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**1 Interpretation**

1.1 In this Agreement, except where the context requires otherwise, the following terms shall have the meanings shown:

- a) "Agreement" means the Purchase Order and these Conditions.
- b) "Client" means where relevant, the other party to MCD's head contract in respect to the project of which the Goods and Works form part, as stated in the Purchase Order.
- c) "Completion" is that stage when all of the Goods have been provided as required by the Agreement

- d) "Conditions" means the Standard Terms and Conditions of Purchase Order set out in this document.
- e) "Date of Delivery" means the last date when the Goods were delivered at the Delivery Point.
- f) "Date for Delivery" means the Required Date(s) specified in the Purchase Order by which the Supplier shall deliver the Goods at the Delivery Point, and where the context admits, as the date or dates may be changed in accordance with the Agreement.
- g) "Delivery Point" means the place specified in the Purchase Order to which the Goods are to be delivered by the Supplier.
- h) "Direction" includes agreement, approval, assessment, authorisation, certification, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement but does not include command or control of how the work in respect to the Goods is to be performed.
- i) "Encumbrance" means and includes any interest or equity of any person or any mortgage, charge, pledge, lien or assignment, or any other encumbrance, priority or security interest or arrangement of whatsoever nature over or in the relevant property.
- j) "Goods" means the machinery, plant, equipment, materials, Vendor Data or other items of any kind (including any part thereof), whether or not fixed or incorporated, described in the Agreement and which are to be provided by the Supplier, and where the context admits, includes any work which the Supplier does, or is required to do, in connection with the manufacture, preparation, assembly, delivery, supply, installation and commissioning thereof.
- k) "Intellectual Property Rights" means all industrial or intellectual property rights including patent rights, copyrights, registered design, design rights, trademarks, service marks, confidential information and trade secrets, moral rights and other similar proprietary rights, all rights of whatever nature in computer programs, firmware, micro-code and other computer software and data, and all intangible rights and privileges of a nature similar to any of the foregoing.
- l) "MCD" means the McConnell Dowell entity shown in the Purchase Order.
- m) "Premises" means the place or places made available by the Supplier (and any Sub-supplier) where the Goods are to be manufactured or assembled
- n) "Price" means the values shown in the Purchase Order.
- o) "Purchase Order" is the document bearing that title, (including any attachments) and which together with these Terms and Conditions, forms the Agreement.
- p) "Site" means the places (if any) stated in the Purchase Order where the Goods are to be installed together with any other places made available to the Supplier by MCD for the purposes of this Agreement, and where the context admits, includes the Delivery Point;

- q) "Specification" includes any design, plans, drawings, calculations, data or other information relating to the Goods ;
- r) "Sub-supplier" means any supplier or contractor of the Supplier who supplies materials, equipment, sub-assemblies or services to the Supplier in connection with the Goods.
- s) "Supplier" means the addressee in the Purchase Order, being the party responsible for providing the Goods.
- t) "Vendor Data" means any specifications, calculations, drawings or other similar information which are to be submitted by the Supplier prior to manufacture of the Goods or at any time during the course of manufacture or execution, or to bring to completion the performance of its obligations to execute and/or deliver the Goods.
- u) "Writing" or "written" includes facsimile transmission and email.

- 1.2 Words in the singular include the plural, and vice versa.
- 1.3 Any reference in this Agreement to a statute or a provision of a statute shall be construed as reference to the statute or provision as amended, re-enacted or extended at the relevant time.
- 1.4 Headings may be used to interpret the provisions of these Conditions where there is uncertainty or ambiguity.
- 1.5 If any provision of the Agreement is, is deemed to be or becomes, void, unenforceable, severed or illegal, the remaining portions of the Agreement shall continue to have full force and effect.
- 1.6 In the interpretation of the Agreement, no rules of construction apply that would disadvantage a party because that party was responsible for drafting the Agreement or part of the Agreement.
- 1.7 In the event that the Supplier discovers any discrepancies between the various documents that comprise the Agreement, the Supplier shall refer the discrepancies to MCD and MCD shall issue directions to resolve such discrepancies.
- 1.8 References to a Clause, is a reference to a Clause of these Conditions.

## 2 Acceptance

- 2.1 The Supplier shall be deemed to have accepted the Agreement upon the earlier of:
  - a) Signature by the Supplier of the Agreement, or some other written acknowledgement;
  - b) Delivery of the Goods by the Supplier to the Delivery Point;
  - c) Submission to MCD by the Supplier of an invoice for payment in respect of the Goods, or
  - d) The Supplier does not notify MCD of its non-acceptance of the Purchase Order or any part thereof, within 7 days of the Supplier's receipt of the Purchase Order.

## 3 Specifications

- 3.1 The quantity, quality and description of the Goods shall be as specified in the Purchase Order or as may otherwise be agreed in writing by MCD.
- 3.2 In the event the Supplier discovers any ambiguity or discrepancies in any Specification, the Supplier shall immediately notify MCD thereof and shall comply with the determination of MCD as to such ambiguity or discrepancy.
- 3.3 The Supplier shall within the time limits which may be specified in the Purchase Order, submit any Vendor Data as required by the Agreement, or such other Vendor Data as is reasonably required by MCD.

## 4 Intellectual Property Rights

- 4.1 The Supplier warrants that any design, materials, equipment, documents and/or methods of working provided by the Supplier shall not infringe any Intellectual Property Rights. The Supplier hereby grants to MCD an unlimited, irrevocable, royalty-free and assignable Intellectual Property Rights license in respect of all its design, goods, material, equipment documents and/or methods of working used in or forming a part of the Goods, which MCD may make by like grant to the Client.
- 4.2 Where relevant, the Supplier shall also not infringe any moral rights in respect of identification, attribution and derogatory treatment of authorship in accordance with the Australian Copyright Amendment (Moral Right) Act, 2000 (Cth).

## 5 Entire agreement

- 5.1 The Agreement constitutes the entire agreement between Supplier and MCD as at the date of acceptance by Supplier and supersedes any Request for Quotation, Supplier's quotation, all negotiations and/or previous agreements either written or oral with respect to the subject of the Agreement made prior to the date of acceptance of the Agreement, other than as these have been expressly incorporated into the Agreement.
- 5.2 Any variation of the Agreement shall be effective only if made in writing and signed by MCD.

## 6 Correspondence Notices and Documentation

- 6.1 All documentation, notices and correspondence relating to the Agreement, including delivery orders, invoices, packing lists, containers, delivery notes, airway bills and bills of lading, shall show the Purchase Order Number. Documentation, notices and correspondence shall be transmitted to the relevant representative of the Party nominated for such purpose in the Purchase Order, to the postal or email address shown, or as this may otherwise be advised in writing. .

