

Terms and Conditions of Supply to Easternwell (Hire)

PART A – GENERAL PROVISIONS

CONTRACTOR'S OBLIGATIONS AND INVESTIGATIONS

1. Contractor's warranties

The Contractor warrants that:

- (a) it is satisfied as to the accuracy, sufficiency or completeness of any information relevant to the performance of the Agreement (including the Site) and provided by or on behalf of Easternwell (**Information**);
- (b) it accepts full responsibility for its use of the Information including any inferences or conclusions it has drawn from the Information;
- (c) it has carefully perused the several documents forming the Agreement and there are no discrepancies, inconsistencies or ambiguities in or between those documents that would be apparent to an experienced and competent contractor; and
- (d) it has made proper allowance for all matters in or capable of inference from the several documents forming the Agreement.

2. Information provided by Easternwell

The Contractor acknowledges that Easternwell:

- (a) has endeavoured to ensure that the Information is accurate, sufficient and complete;
- (b) does not warrant the accuracy, sufficiency or completeness of the Information;
- (c) does not accept any liability for and has not made any representation about, the accuracy, sufficiency and completeness of the Information or the use of it by the Contractor; and
- (d) has provided the Information for the convenience of the Contractor and it does not form part of the Agreement unless specified.

3. Exclusivity

The Contractor acknowledges that nothing in the Agreement creates an exclusive hiring agreement between Easternwell and the Contractor and that Easternwell may hire equipment (whether similar to the Equipment or otherwise) from other suppliers at any time without reference to the Contractor.

SAFETY, HEALTH AND ENVIRONMENT

4. Contractor's obligation and acknowledgment

The Contractor:

- (a) must acquaint itself, and fully comply when on Site, with the WHS Requirements; and
- (b) acknowledges the extreme importance that Easternwell places on establishing and maintaining high standards in relation to workplace health and safety and protection of the environment.

5. Breach of contract

Any failure by the Contractor to comply with any WHS Requirement while on Site constitutes a material breach of the Agreement.

EASTERNWELL REPRESENTATIVE

6. Authority

- (a) The Easternwell Representative is Easternwell's interface with the Contractor in relation to the Agreement and, except as otherwise specified in the Agreement or notified by Easternwell, the Easternwell Representative has full authority to act on behalf of Easternwell in connection with the Agreement.
- (b) The Easternwell Representative may delegate to another person any of its powers, duties, discretions and authorities.

7. Directions

The Contractor must supply or deliver the Equipment in accordance with the Agreement and any directions of the Easternwell Representative given under the Agreement.

8. Act reasonably

Except where expressed otherwise in the Agreement, Easternwell must ensure that the Easternwell Representative acts reasonably in performing its functions or exercising any of its powers, duties, discretions or authorities under the Agreement.

CONTRACTOR REPRESENTATIVE

9. Obligations

The Contractor must ensure that:

- (a) the Contractor Representative has full authority to execute the directions of the Easternwell Representative without delay and is responsible for ensuring that the Equipment is supplied and delivered in accordance with the Agreement;
- (b) notices to Easternwell are only issued by persons who are duly authorised to do so by the Contractor; and

- (c) the Contractor Representative is only removed or replaced with the prior written approval of the Easternwell Representative, which will not be unreasonably withheld.

REPORTING REQUIREMENTS

10. Progress reports

The Easternwell Representative may direct the Contractor to submit reports on the Equipment hired under the Agreement and other issues related to the Agreement at the frequency and in the form required by the Easternwell.

11. Meetings

The Contractor Representative must attend meetings arranged by Easternwell to review problems, claims and matters related to the Equipment hired under the Agreement.

ASSIGNMENT AND SUBCONTRACTING

12. 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.
- (b) Entering a Subcontract (whether with or without the consent of Easternwell) does not relieve the Contractor from full responsibility for the performance of its obligations under the Agreement and the Contractor is fully responsible for the acts and omissions of each Subcontractor and of all persons either directly or indirectly acting for the Subcontractor or under its supervision or control.
- (c) Easternwell may assign, subcontract or otherwise deal with the Agreement or its rights under it.

LAWS AND REGULATIONS

13. Obtaining Consents

Unless otherwise directed by the Easternwell Representative, the Contractor must:

- (a) obtain all Government Consents, other than those specified in the Agreement; and
- (b) give all notices required by Law or Government Consents in connection with the hire of the Equipment.

14. Compliance with Law and other requirements

Without limiting clause 13, the Contractor must comply with all:

- (a) Law affecting or applicable to the Equipment or the supply and delivery of it;
- (b) Government Consents; and
- (c) regulations, rules, schemes or plans issued by Easternwell governing activities, safety (including radiation protection) and the environment, while entering, remaining on or leaving the Site.

