;
  - (ix) comply with all relevant Australian Standards; and
  - (x) be free from all Security Interests; and
- (b) at all times it is and will be suitably qualified and experienced and exercises due skill, care and diligence in the performance of the Work under the Contract; and
- (c) the Work under the Contract is and will be performed in conformance with the Policies.

### 10.2 Warranties additional

The requirements in **clause 10.1** are in addition to any warranties or guarantees which are or may be implied under the *Sale of Goods Act 1895 (WA)*, the *Competition and Consumer Act 2010 (Cth)* and any other legislation applicable to the Work under the Contract.

### 10.3 Subcontractor and supplier warranties

The Supplier must:

- (a) ensure that the Purchaser will have the benefit of all warranties given by all subcontractors and suppliers in relation to services performed by them on the Work under the Contract and materials provided by them which are used in the Work under the Contract; and
- (b) use its best endeavours to obtain all other warranties reasonably required by the Purchaser.

### 10.4 Intellectual Property Rights

- (a) The Supplier grants to the Purchaser a royalty free, perpetual and irrevocable licence to use the Intellectual Property Rights associated with all Documentation for any purpose associated with the use, maintenance or alteration of the Equipment and a right to grant sub-licences on the same terms to any person for any purpose associated with the use, maintenance or alteration of the Work under the Contract. The Supplier warrants that it has, or will procure, all necessary Intellectual Property Rights to comply with its obligations under this **clause 10.4**.

- (b) The Supplier warrants that it has all property and Intellectual Property Rights necessary to perform the Work under the Contract in accordance with the Contract and indemnifies the Purchaser against any Loss suffered or incurred by the Purchaser as a consequence of any claim by a third party that it has a right to any property or Intellectual Property Right in any component of the Work under the Contract.

## 11 Variations

### 11.1 Right to direct Variations

The Purchaser's Representative may, at any time, direct the Supplier to perform a Variation and the Supplier must perform the Variation. The direction must be in writing and must state that it is a direction for a Variation. If the direction states that the Supplier must provide an estimate of the cost of the Variation, then the Supplier must provide the Purchaser's Representative with an estimate within the time specified in the direction and if no time is specified, then promptly.

### 11.2 Notification

If the Supplier considers that a direction from the Purchaser's Representative is a direction for a Variation which does not comply with **clause 11.1**, the Supplier must, if possible before commencing work on the Variation and in any event within 5 Business Days of the direction, notify the Purchaser's Representative in writing that the Supplier considers the work is a Variation and provide an estimate of any Program consequences, and adjustments to the Contract Price, arising from the purported Variation. The Purchaser's Representative will, within 3 Business Days, either:

- (a) confirm the direction is a Variation and issue a direction complying with **clause 11.1**; or
- (b) notify the Supplier that it is not a Variation.

### 11.3 Supplier to submit its final cost

Within 10 Business Days of completion of the Work under the Contract which is the subject of a Variation, the Supplier must submit to the Purchaser's Representative its final claim in respect of the Variation. If, through no fault of the Supplier, the Supplier is unable to determine all costs associated with the Variation within 10 Business Days of completing the Work under the Contract the subject of the Variation, the Supplier must:

- (a) within 10 Business Days of completing the Variation, provide the Purchaser's Representative the Supplier's best estimate of the cost of the Variation, along with evidence to support this estimate; and
- (b) within 20 Business days of completing the Variation, provide the Purchaser's Representative the Supplier's final claim in respect of the Variation.

### 11.4 Cost of Variations

- (a) Where the Purchaser's Representative has given the Supplier a direction to perform a Variation which complies with **clause 11.1**, the Contract Price must be adjusted by the amount calculated in accordance with **clause 16**.
- (b) The Supplier can only claim payment for a Variation under **clause 15.4** or **clause 23.1**

### 11.5 Bar on claims

Unless the Supplier has:

- (a) either received a direction which complies with **clause 11.1** or has delivered a notice with the details and within the time required by **clause 11.2**; and
- (b) submitted its final claim in respect of the Work under the Contract the subject of the Variation with the details and within the time required by **clause 11.3**,

the Supplier will have no Entitlement as a consequence of complying with any direction given by the Purchaser's Representative, however this will not prevent the Purchaser's Representative from reducing the Contract Price in accordance with **clause 16** by reason of the Variation direction. Under no circumstances will the Supplier have any Entitlement as a consequence of complying with any direction given by the Purchaser's Representative exceeding the amount of the Supplier's final claim submitted in accordance with **clause 11.3**.

## **11.6 Direction to perform Work under the Contract**

The Supplier acknowledges and agrees that a direction given by the Purchaser's Representative requiring the Supplier to perform the Work under the Contract, in accordance with the requirements of the Contract will not be a Variation to the Work under the Contract and will not entitle the Supplier to make any claim against the Purchaser.

# **12 Supplier's personnel and subcontractors**

## **12.1 Supplier's Representative**

The Supplier must ensure that the Supplier's Representative:

- (a) has the authority to receive directions on behalf of the Supplier from the Purchaser;
- (b) has the authority of the Supplier to carry out the overall co-ordination and supervision of the Supplier's obligations under this Contract;
- (c) is competent;
- (d) is not discharged as the Supplier's Representative without the written approval of the Purchaser (which cannot be unreasonably withheld); and
- (e) is not replaced by the Supplier without the written approval of the Purchaser.

If the Supplier's Representative knows of a matter, that knowledge is taken to also be within the knowledge of the Supplier.

## **12.2 Employees and subcontractors**

The Supplier must:

- (a) employ and must ensure that its subcontractors employ only people who have the skill, competence and experience to perform the job they are retained to do;
- (b) ensure that all employees and subcontractor employees hold the necessary licences, permits, endorsements or other certificates required by legislative requirements in carrying out its obligations under the Contract;
- (c) retain sufficient personnel to perform the Work under the Contract efficiently and in accordance with this Contract;
- (d) subject to **clause 12.3**, not replace any of the Supplier's personnel without the Purchaser's prior written approval;
- (e) if any of the Supplier's personnel become seriously ill or resign from the employment of the Supplier, or are removed in accordance with **clause 12.3**, replace them with persons:



- (i) of at least equivalent experience, ability and expertise;
  - (ii) who comply with paragraphs (b) and (c); and
  - (iii) approved by the Purchaser's Representative; and
- (f) ensure that its employees and subcontractor employees submit to and comply with the Purchaser's Policies.

### 12.3 Removal

The Purchaser's Representative may direct the Supplier to remove from any activity connected with the Work under the Contract within such time as the Purchaser's Representative directs, any person engaged in the performance of the Work under the Contract whom the Purchaser's Representative considers to be undesirable to perform the Work under the Contract.

### 12.4 Occupational Health and Safety

- (a) The Supplier is responsible for the occupational health and safety at all times of all workers engaged or caused to be engaged by it (including its employees, employees of the Purchaser or the Purchaser's contractors, and the Supplier's subcontractors and their respective employees, who are working or attending at any working environment under the Supplier's control) in connection with the Contract, or any part of the Work under the Contract.
- (b) The Supplier must ensure that:
  - (i) all Work under the Contract is executed in a safe manner;
  - (ii) in carrying out its obligations under the Contract it complies with all Safety Legislation (including any duty imposed on the Supplier by the applicable Safety Legislation as a designer, manufacturer, importer, supplier, installer or constructor of the Equipment);
  - (iii) all subcontractors, and all agents and employees of the Supplier and any subcontractor, comply with all Safety Legislation; and
  - (iv) there is no risk to the health and safety of any person as a result of carrying out any part of the Work under the Contract.
- (c) The Supplier, at no additional cost to the Purchaser, must, and must ensure that all subcontractors and all agents and employees of the Supplier and all subcontractors when on the Site, promptly obey all directions and instructions given by the person appointed to a Statutory Position relating to the health and safety of persons or property, or to the proper compliance with the Safety Legislation. To the extent of any inconsistency, this **clause 12.4** prevails over all other provisions of the Contract.
- (d) If the Supplier fails to comply with an obligation under the Safety Legislation or this **clause 12.4**, the Purchaser may perform or have performed the obligations on the Supplier's behalf and the costs and expenses incurred by the Purchaser are recoverable from the Supplier as a debt due to the Purchaser.
- (e) Subject to the qualification set out in **clause 12.4(f)** below, to the maximum extent permitted by law, and without limiting any other indemnity by the Supplier, the Supplier indemnifies the Purchaser against any and all suits, actions, proceedings, and Loss of whatsoever nature (including legal costs on a full indemnity basis) which the Purchaser may suffer or incur or have brought against it, or which may be imposed under or may arise out of enforcement of any section of any Safety Legislation, arising out of or in any way in connection with any failure by the Supplier to comply with any Safety Legislation or any breach by the Supplier of its obligations under this **clause 12.4**.

- (f) Nothing in **clause 12.4(e)** requires the Supplier to indemnify the Purchaser for any liability to pay a fine for an offence under the Safety Legislation.

## 13 Inspection and rejection

### 13.1 Hold Points

- (a) The Supplier must not proceed with the fabrication or manufacture of any item of Equipment beyond a Hold Point, if any, without first receiving written approval from the Purchaser's Representative to do so.
- (b) The Supplier must provide the Purchaser's Representative with written notice of at least the period specified in **Item 17 of schedule 1** in advance of it reaching a Hold Point.
- (c) Following receipt of the Supplier's notice referred to in **clause 13.1(b)**, the Purchaser must then by written notice to the Supplier, nominate a date and time during normal business hours at which the Purchaser's employees, representatives, contractors or agents will be present at the Supplier's premises at which the Equipment is being fabricated or manufactured, to carry out a joint inspection with the Supplier, of the relevant Equipment. The date so nominated must be a date no later than the period specified in **schedule 1** after the date that the Hold Point will be reached as set out in the Supplier's notice.
- (d) The Supplier must provide documentary evidence in advance of the joint inspection, of any tests (and test results) which are required to have been carried out prior to or upon reaching the relevant Hold Point.
- (e) Representatives of each of the Purchaser and the Supplier must attend the joint inspection of the relevant Equipment at the date and time nominated in the written notice provided under **clause 13.1(c)** or as otherwise agreed by the parties. Within 5 Business Days of the later of the joint inspection and the provision by the Supplier of the evidence required under **clause 13.1(d)**, the Purchaser's Representative must by written notice to the Supplier, either:
  - (i) approve the fabrication or manufacture of the Equipment to proceed; or
  - (ii) specify any Defect or any steps to be taken before the Supplier can proceed with the fabrication or manufacture of the Equipment including whether the process set out in this **clause 13.1** must be repeated in respect of the relevant Hold Point.
- (f) The Supplier will not be entitled to an extension to the Time for Delivery in relation to any delay caused by the cessation of the manufacture or fabrication of any item of Equipment in connection with a Hold Point or the delay in the receipt of the written approval to be provided under **clause 13.1(a)**, unless the Purchaser is in breach of its obligations under **clause 13.1(c)** or **clause 13.1(e)**.

### 13.2 Entry for inspection

The Purchaser, its employees and agents may, at any time prior to Delivery, enter the premises where the Equipment is being manufactured to inspect, examine or test the Equipment. The Supplier must do all things necessary to allow such entry, inspection, examination or testing to be effected.

### 13.3 Quality assurance

If requested by the Purchaser, the Supplier must provide the Purchaser with the following information within 5 Business Days of the request:

- (a) the mode and place of manufacture of the Equipment;

- (b) the source of supply of materials and other components used in the manufacture of the Equipment;
- (c) tests conducted on the Equipment during and at completion of the manufacture of the Equipment and the outcome of such test and any other information reasonably required by the Purchaser concerning the quality of the Equipment manufactured by the Supplier; and
- (d) the Supplier's quality assurance system and procedures in respect of the manufacture of the Equipment.

#### **13.4 Supplier's obligations remain**

No inspection, examination, testing or approval by or on behalf of the Purchaser, will relieve the Supplier of its obligations under the Contract, even if the Equipment contains a Defect which should have been discovered by the inspection, examination or testing.

#### **13.5 Notice to remedy**

If the Purchaser's Representative becomes aware of any Work under the Contract (including any part, material, equipment, plant or other component provided by the Supplier for incorporation in the Work under the Contract, or in the course of manufacture or fabrication by or on behalf of the Supplier) which is Defective or otherwise does not comply with the Contract, the Purchaser's Representative may give the Supplier a notice requiring:

- (a) the Defect or non-compliance to be remedied (including by replacing the Defective or non-compliant Work under the Contract); or
- (b) the Supplier to carry out work to overcome the Defect or non-compliance, within the time specified in the notice or if no time is stated within a reasonable period of time, and at the Supplier's cost and risk.

#### **13.6 Failure to remedy in time**

If the Defect or other breach is not remedied within the time identified in the notice, the Purchaser may, without prejudice to any other rights it may have and by notice in writing addressed to the Supplier, terminate the Contract and **clauses 28 and 29.1** will apply.

### **14 Testing and training**

#### **14.1 Meaning of test**

The word 'test' when used in this **clause 14** includes examine and measure.

#### **14.2 Direction to test**

The Purchaser's Representative may direct that the Equipment must be:

- (a) tested at any time prior to the issue of the Final Payment Schedule; or
- (b) tested and passed before the Equipment is Delivered,

with the results of any such test promptly provided to the Purchaser's Representative. The Purchaser's Representative may direct that the Supplier, the Purchaser or a third party nominee of the Purchaser conducts such test.