## 7 Price of Goods

- 7.1 Unless otherwise expressly excluded in the Agreement, the Price shall be deemed to be inclusive of all labour, plant, materials, equipment, machinery, vehicles, tools, facilities and services, overheads, profit and all ancillary and other works, expenditure, risks, overtime and contingencies, required or necessary to be undertaken, for the Goods to

be provided. MCD shall not be responsible for providing any services, other than those (if any) expressly stated in the Purchase Order.

- 7.2 Unless otherwise indicated in the Purchase Order, the Price shall be firm and fixed and no adjustment in the Price may be made on account of change in any legislation, increased costs of labour, materials or transport, or fluctuation in rates of exchange or otherwise.

## 8 Payment

- 8.1 Unless otherwise specified in the Purchase Order, the Supplier shall submit to MCD, not earlier than the Date of Delivery (and if earlier, shall be deemed to have been submitted on the said date), an invoice for the Goods, subject to any other requirements elsewhere in the Agreement.
- 8.2 Unless otherwise stated in the Purchase Order, MCD shall pay the Supplier the amount properly due within 45 days after the end of the month in which receipt of the Supplier's properly completed invoice occurs. Any payment certified by MCD as being payable to the Supplier, or any payment made to the Supplier, shall be provisional or on account only, and is not an admission of liability or an acknowledgement that the Goods (or any part thereof) have been provided in accordance with the Agreement.
- 8.3 The Supplier's invoice(s) shall be sent to the address shown on the Purchase Order, and contain not less than the following particulars:
- Name and Address of MCD's Representative as set out in the Purchase Order;
  - Name and Address of the Supplier;
  - Purchase Order Number;
  - The date of the invoice and the total amount claimed;
  - Description of each item of Goods supplied and work done in accordance with the Agreement, the quantity delivered and unit price for each item; and
  - The amount of any applicable goods and services tax/value added tax.
- 8.4 All invoices and correspondence regarding payments shall be signed by the Supplier's Representative and forwarded to MCD's Representative at the address specified in the Purchase Order, or as this may be otherwise advised in writing.
- 8.5 If so directed, the Supplier shall provide to MCD documentary evidence to MCD's satisfaction that all workers who have been employed by the Supplier or any Sub-supplier have been paid all monies due and payable to them in respect of their employment on the work under the Agreement and that all mandatory contributions to be made for, or in respect to, workers, and any industry levies, have been made; these include contributions to a relevant superannuation scheme and any industry worker benefit schemes or industry levies.
- 8.6 (a) Notwithstanding Clause 8.2, MCD shall be entitled to deduct and set-off from any moneys otherwise owing to the Supplier under the Agreement or otherwise, the amount of any claim for loss, damages, costs or expense, which has been, or may be, incurred by MCD, by reason of any breach of, or failure to observe the provisions of, the Agreement by the Supplier, or which is otherwise owed to

MCD, or which is awarded to MCD in any arbitration or litigation in connection with the Agreement or otherwise.

(b) Any amount set-off under Clause 8.6(a) is without prejudice to the rights of MCD in any subsequent negotiations, arbitration or litigation to seek to vary the amount set-off.

(c) MCD's right to set-off shall be cumulative and in addition to any other rights and remedies which it may have at law or in equity.

## 9 Currency

- 9.1 Payment for the Goods shall be made in the currency specified in the Purchase Order.

## 10 Examination of Site

- 10.1 In so far as it is necessary for the performance of this Agreement, the Supplier shall be deemed to have examined the Site and the Delivery Point and their surroundings, and to have fully satisfied itself of the relevant physical conditions of the Site and Delivery Point, the climatic conditions in the locality of the Site and Delivery Point, the nature of and access to the Site and Delivery Point and how they may be affected by prior, concurrent or subsequent work carried out by others, the nature, quality, extent and amount of labour, plant, materials, equipment, machinery, vehicles, tools, facilities and services required, and all other matters which can in any way affect the delivery of the Goods.
- 10.2 The Supplier hereby acknowledges it has not and shall not rely on any information given, or statement made to it, by MCD in respect of the condition or future condition of the Site or Delivery Point, other than as this is included in the Agreement or is otherwise provided in writing by MCD.

## 11 Safety and Performance

- 11.1 In the performance at the Site of its obligations under the Agreement, the Supplier shall maintain strict discipline and good order among its workmen and the workmen of its Sub-suppliers (hereinafter called the "Workmen"). Without prejudice to the generality of the foregoing, the Supplier shall ensure that its employees, agents and Sub-suppliers comply with MCD's Safety Rules and any other work directions issued by MCD from time to time which apply to working on the Site, including but not limited to, attending, participating in and giving effect to, any workshops or other formal activities conducted by, or on behalf of, MCD or the Client, in respect to health, safety or the environment. MCD shall be entitled to require the Supplier to remove a Workman who is incompetent, unreliable, unfit or has misbehaved or contravened any rules or directions and the Supplier shall forthwith replace any Workmen removed with suitable Workmen approved by MCD. If the Supplier is a single person, MCD shall be entitled to terminate the Agreement in the event the Supplier is incompetent, unreliable, unfit or has misbehaved or contravened any rules or regulations aforesaid, and the provisions of Clause 28.2 shall, mutatis mutandis, apply.
- 11.2 The Supplier shall place the highest importance and priority on safety, occupational health and protection of the environment during the performance of the Agreement. Notwithstanding the foregoing, the Supplier shall, prior to beginning any work on the Site, submit to MCD for review

a detailed Safety Management Plan setting out the Supplier's proposed procedures for ensuring that work on Site under the Agreement is conducted safely. The Supplier shall comply with its Safety Management Plan. Any approval, acceptance, review or agreement by MCD of the Suppliers own Safety Management Plan, shall not diminish the Supplier's obligations or liabilities under this Clause 11, nor relieve the Supplier of the responsibility to comply with the Agreement or the law.

- 11.3 The Supplier shall not permit a hazardous, unsafe, unhealthy or environmentally unsound condition or activity over which it has control. If the Supplier becomes aware of any such condition or activity, it shall promptly take all necessary steps (including engaging a competent person) to abate or eliminate such condition or activity.
- 11.4 Upon the occurrence of any hazardous, unsafe, unhealthy or environmentally unsound condition or activity at the Site, MCD may serve notice to that effect on the Supplier requiring the Supplier to stop work and to abate or eliminate such condition or activity within the time stipulated in the notice, failing which MCD may by itself or by its contractors or agents do the same at the cost of the Supplier. Any failure by MCD to serve such notice shall not relieve the Supplier of its responsibility to otherwise abate or eliminate such conditions.
- 11.5 The Supplier shall not do or permit to be done any act or thing which may become a nuisance to, or give cause for complaint by, the occupiers of neighbouring premises or sites.
- 11.6 The Supplier undertakes to take all precautions and provide all protection to prevent damage, injury or loss to:
- a) MCD, its personnel, and all other occupiers and users of the Site; and
  - b) all buildings, structures, fittings, fixtures, equipment and other property at the Site and adjacent thereto including trees, shrubs, lawns, pavements, roadways and utilities.
- 11.7 The Supplier shall be liable for all costs and expense incurred by MCD to make good any damage caused by the Supplier, its employees, agents or Sub-suppliers to the Site or any other property and shall indemnify MCD for any loss, injury or damage to any person or property caused by any act, default or negligence of the Supplier, its employees, agents or Sub-suppliers.
- 11.8 The Supplier shall at all times keep the Site and the Premises clean and shall clear away and remove all surplus materials, rubbish and work of any kind as may be occasioned by the work or the Suppliers' performance of its obligations under the Agreement.
- 11.9 Within seven days from the Completion Date or such other date as MCD may direct, the Supplier shall remove all of its personnel, plant and equipment and surplus materials from the Site, and shall leave this and its environs clean and tidy.
- 11.10 For the avoidance of doubt and notwithstanding anything else contained in this Agreement, the Supplier has control of, and ultimate responsibility for, the health and safety of the Suppliers employees, and the health and safety of others who may be affected by the activities of the Supplier in carrying out the work, and nothing in this Agreement relieves the Supplier of this obligation. Compliance by the Supplier with the requirements of this Clause 11, shall be at the Supplier's cost.