15. No Easternwell breach

The Contractor must ensure that it does not cause Easternwell to be in breach of any Government Consent or Law.

16. Taxes, duties and levies

Subject to clause 17, the Contractor must pay any fee, charge, tax, levy, fine, penalty or other impost imposed by any Government Authority in connection with the Equipment and subject to clauses 62 to 65, the Fees is deemed to include all such fees, charges, levies and taxes.

17. Long service leave and safety fees

Any portable long service leave levy or workplace health and safety fee or similar impost imposed in connection with the Equipment:

- (a) must be paid by the party specified in the Agreement Particulars; and
- (b) if the party so named is the Contractor, is deemed to be included in the Fees (subject to clauses 62 to 65).

DOCUMENTS

18. Documents relating to the Equipment

Title to, copyright in and other Intellectual Property Rights in any documents or other property created by the Contractor for or in connection with the Equipment vest in the Contractor on creation and the Contractor grants or shall procure the grant to Easternwell of a royalty-free and irrevocable licence to use those documents or other property in connection with the hire, use and maintenance of the Equipment.

PATENTS AND INTELLECTUAL PROPERTY

19. Right to use and maintain

If Easternwell is prevented from using or maintaining the Equipment or any part of them or is required to pay an amount in addition to the Fees as a result of any actual or alleged infringement of Intellectual Property Rights, the Contractor must, at its cost, take all reasonable steps necessary to immediately procure for Easternwell the right to use or maintain the Equipment or the relevant part for their intended purpose, without the payment of any additional amount.

20. Modification or replacement of the Equipment

If Easternwell fails to procure the necessary rights in accordance with clause 19 within a reasonable time, Easternwell may direct the Contractor, at its cost, to promptly:

- (a) modify the Equipment or the relevant part of it to avoid the infringement of Intellectual Property Rights; or
- (b) replace the Equipment or the relevant part of it so that it does not infringe Intellectual Property Rights.

INSURANCE**21. Insurance for the Equipment**

Easternwell must use reasonable endeavours to insure the Equipment:

- (a) against all loss or damage arising from any insurable cause other than the usually excepted risks;
- (b) for a limit of not less than the new replacement cost of the Equipment; and
- (c) for the Term other than when the Equipment is in transit to or from the Site.

22. Insurance during transit

The Contractor must insure the Equipment:

- (a) against all loss or damage arising from any insurable cause;
- (b) for a limit of not less than the new replacement cost of the Equipment; and
- (c) whenever the Equipment is in transit to or from the Site.

23. Insurance against injury to persons and damage to property

Easternwell must insure against liability to third parties for:

- (a) loss or damage that may occur to any physical property (except things insured under clause 21 or clause 22); and
- (b) death or bodily injury to any person (except persons insured under clause 24),

that arises out of or in connection with the operation of the Equipment by Easternwell.

24. Insurance of employees

- (a) Before commencing the performance of its obligations under the Agreement, the Contractor must obtain workers compensation insurance against liability for the death or bodily injury to any person employed by the Contractor (including all Operators), including liability under statute and at common law.
- (b) The Contractor must ensure that:
 - (i) the workers compensation insurance is maintained for the Term; and
 - (ii) each Subcontractor similarly insures against liability for the death or bodily injury to any person employed by the Subcontractor (including all Operators).

25. Third party motor vehicle insurance

The Contractor must maintain third party motor vehicle liability insurance against liability for death or bodily injury to any person or any damage to the Site, or any other property located on the Site, for each of its vehicles that enter the Site and are capable of registration with a Government Authority, during the performance of the Contractor's obligations under the Agreement and must ensure that Subcontractors similarly insure their vehicles.

26. Other insurances

The Contractor must maintain other insurances required by Law or set out in the Agreement Particulars.

27. Evidence of insurance

Before commencing the performance of its obligations under the Agreement (and whenever requested in writing by the Easternwell Representative), the Contractor must provide evidence to the satisfaction of Easternwell that the Contractor has obtained and maintained insurances required under clauses 21 to 26.

28. Terms of insurance

- (a) All insurance to be obtained and maintained by the Contractor under clauses 21 to 26 must:
 - (i) be from insurers and on terms approved by Easternwell; and
 - (ii) provide for payments to be made in the currencies required to rectify loss or damage covered by the insurance.
- (b) The Contractor (and, if appropriate, Easternwell, to the extent that it is aware) must comply with the conditions stipulated in each of the insurance policies required under clauses 21 to 26.