#### **14.3 Notice of testing**

Before conducting a test, the party conducting the test must give reasonable written notice to the other of the time, date and place of the test. If the notice has been given and the other party does not attend, the test may nevertheless proceed.

#### **14.4 Costs where Work under the Contract does not comply**

If results of the tests show that the Equipment does not comply with the Contract, the costs incurred by the Purchaser in conducting the tests will be a debt due from the Supplier to the Purchaser.

#### **14.5 Training**

If the Supplier is required to provide any training or instruction to the Purchaser or employees or contractors of the Purchaser in connection with the Equipment, the Supplier must:

- (a) ensure that all training or instruction is:
  - (i) carried out by suitably qualified and skilled persons who are familiar with the operation, use and maintenance of the plant, equipment or services;
  - (ii) designed to meet the requirements of the trainee; and
  - (iii) carried out in accordance with the requirements of the Contract; and
- (b) provide the training and instruction as a condition precedent to Delivery.

### **15 Price and payment**

#### **15.1 Obligation to pay**

Subject to **clause 15.5**, the Purchaser must pay the Supplier the Contract Price as consideration for the Supplier's fulfilment of all its obligations under this Contract.

#### **15.2 Sufficiency of Contract Price**

The Supplier acknowledges that the Contract Price:

- (a) is fixed (or where rates make up the Contract Price, the rates are fixed) and will not be subject to adjustment for exchange rate variations, changes in taxes, changes in law or Authority requirements, or any other rise and fall costs;
- (b) includes everything necessary for the performance of the Work under the Contract and all of the Supplier's obligations under the Contract; and
- (c) is wholly sufficient to carry out and complete the Work under the Contract in accordance with the Contract and without adjustment, except to the extent expressly provided for in the Contract.

#### **15.3 Security and Insurance**

The Supplier shall not be entitled to make a claim for payment for Equipment supplied or the Work under the Contract, and the Purchaser shall have no liability to pay any amounts until:

- (a) all security to be provided by the Supplier under **clause 5.1** has been provided in accordance with the Contract; and
- (b) the Supplier has complied with **clause 25.2(a)**

#### **15.4 Payment claims**

- (a) Subject to **clause 15.3**, the Supplier must, at the times identified in **Item 18 of schedule 1**, submit to the Purchaser's Representative a payment claim which identifies clearly the amount owing to the Supplier under this Contract. Each payment claim must:
  - (i) be in writing, include the payment being claimed and be in a form approved by the Purchaser's Representative;

- (ii) include substantiation as required by the Contract and the Purchaser's Representative;
- (iii) include a description of the items of the Equipment supplied by the Supplier, if any, and any other Work under the Contract performed by the Supplier which entitles the Supplier to payment; and
- (iv) not include claims for:
  - (A) Variations or deemed Variations in excess of any amount priced by the Purchaser's Representative under **clause 11.4**;
  - (B) delay costs other than any amount for delay costs set out in a written notice given by the Purchaser's Representative under **clause 17.11**;
  - (C) except to the extent allowed under paragraphs (A) to (B) above, any expense, loss or damage suffered or incurred by the Supplier for breach of the Contract.

## 15.5 Payments

The amount payable by the Purchaser to the Supplier in relation to each payment claim is calculated as follows:

- (a) in accordance with the milestone payment, or milestone payments, set out in **Item 19 of schedule 1**;
- (b) if rates apply, by applying the rates to the quantities properly supplied by the Supplier in accordance with this Contract, as determined by the Purchaser's Representative;
- (c) if Variations or delay costs have been agreed under **clause 11** or **clause 17.11** respectively, the costs as agreed; and
- (d) by adding or subtracting any other amounts due from one party to the other under the Contract.

## 15.6 Payment schedule

- (a) Following receipt of a payment claim provided in accordance with **clause 15.4** the Purchaser's Representative must, within ten Business Days, determine the amount payable in respect of that claim and issue a payment schedule to the Purchaser and the Supplier setting out that determination.
- (b) A payment schedule referred to in **clause 15.6(a)**, must:
  - (i) be in writing;
  - (ii) identify the payment claim to which it relates;
  - (iii) state the Purchaser's Representative's reasonable determination of:
    - (A) the amount payable in accordance with **clause 15.5**;
    - (B) any money which is payable, or which may become payable, from the Supplier to the Purchaser in respect of the Contract or Equipment supplied under the Contract;
  - (iv) indicate the amount payable to the Supplier, or from the Supplier to the Purchaser, being the amounts assessed under **clause 15.6(b)(iii)(A)** less the amounts assessed under **clause 15.6(b)(iii)(B)**;
  - (v) state that if no amount is payable or if the amount payable to the Supplier is less than the amount claimed for payment by the Supplier:
    - (A) why the scheduled amount is less or no payment is proposed; and

- (B) if the reason is that the Purchaser is withholding payment, the reason why the Purchaser is withholding payment.

## 15.7 Timing of payment

- (a) The Supplier must give the Purchaser a valid tax invoice in accordance with **clause 34.5** for the amount determined by the Purchaser's Representative under **clause 15.6(b)(iv)** within two Business Days of receipt of a payment schedule under **clause 15.615.6(a)**.
- (b) Where an amount is certified as being due for payment to the Supplier by the Purchaser in a payment schedule issued under **clause 15.615.6(a)**, the Purchaser must pay the Supplier the amount certified within 20 Business Days of receipt by the Purchaser's Representative of the payment claim issued under **clause 15.4**.
- (c) Where an amount is indicated in a payment schedule as being due for payment to the Purchaser by the Supplier, the Supplier must pay the Purchaser the amount within ten Business Days after receipt of that payment schedule, after which time the Purchaser may recover such amount from the Supplier as a debt.

## 15.8 Interest on payments

If any money due from the Purchaser to the Supplier or the Supplier to the Purchaser as indicated in a payment schedule or Final Payment Schedule, remains unpaid after the last date it should have been paid, interest at the rate prescribed under the *Civil Judgments Enforcement Act 2004*, on the amount remaining unpaid after the due date, will be due and payable from the date due until the sum is paid.

## 15.9 Payment for Equipment not Delivered

The Purchaser's Representative may direct the Supplier:

- (a) in respect of Equipment that has not been Delivered, to provide additional security (in the form required by **clause 5.1**) in an amount equal to the payment to be made for that Equipment; or
- (b) otherwise, to provide evidence that:
- (i) property and ownership in the Equipment has passed to the Purchaser or will pass on the making of the progress payment; and
  - (ii) the Equipment has been properly stored, labelled the property of the Purchaser and insured.

## 15.10 Payment on account only

A payment made in relation to this Contract is not evidence of the value of the Equipment, an admission of liability or an admission that the Equipment is satisfactory, but is a payment on account only.

## 15.11 Right to set off

Without limiting the Purchaser's rights under any provision in this Contract, the Purchaser may deduct from any amount due to the Supplier (including in respect of a payment claim) or from any security held under **clause 5** or **clause 15.6** any sum which the Purchaser asserts is or may become payable by the Supplier to the Purchaser, whether or not:

- (a) the Purchaser's right to payment arises by way of damages (whether liquidated or unliquidated), debt, restitution or otherwise; or
- (b) the factual basis giving rise to the Purchaser's right to payment arises out of this Contract, any other contract, or is independent of any contract.

Nothing in this **clause 15.11** will affect the right of the Purchaser to recover from the Supplier the whole of any such sum or any balance that remains owing.

## 16 Valuing Variations and adjustment to the Contract Price

Adjustments to the Contract Price made in accordance with this Contract must be ascertained by the Purchaser's Representative as follows:

- (a) to the extent that the parties have agreed the amount of the adjustment, then the amount agreed;
- (b) to the extent that this Contract provides for the amount of the adjustment, then that amount;
- (c) to the extent that the rates contained in **schedule 6** apply, by applying those rates to the quantities properly supplied in accordance with this Contract, as measured by the Purchaser's Representative;
- (d) if this Contract provides that the Supplier is entitled to delay costs, by applying the delay costs which the Supplier can demonstrate that it has incurred up to the maximum rate in **Item 20 of schedule 1**; or
- (e) to the extent that **clauses 16(a) to 16(d)** do not apply, by arriving at a reasonable amount, having regard to any increase or decrease in the costs that have been or will be incurred by the Supplier, as determined by the Purchaser's Representative.

## 17 Time and Delivery

### 17.1 No delay

The Supplier must:

- (a) proceed with the Work under the Contract with due expedition and without delay and ensure that the Equipment is Delivered to the Point of Delivery by the Time for Delivery;
- (b) not suspend the Work under the Contract unless given a direction under **clause 17.3** or pursuant to a statutory right to suspend; and
- (c) take all steps necessary to minimise the effect of any delay to the Work under the Contract.

### 17.2 Time and place for Delivery

- (a) The Supplier must Deliver the Equipment to the Point of Delivery by the Time for Delivery during the delivery hours set out in **Item 21 of schedule 1**. The Supplier must give the Purchaser's Representative at least 48 hours' notice of the time at which the Supplier intends to Deliver the Equipment.
- (b) The party stated in **Item 22 of schedule 1** must load or unload the Equipment at the Point of Delivery (as applicable).

### 17.3 Suspension

The Purchaser's Representative may direct the Supplier to suspend the performance of the whole or part of the Work under the Contract. The Contract Price will be adjusted if the Supplier incurs any reasonable, direct additional costs as a result of such suspension (as objectively substantiated to the Purchaser's Representative), provided that the suspension was not necessary because of an act, default or omission of the Supplier.

#### **17.4 No obligation to accept**

- (a) The Purchaser is not obliged to accept Delivery of the Equipment at any time other than the Time for Delivery or at any place other than the Point of Delivery. The Supplier is responsible for holding and storing the Equipment until the Time for Delivery.
- (b) If the Purchaser or any of its representatives signs a delivery docket or other document required by the Supplier to acknowledge delivery, the Purchaser will not be taken to have accepted the Equipment as being in accordance with the terms of this Contract (whether as to quantity or quality). This applies despite any terms and conditions appearing on any such acknowledgment of delivery.

#### **17.5 Power to grant extensions**

The Purchaser's Representative may, at any time and for any reason, by notice in writing to the Supplier, extend the Time for Delivery. The Purchaser's Representative is not under any circumstances obliged to exercise this power reasonably or for the benefit of the Supplier (including where the Supplier has no entitlement to an extension of time by reason of a failure to comply with notification provisions in this **clause 17**) or at all.

#### **17.6 Supplier's entitlement**

The only circumstances under which the Supplier will be entitled to an extension to the Time for Delivery are when all of the following requirements have been met:

- (a) the Supplier can demonstrate to the reasonable satisfaction of the Purchaser's Representative that it has been or will be delayed in Delivering the Equipment to the Point of Delivery by the Time for Delivery by a Qualifying Cause of Delay (having regard to **clauses 17.7**);
- (b) the Contract does not provide that the Supplier has no entitlement in relation to that Qualifying Cause of Delay; and
- (c) the Supplier has given all notices strictly in accordance with the requirements of this **clause 17**.

#### **17.7 Multiple causes**

Where one period of delay has more than one cause, and if one or more of those causes is not a Qualifying Cause of Delay, the Supplier will have no entitlement to an extension of time for that period of delay.

#### **17.8 Notification**

Where the Supplier wishes to make a claim for an extension of time then it must give a notice in writing to the Purchaser's Representative as soon as reasonably practicable, and in any event within ten Business Days of when the Supplier became aware of a delay or the likelihood of a delay, or when the Supplier should reasonably have become aware of a delay or the likelihood of a delay. The Supplier's written notice must provide full detailed particulars of the cause of the delay and how that cause has delayed or may delay the Time for Delivery, the period of the delay (including the dates of commencement and, if applicable, conclusion of the delay) and the extension of time claimed.

#### **17.9 Period of extension**

The period of any extension of time to the Time for Delivery to which the Supplier is entitled under this clause will be the reasonable period by which the Purchaser's Representative determines the Supplier has been or will be delayed in effecting Delivery of the Equipment to the Point of Delivery by the Time for Delivery as a consequence of the cause of the delay.



## 17.10 No prejudice

A failure of the Purchaser's Representative to grant a reasonable extension of time will not cause the Time for Delivery to be set at large but nothing in this **clause 17.10** will prejudice any right of the Supplier to damages.

## 17.11 Delay costs

- (a) Subject to **clause 17.11(b)**, where the Supplier has been granted an extension of time under this clause in relation to a Compensable Cause, the Supplier may recover the actual direct delay costs which the Supplier can demonstrate it has reasonably and necessarily incurred up to the maximum rate in **Item 20 of schedule 1**.
- (b) Delay or disruption costs as provided for in **clause 17.11(a)** are payable only in respect of delays to the Time for Delivery of all of the Equipment.
- (c) The Supplier can only claim payment for delay costs under **clause 15.4** or **clause 23.1**

## 17.12 No entitlement

Except as provided in **clauses 17.6, 17.9** and **17.11**, the Supplier will have no Entitlement in relation to delay or disruption.