## 12 Compliance with Laws

- 12.1 The Supplier shall at its own expense comply in all respects with the provisions of all applicable laws, statutes, regulations or other enactment in respect of the manufacture, packaging, packing and delivery of the Goods and the execution of work, and shall keep MCD indemnified against all penalties and liabilities of any kind arising as a result of breach of any laws.
- 12.2 The Supplier shall prior to the commencement of performance of the Agreement and as and when necessary, at its own cost, obtain from governmental and other competent authorities all necessary approvals, consents, licences and permits whatever which may be from time to time required for or in connection with any matter relating to or arising out of the Agreement, and shall at its own cost, keep current and promptly renew from time to time all such necessary approvals, consents, licences and permits and promptly deliver to MCD on demand certified true copies of all such approvals, consents, licences and permits and documentary evidence of payment of all fees, duties and or impositions levied by the relevant authorities.

## 13 Property

Subject always to clause 20.12;

- 13.1 The property in any Goods shall pass to MCD upon delivery at the Delivery Point, unless, and to the extent, payment therefore (whether in whole or in part) is made prior to delivery, when it shall pass to MCD once such payment has been made. Where progress or instalment payments are made, the property in the Goods in respect of which a progress or instalment payment is made, shall pass to MCD once such payment has been made.
- 13.2 The property in any Goods delivered to the Delivery Point shall re-vest in the Supplier to the extent that surplus Goods may be found to exist upon Completion and handing over of the Goods. All Goods delivered to the Delivery Point shall not be removed from the Delivery Point without the consent of MCD, except that if the Goods are surplus to the requirements of the Agreement, the Supplier shall remove the same, upon the property in such surplus re-vesting to the Supplier.
- 13.3 The Supplier warrants that it has the right to sell, and that MCD shall acquire good clear title to, all Goods free of any Encumbrance, on the date when property in such Goods under the terms herein, passes to MCD.
- 13.4 MCD may require the Supplier to establish to MCD's satisfaction that the Supplier has or will, on the date for making the payment of the progress or instalment payment, or on delivery to the Delivery Point, have good clear title to and ownership of such Goods. If the Supplier shall fail to satisfy MCD as aforesaid, MCD may require the Supplier to provide additional security in form and substance acceptable to MCD prior to making any payment.
- 13.5 The Supplier shall ensure that any Goods in which property has passed to MCD, but which remain in the possession of the Supplier or its Sub-suppliers, are clearly marked and identified as MCD's property, and kept separate from other goods or property of the Supplier and any third party and be properly stored, protected and insured.
- 13.6 MCD shall be entitled at any time by its servants or agents to require the Supplier to deliver up to MCD any such Goods in which property has passed, and if the Supplier fails to do so forthwith, to enter upon any premises of the

Supplier or any third party where such Goods are stored and remove such Goods. The Supplier hereby irrevocably grants to MCD and its authorised agents a licence to enter the Supplier's premises for the purposes aforesaid and will procure that such third party will grant to MCD a similar licence.

- 13.7 The Supplier warrants and undertakes with MCD that it will not, in any contract with a Sub-supplier for the purchase or supply of goods or materials relating to the Goods, agree to or accept any condition providing for the Sub-supplier's reservation of title or property in any Goods to be supplied by the Sub-supplier. If so required by MCD, the Supplier shall produce for MCD's inspection all Agreements (other than in respect to price) with Sub-supplier's which relate to the Goods.

## 14 Risk

- 14.1 Risk of damage to or loss of the Goods shall pass to MCD upon acceptance of delivery by MCD in accordance with the Agreement.
- 14.2 The Goods, (whether located at the Site, the Premises or the premises of any third party) supplied by the Supplier or all goods or materials, if any, supplied by MCD for Supplier's use, shall remain, until handing over of the completed Goods in accordance with the Agreement, at the risk of the Supplier, who shall make good at its own expense and without payment, any accidental or other loss or damage thereto howsoever caused (including theft or act of third parties) save only loss or damage caused by any wilful act of MCD. The Supplier shall protect the Goods and shall insure the Goods and all such goods and materials as aforesaid unless otherwise expressly stated in the Agreement.
- 14.3 The plant, tools, equipment or other property belonging to or provided by the Supplier, its servants agents or Sub-suppliers shall be at the sole risk of the Supplier, and any loss or damage to the same or caused by the same shall, except for any loss or damage due to any wilful act of MCD, be the sole liability of the Supplier, who shall indemnify MCD against any loss, claim or proceedings in respect thereof.

## 15 Insurance

- 15.1 The Supplier shall at his own expense, keep in force during the entire period of performance of the Agreement, the following insurances:
- unless otherwise agreed, comprehensive public and products liability insurance in an amount not less than AUD\$10million, to cover bodily injury or death and damage to property in respect of claims by third parties (with no limit on the number of claims during the period of insurance) with a combined single limit of liability to a value acceptable to MCD per occurrence; and
  - workmen's compensation insurance in accordance with the provisions of any applicable laws and employer's liability insurance at general law providing coverage to cover all workmen from time to time engaged by it.
  - (where a motor vehicle is used in providing the Goods) statutory Third Party insurance covering Supplier's motor vehicles.
- 15.2 As and when required to do so by MCD, the Supplier shall produce for inspection by MCD, documentary evidence that the insurances required by, or referred to in, the

Agreement are properly effected and maintained (including where required the policy or policies and premium receipts in question)

- 15.3 The taking out of any insurance as herein provided shall not relieve the Supplier of any of its obligations under the Agreement or at common law or pursuant to any statute, rule, regulation or other enactment.