29. Contractor to report

The Contractor must report, and ensure that its Subcontractors report, to Easternwell as soon as practicable:

- (a) the cancellation or variation or proposed cancellation or variation of an insurance policy required to be held by the Contractor or any Subcontractor under clauses 21 to 26; and
- (b) all losses, claims and incidents that may give rise to an insurance claim.

30. Failure to insure

If the Contractor fails to obtain or maintain any insurance that is its responsibility under clauses 21 to 26 or fails to provide satisfactory evidence of insurance

under clause 27, Easternwell may obtain the relevant insurance and costs incurred by Easternwell in doing so will be a debt due from the Contractor to Easternwell.

31. Effect of insurance

- (a) Nothing in clauses 21 to 31 limits the obligations, liabilities and responsibilities of the parties under the Agreement or otherwise.
- (b) The insolvency of an insurer providing insurance for the Contractor or the failure of an insurer to pay a claim made by the Contractor does not abrogate, waive or alter any of the Contractor's liabilities under the Agreement.
- (c) Any amounts not insured, including policy deductibles or amounts not recovered from insurers (including the cost of preparing insurance claims) must be borne by the parties according to their liabilities under the Agreement.

PROTECTION**32. Protection of the Equipment**

Easternwell must maintain and protect the Equipment from loss or damage arising from any cause, other than:

- (a) an Equipment Failure; or
- (b) an act or omission of the Contractor or its Personnel.

33. Packing and transport

- (a) Unless otherwise expressly stated in the Agreement, the Contractor must:
 - (i) ensure that the Equipment is appropriately packed and transported to the Site to prevent damage while in transit or storage; and
 - (ii) provide and fit all fittings and devices required for lifting, securing and handling the Equipment when in transit.
- (b) If Easternwell is to arrange transport for the Equipment, then the Contractor must advise Easternwell of the dates when the Equipment will be available for transport in sufficient time to enable Easternwell to arrange transport for the Equipment.

34. Identification

If required by the Easternwell Representative, the Contractor's Personnel who are individuals must, when on Site, wear or carry identification badges or passes issued by Easternwell.

INDEMNITY AND RELEASE**35. Indemnity by Contractor**

The Contractor must indemnify Easternwell and each of its Personnel against all Losses arising in connection with:

- (a) any damage to the Site or any property; and
- (b) death or injury to any person, to the extent that the damage, death or injury, breach or infringement is caused by an Equipment Failure or an act or omission of the Contractor or any of its Personnel, or:
 - (c) a breach by the Contractor of a Law in the course of, or caused by, in the performance of its obligations under the Agreement;
 - (d) any actual or alleged infringement of any Intellectual Property Right caused by the performance of the Contractor's obligations under the Agreement or the use of any process work, material, matter, thing or method used or supplied by the Contractor; or
 - (e) the breach by the Contractor of an obligation under the Agreement or a warranty in clause 1 and clause 59.

36. Continuing obligation

Each of the indemnities given by the Contractor under clause 35:

- (a) is a continuing obligation, separate and independent from the other obligations of the Contractor and survives the termination of the Agreement; and
- (b) applies regardless of the amount of insurance coverage held by the Contractor or any other person, including that under any workers' compensation act, disability act or other act or law that would, but for this clause limit the amount payable by or for the Contractor.

37. Conduct of litigation

If a Claim is made against Easternwell or any of its Personnel in relation to any matter covered by the indemnity in clause 35, Easternwell may require the Contractor to, at its cost, conduct any litigation or settlement negotiations relating to the Claim provided that the Contractor must not consent to any judgement against Easternwell or any of its Personnel or settle the Claim without first obtaining Easternwell's written consent.

38. Exclusion of consequential loss

Despite any other provision of this Agreement, a party (**First Party**) will not be liable to the other party in contract (including under any indemnity), tort (including in negligence or for breach of statutory duty) or otherwise, for any Consequential Loss, except to the extent that the Loss is caused by a gross negligence or wilful act or omission in breach of this Agreement (including a breach of the Law) by the First Party.

39. Consumables

Except as otherwise provided in the Agreement, Easternwell will supply all Consumables necessary for the operation and maintenance of the Equipment by Easternwell in accordance with the Agreement.

PASSING OF PROPERTY AND RISK**40. Title to the Equipment**

The parties acknowledge and agree that:

- (a) the Contractor retains full title to the Equipment despite delivery of the Equipment to, and the possession and use of the Equipment by, Easternwell;
- (b) Easternwell will be a bailee of the Equipment only, subject to the terms and conditions of the Agreement; and
- (c) Easternwell will provide all reasonable assistance to the Contractor to ensure that the rights under this clause are notified or registered against the Equipment in accordance with any Law.