# 18 Delay liquidated damages

## 18.1 Liability for delay liquidated damages

- (a) If the Supplier has not Delivered, or is deemed under **clause 21** to have not Delivered, the Equipment to the Point of Delivery by the Time for Delivery, the Supplier will be liable to the Purchaser for liquidated damages for the amount identified in **Item 23 of schedule 1** for every day or part of a day from the Time for Delivery up to and including the Time of Delivery or termination of the Contract, whichever is the earlier.
- (b) Liquidated damages payable pursuant to this **clause 18.1** will immediately become a debt due and payable by the Supplier to the Purchaser.
- (c) The Purchaser's Representative may, at any time, give the Supplier a written demand for any liquidated damages payable by the Supplier pursuant to this **clause 18.1**.
- (d) The Supplier acknowledges that the level of liquidated damages identified in **schedule 1** is a genuine pre-estimate of the loss suffered by the Purchaser for a failure of the Supplier to Deliver the Equipment to the Point of Delivery by the Time for Delivery and is not a penalty.
- (e) Payment by the Supplier of any liquidated damages will not relieve the Supplier of its obligation to Deliver the Equipment to the Point of Delivery, or from any of its other obligations or liabilities under the Contract.

## 18.2 If amount nil

If **schedule 1** is not completed or is completed by words which indicate that liquidated damages will not apply to this Contract (whether by the use of the words 'not applicable', 'nil' or otherwise) or if **clause 18.1** is found to be unenforceable for any reason, the Supplier must indemnify the Purchaser from any Loss suffered or incurred by the Purchaser by reason of the Supplier's delay in Delivering the Equipment to the Point of Delivery by the Time for Delivery.

## 19 Risk and title

### 19.1 Supplier's warranties

The Supplier warrants that:

- (a) it will have full unencumbered title in the Equipment and will have the right to sell the Equipment; and
- (b) the Purchaser will have quiet possession of the Equipment.

### 19.2 Passing of title

Title in the Equipment and any other material or equipment for incorporation into the Work under the Contract will pass to the Purchaser at the earlier to occur of:

- (a) Delivery of the Equipment or the other material or equipment (as the case may be) to the Point of Delivery;
- (b) when payment is made for the Equipment or the other material or equipment (in each case, whether the payment is in full or in part).

Nothing in this **clause 19.2** limits or affects **clause 19.3** and notwithstanding that ownership of the Equipment or any other item may have passed to the Purchaser, the Supplier must still ensure that the item is properly stored (and in the case of items being transported to the Point of Delivery, adequately packaged), labelled the property of the Purchaser and adequately protected and insured.

### 19.3 Risk

The Equipment will be at the risk of the Supplier until Delivery of the Equipment, even if Delivery is delayed through the fault of the Purchaser and the Supplier must:

- (a) make good any damage to the Equipment which occurs prior to Delivery; and
- (b) provide storage and protection necessary to preserve the Equipment until Delivery.

## 20 Transport of Equipment

### 20.1 Cost of carriage

The cost of carriage of the Equipment to the Point of Delivery (including payment of all freight, insurance, port handling fees and charges and, where the Supplier is required to unload the Equipment under **clause 17.2(b)**, all costs of unloading the Equipment at the Point of Delivery) is taken to be included in the Contract Price and must be borne by the Supplier.

### 20.2 Consolidation of deliveries

The Supplier must, in consultation with the Purchaser's Representative, consolidate deliveries of Equipment to provide for the minimum number of shipments.

### 20.3 Requirements of Program

The Program must clearly indicate the shipment dates and show the periods allowed for shipping and other activities associated with shipment and transportation of the Equipment.

### 20.4 Protection of Equipment

The Supplier must ensure that:

- (a) all Equipment is protected from damage due to weather, climatic conditions and handling;

- (b) all Equipment which is to be shipped by sea is suitably and adequately protected and packed against possible damage resulting from ingress of salt water and any likely damage including condensation and corrosion;
- (c) all timber used in crates or pallets is treated against infestation in accordance with the requirements of Authorities and legislation and that any certificates required in relation to those requirements are available at the time of shipment;
- (d) shipping marks and numbers are identical to the Purchaser's order or Contract number, and item descriptions are identical to those given in any custom tariff classification; and
- (e) each package or crate is plainly marked with the Purchaser's name and address, weight of package, Contract number, job number and any other destination or shipping information which may be required by the Purchaser's Representative.

## **20.5 Progressive Delivery**

- (a) Where the Equipment is to be Delivered progressively and there is more than one date specified as the Time for Delivery, then the interpretation of 'Time for Delivery' and the provisions of this Contract will apply separately to each Delivery and references to the Equipment will mean so much of the Equipment as is comprised by the relevant Delivery.
- (b) Where the Equipment is to be Delivered progressively but there is only one date specified as the Time for Delivery, then Delivery of all of the Equipment must be completed by the Time for Delivery, and interim Deliveries must be made in accordance with the Program or at times agreed in advance with the Purchaser's Representative.

## **21 Acceptance or rejection of Equipment**

### **21.1 Certificate of Acceptance or Notice of Non-Acceptance**

Before the expiry of the Acceptance Period, the Purchaser's Representative must either:

- (a) if the Purchaser's Representative is of the opinion that the Equipment is Acceptable, issue a Certificate of Acceptance which certifies the Time of Acceptance and any minor Defects which do not prevent the Equipment from being reasonably capable of being used for the purposes for which it is intended; or
- (b) if the Purchaser's Representative is not of the opinion that the Equipment is Acceptable, issue to the Supplier a Notice of Non-Acceptance and either:
  - (i) direct the Supplier to take whatever steps are required to rectify or replace the Equipment so that the Equipment is Acceptable;
  - (ii) direct the Supplier to deliver a proposal for rectification or replacement so that the Equipment is Acceptable;
  - (iii) advise the Supplier that it elects to accept the Equipment and claim damages; or
  - (iv) reject the Equipment.

The Purchaser's Representative may issue a Certificate of Acceptance or a Notice of Non-Acceptance under this clause in relation to some or all of the Equipment.

## 21.2 Rectification of minor omissions

On receipt of a Certificate of Acceptance, the Supplier must as soon as practicable rectify the minor Defects (if any) in the Equipment.

## 21.3 Rectification or replacement

- (a) On receipt of a direction issued under **clause 21.1(b)(i)**, the Supplier must take whatever steps are necessary to rectify or replace the Equipment so that the Equipment is Acceptable in accordance with the steps, if any, set out in the direction given under **clause 21.1(b)(i)**. The provisions of **clauses 21.1, 21.2 and 22** will reapply to the rectified or replaced Equipment.
- (b) Within 5 Business Days of receipt of a direction given under **clause 21.1(b)(ii)**, the Supplier must provide a proposal for rectification or replacement which includes the following information:
  - (i) whether the Supplier proposes to replace the Equipment or rectify the Equipment, so that the Equipment is Acceptable;
  - (ii) if the Supplier proposes to rectify the Equipment, the nature of the work involved, how long it will take and where the work will take place;
  - (iii) a proposed program for replacement or rectification (as the case may be); and
  - (iv) any disruption which might be caused to the Purchaser.

## 21.4 Acceptance or rejection of proposal

On receipt of the proposal given under **clause 21.3(b)**, the Purchaser's Representative may by written notice to the Supplier either:

- (a) accept the proposal (in which case the Supplier must promptly carry out the terms of the proposal);
- (b) advise that it elects to accept the Equipment and claim damages; or
- (c) reject the Equipment.

## 21.5 Replacement of Equipment

If following the provision of a Notice of Non-Acceptance under **clause 21.1(b)**, the Equipment is replaced by the Supplier:

- (a) risk in the Equipment to be replaced will pass back to the Supplier at the time of collection;
- (b) title to any replacement Equipment will pass to the Purchaser on Delivery to the Point of Delivery;
- (c) title to the Equipment that was replaced will pass back to the Supplier upon title to the replacement Equipment passing to the Purchaser;
- (d) risk in any replacement Equipment will pass to the Purchaser in accordance with **clause 19**; and
- (e) the Equipment will be deemed to:
  - (i) have been Delivered, and the Time of Delivery of the Equipment will be deemed to be, the date on which the replacement Equipment is Delivered to the Point of Delivery; and
  - (ii) be Acceptable at the Time of Acceptance.

## 21.6 Rectification of Equipment

If following the provision of a Notice of Non-Acceptance under **clause 21.1(b)**, the Equipment is rectified by the Supplier:

- (a) title to the Equipment to be rectified will remain with the Purchaser at all times;
- (b) the Supplier will indemnify the Purchaser for any Loss in connection with the Supplier's rectification work; and
- (c) the Equipment will be deemed to:
  - (i) have been Delivered, and the Time of Delivery will be deemed to be, the date on which the rectification work is complete; and
  - (ii) be Acceptable at the Time of Acceptance.

## 21.7 Rejection where no rectification or replacement

If following the provision of a Notice of Non-Acceptance under **clause 21.1(b)**, the rectification or replacement of the Equipment has not been effected within the time required in a notice given under **clause 21.1(b)(i)** or under a proposal accepted under **clause 21.4(a)**, then the Purchaser's Representative may by notice in writing to the Supplier reject the Equipment.

## 21.8 Consequences of notice of rejection

- (a) On receipt of a notice of rejection given under **clause 21.1(b)(iv)** or **clause 21.7**, the Supplier must:
  - (i) repay that part of the Contract Price it received for the rejected Equipment, and
  - (ii) indemnify the Purchaser against any Loss suffered or incurred in relation to the breach of the Contract.
- (b) On receipt of the repayable and indemnified amounts referred to in **clause 21.8(a)**, the Purchaser must make the rejected Equipment available for collection by the Supplier. At the time of collection, title to and risk in the collected Equipment will pass to the Supplier.

## 21.9 No impact on rights

No action taken by the Purchaser or the Purchaser's Representative under this clause will affect its right to claim damages at common law for breach of the Contract or to exercise any other right under this Contract.

# 22 Warranty period

## 22.1 Duration of Warranty Period

- (a) Subject to **clause 22.1(b)**, the Warranty Period in respect of any of the Equipment will commence on the Time of Acceptance of all of the Equipment and continue for the period specified in **Item 24** of **schedule 1**.
- (b) There is to be a separate Warranty Period in respect of any Equipment rectified during the Warranty Period, commencing on the date the rectification work is completed, and continuing for the period specified in **Item 25** of **schedule 1**.

## 22.2 Direction to rectify

At any time up to 10 Business Days after the expiry of the Warranty Period, the Purchaser's Representative may direct the Supplier to rectify an omission or Defect. The Supplier must comply with any direction within the time stated in the direction, or if no time is stated, within a reasonable time.

### 22.3 Failure to carry out rectification

If the Supplier fails to comply with a direction given under **clause 22.2**, or where the rectification work is required urgently, the Purchaser may perform the work or have the work performed itself or by others. The cost to the Purchaser of having the work performed will be a debt due from the Supplier to the Purchaser.

## 23 Final payment schedule

### 23.1 Final payment claim

Within 20 Business Days after the expiry of the Warranty Period, the Supplier must provide the Purchaser's Representative with a 'Final Payment Claim' which includes details of all sums which the Supplier considers to be due from the Purchaser in respect of the Contract Price including any Variations and delay costs. The Final Payment Claim must:

- (a) be in writing and in a form approved by the Purchaser's Representative; and
- (b) include a breakdown of the payment being claimed and substantiation of the claim as required by the Contract and the Purchaser's Representative.

### 23.2 Issue of Final Payment Schedule

- (a) Within 10 Business Days after:
  - (i) the Purchaser's Representative receives the Supplier's Final Payment Claim; or
  - (ii) if no Final Payment Claim is received, the date for lodgement of the final payment claim,

the Purchaser's Representative must issue to the Supplier a 'Final Payment Schedule' which states:

- (A) the Contract Price as adjusted in accordance with the Contract;
  - (B) if the amount payable to the Supplier is less than the amount claimed for payment by the Supplier:
    - (1) indicate why the final scheduled amount is less or why no payment is proposed; and
    - (2) if the reason is that the Purchaser is withholding payment, the reason why the Purchaser is withholding payment;
  - (C) the resulting amount certified as then being due for payment to the Supplier by the Purchaser or to the Purchaser by the Supplier.
- (b) If the Final Payment Schedule certifies an amount due for payment to the Supplier by the Purchaser, the Supplier must give the Purchaser a valid tax invoice for the difference between the Contract Price and the amount determined by the Purchaser's Representative under **clause 23.2(a)(a)(ii)(C)** within two Business Days of receipt of the Final Payment Schedule.

### 23.3 Payment of sum certified

- (a) The sum certified as due under **clause 23.2** must be paid within 10 Business Days after the Supplier receives the Final Payment Schedule. The sum certified may be an amount which is payable to or from the Supplier.
- (b) The Purchaser may, prior to making any payment under **clause (a)**, require the Supplier to execute a deed of release.

## 23.4 Bar on claims

Except for the amounts payable under **clause 23.3**, after the earlier of:

- (a) the expiry of 20 Business Days after expiry of the last Warranty Period; and
- (b) the receipt of the Final Payment Claim,

the Supplier is barred from making any further claim against the Purchaser in respect of the Contract, or the supply or Delivery of any Equipment, or any other aspect of the Work under the Contract, whether in contract, tort or otherwise, which has not been made.

## 23.5 No approval

The issue of a certificate under this Contract will not constitute approval or acceptance of any Equipment supplied or Work under the Contract or other matter nor will it prejudice any claim by the Purchaser against the Supplier.