## 16 Quality Inspection at Premises

Where so required by the Purchase Order, the Supplier shall establish and maintain quality systems acceptable to MCD. Unless otherwise shown in the Purchase Order, the Supplier's quality systems shall comply with the current version of AS/NZS ISO 9001 'Quality management system - requirements.

- 16.1 MCD and the Client shall be entitled at any time during Supplier's normal business hours to make on-site visits to the Premises and to inspect and test any Goods during manufacture, processing or storage at the Premises and may inspect witness or expedite any tests carried out by the Supplier.
- 16.2 If as a result of inspection or testing MCD is not satisfied that the Goods will comply in all respects with the Agreement, and MCD so informs the Supplier, the Supplier shall take such steps as are necessary to ensure compliance.
- 16.3 For the purposes of conducting any visits, inspections or tests pursuant to this Clause 17, the Supplier shall, and shall procure that its Sub-suppliers will, grant to MCD and its authorised representatives (including the Client) full access to all Premises and provide all tools, testing equipment and manpower, and render all necessary assistance to MCD.
- 16.4 The Supplier's obligations to supply conforming Goods shall not in any way be affected by any inspection (including final inspection) or testing or attendance at Supplier's testing or otherwise, or the issue of an Inspection Release, or failure on MCD's part to inspect or test.
- 16.5 Wherever it is practicable to do so the Supplier shall, at the request of MCD, furnish MCD with any necessary supporting evidence or information confirming that the Goods, whether fixed or unfixed, comply with the requirements of the Agreement.

## 17 Quality Inspection at Site

- 17.1 MCD shall be entitled at any time to inspect and test any Goods during installation, commissioning or maintenance at the Site and may inspect, witness or expedite any tests carried out by the Supplier at the Site.
- 17.2 MCD may direct the opening up or inspection of any work covered up, or the carrying out of tests or investigations of any goods, materials or executed work, or the postponement of further work until the results of the tests or investigations are known. If such direction is reasonable and prudent in the circumstances, including (but not limited to) where there is evidence that some of the work is, or is likely to be, defective, or there has been defective work by the Supplier or a breach of contract or negligence or omission on the part of the Supplier or any Sub-supplier, then, the Supplier shall comply with the direction at its own expense, and shall not be entitled to an extension of time, notwithstanding that no further defective work or breaches of contract are subsequently disclosed thereby, but in other cases the Supplier shall be entitled to reasonable

compensation for any additional expenditure resulting from compliance with such instructions, and to an appropriate extension of time, unless defective work or other breaches of contract are disclosed thereby, in which event it shall not be entitled to such compensation or extension of time.

17.3 Without prejudice to any rights or remedies of MCD, MCD may direct the removal or demolition of any work, goods or materials which form part of the Goods, whether fixed or unfixable, which are not in accordance with the Agreement, and for their re-construction or replacement in exact accordance with the Agreement. Provided that MCD may, but shall not be bound to, accept any work containing defects not remedied and without removal or replacement, in which event the provisions of Clause 22.3(b)(i) shall apply.

17.4 No failure by MCD to exercise any powers in this Clause shall prejudice any subsequent claim by MCD against the Supplier at any time in respect of work which is not in accordance with the Agreement.

## 18 Packing, Marking and Despatch

18.1 A delivery docket or packing list must accompany each delivery or consignment of the Goods and must be displayed prominently. Unless otherwise specified in the Purchase Order or notified by MCD, the delivery docket or packing list shall contain as a minimum the Purchase Order Number, MCD's name, and the Supplier's name.

18.2 Unless the quantity is clearly stated on the packing list, MCD's count shall be deemed to be final, conclusive and binding on the Supplier. Supplier will standardise the count multiples used in shipments.

18.3 All Goods shall be clearly marked in accordance with applicable regulations or requirements of the carrier or shipper, if any.

18.4 The Supplier shall ensure that all Goods are adequately lubricated, packed, protected and secured in accordance with industry standards to prevent loss, damage or deterioration during transit to the Delivery Point, loading and unloading and temporary storage at MCD's premises or elsewhere at any time prior to installation and commissioning.

18.5 Large items or boxes shall be suitably lugged, battened or packed so as to permit loading and unloading using cranes and slings. The gross weights and preferred lifting points shall be clearly and conspicuously marked on the package.

18.6 Miscellaneous small items shall be packed in containers suitable for ease of handling, identification and storage.

18.7 The Supplier shall bear the cost of any loss, damage or deterioration to the Goods arising from inadequate marking, packing or protection and indemnify MCD against all loss damages costs and expenses suffered or incurred by MCD, arising from such loss, damage or deterioration.

## 19 Variations

19.1 For the purposes of this Agreement, "variation" shall mean any change to the Goods, which change shall include:

- a) increase, decrease or omit any part ;
- b) change the character or quality of any material or goods;

c) change the levels, lines, positions or dimensions of any part;

d) execute additional work;

e) accelerate the manufacture, delivery, installation or commissioning, where instructed in writing by MCD so to do, or

f) demolish or remove material, goods or work, whether part of the Goods or otherwise.

The Supplier shall be entitled to make variations to the Agreement only upon MCD's written direction. MCD may at any time direct variations to the Goods, and the Supplier shall promptly comply with such direction. No variation, whether of addition or omission, shall vitiate the Agreement. Where the Supplier receives a written direction which is not stated to be a variation but which the Supplier believes to be a variation, the Supplier shall forthwith so advise MCD before complying with that direction. Should the Supplier fail to so advise MCD, such direction shall be deemed to not constitute a variation; at its sole discretion, MCD may waive its right to rely on this deeming. Where work is omitted, MCD may, without incurring any obligation of cost or other liability to the Supplier, perform this work itself, or have the work carried out by others.

19.2 The value of all variations made or allowed shall be determined in accordance with the following rules:

a) The schedule of rates or other method upon which the original Price was based (including any Bills of Quantity), shall be used to determine the valuation of extra work of a similar character, executed under similar conditions as work priced therein.

b) The said rates where the extra work is not of a similar character or executed under similar conditions as aforesaid, shall be the basis of valuations for the same so far as may be reasonable, failing which a fair valuation thereof shall be made by MCD.

c) The prices in the said schedule of rates or other method upon which the original Price was based, shall determine the valuation of items omitted; provided that if omissions substantially vary the conditions under which any remaining items of work are carried out, the prices for the remaining items shall be valued on a fair and reasonable basis by MCD. Any deductions shall include a reasonable amount for profit, but shall not include any amount for overheads to the extent they continue to be incurred.

d) Where MCD considers extra work cannot properly be measured and valued using the rates or prices in the Agreement, MCD may direct that the work be done;

(i) at day work rates or the prices prevailing when such work is carried out; (in each case, to be reasonably determined by MCD or

(ii) at the reasonable extra cost to the Supplier of its materials, transport and labour for the work concerned, plus a reasonable percentage which percentage shall be deemed to compensate adequately the Supplier in respect

of all costs of (but not limited to) ordinary plant, tools, existing scaffolding, jigs or temporary works, supervision, overheads and profit.

