

Terms and Conditions of Supply to Easternwell (Goods and Services)

PART A – GENERAL PROVISIONS

1. Acceptance

- (a) The acceptance of an Order by the Contractor includes acceptance of these terms and conditions as the sole basis of the supply of the Goods or Services to the exclusion of any terms and conditions of supply appearing on any other document of the Contractor. Modification of these terms and conditions expressed in any document of the Contractor will not apply unless expressly accepted in writing by Easternwell.
- (b) For the avoidance of doubt, any references in an Order or elsewhere to any offer or quotation given by the Contractor to Easternwell will not be evidence of an acceptance by Easternwell of any terms or conditions referred to or attached to such offer or quotation other than those set out in this document. Any terms and conditions proffered or referred to by the Contractor are to be disregarded and any such terms or conditions of the Contractor do not form part of the Agreement or bind Easternwell in any respect. Further, any over stamping on any acknowledgment or invoicing of the Order will not alter the Agreement.
- (c) So far as legally possible, the parties intend that the supply of any Goods or Services to Easternwell by the Contractor, and for all Goods to be supplied or Services to be provided to Easternwell under any future Orders, will be governed by the Agreement.

2. Payment for Goods and Services

- (a) Easternwell will pay the Contractor the Fees for Goods or Services supplied, together with applicable GST, no later than 30 Days after the Month in which the relevant Tax Invoice was received.
- (b) Payment of an invoice does not preclude Easternwell's right to check and object to invoices.
- (c) Easternwell may deduct from any amount due or becoming due to the Contractor under the Agreement:
 - (i) any Loss to be paid by the Contractor to Easternwell or any of its Associated Entities whether under or in connection with the Agreement or otherwise; and
 - (ii) the amount of any claims that Easternwell or any of its Associated Entities has reasonable grounds for believing may be made against the Contractor under or in connection with the Agreement.
- (d) Easternwell will not pay the Contractor any fee for re-stocking where Goods have been incorrectly supplied.

3. Termination

- (a) Either party (**Terminating Party**) may terminate the Agreement by notice in writing (**Termination Notice**) to the other party if the other party (**Defaulting Party**) suffers an Insolvency Event or commits a substantial breach of the Agreement and the breach is not remedied by the Defaulting Party within 10 Business Days after the Terminating Party gives the Defaulting Party the Termination Notice.
- (b) The Contractor may terminate the Agreement if Easternwell fails to make a payment due to the Contractor that is not the subject of a dispute between the parties, pursuant to clause 3(a) above.
- (c) The Agreement or any Order may be terminated for convenience by Easternwell giving notice to the Contractor.
- (d) If this Agreement is terminated, for any reason, Easternwell must pay the Contractor, as the Contractor's sole remedy all amounts due and unpaid for Services performed or Goods delivered as at the Termination Date.
- (e) Other than any amounts payable under clause 2 and 3, Easternwell will not be liable to the Contractor for any claim by the Contractor as a consequence of the termination pursuant to clause 3(c) and the Contractor will otherwise have no claim.
- (f) Termination of the Agreement under this clause 3 does not prejudice any party's pre-existing rights, obligations or liabilities.

4. Contractor's warranties and undertakings

- (a) The Contractor warrants that all Goods and Services will be:
 - (i) provided in accordance with any specifications in and otherwise conform to the Order and Australian standards and/or referenced codes, or if no standards are specified the Contractor must comply with the best practice industry standards applicable to the Goods or Services, the requirement of any relevant Government Agency and applicable Laws, including without limitation all WHS Requirements;
 - (ii) delivered on the Delivery Date; and
 - (iii) fit for the purposes for which goods or services of the same kind are commonly supplied.
- (b) The Contractor also warrants that all Goods supplied will be:
 - (i) new and undamaged (unless otherwise agreed);

- (ii) free from Defects in design, specification, materials and workmanship; and
- (iii) free of pests at the time of delivery. If required by Easternwell, the Contractor will, at or before the time of delivery to Easternwell, provide Easternwell with certification that the Goods to be supplied to Easternwell have been inspected and are free of pests.
- (c) The Contractor undertakes that:
 - (i) Goods supplied will carry any applicable manufacturer's warranty which will be passed on to any purchaser from Easternwell without liability to Easternwell;
 - (ii) procured or manufactured Equipment will be supplied with documentation and certification as referenced from the original build or design standard including but not limited to relevant statutory regulations / legislation and or industry standards and codes of practice, all additional documentation required by Easternwell and as specified in the Order or Agreement;
 - (iii) the Goods or Services supplied will not infringe the Intellectual Property Rights of any third party;
 - (iv) if the Contractor has a quality system (conforming to ISO9002, for example), then it must be applied to the manufacture or provision (as the case may be) of the relevant Goods or Services;
 - (v) if Goods or Services are not supplied by the Delivery Date then Easternwell may, without prejudice to any rights it may have under the Agreement or otherwise and despite any other provision of the Agreement, withhold any payment until the Goods or Services are supplied; and
 - (vi) neither the Contractor nor any of its Personnel will do or permit anything to be done which is dishonest, fraudulent or unlawful or which may in the opinion of Easternwell bring Easternwell or any of its Personnel into disrepute.