# 24 Liability

## 24.1 Indemnity

The Supplier indemnifies the Purchaser and its officers, employees, agents and contractors against:

- (a) all loss or damage to the Purchaser's property;
- (b) any claim, demand, action, suit or proceeding that may be brought by any person against the Purchaser, the Purchaser's Representative or any officer, employee, contractor or agent of the Purchaser;
- (c) any Loss suffered or incurred by the Purchaser in respect of personal injury to or death of any person; and
- (d) loss of or damage to any property (including any suit for an injunction in respect of any loss, apprehended loss or interference with enjoyment of any property),

arising out of or as a consequence of:

- (e) the negligent act or omission of the Supplier, its employees, agents or subcontractors; or
- (f) the Supplier's breach of its obligations under the Contract.

## 24.2 Exclusion of Consequential Loss

- (a) Subject to **clause 24.2(b)**, a party will not be liable to the other party in respect of any Consequential Loss which may be suffered or incurred by the other party in connection with this Contract whether arising by way of indemnity, for breach of contract, in tort (including negligence), under statute, in equity or otherwise.
- (b) The exclusion of liability described in **clause 24.2(a)** does not extend to liability for Consequential Loss in respect of:
  - (i) death or injury to persons or damage to real or personal property;
  - (ii) liquidated damages payable by the Supplier or recovery of any Loss under **clause 18**;
  - (iii) Performance Liquidated Damages payable by the Supplier or recovery of any Loss (if applicable) in accordance with **clause 2.3** and **Schedule 2**;
  - (iv) conduct which is so grossly careless that it amounts to a reckless disregard for the harmful, foreseeable and avoidable consequences which may result from it;

- (v) breach of any applicable laws by the Supplier related to the Work under the Contract;
- (vi) misuse of Confidential Information;
- (vii) the indemnities in **clause 10.4** and **clause 33.1**;
- (viii) any liability of the Supplier to the extent the Supplier is indemnified for the liability under any policy of insurance required to be maintained, or effected and maintained by the Supplier under this Contract, or would have been indemnified but for the inclusion of this **clause 24.2** or the failure by the Supplier to comply with its insurance obligations under this Contract or the terms of any such policy of insurance or to diligently pursue a claim;
- (ix) liability arising from fraudulent or criminal acts or omissions of the liable party or any of its employees, agents or subcontractors;
- (x) liability for wilful misconduct in breach of Contract which has substantial harmful consequences for the other party (including an intentional unlawful abandonment of this Contract);
- (xi) liability for insurance deductibles borne by the Supplier;
- (xii) liability for any fine, penalty, sanction or compensation imposed by any law; or
- (xiii) liability which, by law, a party cannot contract out of or limit.

## 25 Insurance

### 25.1 Obligation to maintain insurance

Without in any way limiting or affecting the Supplier's other obligations under this agreement, the Supplier must (at its own expense) take out and maintain, with a reputable insurer, the following insurance policies:

- (a) from the date of this Contract until 7 years after the issue of the Final Payment Schedule:
  - (i) public and products liability insurance with an overall limit of not less than the amount specified in **Item 27 of schedule 1** for any one occurrence and unlimited as to the number of claims and which covers the Purchaser for its liability arising out of the supply of the Equipment, injury, death to persons and/or damage to property caused by the Equipment during installation, commissioning or operation, the performance of the Services and/or the Supplier's other obligations under this Contract; and
  - (ii) if specified in **Item 26 of schedule 1**, professional indemnity insurance with a limit of the amount specified in **Item 26 of schedule 1** for each and every claim;
- (b) from the date of this Contract until the date specified in this clause 25.1(b) or if no date is stated, the issue of the Final Payment Schedule:
  - (i) workers compensation insurance (including occupational disease where required by law) and employer's indemnity insurance which complies with relevant laws covering all claims and liabilities under any statute and at common law with a sum insured of \$50,000,000, in respect of any one event (where applicable) for the death of or injury to:
    - (A) any person employed by the Supplier in connection with this agreement; and



- (B) any person who is a worker of the Supplier or in connection with this agreement and who may be deemed under statute to be a worker of the Purchaser.

The Supplier's workers' compensation insurance must be endorsed so as to provide:

- (C) that the Purchaser is indemnified as principal against any liability which it may incur to such Supplier employees or workers, arising by virtue of any applicable workers' compensation legislation and at common law, including any liability incurred as a deemed employer; and
  - (D) for the Purchaser to be named as the 'principal' and for the insurance to include a waiver of subrogation from the insurer in favour of the Purchaser as 'principal';
- (ii) insurance of the Equipment for the full replacement value of the Equipment including materials ordered for inclusion into the Equipment (whether or not such items are owned by the Supplier, ownership has passed to the Purchaser or such items are complete or incomplete) against loss or damage including loss or damage in transit until the Time of Delivery;
  - (iii) property damage liability insurance covering all motor vehicles owned, leased or hired by the Supplier used in connection with the performance of its obligations under this Contract, with a limit of \$20,000,000 for each and every claim and which covers the Purchaser for its liability arising out of the performance of the Supplier's obligations under this Contract;
  - (iv) to the extent that a major component of or item of equipment or materials to be incorporated into, any Equipment, or any Equipment themselves, will be imported by the Supplier into Australia, a marine cargo insurance policy which covers the Supplier's property to be provided in connection with this agreement, against the risks of loss, damage or destruction during transport to Australia; and
  - (v) such other insurance as is required by law.

## 25.2 Certificates of currency

- (a) Within 2 Business Days after the date of this Contract and otherwise on the reasonable request of the Purchaser, the Supplier must give the Purchaser copies of any certificates from an insurer or insurers proving the currency of each insurance policy referred to in **clause 25.1**.
- (b) Despite anything to the contrary in this Contract, the Purchaser:
  - (i) has the right to refuse the Supplier (and any of the Supplier's personnel) entry to the Site; and
  - (ii) is not obliged to pay, and may withhold payment of any amount owed by it to the Supplier, without any interest accruing under this Contract,unless and until the Supplier has complied with **clause 25.2(a)**.

## 25.3 Terms of insurance

- (a) The Supplier must ensure that any insurance policies taken out pursuant to **clause 25.1(b)(ii)** and **clause 25.1(b)(iv)** name the Purchaser as an interested party.
- (b) The Supplier must promptly notify the Purchaser in writing:

- (i) if any insurer proposes to cancel any of the policies; and
  - (ii) of any occurrence in connection with any insurance policy procured pursuant to **clause 25.1** of this Contract, that may give rise to a claim against the insurances and which may adversely affect those insurances, and provide any further information reasonably requested by the Purchaser in connection with such occurrence or claim.
- (c) The Supplier must ensure that each of its subcontractors (if any) takes out and maintains insurance as required by this **clause 25** (including as to amounts of insurance and type of insurance) given the nature of work to be performed, or materials, equipment or goods to be provided, by the relevant subcontractor, as if they were the Supplier.

## 26 Confidentiality and media releases

### 26.1 No disclosure

Subject to **clause 26.2** and except to the extent necessary to carry out the Work under the Contract, the Supplier must not, and must ensure that its employees do not, without the prior written approval of the Purchaser, at any time (including after the termination or expiry of this Contract):

- (a) disclose or give to any person any Confidential Information; or
- (b) use or reproduce, or permit or allow any other person to use or reproduce the Documentation or Confidential Information.

### 26.2 Exclusions

**Clause 26.1** does not apply to the extent that the Confidential Information is:

- (a) in the public domain at the time that the Confidential Information is disclosed or given; or
- (b) required by law to be disclosed or given.

### 26.3 No press release

Without limiting the generality of **clause 26.1**, the Supplier must not advertise or issue any information, publication, document or article for publication or media release concerning the Work under the Contract or the Purchaser's business and activities without the prior written approval of the Purchaser.

### 26.4 Referral of media enquiries

The Supplier must refer to the Purchaser any enquiries from the media concerning the Work under the Contract or the Purchaser's business and activities.

### 26.5 Return of documents

Within 10 Business Days of the issue of the Final Payment Schedule or the earlier termination of this Contract, the Supplier must return to the Purchaser all documents or records (including all Confidential Information) the Purchaser has supplied to the Supplier in respect of the Work under the Contract and copies of any documents or records of the Purchaser held by the Supplier. The Supplier may retain one copy of the documents for the purpose only of keeping a record.

## 27 Default and insolvency

### 27.1 Termination for default by the Supplier

The Purchaser may immediately upon written notice terminate this Contract in whole or in part for the Supplier's default, if:

- (a) the Supplier commits a Serious Breach; or
- (b) the Supplier does not carry out any obligation under this Contract (not being a Serious Breach) and, in the case of a default which is capable of remedy, does not remedy that default within 5 Business Days after the Purchaser serves written notice on the Supplier requiring the default to be remedied, or in the case of a default which is not capable of remedy, does not comply with the directions of the Purchaser specified in the Purchaser's written notice within 5 Business Days of service of that written notice.

### 27.2 Rights of the Purchaser

If the Purchaser terminates the Contract under **clause 27.1**, the respective rights and liabilities of the parties will be the same as they would be at common law if the Supplier had wrongfully repudiated the Contract and the Purchaser elected to treat the Contract as at an end and recover damages.

### 27.3 Supplier's right to terminate

The Supplier may terminate this Contract if:

- (a) the Purchaser does not pay the Supplier any undisputed money due and owing to it under this Contract; and
- (b) the Purchaser does not pay that money within a further period of 20 Business Days after the Supplier serves written notice on the Purchaser requiring payment.

## 28 Termination for convenience

### 28.1 Termination for convenience

- (a) Without prejudice to any of the Purchaser's other rights or entitlements or powers under this Contract, the Purchaser may at any time for its sole convenience, and for any reason, by written notice to the Supplier terminate this Contract effective from the time stated in the notice or if no such time is stated, at the time the notice is given to the Supplier.
- (b) If the Contract is terminated under this clause the Purchaser may procure equipment similar to the Equipment from any other person.

## 29 Obligations on and consequences of termination

### 29.1 Supplier's obligations

If this Contract is terminated or the Work under the Contract is taken out of the hands of the Supplier, the Supplier must immediately:

- (a) cease the performance of the Work under the Contract;
- (b) comply with any direction by the Purchaser, including any direction to assign to the Purchaser all rights and benefits under the contracts with third parties;

- (c) co-operate with the Purchaser and any other persons nominated by the Purchaser to enable the Purchaser, or the persons nominated by the Purchaser, to complete the Work under the Contract; and
- (d) at its own cost, deliver to the Purchaser:
  - (i) all documentation licensed to the Supplier pursuant to this Contract (for the purpose of keeping a record of the Work under the Contract provided under this Contract), in the number and format specified in **Item 28 of schedule 1**; and
  - (ii) if directed to do so by the Purchaser, copies of all records and materials in its possession or power relating to the Project, boxed and indexed as reasonably directed by the Purchaser.
- (e) The Purchaser will not be obliged to make any payment to the Supplier, whether under this Contract or otherwise, until the Supplier has complied with this clause.

## **29.2 Payment upon termination for convenience or termination by Supplier**

If the Contract is terminated under **clauses 27.3** or **28.1**:

- (a) the Purchaser's Representative will assess the value of the work performed under the Contract to the date of termination, evidencing the amount which would have been payable had the Contract not been terminated and had the Supplier been entitled to and made a payment claim on the date of termination;
- (b) the Purchaser must pay the Supplier the sum of:
  - (i) the amount determined under **clause 29.2(a)** less any amounts that have been previously paid to the Supplier under **clause 15**; plus
  - (ii) the cost of materials and equipment reasonably ordered by the Supplier solely for the Work under the Contract and which the Supplier is liable to accept, but only if they will become the Purchaser's property upon payment; less
  - (iii) any amounts payable by the Supplier to the Purchaser under the Contract or in connection with the Work under the Contract, as reasonably determined by the Purchaser's Representative;
- (c) subject to **clause 5.6**, the Purchaser must promptly release and return all remaining security provided by the Supplier;
- (d) if the amount calculated in accordance with **clause 29.2(b)** yields a negative number, the Supplier must pay that amount within 5 Business Days of notification by the Purchaser's Representative and the Purchaser may recover such amount as a debt due from the Supplier.

## **29.3 Consequences of termination**

The parties acknowledge that:

- (a) the sums payable under **clauses 27** and **29** will be in full and final satisfaction of all obligations of the Purchaser to the Supplier in relation to this Contract, the rights exercised by the Purchaser or the Supplier under **clauses 27, 28** and **29**, and the performance of Work under the Contract by the Supplier; and
- (b) all rights vested in the Purchaser by **clauses 27, 28** and **29** are without prejudice to any other rights and remedies of the Purchaser.