Provided that as a condition precedent to payment based on time-related rates, written records specifying the time daily spent upon the work (and if required by MCD, the Workmen's names), and any plant, equipment or materials employed, shall be delivered for verification to MCD not later than one working day following that in which work has been executed. The Supplier shall not be entitled to rely on any records which were not provided to MCD as required, unless MCD has otherwise acknowledged and accepted those records in writing.

## 20 Delivery and Progress

- 20.1 The Supplier shall carry out the Agreement with diligence and due expedition at all times. The Supplier shall commence work under the Agreement promptly upon receipt of the Purchase Order and continue with the work until Completion.
- 20.2 The Goods shall be ready for handing over to MCD at the Delivery Point on the Date for Delivery according to the delivery terms specified in the Purchase Order or within the period stated in the Purchase Order, in either case during MCD's usual business hours, subject to any extension of the period granted in accordance with Clause 20.7.
- 20.3 Where the Date for Delivery is to be specified after the placing of the Purchase Order, the Supplier shall give MCD reasonable notice of the specified date, which date shall be consistent with MCD's programme requirements, as these may have been advised to the Supplier.
- 20.4 Within 14 days from award of the Agreement, and if so required by MCD, the Supplier shall submit to MCD two copies of the production programme for the Goods (the "Programme"). The Programme shall list all activities including where applicable, engineering, procurement, manufacture, assembly, testing, preparation for shipment, delivery, installation and commissioning, together with any other activities, showing planned durations for each activity and their inter-relationships. Significant milestones, including those upon which any agreed progress payments may be contingent, are to be indicated on the Programme together with the planned dates.
- 20.5 At 14 day intervals thereafter, or as may be required by MCD, the Supplier shall re-submit the Programme with actual progress clearly shown against each activity. The Programme shall be accompanied by a brief written report for any deviations from planned activities together with the remedial steps being taken by Supplier to restore the Programme so that the Date for Delivery will be maintained.
- 20.6 Where MCD so directs, a brief report on production status and delivery forecast is required to be provided to MCD weekly.
- 20.7 The Date for Delivery may be extended by such time as may in all the circumstances be fair and reasonable if work on the Goods is delayed in the following events:
- a) by any wrongful or negligent act of default, or delay, or breach of this Agreement, by MCD, its servant or agents ;
  - b) suspension of performance of the Agreement by MCD pursuant to Clause 27; or

- c) by force majeure in accordance with Clause 29.

and the Date for Delivery is unable to be achieved as a result.

- 20.8 As a condition precedent to such extension of the Date for Delivery, the Supplier shall as soon as such delay becomes apparent, forthwith give written notice of the cause and likely duration of delay to MCD and provided also that the Supplier shall constantly use its best endeavours to prevent delay and shall do all that may reasonably be required by MCD to proceed with the Goods. Provided that, absent notice from the Supplier, MCD may at its sole discretion and in its own interests, grant such extensions of time as it may consider fair and reasonable
- 20.9 If the Goods are to be delivered by instalments, the Agreement will be treated as a single Agreement and not severable.
- 20.10 The Supplier shall supply MCD in good time with information required to enable MCD to accept delivery of the Goods and performance of any work on the Site.
- 20.11 MCD may at any time, by written notice which is expressly identified as an acceleration direction, direct the Supplier to accelerate the execution of the work. Unless the acceleration is necessitated by the failure of the Supplier to proceed with the work in a diligent and competent manner or otherwise cause progress of the work to be delayed (in which case the cost of such acceleration shall be to the Supplier's account), MCD shall pay the Supplier its direct reasonable costs (if any), directly attributable to the acceleration.
- 20.12 Notwithstanding any other provision of the Agreement, and as a fundamental condition hereof, at any time, and whether or not MCD has terminated the Agreement, MCD may in writing direct the Supplier to immediately release, and make available to MCD, any of the Goods (whether completed or not), and do all things necessary to enable MCD to remove such Goods from the Supplier's (and Sub-supplier's) places of work. The Supplier hereby grants to MCD an irrevocable licence to enter upon the property of the Supplier to give effect to this provision, and shall do all that is necessary to retrieve any Goods from its Sub-suppliers. The Supplier shall promptly thereafter, submit to MCD a claim for payment in respect only to the Goods removed by MCD, which claim shall be regarded as a claim made under Clause 8.1, and which shall be valued as though only that part of the work had been terminated pursuant to Clause 28. Property in the Goods shall be deemed to reside in MCD upon the direction being given to the Supplier to release the Goods. Any Goods not included in MCD's direction, shall continue to be subject to the Agreement. Any failure of the Supplier to comply with this Clause 20.12 shall be a fundamental breach of the Agreement, and in the event that MCD makes application to a court to enforce its rights under this Clause 20.12, this Clause is agreed by the Supplier to constitute a complete bar and defence to any application, defence or counter claim that the Supplier may raise at such, or related, proceedings in challenge of such rights of MCD. This Clause 20.12 shall survive the termination of the Agreement.

## 21 Acceptance of Work

- 21.1 MCD shall be entitled to reject any Goods delivered which are not in accordance with the Agreement, and shall not be deemed to have accepted any Goods until MCD has had a

reasonable time to inspect them following delivery or, if later, within a reasonable time after any latent defect in the Goods has become apparent.

- 21.2 MCD shall not be obliged to return to the Supplier any packaging or packing materials for the Goods, whether or not any Goods are accepted by MCD.

## 22 Goods Warranty

- 22.1 Save where otherwise expressly stated in the Agreement, the Supplier warrants to MCD that all Goods will:

- a) be the best of their described kinds;
- b) be in exact conformity with any Specifications, Vendor Data, sample or other agreed description;
- c) be new, fit and free from defects in design, material and workmanship;
- d) be of merchantable quality and fit for any purpose held out by Supplier or made known to Supplier in the Agreement, or which would be reasonably expected, including that they will function and operate satisfactorily in the environmental and climatic conditions to which they are to be exposed, (including altitude, and operational conditions such as exposure to dust, atmospheric corrosion, corrosive chemicals and fluids and rough handling); and
- e) will comply with all statutory requirements and regulations of the countries in which the Goods are to be manufactured, installed executed, packaged, packed, delivered, sold, used or operated.

- 22.2 The Supplier warrants to MCD that the Goods will be manufactured, and where relevant, installed, by appropriately qualified and trained personnel, with due care, skill and diligence and to the highest standard of quality.

