

## Purchase Order Terms and Conditions



### Purchase Order Specifics

Item	
1. Contract Sum (clause 1.1)	Means the amount stated on the Purchase Order being the amount payable to the Contractor in respect of its obligations under the Agreement.
2. Defects Liability Period (clause 1.1)	12 months
3. Warranty Period (clause 1.1)	8 years.
4. Time for Payment Claims (clause 40.1(a))	On the 25th day of each month for any Supply provided until the 20 <sup>th</sup> of that month.
5. Time for Payment of Amounts in Payment Schedules (clause 40.8)	30 Business Days after receipt of Payment Claim unless the Services are to be provided in Queensland, in which case 15 Business Days.
6. Address for service of Notices (clause 64.1(a))	<b>Keller Pty Ltd</b> ABN 74 609 867 889 Suites G.01 & G. 02, 2 - 4 Lyon Park Road Macquarie Park NSW 2113  <b>Contractor:</b> The address noted on the Purchase Order.

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Note: only one of Section B to E will apply to this Purchase Order

# Purchase Order Terms and Conditions

## Section A – Contract Interpretation

### 1. Definitions and Interpretation

1.1 In the Agreement, unless the context otherwise requires:

**'Agreement'** means the agreement between Keller and the Contractor constituted by the documents in clause 1.2.

**'Business Day'** means a day that is not a Saturday, Sunday or public holiday in the place where the Supply is to be provided.

**'Claim'** includes any claim, demand, dispute, proceeding, suit, litigation, action or cause of action in contract, tort (including in negligence), in equity, under statute or otherwise.

**'Commencement Date'** means the date that the Contractor receives the Purchase Order.

**'Complete'** means:

- (a) in relation to the Work, that the Work is complete and the Contractor has complied with its obligations under the Agreement, except for minor defects which do not prevent the use of the Work for its stated purpose and which can be rectified without inconveniencing Keller or the Principal; and
- (b) in relation to the Services, that the Contractor has completed the performance of all of the Services and complied with all of its other obligations under the Agreement.

**'Completion Date'** means the date that the Contractor is required to complete the Work or the Services (as the case may be) as noted on the Purchase Order, or if none is noted then as soon as reasonably practicable using best industry practice.

**'Contract Sum'** means the amount in Item 1, as may be adjusted by additions or deductions pursuant to the Agreement.

**'Defects Liability Period'** means the period in Item 2.

**'Delivery Address'** means the address noted as such on the Purchase Order, or if none is noted then the address most recently communicated to the Contractor by Keller for delivery of the Goods.

**'Delivery Date'** means the date that the Contractor is required to deliver the Goods as noted on the Purchase Order, or if none is noted then as soon as reasonably practicable using best industry practice.

**'End Date'** means, in respect of each item of Equipment, the date when the Equipment is off-hired by Keller as may be adjusted in accordance with clause 31.

**'Equipment'** means the items of equipment (if any) noted on the Purchase Order to be hired from the Contractor by Keller.

**'Equipment Report'** means a report in a form approved by Keller, prepared and signed by both parties in accordance with clause 30.8 which:

- (a) sets out the condition of the Equipment and any known faults in or damage to the Equipment;
- (b) lists all associated components supplied with the Equipment by the Contractor at the start of the Hire Period; and
- (c) lists all associated components returned with the Equipment by Keller at the end of the Hire Period.

**'Goods'** means the goods (if any) noted on the Purchase Order that are to be supplied to Keller by the Contractor in accordance with the Agreement.

**'GST Act'** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth) (as amended).

**'GST'** means goods and services tax under the GST Act.

**'Head Contract'** means the contract between the Principal and Keller for work in connection with the Project.

**'Hire Period'** means, in respect of each item of Equipment, the period commencing on the Start Date and ending on the End Date.

**'Intellectual Property Right'** means any patent, registered design, trademark or name, copyright or other protected right.

**'Item'** means an Item in the Purchase Order Specifics.

**'Jurisdiction'** means the relevant state or territory in which the Contractor provides the Supply.

**'Legislative Requirement'** means legislation and subordinate legislation of the Commonwealth of Australia or any State or Territory applicable to the Supply, and any instruments made under such legislation or subordinate legislation, and the requirements of any local government, utility or other person or party having power at law to make decisions in relation to the Supply or any other matter which is the subject of the Agreement.

**'Loss'** includes loss, damage, debt, penalty, fine, charge, expense, liability and cost (including legal costs on a solicitor/client basis).

**'Plant'** means machinery or equipment that is used by the Contractor for performing the Work but does not form part of the Work.

**'Principal'** means Keller's client under the Head Contract.

**'Products'** means the items (if any) noted on the Purchase Order which the Contractor is obliged to fabricate for Keller.

**'Project'** means the project worked on by Keller pursuant to the Head Contract.

**'Proportionate Liability Legislation'** means any law in the Jurisdiction which makes provisions for proportionate liability of persons for apportionable claims, including the following as applicable:

- (a) section 87CD of the *Competition and Consumer Act 2010 (Cth)*;
- (b) Chapter 7A of the *Civil Law (Wrongs) Act 2002 (ACT)*;
- (c) Part 2 of the *Civil Liability Act 2003 (Qld)*;
- (d) Part IVAA of the *Wrongs Act 1958 (Vic)*;
- (e) Part 4 of the *Civil Liability Act 2002 (NSW)*;
- (f) Part 2 of the *Proportionate Liability Act 2005 (NT)*;
- (g) Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)*;
- (h) Part 9A of the *Civil Liability Act 2002 (Tas)*; and
- (i) Part 1F of the *Civil Liability Act 2002 (WA)*.

**'Purchase Order'** means the document described as such to which these Purchase Order Terms and Conditions are attached.

**'Purchase Order Specifics'** means the Purchase Order Specifics forming part of the Agreement.

**'Security of Payment Legislation'** means:

- (a) *Building and Construction Industry (Security of Payment) Act 2009 (ACT)*;
- (b) *Building and Construction Industry Payments Act 2004 (Qld)*;
- (c) *Building and Construction Industry Security of Payment Act 2002 (Vic)*;
- (d) *Building and Construction Industry Security of Payment Act 1999 (NSW)*;
- (e) *Construction Contracts (Security of Payments) Act 2004 (NT)*;
- (f) *Building and Construction Industry Security of Payment Act 2009 (SA)*;
- (g) *Building and Construction Industry Security of Payment Act 2009 (Tas)*; and
- (h) *Construction Contracts Act 2004 (WA)*.

**'Services'** means the services to be performed by the Contractor (if any) noted on the Purchase Order.

**'Site'** means the location of the Project, or such other location or address notified in writing by Keller to the Contractor.

**'Site Conditions'** means conditions and circumstances on, at, near, affecting and/or relevant to the Site and/or below the surface of the Site (including weather, climatic, geological, hydrological and geotechnical conditions).

**'Site Personnel'** means all persons under the control of the Contractor (including employees, agents, consultants, suppliers and subcontractors) who undertake any activity at the Site in connection with the Agreement.

**'Start Date'** means the date on which any hire of Equipment is to commence as noted on the Purchase Order, or if not noted then otherwise as agreed between the Parties.

**'Supply'** includes, as the context requires:

- (a) the performance of Work;
- (b) the delivery of Goods;
- (c) the performance of Services; and
- (d) the supply of Equipment on hire,

as required by and in accordance with the Agreement.

**'Variation'** means an increase or decrease in any part of the Supply, the omission of any part of the Supply, a change in the character, quality or performance requirements of all or any part of the Supply, a change in the dimensions of all or any part of the Supply, the execution of additional work, and any other change of the scope of the work to be performed under the Agreement as directed by Keller in writing, and may include the omission of some of the Supply for the purpose of having it provided by Keller or another contractor.

**'Warranty Period'** means the period in Item 3.

**'WHS Authority'** means the workplace health and safety ('WHS') authority that has jurisdiction in the place where the Contractor is to provide the Supply.

**'WHS Law'** means any statute, rule, regulation, ordinance, by-law, code of practice, guideline or Australian Standard, present or future, that relates to **WHS** in the place where the Contractor is to provide the Supply.

**'Work'** means the whole of the work to be performed and completed by the Contractor in accordance with the Agreement, and all work that is necessary or incidental to such work.

**1.2** The following documents together constitute the Agreement:

- (a) the Purchase Order and its attachments (if any);
- (b) the Purchase Order Particulars; and
- (c) these Purchase Order Terms and Conditions.

**1.3** In the Agreement, unless the context otherwise requires:

- (a) clause headings in the Agreement are for information and convenience only, do not form part of the Agreement, and must not be used in the interpretation of the Agreement;
- (b) a reference to a person includes a reference to an individual, a body corporate, an unincorporated body or other entity however constituted;
- (c) the singular includes the plural and vice versa, and a reference to any gender includes all genders;
- (d) where a word or expression is defined, any other grammatical form of the word or expression has a corresponding meaning;
- (e) a reference to dollars or \$ is to Australian currency;
- (f) a Party includes the Party's legal personal representatives, successors, assigns and persons substituted by novation;
- (g) a reference to legislation, standards and codes includes the legislation, standards and codes as amended, modified or replaced; and
- (h) "includes", "including" and similar expressions are not words of limitation.