## 30 Claims

- (a) The Supplier must give the Purchaser the notices required by **clause 30(a)** if it wishes to make a claim in respect of any matter (including a breach of the Contract by the Purchaser) under, arising out of, or in connection with the supply or Delivery of the Equipment or any other aspect of the Work under the Contract or the Contract.
- (b) This **clause 30** does not apply to claims for:
- (i) payment under clause 15;
  - (ii) Variations under clause 11; or
  - (iii) an extension of time or delay costs under clause 17;
- in respect of which the Supplier must give the notices in the form and within the times prescribed by those clauses.
- (c) The Supplier must:
- (i) within 20 Business Days of the date upon which the Supplier became aware or could reasonably have become aware that there would be an adverse impact on the Supplier as a consequence of the events or circumstances on which the claim is based, provide the Purchaser's Representative with written notice of its intention to lodge a claim, giving details of the nature of the claim; and
  - (ii) within 20 Business Days of the completion of the occurrence of the events or circumstances on which the claim is based, provide the Purchaser's Representative with a notice which contains detailed particulars of the claim sufficient to identify the matter at issue and to enable the Purchaser's Representative to understand the precise nature and content of the claim which includes:
    - (A) each item of claim and the basis for it;
    - (B) the clauses of this Contract and the documents upon which each item of claim is based;
    - (C) if a direction of the Purchaser's Representative or any other person is relied upon, the date of the direction, who gave it, whether it was given orally or in writing, and the terms of the direction;
    - (D) if an act or omission of the Purchaser, the Purchaser's Representative or any employee or agent of the Purchaser is relied upon, the nature of the act or omission, the date of the act or omission, whether it was oral or in writing, and the particulars of the act or omission;
    - (E) the amounts (including particulars of those amounts) claimed in respect of each item or claim or if no amount is claimed, a statement to that effect; and
    - (F) any other decision sought in respect of the dispute.
- (d) Notices must be given in accordance with this **clause 30** whether or not the event or circumstance upon which the claim is based is continuing and whether or not the Loss has crystallised or can be fully particularised. The details omitted must be provided within 5 Business Days of the day that they do crystallise or can be fully particularised.
- (e) Any claim which is not notified by the Supplier in accordance with this **clause 30** is barred.

## 31 Disputes

### 31.1 Notice of Dispute

- (a) If a dispute arises in connection with this Contract or the Work under the Contract (**Dispute**), then either party must deliver by hand or send by certified mail to the other party a notice of the Dispute in writing identifying and providing details of the Dispute.
- (b) Despite the existence of a Dispute, each party must continue to perform its obligations under the Contract. The existence of a Dispute will not prejudice either party's rights to terminate the Contract for any reason.

### 31.2 Conference

Within 10 Business Days of service of a notice of Dispute, the Purchaser's Representative and a senior representative of the Supplier must meet 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 (or such longer period as may be agreed by the parties in writing), the matter will be and is hereby referred to arbitration.

### 31.3 Arbitration

- (a) The seat of the arbitration will be Perth, Western Australia, and the arbitration is to take place in Perth, Western Australia. The arbitration will be conducted in accordance with the rules of the Australian Centre for International Commercial Arbitration (as amended from time to time) (the **ACICA Rules**). The arbitration shall be resolved by one arbitrator who shall be appointed in accordance with article 12 of the ACICA Rules.
- (b) To the extent permitted by law, the parties agree that:
  - (i) 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 31.3**; and
  - (ii) 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 31.3**, have applied to any Dispute referred to arbitration and the provisions of Part 1F of the *Civil Liability Act 2002* (WA) are excluded from applying to the Contract or to the Work under the Contract.

### 31.4 Litigation

The parties agree that:

- (a) all Disputes must be resolved in accordance with this **clause 31**; and
- (b) nothing in this **clause 31** shall prejudice the right of a party to seek urgent injunctive or urgent declaratory relief from a court.

## 32 Notices

### 32.1 General

- (a) Unless otherwise specifically provided, any notice, consent, approval or other communication under the Contract:
  - (i) must be in writing;

- (ii) where **item 30 of schedule 1** states that notices must be given by an electronic management system, the notice must be given by the electronic management system as set out in **schedule 1**;
  - (iii) may be (unless **item 30 of schedule 1** states otherwise) delivered by hand or by mail to the address, or sent to the email address, stated in **Item 29 of schedule 1**, or such other postal address, or email address as a party may notify to the other from time to time in writing; and
  - (iv) must be marked with the title stating that it is a notice under this Contract.
- (b) A notice is given on the day that:
- (i) if delivered by the electronic management system set out in **item 30 of schedule 1**, at the time that the electronic management system generates a confirmation of the date and time sent but if delivery or receipt is on a day which is not a Business Day or is after 5:00pm at the place of delivery or receipt, it is taken as given at 9:00am on the next Business Day;
  - (ii) subject to **clause 32.1(c)**, if delivered by hand or by mail to the addressee, on the day of delivery if it is a Business Day, otherwise on the next Business Day; or
  - (iii) subject to **clause 32.1(c)**, if sent by electronic mail, when the communication enters the information system on which the mailbox of the recipient's email address resides. A notice is taken to have entered the information system on which the mailbox of the recipient's email address resides at the time it was sent if the sender does not receive notification within 24 hours of sending the communication that the communication has not been delivered. If a notice is taken to have entered the information system on which the mailbox of the recipient's email address resides on a day which is not a Business Day, it is taken as delivered on the next Business Day.
- (c) If a notice delivered by hand or sent by electronic mail is delivered or sent after 5:00pm on a day, the notice will be deemed to have been received on the next Business Day.
- (d) A party must notify the other party and the Purchaser's Representative of any change to its details stated in **Item 29 of schedule 1**.
- (e) The Purchaser's Representative must notify the parties of any change to its details stated in **Item 29 of schedule 1**.

## 32.2 Email Notices

- (a) Despite any other provision of the Contract but subject to **clause 32.1(a)(ii)** and this **clause 32.2**, the Purchaser and the Supplier agree that notices under the Contract may be sent by electronic mail.
- (b) The party sending the notice must keep a contemporaneous printed record of any notice sent by it by electronic mail.
- (c) Each party must monitor the information systems on which the mailboxes for their respective email addresses reside on a frequent and regular basis but no less often than once a Business Day.
- (d) Each party must immediately notify the other if they discontinue the use of, or change, their respective email addresses, or if they are unable to access their email addresses for a period longer than one day.
- (e) Each party must ensure that it is able to receive notices to its email address, including by ensuring that sufficient storage capacity is available at all times.

- (f) For the avoidance of doubt, a notice sent by electronic means under the Contract will be taken to be a notice in writing signed by the person identified as the sender of the electronic mail.

## 33 Taxes and customs duty

### 33.1 Taxes

- (a) Unless otherwise expressly provided in the Contract, the Supplier must pay all taxes, charges and other payments including payroll tax, levies, duties (including customs duty) and assessments of every nature due in connection with the Work under the Contract and the performance of the Supplier's other obligations under the Contract. The Supplier must indemnify the Purchaser from any liability for those taxes, charges and other payments which has arisen or may arise.
- (b) The Supplier warrants that it is not a foreign resident within the meaning of the *Taxation Administration Act 1953* (Cth).
- (c) If the Purchaser is required in its opinion to withhold any amount in respect of tax from a payment to be made to the Supplier under this Contract, it is entitled to do so and such withholding and payment to the relevant taxing authority will be a good discharge of its obligation to pay the relevant amount to the Supplier.
- (d) If the Purchaser pays an amount to the Supplier without withholding an amount in respect of tax, the Supplier must indemnify the Purchaser for any Loss suffered by the Purchaser as a result of the Purchaser failing to withhold the amount in respect of tax, including as a result of the warranty provided in **clause 33.1(b)** being untrue at any time during the term of this Contract.

### 33.2 Customs clearance and Australian customs duty

- (a) Where the Equipment, materials, plant or other items are to be imported into Australia by the Supplier:
  - (i) subject to **clause 33.2(b)**, the party stated in **Item 31 of schedule 1** will pay any Australian customs duty that may be payable on the importation of those items; and
  - (ii) the Supplier must do all things necessary to ensure that it obtains any available exemptions from or reductions in any Australian customs duty (including under the Australian Tariff Concession Orders and any applicable Free Trade Agreements), and if such exemptions or reductions are obtained, then to the extent (if any) that the amount of the exemption or reduction is incorporated into the Contract Price:
    - (A) the Supplier must if the Purchaser has already paid or reimbursed the Supplier the amount of the exemption or reduction, repay that amount to the Purchaser; and
    - (B) if the Purchaser has not yet paid the Supplier the amount of the exemption or reduction, that amount is not payable to the Supplier and that amount will be deducted from the Contract Price.
- (b) The Supplier must bear and pay for any Australian customs duty that may be payable in connection with the importation into Australia of:
  - (i) any plant or equipment used to manufacture or transport the Equipment; and
  - (ii) the Equipment, materials, plant, or other items required to repair, replace or rectify any loss, damage or Defect that the Supplier is required to repair, replace or rectify at its cost.



- (c) Regardless of whether the Purchaser or the Supplier pays for Australian customs duty, the Supplier is responsible for handling and clearing through customs in all applicable jurisdictions (including Australia), all overseas sourced Equipment, materials, plant, and other items that are to be supplied by the Supplier under this Contract unless the Contract expressly provides otherwise.

## 34 GST

### 34.1 Construction

In this **clause 34**:

- (a) unless there is a contrary indication, words and expressions which are not defined in this document but which have a defined meaning in the GST Law have the same meaning as in the GST Law;
- (b) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) or, if that Act does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act; and
- (c) references to GST payable and input tax credit entitlements include:
  - (i) notional GST payable by, and notional input tax credit entitlements of the Commonwealth, a State or a Territory (including a government, government body, authority, agency or instrumentality of the Commonwealth, a State or a Territory); and
  - (ii) GST payable by, and the input tax credit entitlements of, the representative member of a GST group of which the entity is a member.

### 34.2 Consideration GST exclusive

Unless otherwise expressly stated, all consideration, whether monetary or non-monetary, payable or to be provided under or in connection with this document is exclusive of GST (**GST-exclusive consideration**).

### 34.3 Payment of GST

If GST is payable on any supply made by:

- (a) a party; or
- (b) an entity that is taken under the GST Law to make the supply by reason of the capacity in which a party acts,

(**Supplier**) under or in connection with this document, the recipient of the supply, or the party providing the consideration for the supply, must pay to the Supplier an amount equal to the GST payable on the supply.

### 34.4 Timing of GST payment

The amount referred to in **clause 34.3** must be paid in addition to and at the same time and in the same manner (without any set-off or deduction) that the GST-exclusive consideration for the supply is payable or to be provided.

### 34.5 Tax invoice

The Supplier must deliver a tax invoice or an adjustment note to the recipient of a taxable supply before the Supplier is entitled to payment of an amount under **clause 34.3**.

### 34.6 Adjustment event

If an adjustment event arises in respect of a supply made by a Supplier under or in connection with this document, any amount that is payable under **clause 34.3** will be calculated or recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier or by the Supplier to the recipient as the case requires.

### 34.7 Reimbursements

- (a) Where a party is required under or in connection with this document to pay for, reimburse or contribute to any expense, loss, liability or outgoing suffered or incurred by another party or indemnify another party in relation to such an expense, loss, liability or outgoing (**Reimbursable Expense**), the amount required to be paid, reimbursed or contributed by the first party will be reduced by the amount of any input tax credits to which the other party is entitled in respect of the Reimbursable Expense.
- (b) This **clause 34.7** does not limit the application of **clause 34.3**, if appropriate, to the Reimbursable Expense as reduced in accordance with **clause 34.7(a)**.

### 34.8 Calculations based on other amounts

If an amount of consideration payable or to be provided under or in connection with this document is to be calculated by reference to:

- (a) any expense, loss, liability or outgoing suffered or incurred by another person (**Cost**), that reference will be to the amount of that Cost excluding the amount of any input tax credit entitlement of that person relating to the Cost suffered or incurred; and
- (b) any price, value, sales, proceeds, revenue or similar amount (**Revenue**), that reference will be to that Revenue determined by deducting from it an amount equal to the GST payable on the supply for which it is consideration.

### 34.9 No merger

This **clause 34** does not merge on the completion, rescission or other termination of this document or on the transfer of any property supplied under this document.

## 35 Personal Property Securities Act

- (a) Terms used in this **clause 35** which are defined in the PPS Act have the meanings given to those terms in that Act unless the context indicates otherwise or the term is defined in this Contract.
- (b) Unless expressly permitted by this Contract, a party must not, without the prior written consent of the other party:
  - (i) create any Security Interest over any of the other party's personal property which has priority over Security Interests granted in favour of the other party; or
  - (ii) sell or dispose of the other party's personal property.
- (c) To secure all of its obligations under this Contract, the Supplier grants to the Purchaser a Security Interest in the Equipment.
- (d) The Security Interest created under clause 35(c):
  - (i) will continue in the Equipment until title passes to the Purchaser pursuant to this Contract; and
  - (ii) attaches to the proceeds of the Equipment.

- (e) The Supplier acknowledges that the Purchaser is entitled to register a financing statement on the personal property securities register to perfect the Purchaser's Security Interest in the Equipment.
- (f) The Supplier must do all things required by the Purchaser to:
  - (i) ensure that the Purchaser's Security Interest is perfected, enforceable and has the highest priority possible under the PPS Act;
  - (ii) ensure that the Purchaser has all information necessary to register a financing statement on the personal property securities register to perfect its Security Interest; and
  - (iii) enable the Purchaser to exercise its rights in connection with the Security Interest.
- (g) The Supplier must not:
  - (i) grant, allow to exist or agree to any Security Interest in the Equipment, other than the Purchaser's Security Interest created under this Contract; or
  - (ii) sell, lease or otherwise deal with the Equipment except in accordance with this Contract.
- (h) The Purchaser may enforce its Security Interest in the Equipment and any proceeds immediately upon the occurrence of a termination event described in clause 27.1 and the Supplier grants to the Purchaser a license to enter onto any premises of the Supplier for the purpose of enforcing the Security Interest.
- (i) The Supplier waives its right to receive any notice under the PPS Act (including the right to receive a verification statement in accordance with section 157 of the PPSA) unless the notice is required by the PPS Act and the right to receive it cannot be waived by the Supplier, or otherwise excluded.
- (j) If title to the Equipment passes to the Purchaser prior to the Equipment being under the care, custody and control of the Purchaser, the Supplier grants to the Purchaser a licence to enter onto any premises of the Supplier for the purposes of taking possession of those Equipment.