- 22.3 Without prejudice to any other right or remedy available to MCD, if any Goods are not supplied or performed in accordance with the Agreement, or a defect appears in the Goods (whether or not as a result of a breach of warranty under Clauses 22.1 and 22.2 or any other undertaking or condition or otherwise), then MCD shall be entitled:

- a) to require the Supplier to repair or replace the defective Goods within seven (7) days; or
- b) at MCD's sole option, and whether or not MCD has previously required the Supplier to repair or replace the Goods or Works;
  - (i) to accept the defective Goods, and be entitled to recover from the Supplier, the greater of all damages, losses, costs and expenses suffered or incurred by MCD, as a result of such defective Goods, or the benefit to the Supplier (including any Sub-supplier) of not having to rectify the defective Goods, or
  - (ii) where the Supplier fails to repair or replace the defective Goods as required by paragraph (a) above, to treat the Agreement as repudiated by the Supplier's breach and to accept such repudiation or to terminate the Agreement for the Supplier's breach, and require the repayment of any part of the Price which has been paid, and compensation for all damages, losses, costs and expenses suffered or incurred by MCD.

- 22.4 The Supplier shall be liable for all damages loss, costs and expense incurred or suffered by MCD, and shall indemnify MCD against all liabilities, damages, costs and other compensation awarded against or paid by MCD, in connection with any third party claims arising out of or as a result of or in connection with breach of any warranty given by the Supplier in relation to the Goods or any non-compliance with the Agreement, and all legal or other expenses incurred by MCD in or about the defence or settlement of any such claims.

- 22.5 Repairs and replacements shall themselves be subject to the same warranties as contained in Clauses 22.1 and 22.2.

- 22.6 All express warranties of the Supplier set forth in the Agreement are additional to any warranties or conditions implied by statute or common law.

- 22.7 It is expressly agreed by the Supplier that the warranties given to MCD by this Clause 22, together with any further warranties that may be provided to MCD by the Supplier, shall simultaneously be for the benefit of the Client, who may call upon the Supplier to honour such warranties, whether or not this Agreement has been assigned or novated to the Client pursuant to Clause 30.

## 23 Confidentiality

- 23.1 In this Clause, "Confidential Information" shall mean that information:

- a) disclosed to or obtained by the Supplier at any time prior to the signing of the Agreement by the Supplier or in connection with or during the course of performance of the Agreement and which relates to MCD's past, present or future business and activities, or those of the Client; and
- b) all items prepared for or submitted to MCD for the purposes of performance of the Agreement, including any Vendor Data or other Specification, drafts and associated materials and works carried out under the Agreement.

But shall not apply to Confidential Information that:

- (i) is or becomes publicly available without breach of the Agreement or other legal obligations by the Supplier; or
- (ii) is released for disclosure with the prior written consent of MCD.

- 23.2 The Supplier undertakes not to divulge or communicate to any person, firm or company any Confidential Information without the prior written consent of MCD except to employees, agents or Sub-suppliers who are engaged in the performance of the Agreement and (if requested by MCD) have signed a Confidential Undertaking having the same effect as the provisions contained in this Clause, and then only to the extent necessary for the performance of the Agreement.

- 23.3 The Supplier shall take all reasonable precautions in dealing with any Confidential Information so as to prevent any unauthorised person from having access to such Confidential Information.

- 23.4 If so required by MCD, the Supplier shall simultaneously with delivery of the Goods or handing over of the Works, at its own expense, deliver up to MCD all documents, papers and property containing any Confidential Information which



may be in the possession or under the control of the Supplier, its employees, agents or Sub-suppliers.

- 23.5 The Supplier shall not disclose the existence of the Agreement or mention MCD's name or that of the Client, in any publicity release or announcement or publicity material or other similar communication without MCD's prior written consent.
- 23.6 The provisions of this Clause shall survive the termination or expiry of this Agreement for any reason.

## 24 Infringement of Intellectual Property Rights

- 24.1 The Supplier shall be liable for all damages loss, costs and expense incurred or suffered by MCD, and shall indemnify MCD against all liabilities, damages, costs and other compensation awarded against or paid by MCD, in connection with any infringement or alleged infringement arising from or occasioned by or in relation to the use of any Intellectual Property Rights in any Goods by MCD pursuant to the Agreement, and all legal or other expenses incurred by MCD in or about the defence or settlement of any infringement claim.

## 25 Indemnity

- 25.1 The Supplier hereby indemnifies and saves harmless MCD from and against all liabilities, loss, damages, costs and expenses (including legal expenses on an indemnity basis) awarded against or paid or suffered or incurred by MCD arising out of or as a result of or in connection with any breach of duty or negligence, or any act or omission, of the Supplier, its employees, agents or Sub-suppliers in connection with the performance of the Agreement.

## 26 Termination for Convenience

- 26.1 MCD shall be entitled, at any time prior to delivery of the Goods, to cancel the Agreement in respect of all or any part of the Goods by giving notice in writing to the Supplier. Upon receipt of such notice, the Supplier shall immediately cease to incur expenses in respect of the Agreement or the part thereof which has been cancelled.
- 26.2 The Supplier shall take all steps to mitigate costs to MCD of such cancellation, and the provisions of Clause 20.12 shall, mutatis mutandis, apply. Upon such cancellation, MCD's sole liability shall be to pay to the Supplier (after allowing for any previous payment):
- the value of the Goods delivered to MCD at the Delivery Point;
  - where there is no ready market for the Goods, the value of any Goods manufactured but not delivered at the date of such determination; and
  - where there is no ready market for the unfixed goods or materials for incorporation in the Goods, the value of any unfixed goods and materials (wherever located) properly ordered for which the Supplier shall have paid or of which it is legally bound to accept delivery.
- 26.3 On payment by MCD for any Goods, the property in such Goods so paid, if not already passed to MCD, shall pass to MCD.
- 26.4 Where there is a ready market for any Goods, the Supplier shall not be entitled to any payment therefore, save for its reasonable costs of handling and any bona-fide short-fall in

recovering its reasonable costs of the Goods, whether or not property has passed to MCD. If property has passed to MCD, property shall re-vest in the Supplier and (if the Goods, are in the possession or custody of MCD) MCD shall re-deliver the same to the Supplier at MCD's premises.

- 26.5 The Supplier shall not be entitled to any payment for any Goods, under Clause 26.2 unless they are in all respects in accordance with the Agreement. The Supplier shall not be entitled to any loss of profit on the remaining parts of the Goods or any other compensation.

## 27 Suspension

- 27.1 MCD shall be entitled at any time to suspend performance of the Agreement in respect of all or any part of the Goods by giving notice in writing to the Supplier. Upon receipt of such notice, the Supplier shall immediately cease to incur expenses in respect of the Agreement or the part thereof the performance of which has been suspended. The Supplier shall take all steps to mitigate costs to MCD of such suspension.
- 27.2 The Supplier shall immediately resume performance of the Agreement upon notice in writing from MCD to the Supplier to do so.
- 27.3 Save that the Date for Delivery may be extended and re-calculated by such further period and until such further date as may be reasonable to reflect any delay in Completion (an extension of time) which, notwithstanding due diligence and the taking of all reasonable steps by the Supplier to avoid or reduce the same, has been caused by any suspension by MCD under Clause 27.1. The Supplier shall not be entitled to any additional payment or any adjustment to the Price arising from any such suspension, unless such suspension was caused by the negligent or wilful conduct of MCD, in which case the Supplier shall be entitled to be reimbursed its reasonable costs directly attributable to the suspension. Provided always that the Supplier shall not be entitled to any extension of time, or the payment of any costs, if the suspension was due to any act or omission of the Supplier, its servants or agents or Sub-suppliers, but shall be entitled to an extension of time where the suspension is caused otherwise.
- 27.4 It shall be a condition precedent to an extension of time under this Clause that Supplier shall within 14 days of date of receipt of notice to resume performance, notify MCD in writing of any claim for extension of time and/or costs, together with a full statement of the reasons to justify such claim; any claims made otherwise are barred.