**1.4** All provisions of the Agreement are mutually explanatory and any detailed provisions are in elaboration of any general provisions. Unless there is a conflict, the provisions of all documents comprising the Agreement are equally binding as if contained in all. If a conflict exists between any of the provisions of any of the documents, then (subject to the Instrument of Agreement) the provision which contains the higher standard or more onerous requirement on the Contractor will prevail, except that a term of the Special Conditions (if any) will prevail over a term of these Purchase Order Terms and Conditions.

**1.5** In interpreting the provisions of the Agreement, no rules of construction applying to the disadvantage of Keller will apply merely because Keller was responsible for the drafting of any such provision.

- 1.6** The Contractor acknowledges that it has assumed the risk of inconsistency, ambiguity, discrepancy or omission within the Agreement, including between the documents comprising the Agreement and between those documents and any applicable Legislative Requirements (which requirements will prevail if those requirements are mandatory) on the basis that the more onerous requirement applies to it.
- 1.7** To the extent permitted by law, if the Contractor consists of one or more persons, the Agreement binds such persons and their respective executors, administrators, successors and permitted assigns jointly and severally and the Agreement must be read and construed accordingly.
- 1.8** The Agreement may not be amended unless the amendment is agreed in writing and signed by both Parties.

## Section B – Goods

### 2. Application of Section B

If the Contractor is supplying Goods to Keller, Section B applies to the performance of the Agreement.

### 3. Performance of the Agreement

3.1 The Contractor must deliver the Goods to Keller in accordance with the requirements of the Agreement.

3.2 The Contractor must:

- (a) carry out and complete its obligations under the Agreement:
  - (i) with skill, care and diligence; and
  - (ii) in accordance with up to date best industry practice;
- (b) keep Keller informed of progress and discharge its obligations in respect of the Goods;
- (c) at all times employ staff with appropriate qualifications and experience to carry out the Contractor's obligations in respect of the Agreement; and
- (d) do all things necessary and necessarily incidental for the proper performance of the Contractor's obligations under the Agreement.

3.3 Keller must pay the Contractor the Contract Sum for the Goods.

### 4. Warranties as to the Goods

The Contractor warrants and represents that:

- (a) the Contractor has the right to sell the Goods;
- (b) Keller will enjoy undisturbed possession of the Goods;
- (c) the Goods are free of any security, charge or encumbrance in favour of any third party;
- (d) the Goods are:
  - (i) new and unused (unless the Agreement specifies otherwise);
  - (ii) free from defects in materials and workmanship;
  - (iii) of merchantable quality;
  - (iv) fit for any purpose disclosed in the Agreement;
  - (v) in accordance with the requirements of the Agreement;
  - (vi) comply with any applicable Australian and international standards; and
- (e) the Goods will be in accordance with and conform to any designs, drawings, specifications, samples or descriptions provided by Keller to the Contractor or specified in the Agreement.

### 5. Fabrication of Goods

5.1 This clause will apply if the Contractor is responsible for fabricating the Goods or any part of them.

5.2 The Contractor must not commence fabricating the Goods until:

- (a) shop drawings for the Goods to be fabricated have been submitted to Keller and Keller has consented to their use (but only if Keller has expressly required shop drawings); and
- (b) an inspection and test plan for the fabrication work has been submitted to Keller in the format and containing details acceptable to Keller.

5.3 The Contractor agrees that:

- (a) the requirement to obtain Keller's consent to the use of the shop drawings is solely to allow Keller an opportunity to consider the shop drawings, and does not impose on Keller any obligation in respect of the shop drawings;
- (b) neither Keller's consent to the use of the shop drawings nor any comment or failure to comment upon, review or non-review of or rejection or non-rejection of the shop drawings will relieve the Contractor from any of its obligations in respect of the shop drawings or fabrication of the Goods.

**5.4** The Contractor grants, or must procure the grant of, an irrevocable, royalty free, non-exclusive, worldwide, perpetual, assignable licence (with the right to further assign and sub-licence) to Keller and any other person specified by Keller to use the shop drawings for any purpose associated with the Goods.

**6. Packaging**

The Contractor must ensure that the Goods are suitably packaged or otherwise suitably prepared for delivery to Keller in a manner that minimises the risk of damage in transit. However, the Contractor must ensure that unnecessary packaging is avoided and waste is kept to a minimum.

**7. Delivery**

**7.1** The Contractor must deliver the Goods undamaged to the Delivery Address on or before the Delivery Date and in accordance with any instructions or conditions specified in the Agreement.

**7.2** The Contractor must give Keller not less than 24 hours prior notice of the expected date and time of delivery of the Goods if special equipment is required to unload the Goods at the Delivery Address.

**7.3** If the Goods are not supplied strictly in accordance with the terms of the Agreement, Keller may, without prejudice to any other remedy that may be available to it under the Agreement or otherwise:

- (a) terminate the Agreement;
- (b) return, at the risk and expense of the Contractor, any Goods already delivered which Keller, in its absolute discretion, determines cannot be effectively or commercially used by Keller;
- (c) recover from the Contractor any money already paid by Keller in respect of Goods returned to the Contractor;
- (d) recover from the Contractor any additional expenditure reasonably incurred by Keller in obtaining replacement products or repairing damaged or defective Goods; and
- (e) recover from the Contractor any Loss that Keller incurs as a result of the Contractor failing to comply with the terms of the Agreement.

**7.4** The Contractor is not entitled to make, and waives its right to make, any Claim against Keller either at law or in equity in relation to the Agreement if Keller exercises any of the rights in clause 7.3.

**7.5** Keller may, without incurring any liability to the Contractor, re-schedule the Delivery Date applicable to any Goods by notification to the Contractor prior to the Delivery Date for those Goods.

**7.6** The Contractor must ensure that, when delivering the Goods, the Contractor's driver reports to Keller's representative at the Delivery Address and awaits instructions before unloading the Goods.

**7.7** If the Contractor's driver is to be involved in unloading the Goods at the Delivery Address, the Contractor must ensure that:

- (a) before the unloading operation commences, the driver:
  - (i) completes such induction training as may be conducted, or specified, by Keller in relation to applicable safe work procedures;
  - (ii) provides to Keller's representative evidence of current trade or operating certificates of competency that are required to undertake the tasks to be performed; and
- (b) at all times the driver wears appropriate personal protective equipment including, at a minimum, safety helmet, high visibility vest and steel capped safety boots.

**7.8** If the Contractor's driver is not to be involved in unloading the Goods at the Delivery Address, the Contractor must ensure that the driver remains at a safe location near the delivery truck and complies with all directions of Keller's representatives involved in unloading the Goods.

**8. Documents**

**8.1** The Contractor must include the Agreement number and delivery address on all invoices, packing slips, delivery dockets, correspondence and other documents relating to or required by the Agreement.

**8.2** Every delivery of Goods pursuant to the Agreement must be accompanied by a completed delivery docket containing an accurate description of the Goods delivered, including the quantity, and any applicable safety data sheet and environmental impact documentation.

**9. Inspection and Return**

**9.1** Keller receives Goods delivered pursuant to the Agreement, subject to inspection within a reasonable time after delivery or, at Keller's discretion, before delivery, irrespective of the date of payment for the Goods.

**9.2** A signed delivery docket does not constitute acceptance by Keller of the Goods delivered but only the quantity delivered.

**9.3** Keller will promptly notify the Contractor of any defects in Goods delivered to Keller and hold any Goods found to be defective for the Contractor's instructions and at the Contractor's risk for a period not exceeding 7 days. If the Contractor's instructions are not received within that period, Keller may, at its option, exercise any of the remedies in clause 7.3 or any other remedy that may be available to it under the Agreement or otherwise, and may set-off any Loss against any moneys otherwise due by Keller to the Contractor.

**10. Title and Risk**

**10.1** Subject to clause 7.3 and clause 9:

(a) title to the Goods will pass to Keller when the Goods are delivered to Keller or Keller pays the Contract Sum for those Goods, whichever occurs first; and

(b) the Goods will be at the Contractor's risk until they are delivered to the Delivery Address.

**10.2** If Keller returns any Goods pursuant to clause 7.3(b) or gives notice pursuant to clause 9.3, the Contractor resumes the risk in those Goods from the time Keller returns the Goods or gives that notice in relation to the Goods (as the case may be).

**11. Warranty Period**

**11.1** The Warranty Period will commence on the date on which the Contractor delivers the last of the Goods to be supplied under the Agreement and, subject to clause 11.3, end on the expiry of the period specified in Item 3.

**11.2** Without limiting clause 7.3 or any other right or remedy Keller may have under the Agreement or at common law, the Contractor warrants to Keller that the Goods are and will remain free of defects for the Warranty Period.

**11.3** If Keller discovers a defect in any Goods at any time up to 14 days after expiration of the Warranty Period, Keller may direct the Contractor to rectify the defects in the Goods or replace the Goods. The Contractor must comply with a direction under this clause at the Contractor's cost and within the time stated in the direction.

**11.4** If Keller directs the Contractor to rectify any defects or replace the Goods during the Warranty Period, there will be a separate Warranty Period for that rectification work or the replacement Goods which will commence on the date the Contractor completes the rectification work or replaces the Goods.

**11.5** The Supplier must carry out rectification replace the Goods at times and in a manner causing as little inconvenience to the users of the Goods as is reasonably possible.

**11.6** If the Goods are not rectified or replaced by the dates specified in the direction given pursuant to clause 11.3, then without prejudice to any other rights and remedies Keller may:

(a) have the rectification carried out by others; or

(b) procure replacement Goods from others,

and the cost of doing so will be a debt due from the Contractor to Keller.