41. Spare parts and modifications

Easternwell acknowledges that any spare parts installed or modifications or variations to the Equipment carried out by Easternwell (where such modifications or variations cannot be removed from the Equipment without detriment to it) are taken to form part of the Equipment and the title to those spare parts, modifications or variations vests in the Contractor on their incorporation.

INSPECTIONS OF EQUIPMENT**42. Equipment condition inspection**

On delivery of the Equipment to the Site, the Easternwell Representative and the Contractor Representative must jointly inspect and, if necessary, test the Equipment in order to determine:

- (a) if the Equipment to be supplied is in accordance with the Agreement; or
- (b) the condition of the Equipment to be supplied.

43. Acceptance Certificate

If, after inspection and testing under clause 42, the Equipment is accepted, the Easternwell Representative must promptly issue an acceptance certificate to the Contractor (**Acceptance Certificate**).

44. Notice of rejection

If the Equipment is not accepted, the Easternwell Representative's notice of rejection must state the reasons for the rejection and may direct the Contractor to rectify the Equipment (which may include requiring the Contractor to replace the rejected Equipment).

45. Equipment Condition Report

- (a) Within 5 Business Days of Easternwell's acceptance of the Equipment, if not previously supplied, the Contractor must provide to the Easternwell Representative a report reflecting the agreed condition of the Equipment (**Equipment Condition Report**) including a genuine indication of the state of the Equipment, including:
 - (i) the remaining utilisation hours for major componentry and sub-components; and
 - (ii) a reasonable estimate of the life remaining in the Equipment expressed as a percentage;
- (b) any existing defects in the Equipment;
- (c) the servicing requirements for the Equipment; and
- (d) details of all attachments, accessories, tools and supporting manuals and documentation for the Equipment supplied to Easternwell.

46. Inspection by Contractor

On giving 3 Business Days' notice to Easternwell, the Contractor may inspect Equipment on the Site during the Term provided that such inspection occurs within the requirements for access to the Site and does not interfere with Easternwell's use of the Equipment.

MAINTENANCE AND REPAIR**47. Easternwell's Maintenance Obligations**

During the Term, Easternwell must maintain the Equipment in good order and repair and must provide all spare parts and labour necessary for the general maintenance of the Equipment as recommended by the manufacturer or any reasonable specific instructions provided by the Contractor, including:

- (a) greasing, oiling and lubrication; and
- (b) cleaning the Equipment and general maintenance such as the tightening of nuts and bolts,

provided that Easternwell will not be responsible for rectifying Equipment Failures or replacing defective parts or repairing defects in the Equipment resulting from ordinary wear and tear.

48. Contractor's Maintenance Obligations

Easternwell must, as soon as practicable, advise the Contractor of any defect in or damage to the Equipment and if the defect in or damage to the Equipment is caused by:

- (a) an Equipment Failure;
- (b) an act or omission of the Contractor or any of its Personnel; or

- (c) ordinary wear and tear, then the Contractor must, at its expense:
- (d) repair the defective or damaged Equipment as soon as practicable after being notified of the defect or damage;
- (e) during the period until the defective or damaged Equipment is repaired and available to be used by Easternwell, supply to Easternwell an appropriate replacement for the Equipment, if requested to do so; and
- (f) if it is necessary for the defective or damaged Equipment to be returned to the Contractor for repairs, transport the Equipment from the Site and re-deliver the repaired or replacement Equipment.

49. Emergency Repairs

If emergency repairs to the Equipment are required in order to protect the Equipment, any property or person and the Contractor fails to undertake the required repairs within a reasonable time (having regard to the circumstances) of being requested to do so by Easternwell:

- (a) Easternwell may carry out the emergency repairs to the Equipment without invalidating any warranty given by the Contractor; and
- (b) the Contractor must bear the cost of those emergency repairs if the Contractor would otherwise have been obliged under clause 48 to carry out the repairs at its cost.

50. Access for Contractor

Easternwell must use its best endeavours to give the Contractor access to the Site at reasonable times and make the Equipment available to the Contractor to allow the Contractor to perform its obligations under clauses 47 to 53 and if clauses 83 to 91 are applicable, to conduct inspections and investigate any incident involving the Equipment or the Operator (and the Contractor must provide Easternwell with a copy of any Record of such inspections or investigations).

51. Objection to Personnel

- (a) The Easternwell Representative may:
 - (i) object to any person that the Contractor or any of its Personnel (e.g. a Subcontractor) proposes to use in performing its obligations under the Agreement, even before the person comes on Site and direct the Contractor that any such person is not permitted on the Site; or
 - (ii) direct the Contractor to promptly procure the removal from the Site and replacement of any person employed or engaged by the Contractor or any of its Personnel who, in the opinion of the Easternwell Representative, is not properly performing their duties, is incompetent, unqualified or negligent or is responsible for a violation of a WHS Requirement.
- (b) For the avoidance of doubt, the Contractor is not entitled to any compensation as a result of an objection or a direction under clause 51(a).