5. Insurance

Before supplying the Goods or Services, the Contractor must obtain and maintain for the duration of this Agreement the Required Insurances from reputable insurers covering Easternwell and the Contractor for their respective rights, interests and liabilities. However, nothing in this clause 5 limits the obligations, liabilities and responsibilities of the parties under the Agreement.

6. Respective responsibilities

- (a) Despite any other provision of the Agreement, Easternwell, its Associated Entities and their Personnel will not be liable to the Contractor on any account for any Consequential Loss in connection with the Order.
- (b) Despite any other provision of the Agreement, Easternwell, its Associated Entities and their Personnel will not be liable to the Contractor on any account (including under any indemnity, in tort including negligence or for breach of statutory duty or otherwise or for any Losses) and the Contractor will not make any Claim against Easternwell, its Associated Entities or their Personnel arising out of or in any way relating to any account except in the case of:
 - (i) Payment of Fees and GST under clause 2;
 - (ii) Losses incurred as a result of the fraud or wilful, reckless or deliberate breach of the Agreement by Easternwell, its Associated Entities or its Personnel; or
 - (iii) Losses incurred as a result of Claims made against Easternwell, its Associated Entities or its Personnel for contribution or indemnity in respect of Claims by third parties (but not any Personnel of the Contractor) for personal injury, death or property damage, provided that any such Losses (in (ii) and (iii) above) do not include Consequential Loss.
- (c) The maximum sum for which Easternwell may be liable to the Contractor under or in connection with the Order, in tort, in equity or otherwise at law, is limited to the price listed on the Order.
- (d) The Contractor indemnifies and keeps indemnified each of Easternwell, its Associated Entities and their Personnel against any and all Loss suffered by any of Easternwell, its Associated Entities and their Personnel arising as a result of any act, omission, breach, neglect or default of the Contractor, except to the extent that it was caused by the gross negligence of Easternwell.
- (e) Each of the Contractor's obligations under clause 6(d) is:
 - (i) a continuing obligation, separate and independent from the other obligations of the Contractor and survives termination of the Agreement; and
 - (ii) applies regardless of the insurance coverage held by the Contractor, including that under any workers' compensation act, disability act or other Law that would limit the amount payable by or for the Contractor.

7. Confidential Information

- (a) During the Term or at any time afterwards, the Contractor will not, except in the proper course of its duties under the Agreement or as required by Law or permitted by Easternwell, use or disclose to any person any Confidential Information of, supplied by, relating to or developed at the direction of Easternwell which has come into its possession as a result of the Agreement or the negotiations preceding the Agreement including the terms of the Agreement and will use its best endeavours to prevent the use or disclosure of any such Confidential Information, except as permitted by this clause.
- (b) The Contractor will return, erase or destroy any of the Confidential Information in its possession or under its control on the Termination Date or when and as directed to do so by Easternwell. The return, erasure or destruction of any of the Confidential Information does not relieve the Contractor of any of its obligations under the Agreement.
- (c) The Contractor acknowledges that damages are not a sufficient remedy for breach of this clause 7 and that Easternwell is entitled to specific performance or injunctive relief (as appropriate) for breach or threatened breach by the Contractor or any person, in addition to any other remedies available at law or in equity.

8. Notices

All notices given pursuant to the Agreement must be in writing and will be properly served if delivered personally, posted, sent by facsimile or e-mailed to the other party at the address or facsimile number or email address set out in the Agreement or as otherwise notified in writing by the intended recipient. A notice sent by post will be deemed to have been given on the third Business Day after posting except in the case of international post, which will be deemed to have been given on the fifth Business Day after posting where sent by airmail. A notice sent by facsimile transmission will be deemed to have been given upon confirmation by the sending machine of successful transmission of the total number of pages of the notice. Notice sent by e-mail will be deemed to have been given on confirmation that the email transmission has been received. A facsimile or email sent after 17.00hrs on a Business Day or on a day which is not a Business Day will be deemed received at 09.00hrs on the following Business Day.

9. Assignment and subcontracting

- (a) The Contractor must not assign, subcontract or otherwise deal with the Agreement or any right under it except with the consent of Easternwell in writing.
- (b) Easternwell may assign, subcontract or otherwise deal with the Agreement or its rights under it.

10. General

- (a) **(No merger)** The rights and obligations of any party under the Agreement do not merge on completion of any transaction contemplated by the Agreement.
- (b) **(No Waiver)** Time is of the essence of the Agreement, except that no delay by Easternwell in exercising any right or power will operate as a waiver of that right or power.
- (c) **(Variation)** Easternwell may vary these Terms and Conditions (as set out in this document) effective from the date of the Order issued to the Contractor after the earlier of:
 - (i) notice by Easternwell to the Contractor of the variation; and
 - (ii) the publication of the document reflecting the variation on the Easternwell website.