## 36 Building and Construction Industry (Security of Payment) Act 2021 WA

- (a) The provisions of the Contract do not prevent a party from seeking adjudication under the *Building and Construction Industry (Security of Payment) Act 2021 (WA) (Security of Payment Act)* in respect of a payment dispute, as that term is defined in the Security of Payment Act.
- (b) The adjudicator for any payment dispute under the Security of Payment Act will be appointed by the Resolution Institute, Australia or their successors. Nothing in this clause will prevent a party from contending that the Contract is not a construction contract as that term is defined in the Security of Payment Act.
- (c) In this **clause 36**, where this Contract comes into effect before 1 August 2022, a reference to the Security of Payment Act shall be construed as a reference to the *Construction Contracts Act 2004 (WA)*.

## 37 Financing Assistance

### 37.1 Financing Assistance

The Supplier must provide documents and other technical assistance as the Purchaser may reasonably request in connection with the financing of the Project. During the performance of the Work under the Contract, the Supplier must make available to the Purchaser information relating to the status of the Equipment, the status of any required licences and permits and other Authority approvals or other matters as the Purchaser may request.

### 37.2 Lenders Direct Deed

If requested by the Purchaser, the Supplier agrees to (and will procure any guarantor that has entered into a guarantee in accordance with **clause 5.1(b)**) enter into a direct deed with the Purchaser's Lenders and the Purchaser on terms which are consistent with accepted market practice in Australia for project financing of a resources based project (including in relation to performance, security, notice, termination, step-in, variations and assignment).

### 37.3 Interface with the Lenders

- (a) Without limiting the Supplier's obligations in clause (b) below, the Purchaser must co-ordinate and is responsible for all interfaces with the Lenders and the Lenders' Representative.
- (b) The Supplier must, when reasonably requested to do so by the Purchaser, co-operate with any Lenders and the Lenders' Representative. The Supplier acknowledges and agrees that:
  - (i) such co-operation will not detract from or otherwise affect the Supplier's warranties obligations or liabilities under or in connection with this Contract; and
  - (ii) it will not be entitled to claim any additional cost or expense or any adjustment to the Contract Price or to claim any extension to the Time for Delivery or to make any claim under this Contract, any applicable law, in equity or otherwise in relation to such co-operation.

### 37.4 Enforcement of Security Interests

Notwithstanding any other provisions of this Contract, the Supplier:

- (a) consents to the assignment or novation by the Lenders of this Contract to a third party following enforcement of any Security Interests and agrees to enter into a document to effect such assignment or novation, subject to the third party entering into a deed of covenant in favour of the Supplier acknowledging their rights under this Contract and undertaking to observe and perform all the obligations of the Purchaser or any other person giving the assignment or the novation of this Contract;
- (b) agrees that enforcement of any Security Interests held by the Lenders will not of itself constitute a breach of this Contract or the Purchaser's obligations under this Contract or give rise to a right of the Supplier to terminate this Contract.

## 38 General

### 38.1 Novation

- (a) The Supplier consents to the novation of this Contract by the Purchaser to a contractor of the Purchaser who is carrying out works in relation to the Project for which the Equipment is required.

- (b) If directed by the Purchaser, the Supplier must execute a deed of novation in the form set out in **schedule 11** between the Purchaser, the Supplier and the relevant contractor of the Purchaser.
- (c) The Supplier hereby appoints the Purchaser as the Supplier's attorney to execute the deed of novation as attorney for the Supplier provided that the Purchaser may only execute the deed of novation as attorney for the Supplier if the Supplier fails to execute the deed of novation in the form set out in **schedule 11** within 10 Business Days of being directed to do so by the Purchaser.
- (d) If the Purchaser executes the deed of novation as attorney for the Supplier in accordance with **clause 38.1(c)**, the Supplier will be bound by the deed of novation from the date on which the Purchaser notifies the Supplier in writing of the novation.
- (e) The Supplier is not entitled to any compensation for entering into a deed of novation pursuant to this **clause 38.1**.

### **38.2 Duty**

- (a) As between the parties, the Supplier is liable for, must pay, and indemnify the other the Purchaser for all stamp duty, duty, or like duties or imposts (**Duty**) (including any fine, interest or penalty) payable or assessed on or in connection with:
  - (i) this document;
  - (ii) any document executed under or required by or contemplated by this document; and
  - (iii) any transaction evidenced, effected or contemplated by a document referred to in **clause 38.2(a)(i)** or **clause 38.2(a)(ii)**.
- (b) If a party other than the Supplier pays any Duty referred to in **clause 38.2(a)** (including any fine, interest or penalty), in whole or in part, the Supplier must reimburse the paying party without set-off or deduction immediately on demand.

### **38.3 Legal Costs**

Except as expressly stated otherwise in this Contract, each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Contract.

### **38.4 Assignment**

- (a) The Supplier must not assign or deal with any right under this document without the prior written consent of the Purchaser.
- (b) The Purchaser may assign all or any part of its rights or transfer its obligations under this document without the Supplier's prior written consent.
- (c) Any purported dealing in breach of this clause is of no effect.

### **38.5 Amendment**

The Contract may only be varied or replaced by a document duly executed by the parties.

### **38.6 Waiver and exercise of rights**

- (a) A single or partial exercise or waiver by a party of a right relating to this Contract does not prevent any other exercise of that right or the exercise of any other right.

- (b) A party is not liable for any Loss 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.

### **38.7 Rights cumulative**

Except as expressly stated otherwise in this Contract, the rights of a party under this Contract are cumulative and are in addition to any other rights of that party.

### **38.8 Consents**

Except as expressly stated otherwise in this Contract, a party may conditionally or unconditionally give or withhold any consent to be given under this Contract and is not obliged to give its reasons for doing so.

### **38.9 Further steps**

Each party must promptly do whatever any other party reasonably requires of it to give effect to this Contract and to perform its obligations under it.

### **38.10 Governing law and jurisdiction**

- (a) The Contract is governed by and is to be construed in accordance with the laws applicable in Western Australia.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in 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.

### **38.11 Liability**

An obligation of two or more persons binds them separately and together.

### **38.12 Counterparts**

The Contract may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

### **38.13 Relationship of parties**

The Contract is not intended to create a partnership, joint venture or agency relationship between the parties.

### **38.14 Currency**

All amounts payable under the Contract are to be paid in Australian dollars unless the Contract expressly provides otherwise.

### **38.15 Construction**

Unless expressed to the contrary, in this Contract:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) 'includes' or similar words mean includes without limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- (f) derivatives of defined terms have an analogous meaning; and

- (g) a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or Authority;
  - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
  - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation; and
  - (v) a right includes a benefit, remedy, discretion or power;
  - (vi) '\$' or 'dollars' is a reference to Australian currency;
- (h) if the date on or by which any act must be done under this Contract is not a Business Day, the act must be done on or by the next Business Day;
- (i) where time is to be calculated by reference to a day or event, that day or the day of the event is excluded; and
- (i) headings do not affect the interpretation of this Contract.

### **38.16 Deed**

This document is a deed. Factors which might suggest otherwise are to be disregarded.

# Schedule 1

## Contract Details

Item No	Clause No	Information Sought	Details
1	1	Commencement Date	<i>[Insert Commencement Date]</i>
2	1	Contract	<p>(a) General Conditions</p> <p>(b) <b>schedule 1</b></p> <p>(c) <i>[Insert schedules in order that you would like them to take priority]</i></p> <p>(d) <i>Any other <b>schedules</b> not set out above, being schedules [insert]</i></p> <p>(e) <i>[any documents other than the General Conditions and Schedules which are to form part of the Contract. Note: these should not include Information Documents, or the Supplier's tender submission]</i></p> <p><i>[Insert order of priority of Contract documents:]</i></p>
3	1	Contract Price	<p>Lump Sum:    \$<i>[insert]</i></p> <p>Rates:            See <b>schedule 6</b></p> <p><b>[Note: delete as applicable. Both can be retained if desired]</b></p>
4	1	Equipment	<i>[Insert detailed description of Equipment]</i>
5	1	Legal Opinion	<i>[Insert details of person to whom Legal Opinion should be addressed in cases where a foreign entity is providing the Deed of Guarantee and Indemnity]</i>
6	1	Longstop Date	<p><b>[Note: The Longstop Date only applies if Schedule 2 applies]</b></p> <p><i>[Insert date by which the Purchaser can terminate the Contract if the Supplier fails to achieve the Minimum Performance Criteria]</i></p>



Item No	Clause No	Information Sought	Details	
7	1	Performance Liquidated Damages	[Insert rate per unit measure for each Performance Criteria]	
8	1	Point of Delivery	[Insert Point of Delivery]	
9	1	Purchaser's Representative	Name	[Purchaser's Representative: Name]
			Delivery Address	[Delivery address]
			Postal address:	[Purchaser's Representative's PO box details/Same as delivery address]
10	1	Site	[insert mine site]	
11	1	Supplier's Representative	Name	[Supplier's Representative: Name]
			Delivery Address	[Delivery address]
			Postal address	[Supplier's Representative's PO box details/Same as delivery address]
12	1	Time for Delivery	[Time for Delivery]	
13	2.3	Performance Criteria	Clause 2.3 and <b>schedule 2</b> [apply / do not apply]	
14	5	Unconditional undertaking	From the Commencement Date until the date referred to in <b>clause 5.3</b>	[Two (2) unconditional undertakings, each for 5% of the Contract Price]
15			From the date referred to in <b>clause 5.3</b> until the date referred to in <b>clause 5.4</b>	[5% of the Contract Price]

Item No	Clause No	Information Sought	Details
16	5.1(b)	Deed of guarantee and indemnity	[Drafting Note: a parent company guarantee is expected] A Deed of Guarantee and Indemnity [is/is not] required [Delete as inapplicable] Entity from which Deed of Guarantee and Indemnity is required: [insert or delete if not applicable]
17	13.1	Hold Points	[Insert notice period]
18	15.3	Timing for payment claims	Upon achievement of the following milestones: [insert]
19	15.5(b)	Milestone payments	[insert]
20	16(d) 17.11	Maximum rate for delay costs	[Maximum rate for delay costs Supplier may be entitled to]
21	17.2	Delivery hours	[Delivery hours]
22	17.2	Party responsible for unloading the Equipment, or, where the Point of Delivery is the Supplier's premises, loading of the Equipment	[insert]
23	18.1	Liquidated damages (Delivery)	[\$[Daily rate for liquidated damages]/day]
24	22.1(a)	Warranty Period	[insert period]
25	22.1(b)	Further Warranty Period	[insert period]
26	25.1(a)(ii)	Professional indemnity insurance required Amount	Professional indemnity insurance [is/is not] required. [Professional indemnity insurance: Value]
27	25.1(a)(i)	Amount of combined public and products liability Insurance	[\$[Amount]]

Item No	Clause No	Information Sought	Details						
28	29.1(d)	Documentation upon termination	<table border="1"> <tr> <td>Number of copies</td> <td>Format required</td> </tr> <tr> <td>[insert]</td> <td>[insert]</td> </tr> <tr> <td>[insert]</td> <td>[insert]</td> </tr> </table>	Number of copies	Format required	[insert]	[insert]	[insert]	[insert]
Number of copies	Format required								
[insert]	[insert]								
[insert]	[insert]								
29	32	Purchaser	Name [Purchaser: Name]						
			Delivery Address [Purchaser: Delivery address]						
			Postal address: [Purchaser's PO box details/Same as delivery address]						
			Email: [insert]						
	32	Supplier	Name [Supplier: Name]						
			Delivery Address [Supplier: Delivery address]						
			Postal address: [Supplier's PO box details/Same as delivery address]						
			Email: [insert]						
30	32	Must notices be sent by an electronic management system	[Yes/No – if Yes, specify Teambinder]						
31	33.2	Customs clearance and Australian customs duty	[Insert party responsible for payment]						

# Schedule 2

## Performance Criteria

(clause 1 and clause 2.3)

**[Note: This Schedule 2 is an example only of a regime dealing with Performance Criteria, Minimum Performance Criteria and a Performance Liquidated Damages Regime. It should be reviewed and adjusted or replaced as relevant for the particular Equipment being procured. In many cases, it may be more usual that this regime will apply where installation is required. If that is the case, then please use the supply contract with installation template]**

### 1 Obligations

- (a) The Supplier:
  - (i) guarantees that the Equipment will achieve the Performance Criteria.; and
  - (ii) must monitor the Work under the Contract and its other obligations under the Contract.
- (b) Without limiting the Supplier's other obligations under this Contract, and subject to paragraph (c), if the Supplier fails to achieve any of the Performance Criteria, the Purchaser may give written direction to the Supplier to take the remedial steps contemplated by **section 5** of this **schedule 2** or such other reasonable steps to ensure that the Performance Criteria are achieved.

**[Note: what (if any) impacts would POPL like to see flow from a failure to achieve the Performance Criteria (e.g. a pain / gain adjustment to the Contract Price or performance LDs. Please note additional draft performance LDs provision included below)?]**
- (c) Without limiting any other right or remedy of the Purchaser under this Contract, if the Equipment fails to achieve the Minimum Performance Criteria, the Purchaser may reject the Equipment.
- (d) The Supplier must comply with any direction given by the Purchaser under paragraph (b).
- (e) The parties acknowledge that the Supplier will not be in breach of its obligations in this **schedule 2** or the Performance Criteria to the extent that the Purchaser directly causes the Supplier to breach its obligations under this **schedule 2** or to fail to achieve the relevant Performance Criteria.