52. Removal of Equipment

The Contractor must not remove the Equipment from the Site without the prior written consent of the Easternwell Representative, which must not be unreasonably withheld.

53. Modifications to the Equipment

Easternwell must not modify or vary the Equipment without the prior consent of the Contractor.

TIME**54. Rate of Progress**

Unless the Agreement provides otherwise, the Contractor must deliver the Equipment to the Site promptly on the Commencement Date.

55. Extension of Term

- (a) Easternwell may elect to extend the Term by written notice to the Contractor at least 1 Month prior to the Termination Date, notifying the proposed amended Termination Date.
- (b) The Contractor may object to the extension of the Term by written notice to Easternwell within 5 Business Days of Easternwell's notice, provided that if the Contractor does not do so, the Termination Date is deemed to be amended as notified by Easternwell.

56. Return of Equipment

- (a) At the expiry of the Term, Easternwell must make the Equipment available at Site for collection by the Contractor in the same good working order and condition as Easternwell received the Equipment from the Contractor (except for ordinary wear and tear).
- (b) If at the expiry of the Term or upon the termination of the Agreement Easternwell is unable to make the Equipment available at Site for collection by the Contractor or is unable to deliver the Equipment to the Contractor, Easternwell must pay to the Contractor the replacement value of the Equipment. The replacement value of the Equipment will be determined by an independent valuer taking into account the age of the Equipment, the order and condition of the Equipment on the Commencement Date and fair wear and tear of the Equipment since the Commencement Date.

EVENTS OF FORCE MAJEURE**57. Force Majeure**

- (a) In the event of an interruption to the supply of the Equipment to Easternwell that the Contractor attributes to Force Majeure, the Contractor must notify Easternwell immediately of the circumstances, likely duration and impact on the hire of the Equipment as contemplated by this Agreement.
- (b) The Contractor will not be responsible for any failure to fulfil any term or condition of the Agreement if, and to the extent that fulfilment has been delayed or temporarily prevented by a Force Majeure occurrence, notification has been given in accordance with clause 57(a) and the occurrence is beyond the control and caused without the fault or negligence of the Contractor or any of its Personnel.
- (c) Easternwell's obligations to make any payments under the Agreement are suspended to the extent that an event of Force Majeure prevents the Contractor from performing its obligations under the Agreement while the event of Force Majeure persists.
- (d) Easternwell may elect at any time to terminate the Agreement by written notice to the Contractor if an event of Force Majeure persists for 14 Days or more.

PAYMENT CLAIMS**58. Submission of Tax Invoice**

The Contractor must submit to Easternwell a Tax Invoice for the Fees (or agreed rates) which shows:

- (a) the Equipment hired by the Contractor to Easternwell;
- (b) the total amount due and payable by Easternwell to the Contractor for the Equipment;
- (c) the lump sum or daily or hourly rate for the Equipment;
- (d) the lump sum or daily or hourly rate for the Operator (if applicable);
- (e) the Operator's expenses that the Contractor intends on passing through to Easternwell together with a copy of all applicable receipts; and
- (f) any other amounts claimed by the Contractor from Easternwell and all supporting documentation for those claims.

59. Contractor's warranties

In issuing a Tax Invoice, the Contractor warrants to Easternwell that:

- (a) the figures appearing in the Tax Invoice are accurate;
- (b) it has complied with all of the obligations imposed on it by the Agreement where those obligations have to be complied with at or before the time of issuing a Tax Invoice;
- (c) it is not aware of any claim by the Contractor against Easternwell that is not identified in a written notice previously given to Easternwell in accordance with the Agreement or in the Tax Invoice; and
- (d) it is entitled to payment of the amount claimed.

60. Non approval

Easternwell may dispute the validity of an invoice or object to an invoice or to any amount claimed by notifying the Contractor within 30 Days of the end of the Month of receipt of that invoice or of the final invoice under the Agreement.

61. Payment by Easternwell

Easternwell will pay the Contractor the undisputed portion of the amount specified in the Tax Invoice, together with any applicable GST, no later than 45 Days after the Month of receipt of that invoice.

GST**62. GST gross up**

If a party makes a supply under or in connection with the Agreement in respect of which GST is payable, the consideration for the supply but for the application of clauses 62 to 65 (**GST exclusive consideration**) is increased by an amount equal to the GST exclusive consideration multiplied by the rate of GST prevailing at the time the supply is made.