To avoid doubt, a variation will not apply to any Order issued before the earlier of those times referred to above. Any other variation of any term of the Agreement must be in writing and signed by the parties.

- (d) **(Survival)** Any indemnity or any obligation of confidence under the Agreement is independent and survives termination of the Agreement. Any other term by its nature intended to survive termination of the Agreement (e.g. clauses 2, 3, 5, 6, 7, 8 and this clause 10) survives termination of the Agreement.
- (e) **(Severability)** Any provision or part of the Agreement that is void or unenforceable may be severed from the Agreement and the remaining provisions or parts of the provision of the Agreement continue in force.
- (f) **(Entire agreement)** The Agreement states all the express terms of the agreement between the parties in respect of its subject matter. It supersedes all prior discussions, negotiations, understandings and agreements in respect of its subject matter.
- (g) **(Counterparts)** The Agreement may be executed in any number of counterparts.
- (h) **(Governing Law)** Unless otherwise specified, the Agreement will be governed and construed in accordance with the Laws of the Jurisdiction. The Contractor and Easternwell submit to the non-exclusive jurisdiction of the Courts of the Jurisdiction.
- (i) **(Definitions and Interpretation)** The document named [FRM-S01-053: Terms and Conditions of Supply to Easternwell \(Definitions\)](#) is incorporated into the Agreement, and is available from the Easternwell website (www.easternwell.com.au).

PART B – PROVISIONS APPLYING TO GOODS

11. Price

- (a) An Order is placed on a fixed and firm price basis in accordance with the prices listed on the Order Ex-Works.
- (b) No charge will be made by the Contractor to Easternwell for wrapping, packaging, packing, using cartons or crating, freight-in to nominated Delivery Address or unpacking, unless approval for such charge is expressly incorporated in the Order. All Goods must be suitably packed or otherwise prepared for shipment or transport so as to ensure no damage occurs to the Goods in transit.

12. Acceptance of Goods

- (a) All Goods must be accompanied by an itemised and priced delivery docket, or itemised Tax Invoice.
- (b) Signing a delivery docket will not mean acceptance by Easternwell of any of the Goods delivered but only that items were delivered at that time.
- (c) Easternwell may reject any Goods, but must state the reasons for rejection.
- (d) Unencumbered title to and risk in the Goods will pass to Easternwell upon acceptance of Goods by Easternwell.

13. Defects

The Contractor must, at its expense, rectify to the satisfaction of Easternwell any Defect discovered within the Defect Period.

PART C – PROVISIONS APPLYING TO SERVICES

14. Warranties in relation to Services

The Contractor must ensure that its Personnel carry out the Services:

- (a) with due care, skill and diligence and to the best of their ability and expertise;
- (b) in a timely, thorough and professional manner in accordance with all applicable professional principles and standards and industry best practice;
- (c) to any other standards as specified by Easternwell; and
- (d) in accordance with the requirements of all Laws, guidelines, rules and procedures and all reasonable directions and orders provided by Easternwell.

15. Payment for Services

- (a) In relation to a Contractor providing Services, the Contractor must include with each invoice a statement that all remuneration or other amounts payable by the Contractor by law (including under any industrial instrument) in respect of the Services to any of its employees, consultants or subcontractors has been paid.
- (b) In relation to a Contractor who has performed Services:
 - (i) in NSW (or otherwise has liabilities which arise under the *Payroll Tax Act 2007 (NSW)*), the Contractor must include with each invoice a statement by the Contractor in accordance with the requirements of clause 18 of schedule 2 of the *Payroll Tax Act 2007 (NSW)*; and
 - (ii) in NSW, the Contractor must include with each invoice a statement by the Contractor in accordance with the requirements of section 175B(4) of the *Workers Compensation Act 1987 (NSW)*.
- (c) Easternwell may withhold any payment due to the Contractor until it receives from the Contractor the relevant statements required by this clause 15.

16. Intellectual Property Rights

- (a) In this clause 16, a reference to 'Easternwell' includes a reference to an Associated Entity of Easternwell.
- (b) Any and all Intellectual Property in any sketches, product, material, plans, drawings, designs, reports or documents (including any improvements or processes of any nature) prepared by the Contractor in the provision of the Services under the Order or at Easternwell's direction will upon its creation absolutely vest in Easternwell. The Contractor, at its own expense, will do all things necessary to ensure title is assigned to, or otherwise held by Easternwell. Any Intellectual Property owned by the Contractor prior to the provision of the Services under the Order will remain the property of the Contractor, although such Intellectual Property may be used by the Easternwell pursuant to a non-exclusive, irrevocable, worldwide, royalty-free license in perpetuity and for any purpose.
- (c) The Contractor indemnifies Easternwell and its Associated Entities and Personnel against all Losses arising out of or in any way connected with or relating to the infringement of any Intellectual Property Right, including all royalties and fees claimable by or payable to any person for or in connection with any material, matter or thing (including any Intellectual Property) used or required to be used in the performance of the Services under the Order.