### 2 Performance Criteria

- (a) **[insert Performance Criteria]**
- (b) **[Insert Minimum Performance Criteria]**

### 3 Performance Tests

**[Note: The performance testing regime will need to be adjusted on a case by case basis as may be applicable to the Equipment. This will include specifying the timing of performance tests to be undertaken.]**

- (a) Where the Contract provides for performance tests to be carried out by the Supplier, the Supplier must carry out those performance tests in accordance with, and at the time or times required by, the Contract. In respect of such performance tests, the Supplier must:
  - (i) provide the Purchaser with reasonable prior notice of those tests and the opportunity to attend those tests; and
  - (ii) all reasonable information regarding the performance testing.
- (b) Where the Contract provides for performance tests to be carried out by the Purchaser or by third parties:
  - (i) the Purchaser will provide the Supplier with reasonable prior notice of those tests;
  - (ii) the Supplier must attend at those performance tests; and
  - (iii) the Supplier must provide the Purchaser or third parties undertaking the performance tests or both (as the case may be), with all reasonable assistance and information to assist with the required performance testing.
- (c) If the Equipment does not achieve the Minimum Performance Criteria during the performance tests, the Supplier must, at its own cost:
  - (i) carry out all work required to achieve the Minimum Performance Criteria; and
  - (ii) following completion of such work:
    - (A) where the Contract provides for the performance tests to be carried out by the Supplier:
      - repeat the performance tests; and
      - provide not less than 5 Business Days' notice to the Purchaser's Representative of the date on which it will repeat the performance test.
- (d) The requirements of **section 3** of this **schedule 2** continue to apply until the Equipment achieves the relevant Minimum Performance Criteria.
- (e) Without prejudice to **clause 21**, if the Equipment has not achieved the Minimum Performance Criteria by the Longstop Date the Purchaser may, in its absolute discretion, immediately terminate the Contract by written notice to the Supplier. Termination pursuant to **section 3(d)** of this **schedule 2** will be deemed to be a termination pursuant to **clause 27.1**.

### 4 Performance Liquidated Damages

#### 4.1 Liability for Performance Liquidated Damages

- (a) If the Equipment does not achieve the Performance Criteria by the Longstop Date but has achieved the Minimum Performance Criteria, the Supplier must pay to the Purchaser Performance Liquidated Damages at the relevant rate set out in **schedule 1**. **[Note: Please consider whether POPL will offer a cap on**

performance liquidated damages, or deal with this only where applicable and requested by a supplier]

- (b) Performance Liquidated Damages payable pursuant to this **section 4** will immediately become a debt due and payable to the Purchaser.
- (c) The Purchaser's Representative may, at any time, give the Supplier a written demand for any Performance Liquidated Damages payable by the Supplier pursuant to **section 4** of this **schedule 2**.
- (d) The Supplier acknowledges that the level of Performance Liquidated Damages identified in **schedule 1** is a genuine pre-estimate of the loss suffered by the Purchaser in relation to the Equipment failing to achieve the Performance Criteria and is not a penalty.
- (e) Payment by the Supplier of any Performance Liquidated Damages will not relieve the Supplier of its obligation to ensure that the Equipment will achieve the Minimum Performance Criteria or any of its other obligations (save in respect of its obligation to achieve the requisite level of Performance Criteria in respect of which the Purchaser has accepted and received the payment of Performance Liquidated Damages in accordance with **section 4** of this **schedule 2**) or other liabilities under the Contract.

#### **4.2 If amount nil**

If **schedule 1** is not completed or is completed by words which indicate that Performance Liquidated Damages will not apply to this Contract (whether by the use of the words 'not applicable', 'nil' or otherwise) or if **section 4** of this **schedule 2** is found to be unenforceable for any reason, the Supplier must indemnify the Purchaser from any Loss suffered or incurred by the Purchaser by reason of the Equipment not achieving the Performance Criteria.

## **5 Remedial steps**

- (a) [Insert]

# Schedule 3

## Drawings

(clause 1)

[List Drawings]

# Schedule 4

## Specification

(clause 1)

[Describe Specification]



# Schedule 5

## Approved Subcontractors

<b>Approved Subcontractor</b>	<b>Work under the Contract for which Subcontractor approved</b>

# Schedule 6

## Rates for Calculation of Contract Price

(Where the entire Contract Price is a lump sum, these rates will only be used for valuing Variations.)

[Set out Rates]

# Schedule 7

## Approved Form of Financial Undertaking

(clause 5.1)

Details		
<b>Bank</b>	Name	
	ABN	
<b>Purchaser</b>	Name	<1A-Purchaser: Name>
	ABN	<Purchaser: ACN/ABN>
	Address	<1C-Purchaser: Address>
<b>Supplier</b>	Name	<2A-Supplier: Name>
	ABN	<Supplier: ACN/ABN>
	Address	<2C-Supplier: Address>
<b>Contract</b>	Date	
	Description	
<b>Amount</b>		

The terms defined in the Details section above apply when used in this undertaking.

- 1 At the request of the Supplier and in consideration of the Supplier accepting this undertaking by way of security to the Purchaser for the performance by the Supplier of its obligations under the Contract, the Bank undertakes unconditionally and irrevocably to pay the Purchaser on demand any sum or sums which may from time to time be demanded by the Purchaser to a maximum aggregate of the Amount.
- 2 This undertaking is to continue until the first to occur of the following:
  - (a) a written notification has been received from the Purchaser that such sum is no longer required by the Purchaser;
  - (b) this undertaking is returned to the Bank; or
  - (c) payment to the Purchaser by the Bank of the whole of the Amount.
- 3 The Bank must make payment of the Amount or any part or parts of the Amount to the Purchaser:
  - (a) immediately upon the Bank receiving at any place where the Bank carries on business a written demand from the Purchaser;
  - (b) so that it is immediately available and freely transferable in Australian dollars clear of and without any deductions;
  - (c) without reference by the Bank to the Supplier;
  - (d) despite any notice given to the Bank by the Supplier not to pay the Purchaser any part of the Amount; and

- (e) irrespective of the performance or non-performance by the Supplier or the Purchaser of the Contract in any respect.
- 4 The Bank acknowledges its obligations under this undertaking constitute direct primary, irrevocable and unconditional obligations. The Bank further acknowledges its obligations under this undertaking will not be abated, suspended, abrogated, varied, discharged or otherwise prejudiced or affected by any matter or thing which, in the absence of this provision, would or might have that effect, except for a discharge or amendment expressly made or agreed to in writing by the Purchaser.
  - 5 The Bank may at any time, without being required to do so, pay to the Purchaser the Amount less any amount or amounts it has previously paid under this undertaking and when it has done so the liability of the Bank under this undertaking will immediately cease and determine.
  - 6 The Purchaser may assign this undertaking to any person and upon receipt of notification to the Bank in writing, the Bank undertakes to make any payment claimed under this undertaking to the person specified in the notice which will constitute a full and valid discharge to the Bank in relation to the payment.
  - 7 If two or more persons are named as the Purchaser, this undertaking takes effect for the benefit of them jointly and a demand under this unconditional undertaking by any one or more of them is deemed to be a demand by both or all of them jointly.
  - 8 This unconditional undertaking is governed by and is to be construed in accordance with the laws of [Name of State or Territory].

## Schedule 8

### Deed of Guarantee and Indemnity

(clause 5.1)

[date]

---

[#] (Guarantor)

---

[#] (Beneficiary)

---

(Supplier)

---

# Guarantee and Indemnity

Date

## Parties

[insert] ACN [insert] of [insert Address] (Guarantor)

[insert] ACN [insert] of [insert Address] (Beneficiary)

of (Supplier)

---

## Agreed terms

### 1 Definitions

- (a) The following words have these meanings in this guarantee and indemnity:

**Supply Contract**                      The agreement dated on or about the date of this guarantee and indemnity between the Beneficiary and the Supplier.

**Related Entity of an entity**                      Another entity which is related to the first within the meaning of section 50 of the Corporations Act or is in any economic entity (as defined in any approved accounting standard) which contains the first.

- (b) Terms not otherwise defined in this guarantee and indemnity have the same meaning as in the Supply Contract.

### 2 Consideration

- (a) The Guarantor gives this guarantee and indemnity for a consideration of [#] Australian dollars (AUD[#]). The Guarantor acknowledges receipt of that consideration
- (b) The Guarantor acknowledges the receipt of valuable consideration from the Beneficiary for the Guarantor incurring obligations and giving rights under this guarantee and indemnity.

### 3 Guarantee

- (a) The Guarantor unconditionally and irrevocably guarantees to the Beneficiary the due and punctual performance and observance by the Supplier of its obligations under the Supply Contract, including (without limitation) the obligation to execute and complete the Work under the

Contract in accordance with the Supply Contract and the obligation to pay money.

- (b) Nothing in this guarantee and indemnity restricts or otherwise affects the rights of the Beneficiary under the Supply Contract.

## 4 Indemnity

As a separate undertaking, the Guarantor unconditionally and irrevocably indemnifies the Beneficiary against all Loss the Beneficiary suffers and any costs, charges or expenses incurred by the Beneficiary to the extent that the Supplier is, or would be liable to the Beneficiary under the Supply Contract, including (without limitation) a breach of the obligation to execute and complete the Work under the Contract in accordance with the Supply Contract and a breach of an obligation to pay money. It is not necessary for the Beneficiary to incur expense or make payment before enforcing that right of indemnity.

## 5 Completion undertaking

- (a) If the Beneficiary is entitled to terminate the Supply Contract and the Beneficiary gives the Guarantor a written notice of that entitlement, then:
  - (i) the Guarantor must perform the Supplier's obligations under the Supply Contract; and
  - (ii) for that purpose, the Guarantor must give a written notice to the Beneficiary and the Supplier stating its intention to have the Supply Contract novated in its favour;
  - (iii) on and from the date of that notice:
    - (A) all the rights and obligations of the Supplier under the Supply Contract will be taken to have been novated to the Guarantor;
    - (B) the Guarantor must perform all of the obligations of the Supplier under the Supply Contract which are not performed at the date of the notice; and
    - (C) the Guarantor is bound by the Supply Contract as if the Guarantor had originally been named in the Supply Contract in place of the Supplier.
- (b) The Supplier irrevocably and severally appoints (for valuable consideration) the Guarantor and any authorised representative of the Guarantor to be the Supplier's attorney to execute, sign, seal and deliver all notices, deeds and documents for the purpose referred to in **clause 5(a)(iii)**.
- (c) The Supplier ratifies anything done by an attorney or its delegate in accordance with **clause 5(b)**.

## 6 Interest

The Guarantor must pay interest on any amount payable under this guarantee and indemnity from when the amount becomes due for payment until it is paid in full at the rate (upon the date on which it should have been paid) which is the 90 day Bank Bill Swap Reference Rate (Average Bid) as published in the Australian Financial Review.

## 7 Enforcement of rights

The Guarantor waives any right it has of first requiring the Beneficiary to commence proceedings or enforce any other right against the Supplier or any other person before claiming under this guarantee and indemnity.

## 8 Continuing security

This guarantee and indemnity is a continuing security and is not discharged by any one payment or any one act.

## 9 Guarantee not affected

The liabilities of the Guarantor under this guarantee and indemnity as a guarantor, indemnifier or debtor and the rights of the Beneficiary under this guarantee and indemnity are not affected by anything which might otherwise affect them at law or in equity including, but not limited to, one or more of the following:

- (a) the Beneficiary granting time or other indulgence to, compounding or compromising with or releasing the Supplier;
- (b) acquiescence, delay, acts, omissions or mistakes on the part of the Beneficiary;
- (c) any novation of a right of the Beneficiary;
- (d) any variation of the Supply Contract; or
- (e) the invalidity or unenforceability of an obligation or liability of a person other than the Guarantor.

## 10 Suspension of Guarantor's rights

The Guarantor may not, without the consent of the Beneficiary:

- (a) raise a set-off or counterclaim available to it or the Supplier against the Beneficiary in reduction of its liability under this guarantee and indemnity;  
or
- (b) claim to be entitled by way of contribution, indemnity, subrogation, marshalling or otherwise to the benefit of any security or guarantee held by the Beneficiary in connection with the Supply Contract.



## 11 Reinstatement of Guarantee

If a claim that a payment or transfer to the Beneficiary in connection with the Supply Contract or this guarantee and indemnity is void or voidable (including, but not limited to, a claim under laws relating to liquidation, insolvency or protection of creditors) is upheld, conceded or compromised, then the Beneficiary is entitled immediately as against the Guarantor to the rights to which it would have been entitled under this guarantee and indemnity if the payment or transfer had not occurred.

## 12 Novation

- (a) The Guarantor acknowledges that in certain circumstances the Supply Contract may be assigned or novated.
- (b) The Guarantor acknowledges and agrees that its obligations under this guarantee and indemnity extend to the Supply Contract as assigned or novated.
- (c) The Beneficiary may assign the benefit of this guarantee and indemnity to the same person to whom the Supply Contract is assigned or novated.
- (d) The Guarantor agrees to enter into a guarantee and indemnity on the same terms as this guarantee and indemnity in favour of any person to whom the Supply Contract is assigned or novated.