63. Reimbursements

If a party must reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by any input tax credit to which the other party is entitled for the loss, cost or expense and then increased in accordance with clause 62. That party is assumed to be entitled to a full input tax credit unless it proves, before the date on which the payment must be paid, that its entitlement is otherwise.

64. Tax invoices

Despite any other provision of the Agreement, the recipient of a taxable supply made under or in connection with the Agreement need not make a payment until the supplier has given the recipient a tax invoice for the supply to which the payment relates. The supplier must give the recipient an adjustment note for an adjustment arising from an adjustment event relating to a taxable supply made under or in connection with the Agreement within 7 Days after the date the supplier becomes aware of the adjustment event.

65. GST group

If a party is a member of a GST group, references to GST which the party must pay, and to input tax credits to which the party is entitled, include GST which the representative member of the GST group must pay and input tax credits to which the representative member is entitled.

TERMINATION FOR CONTRACTOR'S INABILITY TO PERFORM**66. Effect of Insolvency Event**

If an Insolvency Event occurs, Easternwell may either:

- (a) terminate the Agreement by written notice to the Contractor (or the person in whom the Agreement is vested as a result of the Insolvency Event); or
- (b) give to any person in whom the Agreement is vested as a result of the Insolvency Event, the option to perform the Contractor's obligations in accordance with the Agreement, provided that person provides security satisfactory to Easternwell for the proper and timely performance of the Contractor's outstanding obligations under the Agreement.

DEFAULT BY CONTRACTOR**67. Event of default**

If the Contractor:

- (a) fails to perform or comply with any of its obligations under the Agreement;
- (b) without reasonable cause, wholly or substantially suspends performance of any of its obligations under the Agreement; or
- (c) fails or refuses to comply with any direction given by the Easternwell Representative,

(**Contractor Default**) then Easternwell may serve a notice on the Contractor specifying the Contractor Default, the time within which the Contractor Default is to be remedied and requiring the Contractor to remedy it.

68. Failure to remedy

If, within the time specified in a notice served under clause 67, the Contractor fails to:

- (a) take all reasonable steps to prevent recurrence of a Contractor Default that is not capable of remedy;
- (b) remedy the Contractor Default to the satisfaction of Easternwell Representative; or
- (c) provide satisfactory assurance to Easternwell that the Contractor Default will be rectified as soon as practicable or remedy the Contractor Default as soon as practicable after providing this assurance,

then Easternwell may, without prejudice to any other rights of Easternwell, terminate the Agreement by 5 Days' written notice to the Contractor.

69. Effect of termination

If Easternwell terminates the Agreement under clause 68, the Contractor is not entitled to any payment from Easternwell in respect of the period after the date of the Contractor Default, including costs incurred by the Contractor in removing the Equipment, its Personnel and Operator from the Site.

DEFAULT BY EASTERNWELL**70. Event of default**

Subject to Easternwell's rights under the Agreement to deduct and withhold amounts owing to the Contractor, if Easternwell fails to make a payment due to the Contractor that is not the subject of a dispute between the parties (**Easternwell Default**) then the Contractor may serve a notice on Easternwell specifying the Easternwell Default, the time within which the Easternwell Default is to be remedied (which must be no less than 14 Days after Easternwell's receipt of the notice) and requiring Easternwell to remedy the Easternwell Default.

71. Termination

If Easternwell has not remedied an Easternwell Default within the time within which the default is to be remedied, specified in the notice referred to in clause 70, the Contractor may within a further period of 5 Days terminate the Agreement by 5 Days' written notice to Easternwell.

72. Effect of termination

If the Contractor terminates the Agreement under clause 71, the Contractor may recover from Easternwell all amounts due and unpaid in relation to the Agreement at the date of termination.

TERMINATION FOR CONVENIENCE**73. Right of Easternwell**

In addition to any other rights that Easternwell may have under the Agreement, Easternwell may:

- (a) at any time, in its absolute discretion and without cause, terminate the Agreement in whole or in part by written notice to the Contractor; and
- (b) engage another Contractor to perform any part of the Contractor's obligations under the Agreement, in respect of which the Agreement is terminated, without being in breach of the Agreement.

74. Compensation to Contractor

If the Agreement is terminated under clause 73, then subject to Easternwell's rights under the Agreement to deduct and withhold amounts owing to the Contractor, Easternwell must pay the Contractor, as the Contractor's sole remedy in relation to the termination:

- (a) all amounts due and unpaid for the hire of the Equipment at the date of termination; and
- (b) in consideration of demobilisation costs, if any, and on any other account, 2% of the difference between:
 - (i) the amount the Contractor would have been paid if the Equipment held at the date of Easternwell's notice under clause 73 was hired by Easternwell until the end of the Term; and
 - (ii) all amounts paid under the Agreement prior to the date of Easternwell's notice under clause 73.