**12. Personal Property Securities Act 2009 (Cth)**

**12.1** In this clause 12:

(a) "PPS Law" means the Personal Property Securities Act 2009 (Cth) ("PPS Act"), and any amendment made at any time to any other legislation as a consequence of a PPS Law;

(b) "PPS Register" means the register established under the PPS Law; and



## Section C – Work on Site

### 13. Application of Section C

If the Contractor is undertaking Work on or in relation to the Site, Section C applies to the performance of the Agreement.

### 14. Performance of the Work

14.1 The Contractor must carry out and complete the Work:

- (a) with due expedition and without delay;
- (b) in a proper and workmanlike manner;
- (c) in accordance with the provisions in the Agreement, directions by Keller, any applicable Legislative Requirements, codes of practice, guidelines and standards and best industry practice; and
- (d) using new materials (unless otherwise agreed in writing) that are fit for the purpose for which they are intended.

14.2 The Contractor acknowledges that Keller is relying on the Contractor's advice, skill and judgement in relation to the performance of the Work.

### 15. Warranties as to the Work

15.1 The Contractor warrants that:

- (a) the Contractor is suitably qualified and experienced to execute and complete the Work (including its employees and subcontractors), and will exercise due skill, care and diligence in the execution and completion of the Work; and
- (b) the Work when Complete will:
  - (i) be fit for its intended purpose as stated in, or reasonably inferable from, the Agreement;
  - (ii) comply with the requirements of the Agreement, applicable Legislative Requirements, applicable codes of practice, guidelines and standards; and
  - (iii) not infringe any third party Intellectual Property Right.

### 16. Design Obligations

16.1 This clause applies if the Contractor is responsible for design of the Work or any part of it.

16.2 The Contractor agrees that the Work includes completion of the design as specified in the Agreement.

16.3 The Contractor warrants that the design will:

- (a) comply with the requirements in the Agreement;
- (b) comply with all applicable Legislative Requirements; and
- (c) be fit for its intended purpose including any purpose specified in the Agreement.

16.4 The Contractor must not commence the Work until all design documents have been submitted to Keller for review, and Keller has consented to their use.

16.5 The Contractor agrees that:

- (a) the requirement to obtain Keller's consent to the use of the design is in place to allow Keller an opportunity to consider the design, and does not impose on Keller any obligation in respect of the design; and
- (b) neither Keller's consent to the use of the design nor any comment or failure to comment upon, review or non-review of, or rejection or non-rejection of the design or any part thereof will relieve the Contractor from any of its obligations in respect of the design.

16.6 The Contractor grants, or must procure the grant of, an irrevocable, royalty free, non-exclusive, worldwide, perpetual, assignable licence (with the right to further assign and sub-licence) to Keller and any other person specified by Keller to use the design for any purpose associated with the Work.

**17. Fabrication of Products**

- 17.1 This clause applies if the Contractor is responsible for the fabrication of Products.
- 17.2 The Contractor agrees that the Work includes fabrication of the Products.
- 17.3 The Contractor must not commence fabrication of the Products until shop drawings for the Products have been submitted to Keller for review and Keller has consented to their use.
- 17.4 The Contractor agrees that the provisions in clauses 16.5 to 16.6 inclusive will apply to this clause 17, subject to the references in those clauses to 'the design' being read as references to 'the shop drawings'.
- 17.5 Ownership of and property in the Products to be fabricated by the Contractor pursuant to this clause 17 will pass to Keller upon delivery of the Products to the Site or upon payment by Keller for the Products, whichever occurs first.

**18. Time**

- 18.1 The Contractor must commence the Work by the Commencement Date.
- 18.2 Prior to commencing the Work the Contractor must provide all documents and information specified in Keller's Contractor Pre-start Requirements form (if applicable) and in the Agreement.
- 18.3 The Contractor must complete the Work by the Completion Date, unless delayed by a breach of the Agreement by Keller.
- 18.4 If the Contractor is or expects to be delayed in completing the Work, the Contractor must give notice to Keller within 7 days after the date when the Contractor becomes or should have become aware of the delay, and that notice must contain details of:
  - (a) the cause of the delay;
  - (b) when that cause of delay commenced;
  - (c) the impact the delay is having, or is expected to have, on the performance of the Work; and
  - (d) the period by which the Contractor expects to be delayed in Completing the Work as a result of the cause of delay.
- 18.5 If the Contractor is delayed in completing the Work by a breach of the Agreement by Keller and:
  - (a) the Contractor has complied with clause 18.4 in respect of the delay, Keller may, subject to any other provision in the Agreement, grant to the Contractor a reasonable extension of time to the Completion Date; or
  - (b) the Contractor has not complied with clause 18.4 in respect of the delay, the Contractor is not entitled to an extension to the Completion Date or to any other Claim in respect of the delay.

**19. Site**

- 19.1 In the sole discretion of Keller and subject to the Agreement, Keller will give the Contractor sufficient non-exclusive access to the Site to enable the Contractor to perform the Work.
- 19.2 Keller is not obliged to:
  - (a) provide the Contractor with sole, uninterrupted or continuous access to the Site; or
  - (b) perform any work or provide any facilities to the Contractor which may be necessary to enable the Contractor to perform the Work.
- 19.3 Keller may from time to time restrict the Contractor's use of or access to the Site if determined to be necessary by Keller in its sole discretion, including to facilitate work being performed by other contractors.

**20. Site Conditions**

- 20.1 Keller does not warrant, make any representations in relation to, or assume any duty of care with respect to, and is otherwise not responsible for, the completeness, accuracy or adequacy of any information provided by Keller, its consultants, employees or agents or any other person to the Contractor concerning Site Conditions.
- 20.2 The Contractor is responsible for, and assumes the risk of, all Loss suffered or incurred by the Contractor as a result of or in connection with Site Conditions encountered in the performance of its obligations under the

Agreement. The Contractor is not entitled to make, and waives its right to make, any Claim against Keller in relation to, arising from or in connection with any Site Conditions, any information concerning Site Conditions or any failure to provide any information concerning Site Conditions to the Contractor.

**21. Defects Liability Period**

- 21.1** The Defects Liability Period will commence on the date of Completion of the Work and, subject to clause 21.3, end on the expiry of the period specified in Item 2.
- 21.2** Any minor omissions or defects which exist at the date the Work is Complete must be rectified as soon as possible by the Contractor.
- 21.3** At any time, Keller may direct the Contractor to rectify omissions or defects in the Work. The Contractor must comply with a direction under this clause within the time stated in the direction.
- 21.4** If Keller directs the Contractor to rectify any omissions or defects during the Defects Liability Period, there will be a separate Defects Liability Period for that rectification work which will commence on the date the Contractor completes the rectification work.
- 21.5** If the Contractor fails to comply with a direction under clause 21.3, or where the rectification work is urgent, Keller may perform the rectification work or have the work performed by others. Any Loss suffered or incurred by Keller in performing the rectification work or having the work performed by others will, be a debt due by the Contractor to Keller.

**22. Quality Assurance**

At least 5 working days prior to commencing the Work, the Contractor must submit to Keller, for its review, an inspection and test plan for the Work in a format and containing details acceptable to Keller.

(a) "Security Interest" has the meaning in the PPS Law.

**22.2** If, in the opinion of Keller, a PPS Law applies, or will in the future apply to the Agreement, or any other agreement between Keller and the Contractor ("Transaction Documents") or any of the transactions provided for or contemplated by them and that PPS Law:

- (a) adversely affects or would adversely affect Keller's security position or the rights or obligations of Keller under or in connection with the Transaction Documents ("Adverse Effect"); or
- (b) enables or would enable Keller's security position to be improved without adversely affecting the Contractor in a material respect ("Improvement"),

Keller may by notice to the Contractor require the Contractor to do anything (including amending any Transaction Document or executing any new document) that in Keller's opinion is necessary or desirable to ensure that, to the maximum possible extent, Keller's security position, and its rights and obligations, are not subject to an Adverse Effect or are improved by an Improvement. The Contractor must comply with the requirements of that notice within the time stipulated in that notice.

**22.3** Without limiting any other provision of this clause 12, the Contractor agrees to do anything Keller requests (such as obtaining consents, providing information and signing and producing documents) in order to perfect, preserve, maintain, protect, or otherwise give full effect, under the PPS Law, to any Transaction Document and the security interests created by any Transaction Document, including registering any one or more financing statements in relation to the security interest created by any Transaction Document on the PPS Register.

**22.4** If Keller makes a payment in advance of delivery of any Goods, the Contractor charges the Goods (including any item identified for incorporation in the Goods) to Keller with its obligations under the Agreement and consents to Keller registering its interest in the Goods on the PPS Register.

**22.5** If the Contractor believes that a Security Interest arises under the Agreement, the Contractor must notify Keller at least 5 Business Days before the Contractor takes steps to register the Security Interest on the PPS Register.

**22.6** Within 10 Business Days of the earlier of:

- (a) the expiry or termination of the Agreement; or
- (b) payment by Keller of the Contract Sum in respect of the Goods,

the Contractor must at its own cost procure the removal from the PPS Register of each Security Interest it has registered in respect of any Goods, and must provide Keller with verification of the removal of Security Interests pursuant to section 157 of the PPS Law.

## Section D – Services

### 23. Application of Section D

If the Contractor is required to perform professional services under the Agreement, Section D applies to the performance of the Agreement.