## 13 Costs

- (a) The Guarantor must pay or reimburse the Beneficiary on demand for:
  - (i) the Beneficiary's costs, charges and expenses in making, enforcing and doing anything in connection with this guarantee and indemnity including, but not limited to, legal costs and expenses on a full indemnity basis; and
  - (ii) all stamp duties, taxes and charges which are payable in connection with this guarantee and indemnity or a payment, receipt or other transaction contemplated by it.

Money paid to the Beneficiary by the Guarantor must be applied first against payment of costs, charges and expenses under this clause then against other obligations under the guarantee and indemnity.

- (b) To the extent that any monies payable by the Guarantor under any other clause of the guarantee and indemnity are regarded for the purposes of any law relating to GST as consideration (in whole or in part) for a taxable supply, the Guarantor must pay an additional amount to the Beneficiary calculated by multiplying the consideration for the supply by the prevailing GST rate. For the purposes of **clause 13(b)**, GST is defined as a goods and services tax, as governed by *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

## 14 Notices

- (a) Any notice, consent approval or other communication under this deed must be:
- (i) in writing;
  - (ii) delivered by hand or by mail to the address, or sent to the email address shown below:
    - (A) to the Beneficiary:
      - [#]
      - Attention: [#]
      - Email: [#]
    - (B) to the Guarantor:
      - [#]
      - Attention: [#]
      - Email: [#]
    - (C) to the Supplier:
      - [#]
      - Attention: [#]
      - Email: [#]
  - (iii) marked with the following title:
    - [#]
- (b) A notice is given on the day that:
- (i) it is delivered to the addressee; or
  - (ii) if transmitted by email, when the communication enters the information system on which the mailbox of the recipient's email address resides. A notice is taken to have entered the information system on which the mailbox of the recipient's email address resides at the time it was sent if the sender does not receive notification within 24 hours of sending the communication that the communication has not been delivered. If a notice is taken to have entered the information system on which the mailbox of the recipient's email address resides after 5.00pm or on a day which is not a Business Day, it is taken as delivered at 9.00am on the next Business Day.
- (c) A party may, from time to time, notify the other parties of any change to its details in **clause 14(a)(ii)**.

## 15 Governing law

- (a) The law of this deed is the law in force in Western Australia.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of Western Australia.

## 16 Counterparts

This deed may consist of a number of copies of this deed, each signed by one or more parties to this deed. When taken together, the signed copies are treated as making up the one document.

# Execution

## Executed as a deed

Executed by [#] ACN [#] in accordance )  
with section 127 of the *Corporations Act* )  
2001 (Cth): )  
)  
)  
)  
)  
)  
)

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director

.....  
Name of Director

Executed by [#] ACN [#] in accordance )  
with section 127 of the *Corporations Act* )  
2001 (Cth): )  
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Executed by ACN [#] in accordance )  
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2001 (Cth): )  
)  
)  
)  
)  
)  
)

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director

.....  
Name of Director

# Schedule 9

## Hold Points

(clause 13.1)

[insert Hold Points or mark as not applicable]

# Schedule 10

## Policies

(clause 4.3)

[insert POPL policies for the Supplier to comply with, including polices applicable to the mine site]

# Schedule 11

## Form of Novation Agreement

(clause 38.1)

### Deed of Novation

**Date**

**Parties**

**Purchaser**                      Name                      **[Insert] (ACN [insert])**

Address                      **[Insert]**

Email                      **[Insert]**

Attention                      **[Insert]**

**Supplier**                      Name                      **[Insert] (ACN [insert])**

Address                      **[Insert]**

Email                      **[Insert]**

Attention                      **[Insert]**

**Works Contractor**                      Name                      **[Insert] (ACN [insert])**

Address                      **[Insert]**

Email                      **[Insert]**

Attention                      **[Insert]**

**Recitals**

- A.**     By agreement dated **[insert] (Supply Contract)**, the Purchaser has engaged the Supplier to supply the Equipment and to perform the Services for the Purchaser.
  
- B.**     The Purchaser has entered into the Works Contract with the Works Contractor.
  
- C.**     The Supply Contract requires the Supplier to execute this deed if directed to do so by the Purchaser.
  
- D.**     Pursuant to the Supply Contract, the Purchaser has directed the Supplier to execute this deed.

- E. Subject to this deed, the Works Contractor has agreed to accept the Purchaser's liabilities and obligations under the Supply Contract.
- F. Subject to this deed, the Supplier has agreed to accept the Work Contractor in place of the Purchaser for the performance of the obligations of the Purchaser and to release completely and discharge the Purchaser from all of its obligations under the Supply Contract and from all claims and demands in respect of the Supply Contract.

## General Conditions:

---

### 1 Works Contractor's obligations

The Works Contractor must perform all of the obligations of the Purchaser under the Supply Contract which are not performed at the date of this deed. The Works Contractor is bound by the Supply Contract as if the Works Contractor had originally been named in the Supply Contract in place of the Purchaser.

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### 2 Release of Purchaser by Supplier

The Supplier:

- (a) releases and forever discharges the Purchaser from its obligations under the Supply Contract and from all claims and demands in respect of the Supply Contract; and
  - (b) subject to this deed, accepts the liability of the Works Contractor in place of the liability of the Purchaser under or in relation to the Supply Contract.
- 

### 3 Works Contractor's obligations

The Works Contractor must perform its obligations under, and be bound by, the Supply Contract as if the Works Contractor was originally named in the Supply Contract in place of the Purchaser.

---

### 4 Security and insurance

#### 4.1 Security

The Supplier must replace:

- (a) any security provided by the Supplier to the Purchaser in accordance with Clause 5.1(a) of the Supply Contract with the equivalent security in favour of the Works Contractor; and
- (b) any Deed of Guarantee and Indemnity provided by in accordance with Clause 5.1(b) of the Supply Contract with a new Deed of Guarantee and Indemnity in favour of the Works Contractor.

#### 4.2 Insurance

The Supplier must ensure that:



- (a) the workers' compensation insurance to be effected by the Supplier in accordance with **clause 25.1(b)** of the Supply Contract is endorsed so as to provide:
  - (A) that the Works Contractor is indemnified as principal against any liability which it may incur to such Supplier employees or workers, arising by virtue of any applicable workers' compensation legislation and at common law, including any liability incurred as a deemed employer; and
  - (B) for the Works Contractor to be named as the 'principal' and for the insurance to include a waiver of subrogation from the insurer in favour of the Works Contractor as 'principal',  
in accordance with **clause 25.1(b)** of the Supply Contract; and
- (b) any insurance policies taken out by the Supplier pursuant to **clause 25.1(b)(ii)** and **clause 25.1(b)(iv)** of the Supply Contract name the Works Contractor as an interested party in accordance with **clause 25.3(a)** of the Supply Agreement.

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## 5 Confidentiality

The Supplier must not, and must ensure that its employees and subcontractors do not, without the Purchaser's prior written approval, disclose or give to any person any document or other information that is the property of the Purchaser (or any copy or record of any such document or information), or any confidential report concerning the business or finances of the Purchaser acquired by the Supplier before, on or after the date of this deed (whether under the Supply Contract or this deed), except for the purposes of performing its obligations under the Supply Contract.

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## 6 Payment of Contract Price

The parties acknowledge and agree that the Purchaser has paid the Supplier [*insert*] (\$*insert*), being all amounts due to the Supplier from the Purchaser under the Supply Contract at the date of this deed.

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## 7 Governing law and jurisdiction

- (a) This deed will be interpreted under and governed by the law in force in Western Australia.
- (b) Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of Western Australia and courts of appeal from them.
- (c) Subject to the parties having first had regard to the provisions of the Supply Contract regarding dispute resolution, each party waives any right it has to object to an action being brought in those courts including by claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.

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## **8 Costs of novation**

Each party must bear its own costs, charges and expenses (including, without limitation, legal expenses) in entering into this deed.

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## **9 Notices**

### **9.1 Giving notices**

Any notice or communication given to a party under this deed is only given if it is in writing and sent in one of the following ways:

- (a) delivered by hand to the person to whom the notice is addressed;
- (b) delivered or posted to that party at its address and marked for the attention of the relevant department or officer (if any) set out in this deed; or
- (c) sent to that party at the email address and marked for the attention of the relevant department or officer (if any) set out in this deed.

### **9.2 Change of address or email**

If a party gives another party 3 Business Days' notice of a change of its address, any notice or communication is only given by that other party if it is delivered or posted to the latest address.

### **9.3 Time notice is given**

Any notice or communication is to be treated as given at the following time:

- (a) if it is delivered by hand, when it is left at the relevant address if it is a Business Day, otherwise the next Business Day;
- (b) if it is sent by post, 5 Business Days (or, in the case of a notice or communication posted to another country), 15 Business Days after it is posted; or
- (c) if sent by electronic mail, when the communication enters the information system on which the mailbox of the recipient's email address resides. A notice is taken to have entered the information system on which the mailbox of the recipient's email address resides at the time it was sent if the sender does not receive notification within 24 hours of sending the communication that the communication has not been delivered. If a notice is taken to have entered the information system on which the mailbox of the recipient's email address resides on a day which is not a Business Day, it is taken as delivered on the next Business Day.

---

## **10 Miscellaneous**

### **10.1 Assignments and transfers**

- (a) A party must not assign or deal with any of its rights or obligations under this deed without the prior written consent of the other parties.
- (b) Any purported dealing in breach of this clause is of no effect.

## 10.2 Entire agreement

This deed contains everything the parties have agreed in relation to the subject matter it deals with. No party can rely on an earlier written document or anything said or done by or on behalf of another party before this deed was executed.

## 10.3 Execution of counterparts

This deed is properly executed if each party executes either this deed or an identical counterpart of this document. In the latter case, this deed takes effect when the separately executed counterparts are exchanged between the parties.

## 10.4 Further acts

Each party must at its own expense promptly execute all documents and do or use reasonable endeavours to cause a third party to do all things that another party from time to time may reasonably request in order to give effect to, perfect or complete this deed and all transactions incidental to it.

## 10.5 Joint and individual liability and benefits

Where any party is comprised of more than one person, any agreement, covenant, representation or warranty under this deed by that party binds each person comprising that party jointly and each of them individually, and any benefit in favour of two or more persons is for the benefit of them jointly and each of them individually.

## 10.6 Invalidity and enforceability

- (a) If any provision of this deed is invalid under the law of any jurisdiction the provision is enforceable in that jurisdiction to the extent that it is not invalid, whether it is in severable terms or not.
- (b) **Clause 10.6(a)** does not apply where enforcement of the provision of this deed in accordance with **clause 10.6(a)** would materially affect the nature or effect of the parties' obligations under this deed.

## 10.7 Variation

No variation of this deed will be of any force or effect unless it is in writing and signed by each party to this deed.

## 10.8 Waivers

- (a) A waiver of any right, power or remedy under this deed must be in writing signed by the party granting it. A waiver only affects the particular obligation or breach for which it is given. It is not an implied waiver of any other obligation or breach or an implied waiver of that obligation or breach on any other occasion.
- (b) The fact that a party fails to do, or delays in doing, something the party is entitled to do under this deed does not amount to a waiver.

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## 11 Definitions and interpretation

### 11.1 Definitions

Definitions in the Contract apply in respect of the interpretation and operation of this deed and the following definitions apply:

- (a) **Business Day** means a day which is not a Saturday, Sunday or public holiday in Western Australia; and
- (b) **Works Contract** means contract between the Purchaser and the Works Contractor entered into on [*insert date*] for the performance of [*insert type of works*].

### 11.2 Interpretation

In this deed unless the contrary intention appears:

- (a) headings are inserted for convenience only and do not affect the interpretation of this deed;
- (b) a reference to a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later;
- (c) a reference in this deed to dollars or \$ means Australian dollars and all amounts payable under this Contract are payable in Australian dollars;
- (d) a reference in this deed to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this deed to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (f) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this deed;
- (g) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (h) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (i) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (j) a reference to the word 'include' or 'including' is to be construed without limitation;
- (k) a reference to this deed includes this agreement recorded in this deed; and
- (l) any schedules and attachments form part of this deed.

---

## Execution

**Executed** as a deed.

**Executed by Pilgangoora Operations** )  
**Pty Ltd ACN 616 560 395** in )  
accordance with section 127(1) of the )  
Corporations Act: )

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director  
(print)

.....  
Name of Director  
(print)

**Executed by [insert name and ACN** )  
**of Supplier]** in accordance with )  
section 127(1) of the Corporations Act: )

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director  
(print)

.....  
Name of Director  
(print)

**Executed by [insert name and ACN** )  
**of Works Contractor]** in accordance )  
with section 127(1) of the Corporations )  
Act: )

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director  
(print)

.....  
Name of Director  
(print)

[End of Schedule]

# Schedule 12

## Scope of Services

[If applicable, insert scope of any ancillary services the Supplier must perform (i.e. training, supervision of performance tests or installation of Equipment on Site)]

# Execution

**Executed** as a deed.

**Executed** by **Pilgangoora Operations** )  
**Pty Ltd ABN 75 616 560 395** in )  
accordance with section 127(1) of the  
Corporations Act:

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director  
(print)

.....  
Name of Director  
(print)

**Executed** by **[name and ABN of** )  
**Supplier]** in accordance with section )  
127(1) of the Corporations Act:

.....  
Company Secretary/Director

.....  
Director

.....  
Name of Company Secretary/Director  
(print)

.....  
Name of Director  
(print)