## 28 Termination for Default

- 28.1 MCD shall be entitled to terminate the Agreement forthwith by giving notice to the Supplier at any time if:
- the Supplier ceases, or threatens to cease, to carry on business, becomes bankrupt or makes a composition or arrangement with its creditors or having a proposal in respect of its company for a voluntary arrangement for having a composition of debts or scheme or arrangement approved by, or having an application made in respect of its company to, the court for the appointment of an administrator, or having a winding up order made (except for the purposes of amalgamation or reconstruction) or a resolution for voluntary winding up passed or having a provisional liquidator, receiver or manager of its business or undertaking duly appointed, or having an administrative receiver

appointed, or having possession taken, by or on behalf of the holders of any debentures secured by a floating charge of any property comprised in or subject to the floating charge, or MCD reasonably apprehends that any of the events mentioned above is about to occur in relation to the Supplier and notifies the Supplier accordingly (in any of the events aforesaid, the Supplier shall be deemed to be in breach of Agreement); or

- b) the Supplier commits a breach of any of its obligations under the Agreement.

In the case of a default referred to in Clause 28.1(b), other than a default in respect to on-Site safety, in which case MCD may terminate the Agreement without notice, MCD shall not be entitled to terminate the Agreement, unless it has served on the Supplier a notice advising of the breach, and allowing the Supplier not less than seven days in which to remedy the breach or otherwise show good cause why MCD should not terminate the Agreement, and the Supplier fails to do so.

- 28.2 Upon termination for breach, the Supplier shall be liable for all damages, loss, costs and expense which may be suffered or incurred by MCD arising out of such determination and shall indemnify MCD against all liabilities, damages, costs and other compensation awarded against or paid by MCD in connection with any third party claims and all legal expenses and costs incurred by MCD in the defence or settlement of any such claims, arising out of, or as a result of, or in connection with, such termination. MCD's only liability to the Supplier, subject to MCD's right of set-off, shall be to make payment of (or allow as credit) the Price of all Goods delivered or handed over to MCD in accordance with the Agreement.

## 29 Force Majeure

- 29.1 If either party to the Agreement is prevented or delayed in the performance of any of its obligations under the Agreement by force majeure, and provided that such party has given written notice thereof to the other party specifying the matters constituting force majeure, together with such evidence as it reasonably can give and specifying the period for which it is estimated that such prevention or delay will continue, then such party shall be excused from the performance or the punctual performance as the case may be as from the date of such notice for so long as such cause of prevention or delay shall continue.
- 29.2 For the purpose of Clause 29.1, "force majeure" shall be deemed to be any cause affecting the performance of the Agreement arising from or attributable to causes which are not reasonably foreseeable and beyond the reasonable control of the party affected and without limiting the generality thereof shall include the following:
- a) strikes, lock-outs or other industrial actions (excluding strikes by Supplier's employees);
  - b) civil commotion, riot, invasion, war threat or preparation for war;
  - c) fire, explosion, storm, flood, earthquake, subsidence, epidemic or other natural physical disaster;
  - d) impossibility of the use of railways, shipping, aircraft, motor transport or other means of public or private transport; or
  - e) Political interference with the normal operations of any party provided always that Supplier shall not be

excused from performance hereunder where alternate sources of supply of Goods or goods or materials for incorporation into the Goods are available.

- 29.3 If the force majeure in question prevails for a continuous period in excess of one month, the parties shall enter into bona fide discussions with a view to alleviating its effects, or to agreeing upon such alternative arrangements as may be fair and reasonable provided that either party may terminate the Agreement (insofar as it is affected by the force majeure) if no such alleviation or alternative can be agreed.

## 30 Assignment or Subletting

- 30.1 The Supplier shall not assign or sub-let the performance of the Agreement (or any part thereof) without the prior consent in writing of MCD. The Supplier shall at all times be responsible to MCD for the acts or omissions of any assignee or Sub-supplier. When requested, an unpriced copy of the Supplier's contracts with an approved Sub-supplier shall be furnished to MCD promptly after receipt of MCD's consent.
- 30.2 The Supplier accepts that MCD may be entering into the Agreement for and on behalf of the Client (whether or not made known to the Supplier). MCD may freely assign or novate all its rights and obligations under the Agreement to any such Client. The Supplier hereby irrevocably consents to any such assignment or novation in the form required by such Client and to the release of MCD upon any such assignment or novation, of all further obligations under the Agreement and agrees to execute any instrument or other document to give effect to any such assignment or novation and release.
- 30.3 MCD may, upon written notice to the Supplier and without its consent, assign all or any part of its rights and benefits hereunder or transfer all or any part of its obligations hereunder to a related corporation, who upon receiving such an assignment or transfer will thereafter be liable solely for the performance of the obligations hereunder.

## 31 Approval not to relieve Supplier of liability

- 31.1 No approval or consent of MCD shall relieve the Supplier of any liability arising out of or in any way connected with the performance of its obligations under the Agreement.
- 31.2 Except as provided at law or in equity or elsewhere in the Agreement, none of the terms of the Agreement shall be varied, waived, discharged or released except with the written consent of the parties, which shall not be continuing unless expressed to do so and further shall not constitute a waiver, discharge or release of any other term

## 32 Lien

- 32.1 The Supplier hereby waives any and all rights of lien against any of the Goods or any work of which the Goods form part or the Site (or part thereof) to the fullest extent consistent with the law. In the event an employee of the Supplier, or a Sub-supplier or a worker employed by them, institutes action to place a lien on the Site (or part thereof), the Supplier will take whatever action is necessary to avoid the lien being registered or to have the lien removed forthwith (as the case may be), and shall indemnify MCD against costs, losses or damages whatsoever, that MCD may suffer as a result of the registration or proposed registration, of such lien.

**33 Waiver**

33.1 A failure by MCD to enforce or exercise any rights conferred upon it under the Agreement or at law shall not be deemed to be a waiver of any such rights (unless made in writing by MCD) or operate so as to bar the exercise or enforcement thereof at any subsequent time or times. No waiver in respect of any breach of the Supplier shall operate as a waiver in respect of any subsequent breach.