### 24. Performance of the Services

#### 24.1 The Contractor must:

- (a) perform the Services for Keller with due expedition and without delay, and must use its best endeavours to prevent and/or minimise delays in performing the Services;
- (b) perform the Services to Keller in accordance with the requirements of the Agreement, directions from Keller, any applicable Legislative Requirements, codes of practice, guidelines and standards, and best industry practice applicable to the Services;
- (c) perform the Services in a manner which facilitates the timely completion of the Project by Keller; and
- (d) co-ordinate the performance of the Services with the activities of Keller.

#### 24.2 The Contractor acknowledges that Keller is relying on the Contractor's advice, skill and judgement in relation to the performance of the Services.

### 25. Contractor's warranties

Without limiting any other provision in the Agreement, the Contractor warrants to Keller that:

- (a) the Contractor:
  - (i) is suitably qualified and experienced to perform the Services, and will exercise due skill, care and diligence in the performance of the Services;
  - (ii) will have the necessary resources to perform the Services;
- (b) the Services will:
  - (i) be fit for their intended purpose as stated in, or reasonably inferable from, the Agreement;
  - (ii) comply with the requirements of the Agreement, applicable Legislative Requirements, applicable codes of practice, guidelines and standards; and
  - (iii) not infringe any third party Intellectual Property Right.

### 26. Time and Progress

#### 26.1 The Contractor must commence performing the Services by the Commencement Date.

#### 26.2 Prior to commencing to perform the Services the Contractor must provide all documents and information specified in Keller's Contractor Pre-start Requirements form (if applicable) and in the Agreement.

#### 26.3 The Contractor must Complete the Services by the Completion Date, unless delayed by a breach of the Agreement by Keller.

#### 26.4 If the Contractor is or expects to be delayed in Completing the Services, the Contractor must give notice to Keller within 7 days after the date when the Contractor becomes or should have become aware of the delay, and that notice must contain details of:

- (a) the cause of the delay;
- (b) when that cause of delay commenced;
- (c) the impact the delay is having, or is expected to have, on the performance of the Services; and
- (d) the period by which the Contractor expects to be delayed in Completing the Services as a result of the cause of delay.

#### 26.5 If the Contractor is delayed in Completing the Services by a breach of the Agreement by Keller and:

- (a) the Contractor has complied with clause 26.4 in respect of the delay, Keller may, subject to any other provision in the Agreement, grant to the Contractor a reasonable extension of time; or

- (b) the Contractor has not complied with clause 26.4 in respect of the delay, the Contractor is not entitled to an extension to the Completion Date or to any other Claim in respect of the Delay.

**27. Defects Liability Period**

- 27.1** The Defects Liability Period will commence on the date the Services are Complete and, subject to clause 27.3, end on the expiry of the period specified in Item 2.
- 27.2** Any minor omissions or defects which exist at the date the Services are Complete must be rectified as soon as possible by the Contractor.
- 27.3** At any time, Keller may direct the Contractor to rectify omissions or defects in the Services. The Contractor must comply with a direction under this clause within the time stated in the direction.
- 27.4** If Keller directs the Contractor to rectify any omissions or defects during the Defects Liability Period, there will be a separate Defects Liability Period for that rectification work which will commence on the date the Contractor completes the rectification work.
- 27.5** If the Contractor fails to comply with a direction under clause 27.3, or where the rectification work is urgent, Keller may perform the rectification work or have the work performed by others. Any Loss suffered or incurred by Keller in performing the rectification work or having the work performed by others will, be a debt due by the Contractor to Keller.

## Section E – Plant Hire

### 28. Application of Section E

If the Contractor is required to hire plant to Keller under the Agreement, Section E applies to the performance of the Agreement.

### 29. Hire of Equipment

**29.1** During the Hire Period the Contractor must hire the Equipment to Keller in accordance with the terms of the Agreement.

**29.2** Equipment hired under the Agreement must comply with all relevant Australian Standards and any specifications or requirements communicated to the Contractor.

**29.3** The Contractor must:

- (a) supply the Equipment to Keller in a clean and serviceable condition;
- (b) carry out and complete its obligations under the Agreement;
  - (i) with skill, care and diligence; and
  - (ii) in accordance with up to date best industry practice;
- (c) comply with all written instructions and directions of Keller in relation to the Equipment or operators; and
- (d) do all things necessary and necessarily incidental for the proper performance of the Contractor's obligations under the Agreement.

**29.4** The Contractor must not supply for hire, and Keller is not obliged to accept, Equipment which does not comply with all relevant Australian Standards and any specifications or requirements communicated to the Contractor.

**29.5** If the Contractor supplies for hire Equipment which does not comply with all relevant Australian Standards and any specifications or requirements communicated to the Contractor, then if:

- (a) the Contractor corrects the non-compliance;
- (b) the Contract Sum is reduced by a sum Keller assesses as reasonable to take into account and allow for any non-compliance; or
- (c) Keller reserves its rights to have the non-compliance rectified by the Contractor, at the Contractor's cost, at a later stage,

Keller may by notice accept the Equipment for hire under this Agreement.

**29.6** If Keller accepts Equipment for hire in accordance with clause 29.5, Keller is liable to pay the Contract Sum for the Equipment (as may be adjusted in accordance with clause 29.5(b)) from the date of Keller's notice.

### 30. Hire Period

**30.1** The Contractor must hire the Equipment (and supply an operator, if specified in the Purchase Order) to Keller for the Hire Period.

**30.2** The Contractor must deliver the Equipment (and supply an operator, if specified in the Purchase Order) to Keller at the Site by the Start Date(s).

**30.3** The Contractor is responsible for unloading the Equipment at the Site.

**30.4** Upon delivery of the Equipment to the Site, the Contractor must:

- (a) promptly assemble, erect and commission the Equipment and do all other things required to ensure that the Equipment is:
  - (i) capable of use by Keller for its intended purpose (including any purpose specified in the Agreement); and
  - (ii) in good working order; and
- (b) provide to Keller a copy of all operations and maintenance manuals and instructions in respect of the Equipment, recent maintenance records and any other documents or information requested by Keller or required by Legislative Requirements.

- 30.5** The Contractor must notify Keller when the Contractor has complied with clause 30.4 and the Equipment is ready for use.
- 30.6** At the end of the Hire Period Keller will make the Equipment available to the Contractor at the Site.
- 30.7** Following the completion of the Equipment Report in accordance with clauses 30.8 or 30.10, the Contractor must immediately (or within such time as directed by Keller) decommission, dismantle and remove the Equipment (and demobilise any operator) from the Site.
- 30.8** At both the commencement and conclusion of the Hire Period for an item of Equipment, a duly authorised representative of Keller and the Contractor must jointly inspect the Equipment and complete and jointly sign an Equipment Report for the Equipment.
- 30.9** The Parties agree and acknowledge that the Equipment Report as jointly signed by Keller and the Contractor at the commencement or conclusion of the Hire Period, will be deemed to represent an accurate record of the matters stated in the Equipment Report in relation to the Equipment on the date it was signed.
- 30.10** If the Contractor fails to make an authorised representative available to properly inspect the Equipment within 24 hours of the commencement or conclusion of the Hire Period, the Contractor is deemed to accept the Equipment Report as completed and signed by Keller as being accurate.

**31. Amendment to Hire Period**

- 31.1** Keller may (in its absolute discretion) amend the Hire Period by giving notice to the Contractor not later than 14 days prior to the End Date.
- 31.2** If Keller amends the Hire Period in accordance with clause 31.1:
- (a) Keller is liable to pay, and the Contractor is entitled to be paid, the Contract Sum for the amended Hire Period; and
  - (b) Keller is not liable for, and the Contractor is not entitled to, any additional payment or other compensation as a result of any such amendment of the Hire Period.

**32. Operators**

- 32.1** If the Purchase Order specifies that the Contractor is to supply an operator, the Contractor must supply an operator who:
- (a) is acceptable to Keller (in its absolute discretion); and
  - (b) has the necessary qualifications, is suitably experienced, competent and licensed, and at all times carries a current certificate of competency.
- 32.2** If an operator supplied by the Contractor is not acceptable to Keller for any reason, the Contractor must immediately replace the operator with a suitably qualified, experienced, competent and licensed operator with a current certificate of competency, at the Contractor's cost.
- 32.3** Keller will direct any operator supplied by the Contractor:
- (a) in the performance of the work to be performed by Keller utilising the Equipment;
  - (b) with respect to occupational health and safety matters arising under the Agreement; and
  - (c) with respect to industrial relations matters arising under the Agreement.
- 32.4** Any operators supplied by the Contractor are not employed by Keller and, unless otherwise agreed in writing, will return to the Contractor at the end of the Hire Period.

**33. Maintenance**

- 33.1** The Contractor must carry out maintenance of the Equipment in accordance with the Agreement and so as to ensure that the Equipment:
- (a) remains fit for its intended purpose (including any purpose specified in the Agreement) and in good working order;
  - (b) complies with all relevant Australian Standards and any specifications or requirements communicated to the Contractor and all other requirements of the Agreement; and



(c) complies with all applicable Legislative Requirements, at all times during the Hire Period.

**33.2** Without limiting this clause 33, the Contractor must:

- (a) make available all spare parts and components necessary for the operation of the Equipment, within a reasonable time;
- (b) provide transportation of spare parts and components to the Site and back;
- (c) carry out regular inspections to evaluate the performance of the Equipment and, if requested to do so by Keller, provide Keller with a written report advising of the state of the Equipment and recommending any improvements; and
- (d) carry out all tests required by Legislative Requirements and otherwise under the Agreement.