75. Continued Performance

Despite the provisions of clauses 70 to 74, the Contractor must continue to provide to Easternwell any part of the Equipment in respect of which the Agreement is not terminated.

76. Contractor's Obligations on Termination

On termination following receipt of a notice under clause 66(a), 68, 71 or 73, the Contractor must:

- (a) remove the Equipment from Site as directed by the Easternwell Representative; and
- (b) take any other action relating to the termination of the Agreement reasonably required by the Easternwell Representative.

77. Effect of Termination

Action taken by Easternwell under clauses 66 to 76 does not prejudice:

- (a) any other rights, remedies, powers and discretions of Easternwell including any right to deduct or withhold amounts owing to the Contractor or recover amounts owing to Easternwell by the Contractor; and
- (b) the accrued liabilities and obligations of the Contractor, all of which continue in full force and effect as if the Agreement had not been terminated.

78. Dispute Resolution

- (a) If a dispute arises in connection with or relating to the Agreement, a party to the dispute must give to the other party or parties to the dispute notice specifying the dispute and requiring its resolution under clause 78 (**Notice of Dispute**).
- (b) An executive officer of each party must confer within 5 Business Days after the Notice of Dispute is given to try to resolve the dispute.
- (c) If the parties cannot resolve a dispute within 5 Business Days of the Dispute first being raised between the parties, the parties agree that the dispute must then be referred to the Australian Commercial Disputes Centre for mediation.
- (d) Either party may commence court proceedings at any time in relation to any Claim arising under or in connection with the Agreement where:
 - (i) the party seeks urgent interlocutory relief; or
 - (ii) the Claim relates to a dispute which is not resolved within 30 Days after the Notice of Dispute is given.
- (e) Subject to clause 78(d), neither party may litigate until the procedures in clause 78(a) to 78(c) above have first been complied with.
- (f) Each of the parties must continue to perform its obligations under this Agreement, despite a dispute.
- (g) Easternwell may set-off or deduct from any payments due to the Contractor under this Agreement, any money due or which may become due from the Contractor to Easternwell under this Agreement or otherwise at law relating to this Agreement.

79. Confidentiality

- (a) Given the Contractor's rights to interact with Easternwell's business activities, during the Term or at any time after the date, the Contractor undertakes that it 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 or relating to the other party 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 information, except as permitted by this clause.
- (b) Easternwell's Confidential Information (which includes specifications developed for the Contractor or any designs or other specifications) supplied by Easternwell to the Contractor and copies of it must be held by the Contractor on Easternwell's behalf and at Easternwell's disposal and must not be disclosed or furnished to any other person or used for any purpose without Easternwell's express consent and all reasonable precautions must be taken by the Contractor to protect such confidentiality.
- (c) 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.

- (d) The Contractor acknowledges that damages are not a sufficient remedy for breach of clause 79 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.
- (e) This clause survives termination of the Agreement.

80. 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.

81. Acceptance

- (a) The acceptance of an Order by the Contractor includes acceptance of these terms and conditions as the sole basis of the hire of Equipment to the exclusion of any terms and conditions of hire 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 hire of Equipment to Easternwell by the Contractor, and for all hire of Equipment to be provided to Easternwell under any future Orders, will be governed by the Agreement.

MISCELLANEOUS PROVISIONS**82. General**

- (a) (**Benefit of Agreement held on trust**) Easternwell accepts the benefit of the Agreement on behalf of its Associated Entities and Personnel and holds the benefit of the Agreement on trust for its Associated Entities and Personnel and may enforce the Agreement in its own name and in the name of (or for the benefit of) any of its Associated Entities or Personnel.
- (b) (**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.
- (c) (**No merger**) The rights and obligations of the parties under the Agreement do not merge on completion of any transaction contemplated by the Agreement.
- (d) (**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. Nor will any single or partial exercise of any right or power by Easternwell preclude any other or further exercise of that right or power.
- (e) (**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.

- (f) (**Further actions**) Each party must, at its own expense, do all things and execute all documents necessary to give full effect to the Agreement and the transactions contemplated by it.
- (g) (**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 survives termination of the Agreement.