**34 Cumulative rights**

34.1 The rights and remedies hereby conferred shall be cumulative and in addition to any and all other rights and remedies now or hereafter existing at law or in equity.

**35 Survival of terms**

35.1 The termination or cessation otherwise of the Agreement howsoever caused shall be without prejudice to any obligations or rights of either party which have accrued prior to such termination or cessation and shall not affect any provision of the Agreement which is expressly or by implication provided to come into effect on or to continue in effect after such termination or cessation.

**36 Property Furnished by MCD**

36.1 Without prejudice to Clause 23.4, any tools, tooling, drawings, plans, papers, documents, tape, diskettes, materials and other property furnished by MCD for use by the Supplier shall be identified and shall remain the property of MCD and shall be used by the Supplier only for the purpose of the performance of the Agreement. The Supplier shall ensure that any such property is clearly marked and identified as MCD's property, and kept separate from other property of the Supplier or any third party and properly stored and protected.

36.2 All property aforesaid shall be delivered to MCD forthwith upon MCD's request to a destination specified by MCD, in their original condition except for normal wear and tear.

**37 Independent Contractor**

37.1 For the purposes of the Agreement, the Supplier is an independent contractor and not an agent or employee of MCD.

**38 Governing Law**

38.1 The Agreement shall be governed by and construed in all respects in accordance with the laws (and be subject to the courts) of:

- a) where the Delivery Point is in Australia, the place where the Delivery Point is situated;
- b) where the Delivery Point is in New Zealand, New Zealand; and
- c) where the Delivery Point is not in Australia or New Zealand, Victoria.

**39 Dispute Resolution**

**39.1 Disputes**

In the event that any dispute, controversy or difference of any kind whatsoever arising out of or in connection with the Agreement (including the validity or enforceability of the Agreement or any part thereof) or the carrying out of the

Agreement, shall arise, either Party may notify the other in writing that a dispute has arisen and giving full details of the dispute.

**39.2 Resolution by Senior Executives**

Within 14 days of the date of notification of a dispute, Senior Executives of MCD and the Supplier shall confer in good faith and attempt to settle the dispute amicably or agree a method for settlement.

**39.3 Arbitration**

If the parties are unable to resolve the dispute by negotiation or agree a method of settlement, within 30 days of notification of the dispute, the dispute may be referred by either party to arbitration by a single arbitrator to be appointed by agreement or (failing agreement within 14 days after receipt of notification by one party to the other of the intended reference) by a single arbitrator to be appointed on the written request of either party by the President of the chapter of the Australian Institute of Mediation and Arbitration in the place of the governing law, but only where the matter being referred in MCD's opinion does not give rise to a claim by MCD against the Client under MCD's contract with the Client, in which case Clause 39.7 will apply.

**39.4 Conduct of Arbitration**

The place of arbitration shall be:

- a) where the governing law under this Agreement is the laws of New Zealand, a city in New Zealand as agreed by the parties; and
- b) where the governing law under this Agreement is not the laws of New Zealand, the capital city of the place of the governing law.

Unless otherwise agreed, the arbitration shall be conducted in accordance with, and subject to The Institute of Arbitrators and Mediators Australia, 'Rules for Conducting Expedited Arbitration'. The decision of the arbitrator shall be final and binding upon MCD and the Supplier.

The parties expressly and irrevocably agree, that any statutory proportionate liability regimes that may otherwise apply, are, to the maximum extent permitted, hereby excluded from operation in respect to any dispute, claim, action or matter whatsoever arising in connection with the Agreement.

**39.5 Continued Performance**

Notwithstanding the existence of a claim or dispute, the parties must continue to perform their respective obligations under this Agreement.

**39.6 Language**

All documents, correspondence, drawings and data relating to the Agreement or any dispute are to be in the English language.

**39.7 Dispute affecting Client**

Where in MCD's opinion, the matter being referred to in Clause 39.1 gives rise to a claim by MCD against the Client under its contract with the Client and MCD intends to pursue that claim through arbitration or other formal dispute resolution protocol under that contract, MCD shall upon the expiry of the 30 days indicated in Clause 39.3 give notice to the Supplier informing the Supplier of its intention to pursue the matter under the contract with the Client in which case the following shall apply.

# STANDARD TERMS AND CONDITIONS OF PURCHASE ORDER

- a) The Supplier shall give MCD all reasonable assistance in the prosecution of MCD's claim or dispute and shall make available all relevant information, documents and evidence within its possession or control.
  - b) MCD shall prosecute its claim or dispute with due diligence.
  - c) The Supplier shall be bound by the findings of fact and by the decision or decisions made in respect of MCD's claim or dispute to the extent that the same involves any issue or issues which are the same or substantially the same as issues which are relevant to the Supplier's claim, and the Supplier's claim shall be determined in a manner consistent with all such findings and decisions.
  - d) The Supplier shall indemnify MCD to the extent of the Supplier's interest in respect of the claim or dispute, against all costs and expenses incurred by MCD by reason of the operation of this Clause.
  - e) The Supplier shall lodge with MCD reasonable cash or other security against such costs and expenses MCD may reasonably incur, and any monies MCD may recover shall be to the benefit of the Supplier to the extent of the Supplier's interest in the claim or dispute, save that MCD shall be entitled to withhold from any such moneys, an amount representing MCD's unrecovered costs of conducting the claim, in the proportion that the Supplier's entitlement bears to the total award.
- b) The Supplier will permit MCD to undertake inspections and audit its books and will provide whatever other documents and information that MCD may reasonably request, relating to Code compliance. The Supplier shall be deemed to have confirmed its continuing Code compliance with the submission of any invoice or other claim for payment.
  - c) Where they have relevant application, the Victorian Government's Code of Practice for the Building and Construction Industry (Victorian Code) and the Victorian Government's Implementation Guidelines to the Victorian Code of Practice for the Building and Construction Industry as amended from time to time (Victorian Guidelines) apply to this purchase order. By accepting this purchase order the Supplier warrants it is not precluded from accepting the order and agrees that it will be deemed to have read and understood, and that it will comply with, the Victorian Code and Victorian Guidelines.
  - d) Where they have relevant application, the NSW Government's Code of Practice for the Building and Construction Industry (NSW Code) and the NSW Government's Implementation Guidelines to the NSW Code of Practice for the Building and Construction Industry as amended from time to time (NSW Guidelines) apply to this purchase order. By accepting this purchase order the Supplier warrants it is not precluded from entering the purchase order and agrees that it will be taken to have read and understood, and that it will comply with, the NSW Code and NSW Guidelines.

#### 40 Code Compliance (Australia only)

- a) Where the Building Code 2013 or its successor Code and the Supporting Guidelines for the Code applies to MCD with respect to the supply of Goods, the Supplier agrees that the Building Code 2013 or its successor Code and the Supporting Guidelines apply to the Supplier in respect to its provision of the Goods and in the conduct of its business.

**END OF TERMS AND CONDITIONS**