**33.3** Keller may conduct compliance checks on the Equipment after the Contractor has conducted maintenance on the Equipment in accordance with its obligations under clauses 33.1 and 33.2.

**33.4** If Keller elects to carry out such compliance checks:

- (a) Keller does not take any responsibility for ensuring that the maintenance work has been completed correctly by the Contractor; and
- (b) the compliance checks do not release the Contractor from liability for ensuring that the maintenance work is carried out in accordance with the Agreement.

**33.5** The Contractor acknowledges that nothing in this clause 33 or any other provision of the Agreement (including any obligation (if any) on Keller to maintain the Equipment):

- (a) relieves the Contractor of its obligations and liabilities in respect of defects; or
- (b) obliges Keller to bear the cost of defects.

**33.6** If Keller carries out maintenance on behalf of the Contractor, Keller:

- (a) is entitled to reimbursement of the actual cost of all parts together with all labour hours reasonably spent on the repair at the rate detailed in the Purchase Order; and
- (b) may deduct the amount of these costs from the Contract Sum otherwise payable under the Agreement.

**33.7** Keller does not warrant on any repairs on the Equipment performed by Keller.

**34. Idle time**

Keller is not liable to pay the Contract Sum for any time when the Equipment is not able to be used during the Hire Period due to:

- (a) mechanical breakdown of the Equipment for any reason;
- (b) the unavailability of any operator to be supplied by the Contractor;
- (c) wet weather;
- (d) industrial disputes;
- (e) Force Majeure as defined in the Head Contract; or
- (f) working or operational difficulties.

**35. Industrial relations**

The Contractor must:

- (a) comply with all applicable industrial agreements and industrial relations requirements applicable to the hire of the Equipment and any operators under this Agreement; and
- (b) keep Keller fully informed at all times of all industrial relations matters relevant to the hire of the Equipment and any operators.

**36. Title, use and risk**

**36.1** The Equipment remains the property of the Contractor, and nothing contained in the Agreement will confer on Keller any right or property or interest in the Equipment other than as hirer.

**36.2** The Contractor must ensure that Keller will possess the Equipment during the performance by the Contractor of its obligations under the Agreement without any interruption from the Contractor or any other person with a lawful interest in the Equipment, subject to the Contractor's rights under the Agreement.

**36.3** The Contractor assumes all risk and liabilities (unless specifically assumed by Keller in the Agreement) for:

- (a) the use, possession, transportation, operation, maintenance, repair and servicing of the Equipment by the Contractor and the Contractor's personnel; and
- (b) defects of any kind in relation to the Equipment and its spare parts, parts and components, including manufacturing, design, structural and mechanical defects.

**36.4** The Contractor bears the risk of any loss of or damage to the Equipment until delivery to Keller.

### **37. Suspension**

**37.1** Keller may at any time and for any reason direct the Contractor to suspend the hire of the Equipment.

**37.2** The Contractor must comply with any direction issued by Keller pursuant to clause 37.1 and recommence when directed to do so by Keller.

### **38. Warranties as to the Equipment**

**38.1** The Contractor warrants that:

- (a) it has the full legal and beneficial right to hire the Equipment free of all mortgages, charges, encumbrances or claims of any kind, except those notified to and accepted by Keller;
- (b) it will properly, carefully and skilfully carry out all of its obligations under the Agreement;
- (c) as at the Start Date, the Equipment:
  - (i) will be free from defects in design, materials and workmanship;
  - (ii) is fit for the purpose for which it is hired by Keller and for all purposes which an experienced contractor could reasonably expect it may be used;
  - (iii) has been maintained by the Contractor in good and safe working condition at the Contractor's own expense;
  - (iv) conforms to all relevant Australian Standards and any specifications or requirements communicated to the Contractor and all other requirements of the Agreement;
  - (v) conforms to all applicable Legislative Requirements;
- (d) any operators supplied by the Contractor under the Agreement:
  - (i) are and will be properly trained, qualified, licensed and certified to operate the Equipment in a safe and competent manner;
  - (ii) hold a current and valid driver's licence (as required in the State or Territory of Australia that the work is being performed in, given the nature of the Equipment being operated);
  - (iii) are not suspended or prohibited from driving or operating machinery in any State or Territory of Australia;
- (e) it is able to carry out its obligations under the Agreement for the Contract Sum; and
- (f) it will do everything necessary to maintain all warranties from suppliers or manufacturers relating to the Equipment in full force.

**38.2** The warranties set out in clause 38.1 are in addition to any statutory warranties applicable to the Equipment.

### **39. Defects in the Equipment**

**39.1** If the Equipment, or any part of the Equipment, contains a defect, then without limiting Keller's other rights and entitlements under the Agreement, Keller may direct the Contractor to repair or replace the Equipment, or the relevant part of the Equipment.

**39.2** Keller may direct the times within which the Contractor must commence and complete the rectification of the defect.

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- 39.3** Keller is not liable to make payment in respect of Equipment which contains a defect from the date that Keller gives the Contractor notice of the defect until the defect has been rectified to the reasonable satisfaction of Keller and the Equipment is fully operational and complies with the Agreement.
- 39.4** If the Contractor does not rectify the defect within the time directed by Keller, then Keller may, by written notice, terminate the Agreement.

## Section F –Payment

### 40. Progress Claims and Payment

40.1 The Contractor must submit claims for payment (each a ‘**Payment Claim**’):

- (a) progressively in accordance with Item 4;
- (b) if Section C applies, within 10 Business Days after Completing the Work; and
- (c) if Section D applies, within 10 Business Days after Completing the Services.

40.2 An early Payment Claim will be deemed to have been made on the date for making the claim in Item 4.

40.3 Payment Claims must be in writing and must include:

- (a) if Section C applies, details of the Work to which the Payment Claim relates and the amount claimed for that Work;
- (b) if Section B applies, details of the Goods to which the Payment Claim relates and the amount claimed for those Goods;
- (c) if Section D applies, details of the Services to which the Payment Claim relates and the amount claimed for those Services;
- (d) details of any other amount then due to the Contractor under the Agreement; and
- (e) any other details (including supporting documentary evidence) reasonably required by Keller.

40.4 In addition to the details and supporting evidence required by clause 40.3, if Section C or Section D applies the Contractor must also include documentary evidence of the payment of monies due and payable to:

- (a) workers of the Contractor and of any subcontractor; and
- (b) subcontractors or sub-suppliers,

in respect of the Work or Services that are the subject of the relevant Payment Claim.

40.5 Documentary evidence provided by the Contractor in accordance with clause 40.3 or clause 40.4 must be to Keller’s satisfaction.

40.6 Within 10 Business Days following receipt of a Payment Claim, Keller must give the Contractor a payment schedule (‘**Payment Schedule**’) which evidences Keller’s opinion of the amount due to the Contractor in connection with the Payment Claim and the reasons for any difference.

40.7 If Keller does not issue a Payment Schedule within the time specified in clause 40.6, Keller will be deemed to have issued a Payment Schedule certifying that there is no amount payable to the Contractor in relation to that Payment Claim.

40.8 Subject to clause 40.10 and the Contractor complying with clause 40.3 (compliance with the requirements of which are conditions precedent to the Contractor’s entitlement to payment), Keller must, within the number of days in Item 5 after the Contractor has given to Keller a Payment Claim under clause 40.1, pay to the Contractor the amount set out in the applicable Payment Schedule as payable by Keller to the Contractor.

40.9 Neither a Payment Schedule nor the payment of monies by Keller will be evidence of the value of the Supply provided by the Contractor or an admission of liability or evidence that any part of the Supply has been provided satisfactorily. Payment is on account only.

40.10 Keller may deduct or withhold from any progress payment the value of any part of the Supply that is defective or not in accordance with the requirements in the Agreement until that part of the Supply is rectified, and may set off against payments due to the Contractor all monies due to or claimed by Keller under the Agreement or any other contract between the Contractor and Keller.

40.11 Any failure of Keller to exercise a right of deduction or set-off in respect of a Payment Claim does not prejudice Keller’s rights to exercise that right of deduction or set-off subsequently.

40.12 If required by Keller, the Contractor must sign a final release of all Claims in terms acceptable to Keller prior to payment of the final payment.

40.13 Without limiting clause 40.10, Keller may withhold payment of any amount owing by the Contractor to the Contractor’s workers and subcontractors until the Contractor complies with clause 40.4.