- (h) **(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.
 - (i) **(Counterparts)** The Agreement may be executed in any number of counterparts.
 - (j) **(Governing Law)** Unless otherwise specified, this Agreement will be construed in accordance with the Law in the Jurisdiction. Each party submits to the non-exclusive jurisdiction of the Courts of the Jurisdiction.
 - (k) **(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).
- (iii) direct the Contractor to promptly procure the removal from the Site of any Operator who, in the opinion of the Easternwell Representative, is excess to Easternwell's requirements.
 - (b) For the avoidance of doubt, if a direction is given under clause 89(a)(i) or 89(a)(ii), the Contractor:
 - (i) is not entitled to any compensation as a result of the direction;
 - (ii) without limiting clause 89(a)(i), if the direction is given on or before the first day that an Operator is on Site, Easternwell is not obliged to pay any amount to the Contractor for the supply of that Operator; and
 - (iii) except in the circumstances contemplated by clause 89(a)(iii), the Contractor must supply a replacement Operator at its cost.

90. Operator's Expenses

The Contractor will:

- (a) include in the Operator Costs payment to the Operator for the time taken for the Operator's travel to and from the Operator's residence to the Site during the Term; and
- (b) pay for or reimburse the Operator for the payment of the cost of such travel, accommodation and meals during such period that accommodation is reasonably necessary in order to complete the Agreement.

91. Responsibility for Operator

- (a) The Contractor acknowledges that the Operator will be subject to the control and supervision of Easternwell but that the Contractor is responsible for all acts and omissions of the Operator, and:
 - (i) releases to the full extent permitted by law Easternwell from all claims and demands of every kind whether by the Contractor, any of its Personnel or any other person resulting from any accident, loss, damage or injury caused by any act, omission or negligence of the Operator or any of its Personnel; and
 - (ii) indemnifies and keep indemnified Easternwell from and against all Claims and Losses brought by any person which Easternwell may suffer or incur as a consequence of, incidental to, or in any way arising out of the work carried out by the Operator or occasioned wholly or in part by any act, neglect, default or omission by the Operator or any of its Personnel, or loss of life or any injury suffered by the Operator or any of its Personnel.
- (b) Easternwell will notify the Contractor as soon as practicable upon becoming aware of any incident involving an Operator or any of its Personnel.

PART B – PROVISIONS APPLYING TO WET HIRE

83. Application of part

If the Agreement requires the Contractor to supply an Operator, then clauses 83 to 91 will apply.

84. Provision of Operator

The Contractor will provide to Easternwell an Operator to operate the Equipment. Subject to clauses 83 to 91, the Operator will comply with all reasonable directions of the Easternwell Representative in relation to the operation of the Equipment.

85. Qualified Operator

- (a) The Contractor must only supply an Operator who:
 - (i) is suitably qualified to operate the Equipment;
 - (ii) has completed, at the Contractor's cost, the safety inductions required by Easternwell; and
 - (iii) has been employed or contracted by the Contractor under a written agreement.
- (b) If requested by the Easternwell Representative, the Contractor must:
 - (i) before an Operator starts work on-Site, provide copies of that Operator's medical and other test results to satisfy WHS Requirements, employment or engagement contract and certifications supporting current qualifications; and
 - (ii) ensure that the Operator is equipped with appropriate tools of trade and equipment (including clothing and provisions).

86. Costs associated with Operator

Easternwell will pay to the Contractor the Operator Costs as detailed in the Agreement (**Operator Costs**) and invoiced in accordance with this Agreement.

87. Contractor's Obligations

The Contractor must:

- (a) ensure that the Operator complies with any Law (including any relating to earthmoving, mining, labour) and WHS Requirements and without limitation will take out and keep in force all licences and permits required for the carrying on of any business or activity conducted by it or the Operator;
- (b) provide all safety and protective equipment for the Operator and ensure that the Operator wears or uses that equipment at all relevant times;
- (c) ensure that the Operator is aware of all the relevant terms and conditions of this Agreement; and
- (d) ensure that the Operator complies with all applicable terms and conditions of this Agreement, as if the Contractor.

88. Easternwell's obligations

Easternwell must conduct all operations involving the Equipment in accordance with generally accepted industry and work standards and practices, including without limitation:

- (a) providing a safe work environment to enable the Operator to carry out the Operator's duties in a safe and efficient manner including a site-specific, or where applicable, job-specific, safety induction program prior to the commencement of work by the Operator; and
- (b) complying with all generally accepted industry and work standards and practices relating to WHS Requirements.

89. Objection to personnel

- (a) The Easternwell Representative may:
 - (i) object to any Operator (including one that the Contractor proposes to supply and before that Operator comes on Site) and direct the Contractor that any such person is not permitted on the Site;
 - (ii) direct the Contractor to promptly procure the removal from the Site and replacement of an Operator who, in the opinion of the Easternwell Representative, is not properly performing their duties, is incompetent, unqualified or negligent or is responsible for a violation of a WHS Requirement; or