## Section G – Insurance and Indemnities

### 41. Insurance

- 41.1** If the Contractor is required to undertake Work on Site, the Contractor must, at its cost, effect and have in place from the Commencement Date until the end of the Defects Liability Period, a policy of insurance in respect of loss or damage to the Work:
- (a) for the amount not less than the Contract Sum;
  - (b) noting and insuring the interests of Keller and the Principal; and
  - (c) otherwise upon terms and conditions approved by Keller.
- 41.2** The Contractor must effect prior to the Commencement Date, and maintain for the duration of the Agreement a public and products liability policy of insurance which:
- (a) is endorsed to insure the Contractor, Keller, the Principal and their respective personnel as separate insureds for their respective rights and interests;
  - (b) provides cover to the Contractor, Keller, the Principal and their respective personnel for their respective liabilities to third parties and to each other for loss of or damage to any property (other than the property required to be insured by clause 41.1) and death of or injury to any persons (other than liability which is covered by a workers' compensation policy) arising out of or in any way in connection with the performance or non-performance of the Agreement; and
  - (c) provides cover for \$20,000,000.00 in respect of any one occurrence
- 41.3** If clause 16 or clause 5 applies, then before the Contractor commences performing the Agreement the Contractor must effect and maintain professional indemnity insurance for the period of 7 years after the Defects Liability Period with a limit of indemnity not less than \$10,000,000.00 (with an excess of not greater than \$100,000.00). The policy must:
- (a) be on terms acceptable to Keller; and
  - (b) provide cover in respect of legal liability arising from any negligent act, error or omission by the Contractor, its subcontractors, employees or agents arising from or concerning the performance of the Agreement.
- 41.4** Before commencing to perform the Agreement, the Contractor must effect workers' compensation and employer's indemnity insurance covering all claims and liability for death of or injury to persons employed by the Contractor, including liability by statute and at common law.
- 41.5** The insurance cover required under clause 41.4 must:
- (a) be maintained for the duration of the Agreement;
  - (b) where permitted by law, be endorsed to provide indemnity for Keller as principal for principal's statutory and common law liability in relation to the Contractor's employees; and
  - (c) where claims are allowed outside of the statutory scheme, provide cover to Keller for principal's liability for such claims for not less than \$10,000,000.00.
- 41.6** The Contractor must ensure that all subcontractors have similarly insured their employees.
- 41.7** Whenever requested in writing by Keller, the Contractor must provide evidence satisfactory to Keller that the Contractor has effected and maintained the insurance required by clause 41.
- 41.8** If after being so requested, the Contractor fails to provide satisfactory evidence of compliance with clause 41 then without prejudice to other rights or remedies, Keller may:
- (a) terminate the Agreement;
  - (b) obtain the required insurance and the cost of doing so will be a debt due from the Contractor to Keller; or
  - (c) refuse payment until such evidence is produced by the Contractor.
- 41.9** Any insurance required to be effected in accordance with the Agreement by the Contractor in joint names must include a cross liability clause for the purpose of which the insurer accepts the term 'insured' as applying to each

of the persons comprising the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby).

**41.10** The Contractor must:

- (a) as soon as practical, inform Keller in writing of any occurrence that may give rise to a Claim under an insurance policy required by clauses 41.1, 41.2 and 41.3, and must keep Keller informed of the subsequent developments concerning the Claim; and
- (b) ensure that its subcontractors in respect of their operation similarly inform the Parties.

**42. Indemnity**

**42.1** Without limiting any other clause of this Agreement, the Contractor indemnifies Keller against:

- (a) any liability to or Claim by the Principal or any other person; and
- (b) all Claims and Losses that Keller may sustain or incur, whether directly or indirectly, arising out of or in connection with:
  - (c) a breach of this Agreement by the Contractor, or
  - (d) any other act or omission (including negligence) of the Contractor or the Contractor's employees, agents or contractors associated with and arising from the performance of the Agreement.

**42.2** Any liability of the Contractor under clause 42.1 is not reduced by reason of any contribution to any Losses by Keller.

## Section H – Safety and the Environment

### 43. Application of Section H

If the Contractor is required by this Agreement to undertake Work on Site or perform Services on Site, Section H applies to the performance of the Agreement.

### 44. Workplace Health & Safety

44.1 The Contractor must, and must ensure that Site Personnel, comply with:

- (a) applicable WHS Law;
- (b) directions by Keller in relation to WHS;
- (c) relevant Site safety rules and Safe Work Method Statements ('**SWMS**');
- (d) if provided pursuant to clause 44.4 and approved by Keller, the Safety Management Plan ('**SMP**'); and
- (e) those parts of Keller's project plan ('**Project Plan**') and project risk assessment ('**Project Risk Assessment**') for the Project that are provided to the Contractor by Keller,

and, if so directed by Keller, must provide evidence acceptable to Keller of such compliance.

44.2 The Contractor must ensure that Site Personnel hold a current general induction for construction work training certificate recognised by the WHS Authority and trade or operating certificates of competency that are required to perform the Contractor's obligations under the Agreement.

44.3 At least 5 Business Days prior to commencing to perform the Agreement, the Contractor must submit to Keller, for its review, a SWMS covering all work to be undertaken by the Contractor under the Agreement. The SWMS must:

- (a) be in the format acceptable to Keller;
- (b) comply with the requirements of the WHS Law; and
- (c) follow a step-by-step approach where each step of an activity is described, the associated hazards identified and applicable control measures specified.

44.4 If requested by Keller, at least 5 Business Days prior to commencing to perform the Agreement, the Contractor must submit to Keller, for its review, an SMP covering the performance of the Contractor's obligations under the Agreement. The SMP must be in the format and containing details acceptable to Keller and must address how the Contractor will manage safety at the Site.

44.5 Prior to commencing work at the Site, the Contractor must, at its cost, provide and ensure that all Site Personnel attend and complete such Project specific induction training as may be required or specified by Keller, including in relation to the SWMS and (if submitted by the Contractor and approved by Keller) the SMP, and provide evidence acceptable to Keller of the induction training.

44.6 All safety documentation that is submitted by the Contractor to Keller in relation to the Agreement must be equivalent to, or exceed the requirements in the Project Plan, Project Risk Assessment and applicable WHS Law.

44.7 No comment or failure to comment upon, review or non-review of or rejection or non-rejection by Keller of any safety documentation that is submitted by the Contractor to Keller in accordance with clause 44 or any other provision in the Agreement will relieve the Contractor from any of its obligations in relation to WHS under the Agreement, applicable WHS Law or other applicable Legislative Requirement.

44.8 The Contractor must arrange for Site Personnel to attend a toolbox meeting before work commences at the Site each working day to inform Site Personnel of relevant matters including:

- (a) work to be undertaken that day;
- (b) hazards identified since the last toolbox meeting;
- (c) changes to procedures or processes;
- (d) other persons who will be working on the Site that day;
- (e) work by other persons that may impact on the work to be undertaken by Site Personnel; and
- (f) any other matter that is relevant to the work to be undertaken that day.

- 44.9** The Contractor must ensure that:
- (a) accurate minutes are taken of each toolbox meeting that include the following details:
    - (i) date, commencement time and duration of meeting;
    - (ii) name of person who conducted the meeting;
    - (iii) names of all attendees at the meeting; and
    - (iv) matters discussed during the meeting;
  - (b) all attendees sign the toolbox meeting minutes at the end of the meeting; and
  - (c) a copy of the signed minutes of each toolbox meeting is forwarded to Keller within 2 working days of each meeting.
- 44.10** The Contractor must participate in any workplace consultation system that is in place at the Site.
- 44.11** The Contractor must participate in weekly Site inspections with Keller and assist with the identification and rectification of hazards.
- 44.12** The Contractor must, at its cost, provide Site Personnel with Personal Protective Equipment ('PPE') while they are at the Site, including:
- (a) safety helmet;
  - (b) safety glasses;
  - (c) long sleeved shirt;
  - (d) steel-capped safety boots;
  - (e) long pants;
  - (f) high visibility clothing or vest;
  - (g) protective gloves;
  - (h) buoyancy vest if working on or near water; and
  - (i) any other PPE that is necessary for undertaking the Work in a safe manner, as required by applicable WHS Law, or as specified by Keller.
- 44.13** The Contractor must ensure that all PPE complies with applicable Australian Standards and is maintained in serviceable condition and that Site Personnel are properly trained in the correct use and care of all PPE that is provided to them.
- 44.14** Keller may direct any Site Personnel who are at the Site without all required PPE to cease work and leave the Site until the person has obtained all required PPE. The Contractor is responsible for the cost of any lost time or delay that results from compliance with a direction under this clause.

**45. Plant**

- 45.1** At least 5 Business Days prior to bringing any Plant onto the Site, the Contractor must submit to Keller, for its review, the following documents, in a form and containing details acceptable to Keller, for each item of Plant:
- (a) a risk assessment;
  - (b) a SWMS covering operation of the Plant and all tasks to be undertaken by the Contractor with the Plant;
  - (c) a completed pre-commencement checklist;
  - (d) if required by Keller, maintenance, inspection and repair records for the Plant for the previous 12 months which confirm that maintenance, inspection and repair of the Plant has been undertaken in accordance with the Plant manufacturer's recommendations and applicable Legislative Requirements and at the frequencies recommended by the Plant manufacturer by appropriately qualified and competent persons;
  - (e) in respect of any lifting or marine Plant, records of inspection and maintenance of the Plant in accordance with applicable Legislative Requirements; and
  - (f) applicable environmental impact documentation.
- 45.2** The Contractor must ensure that:



- (a) Plant is properly marked with applicable operational markings (eg. SWL, WLL) and that all markings are in English and legible;
- (b) Plant is fitted with guarding in accordance with the Plant manufacturer's requirements and applicable Australian Standards including AS4024 – Safe Guarding of Machinery;
- (c) mobile Plant is fitted with all appropriate safety controls including amber rotating beacon, audible reversing alarm and, where applicable, rollover protection and seat belts;
- (d) engine powered Plant complies with applicable emission control legislation, codes of practice and guidelines; and
- (e) while the Plant is being used by the Contractor in connection with performance of the Agreement, it is maintained, inspected and repaired in accordance with the Plant manufacturer's recommendations and at the frequencies recommended by the Plant manufacturer by suitably qualified and competent persons.

**46. Drugs and Alcohol**

**46.1** The Contractor must, and must ensure that Site Personnel, comply with Keller's Drug and Alcohol Policy Management Procedure ('**Drug and Alcohol Procedure**').

**46.2** Keller may subject Site Personnel to random drug and alcohol testing at the Site, and the Contractor must ensure that any Site Personnel who are selected by Keller for drug and alcohol testing undertake that testing.

**46.3** If any Site Personnel are removed from, or denied access to, the Site due to actual or suspected drug or alcohol use, the Contractor is responsible, and assumes all liability, for immediately and safely removing the person from the Site.

**47. Unsafe Acts or Omissions**

**47.1** If the Contractor causes an unsafe or unlawful health or safety situation or condition to occur or exist in connection with the Agreement, it must immediately, at its cost, take steps to remedy the unsafe or unlawful health or safety situation or condition upon it becoming aware of the existence of the situation or condition.

**47.2** If Keller notifies the Contractor of an unsafe or unlawful health or safety situation or condition in connection with the Agreement, and directs the Contractor to remedy the unsafe or unlawful health or safety situation or condition:

- (a) the Contractor must immediately, at its own cost, comply with the direction; and
- (b) if the Contractor fails to remedy the situation or condition within 3 Business Days of the date of issue of the direction, Keller may, at its sole discretion, remedy the situation or condition, and any costs incurred by Keller in doing so will be a debt due to Keller by the Contractor.

**48. Incidents**

**48.1** The Contractor must immediately notify Keller of:

- (a) any incident or potential incident in connection with the Agreement which results in, or involves a risk of, death or injury to any person or damage to any property ('**Incident**'); or
- (b) any event or events that exposed a person, plant or equipment to an Incident, but in which no one was injured and no property damaged ('**near miss**'),

and provide details acceptable to Keller of the Incident or near miss and the circumstances that led to its occurrence.

**48.2** Within 24 hours of the occurrence of an Incident or near miss referred to in clause 48.1, the Contractor must provide Keller with a detailed written report, in a form acceptable to Keller, concerning the Incident or near miss which includes:

- (a) details of any death, injury or damage suffered as a result of the Incident;
- (b) a full description of the Incident or near miss and the circumstances that led to its occurrence;
- (c) an assessment of the potential for the Incident or near miss to re-occur;

- (d) a copy of the Contractor's preliminary investigation into the cause of the Incident or near miss;
- (e) details of remedial action taken or proposed to avoid a re-occurrence of the Incident or near miss;
- (f) a copy of any information the Contractor is, or may be, required to provide to any person in relation to the Incident or near miss; and
- (g) any other information required by Keller.

**48.3** In addition to the obligations in clause 48.1 and clause 48.2, the Contractor must:

- (a) give all notices that the Contractor is required to give under applicable WHS Law and, at the same time, provide to Keller a copy of each notice given by the Contractor;
- (b) immediately notify Keller of any visit to, or inspection of, the Site or any other place where the Work is carried out by any person authorised under WHS Law; and
- (c) immediately:
  - (i) provide to Keller a copy of any notice issued by, or on behalf of, any government agency, including the WHS Authority, to the Contractor or any Site Personnel; and
  - (ii) notify Keller of any prosecution commenced by, or on behalf of, the WHS Authority against the Contractor or any Site Personnel,in connection with the performance of the Agreement.

**48.4** The Contractor must:

- (a) promptly notify Keller of all action or intended action in relation to any Incident or near miss, including medical treatment or repair of property damage, and all action or intended action to prevent a recurrence of the Incident or near miss; and
- (b) comply with all directions given by Keller relating to the Incident or near miss.

## **49. Hazardous Chemicals and Dangerous Goods**

**49.1** In this clause:

- (a) **'ADG Code'** means the Australian Code for the Transport of Dangerous Goods by Road and Rail, Edition 7.6 (2018).
- (b) **'SDS'** means safety data sheet, having the same meaning as in the Code of Practice on Preparation of Safety Data Sheets for Hazardous Chemicals, May 2018.
- (c) **'Dangerous Goods'** has the same meaning as in the ADG Code.

**49.2** The Contractor must not bring, or allow anyone else to bring, any hazardous chemicals or Dangerous Goods onto the Site without the prior approval of Keller.

**49.3** The Contractor must provide to Keller an SDS for any hazardous chemicals or Dangerous Goods that it wishes to bring onto the Site.

**49.4** Any hazardous chemicals or Dangerous Goods that are brought onto the Site by the Contractor with the prior written approval of Keller must be stored, handled and used only in accordance with the applicable SDS and any directions given by Keller.

## **50. Environmental Obligations**

**50.1** In this clause, unless the context otherwise requires:

- (a) **'Contamination'** means the presence in, on or under land, air or water of a substance (whether a solid, liquid, gas, odour, heat, sound, vibration or radiation) at a concentration above the concentration at which the substance is normally present in, on or under land, air or water in the same locality, that represents or has the potential to present a risk of Environmental Harm, including harm to human health or any aspect of the Environment, or could otherwise give rise to a risk of non-compliance with any law for the protection of the Environment.
- (b) **'Environment'** includes:
  - (i) eco systems and their constituent parts, including people, flora, fauna and communities;
  - (ii) natural and physical resources;

- (iii) the qualities and characteristics of locations, places and areas;
  - (iv) the social, economic, aesthetic and cultural aspects of things mentioned in paragraphs (i) to (iii) of this definition; and
  - (v) interaction between any of the things mentioned in paragraphs (i) to (iv) of this definition.
- (c) **'Environmental Harm'** means any actual or threatened adverse impact on, or damage to, the Environment.
- (d) **'Pollution'** means direct and indirect alteration of the Environment to its detriment or degradation that involves an emission, including an emission of waste, dust, noise, vibration, odour or radiation.

**50.2** The Contractor must:

- (a) perform its obligations under the Agreement in a manner that does not cause or threaten to cause Pollution, Contamination or Environmental Harm to, under, above or outside the Site;
- (b) immediately notify Keller of any incident which results in or involves a risk of Pollution, Contamination or Environmental Harm to, under, above or outside the Site;
- (c) at its own cost:
  - (i) clean up all Pollution, Contamination and Environmental Harm arising from the performance of the Agreement;
  - (ii) comply with all directions by Keller or any statutory or government authority, body or agency regarding cleaning up Pollution, Contamination and Environmental Harm arising from the performance of the Agreement;
  - (iii) dispose in a manner approved by Keller of any waste or contaminated material arising from the performance of the Agreement; and
  - (iv) participate in any waste recycling programme notified by Keller; and
- (d) immediately:
  - (i) provide to Keller a copy of any notice issued by any person to the Contractor or Site Personnel in relation to any Pollution, Contamination or Environmental Harm; and
  - (ii) notify Keller of any prosecution commenced by any person against the Contractor or any Site Personnel in relation to any Pollution, Contamination or Environmental Harm, arising from the performance of the Agreement.

**51. Removal of Personnel from the Site**

Keller may direct the Contractor to remove from the Site or from any activity connected with the Supply, any Site Personnel who, in Keller's opinion, is incompetent, negligent or guilty of misconduct (including failure to comply with the Drug and Alcohol Procedure or with a direction given pursuant to clause 47.2), or who breaches any WHS or environmental obligation, or for any other reason that Keller determines warrants the person's removal from the Site or from an activity connected with the Supply. The person must not thereafter be employed on the Site or on any activity connected with the Supply without the prior written approval of Keller.

## Section I – Default and Termination

### 52. Remedies for Failure to Comply with Agreement

**52.1** If the Contractor fails to comply with any provision in the Agreement, Keller may, without prejudice to any other remedy that may be available to it under the Agreement or otherwise:

- (a) take out of the Contractor's hands the whole or any part of the Supply remaining to be completed;
- (b) recover from the Contractor any expenditure incurred by Keller in completing the Supply (either by itself or by engaging other contractors); and
- (c) recover from the Contractor any Loss that Keller incurs as a result of the Contractor failing to comply with the Agreement.

**52.2** The Contractor will not be entitled to make any Claim, and waives its right to make any Claim, against Keller, either at law or in equity, in relation to the Agreement if Keller exercises any of the rights in clause 52.1.

### 53. Termination for default

Without limitation of Keller's common law rights, Keller may terminate the Agreement by giving notice to the Contractor if:

- (a) in the opinion of Keller, the Contractor is unable or unwilling to perform the Agreement according to its terms;
- (b) the Contractor commits a material breach of the Agreement (including failing to provide evidence of insurance, failing to properly perform the Contractor's obligations, failing to comply with a direction from Keller, and failing to proceed with due expedition and without delay) and the Contractor does not rectify the breach within 7 days of Keller giving the Contractor notice in writing of the breach; or
- (c) the Head Contract is terminated due to an act or omission of the Contractor.

### 54. Termination for convenience

**54.1** Without prejudice to any of Keller's other rights under the Agreement, Keller may:

- (a) at any time for its sole convenience, and for any reason, by written notice to the Contractor terminate the Agreement effective from the time stated in Keller's notice; and
- (b) thereafter, at its sole discretion, complete the whole or any part of the Supply remaining to be completed (either by itself or by engaging other contractors).

**54.2** If Keller terminates the Agreement under clause 54.1, and subject to clause 54.4, Keller will pay to the Contractor:

- (a) for the Contractor's performance of the Agreement up to the date of termination, the amount which would have been payable if the Agreement had not been terminated and the Contractor submitted a Payment Claim for performance up to the date of termination; and
- (b) the costs of materials reasonably ordered for the performance of the Agreement which the Contractor is legally obliged to accept and pay for, provided that:
  - (i) the value of the materials is not included in the amount payable under clause 54.2(a); and
  - (ii) Keller becomes the owner of the materials upon payment.

**54.3** Keller's liability to the Contractor relating to, arising out of, or in any way in connection with, the termination of the Agreement under clause 54 will be limited to amounts calculated under clause 54.2, and the Contractor has no further remedy against Keller and may not make any Claim of any kind against Keller relating to, arising out of, or in any way in connection with, the termination of the Agreement other than for the amount payable under this clause.

**54.4** The amount payable by Keller to the Contractor pursuant to clause 54.2 must not exceed the Contract Sum.

**54.5** Clause 54 survives the termination of the Agreement by Keller.

**55. Rights on Termination**

**55.1** If the Agreement is terminated pursuant to clause 53, the rights and liabilities of the Parties will be the same as they would have been at common law had the defaulting Party repudiated the Agreement and the non-defaulting Party elected to treat the Agreement as at an end and recover damages.

**55.2** Without limiting anything in this clause, any costs incurred by Keller to engage other contractors to complete the Work arising from termination pursuant to clause 53 may be recovered as a debt due by the Contractor to Keller.

**55.3** If Keller terminates the Agreement under clause 53 or 54.1, the Contractor must:

- (a) take all steps possible to mitigate the costs referred to in clause 54.2; and
- (b) immediately hand over to Keller all copies of:
  - (i) documents provided by or on behalf of Keller under the Agreement; and
  - (ii) documents prepared by the Contractor to the date of termination (whether complete or not).

## Section J - General

### 56. Variations

- 56.1** The Contractor must carry out Variations directed by Keller.
- 56.2** The price of Variations will be as agreed or, failing agreement, determined by Keller by reference to rates or prices in the Agreement so far as they are applicable to the Variation or, to the extent that such rates or prices are not applicable, reasonable rates or prices.
- 56.3** The price for the Variation will be added to or deducted from the Contract Sum.

### 57. Subcontracting

- 57.1** The Contractor must not subcontract any part of the Supply without Keller's prior written approval, which may be given or withheld, including on terms and subject to any conditions, in Keller's absolute discretion.
- 57.2** The Contractor remains liable for any work performed by a subcontractor, and any approval to subcontract does not relieve the Contractor from any liability or obligations to Keller in relation to the Agreement.

### 58. Legislative Requirements

- 58.1** The Contractor must:
- (a) comply with all Legislative Requirements; and
  - (b) implement policies, procedures, systems and controls to:
    - (i) ensure that the Contractor does not breach any Legislative Requirement while performing the Agreement;
    - (ii) endeavour to prevent breaches of any Legislative Requirement by its suppliers and subcontractors while they are performing their subcontracts
  - (c) maintain appropriate records of the actions it takes to comply with its obligations in clauses 58.1(a) and 58.1(b), and make those records available to Keller upon request.
- 58.2** Without limiting clause 58.1, the Contractor must obtain all approvals, authorities, licences and permits which are required from government, municipal or other responsible authorities for the lawful performance of the Work.
- 58.3** The Contractor must pay all fees and charges legally demandable or required in accordance with all Legislative Requirements.
- 58.4** The Contractor must, when required by Keller, provide reasonable and necessary assistance to Keller to enable Keller to apply for and maintain any approvals for which Keller or the Principal are responsible.

### 59. Contractor's warranties

- The Contractor warrants that it:
- (a) has satisfied itself that the Contract Sum covers the cost of complying with all of its obligations under the Agreement and of all matters and things necessary for the due and proper performance and completion of the Agreement;
  - (b) has examined carefully and has acquired actual knowledge of and verified through its own investigations the contents of the Agreement, and any other information made available by Keller or any other person on Keller's behalf to the Contractor for the purpose of entering into the Agreement;
  - (c) has examined and verified through its own investigations all information relevant to the risks, contingencies and other circumstances which could affect it entering into the Agreement, the calculation of the Contract Sum and the performance of its obligations under the Agreement;
  - (d) has informed itself of the means of access to and the facilities at the Site and transport facilities for deliveries to or from the Site;
  - (e) has informed itself of all Legislative Requirements relevant to the performance of the Agreement, including measures necessary to protect the environment from any adverse effect or damage arising from the performance of the Agreement; and

- (f) has made itself familiar with the existing structures and other conditions on and near the Site and the services available to the Site and taken into account all matters involving access, provision of services to the Site, conditions of existing structures and conditions under which the Agreement is to be performed.

**60. Manufacturers' Warranties**

The Contractor must assign to Keller and any other person specified by Keller, the benefit of any manufacturer's warranty or guarantee that the Contractor receives or is entitled to receive from any person (whether under contract or by implication or operation of law) in respect of the Supply.

**61. GST**

**61.1** Unless stated otherwise in the Agreement, the Contract Sum and any other amount payable under the Agreement are exclusive of GST.

**61.2** In relation to any GST that is payable in respect of a taxable supply (as defined in the GST Act) pursuant to the Agreement, Keller must pay to the Contractor the applicable GST subject to the Contractor providing a tax invoice (as defined in the GST Act) to Keller.

**62. Governing Law**

The Agreement must be construed in accordance with the laws of the Jurisdiction, and the parties submit to the non-exclusive jurisdiction of the courts in that Jurisdiction and the courts entitled to hear appeals from those courts.

**63. Dispute Resolution**

**63.1** In the event of any dispute or difference relating to, arising out of or in connection with the Agreement:

- (a) the Party claiming such dispute or difference has arisen must give written notice to the other Party of the existence of such dispute or difference;
- (b) the notice must provide sufficient detail to identify the cause and nature of the dispute or difference and call on the other Party to rectify the matters complained of; and
- (c) within 14 days of issue of a notice under this clause (or such longer period agreed in writing by the Parties), senior executives as nominated by each party must meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference.

**63.2** If the dispute or difference is not resolved pursuant to clause 63.1, then either Party may refer the dispute to litigation.

**63.3** Nothing in this clause 63 will prejudice the right of a Party to seek injunctive or urgent interlocutory relief in respect of a dispute under this clause 63 or any matter arising under the Agreement, or to apply for adjudication under Security of Payment Legislation.

**64. Service of Notices**

**64.1** Any notice, demand, consent, direction, Claim or other communication ('**Notice**') required or authorised to be given in connection with the Agreement must be given in writing and must be:

- (a) delivered by hand to the address of the Party specified in Item 6 or the address which has subsequently been notified in writing to the other Party, in which case it will be deemed to have been given upon delivery;
- (b) sent by pre-paid post to the address referred to in clause 64.1(a), in which case it will be deemed to have been delivered on the third Business Day after posting; or
- (c) delivered by email to the address of the Party specified in Item 6, in which case it will be deemed to have been delivered upon confirmation of transmission of the email,

but if the result is that the Notice is deemed to have been delivered on a day which is not a Business Day at the recipient's location, it will be deemed to have been delivered on the next Business Day in that location.

**64.2** A Notice does not have any legal effect unless in writing.

**64.3** To the extent that Keller fails to respond to any Claim, or part thereof, the Claim is deemed to be disputed.

**65. Waiver**

**65.1** A right created by the Agreement cannot be waived except in writing signed by the Party entitled to the right.

**65.2** Delay by a Party in exercising a right will not constitute a waiver of that right, nor will the waiver (either wholly or partly) by a Party of a right operate as a subsequent waiver of the same or any other right of that Party.

**66. Further Assurances**

Each party must promptly execute all documents and do all things necessary or desirable to give full effect to the arrangements contained in the Agreement.

**67. Severance**

Every provision of the Agreement is deemed to be severable and if any provision of the Agreement is void or illegal or unenforceable for any reason then the same is deemed to be severed from the Agreement and the remaining provisions are otherwise of full force and effect.

**68. Preservation of Existing Rights**

The termination or expiration of the Agreement does not affect any right that accrued to a Party before the termination or expiration date.

**69. Survival of clauses**

**69.1** All obligations to indemnify Keller under the Agreement survive termination of the Agreement.

**69.2** The termination of the Agreement does not affect the provisions in the Agreement which:

- (a) expressly provide that they will survive the termination of the Agreement; or
- (b) of necessity must continue to have effect after the termination of the Agreement notwithstanding that the clauses do not expressly provide for this.

**70. Counterparts**

The Agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

**71. Assignment and Novation**

**71.1** The Contractor must not assign its rights or transfer its obligations under the Agreement without the prior written consent of Keller.

**71.2** Keller may novate the Agreement to the Principal or the Principal's nominee.

**71.3** If Keller gives the Contractor a Notice advising that Keller has novated the Agreement to the Principal or its nominee:

- (a) the Contractor must promptly, upon request from Keller, execute all documents required by Keller to give effect to the novation;
- (b) from the date the Contractor receives the Notice, the Contractor:
  - (i) must perform all its obligations under the Agreement as if the Principal or its nominee is a party to the Agreement in place of Keller; and
  - (ii) ceases to have any rights against Keller under the Agreement.

**71.4** The novation will not entitle the Contractor to any payment additional to the Contract Sum by reason of the novation.



**72. Exclusion of Proportionate Liability Legislation**

**72.1** To the extent permitted by law, the operation of the Proportionate Liability Legislation is excluded in relation to any and all rights, obligations and liabilities arising under or in relation to the Agreement, whether such rights obligations or liabilities are sought to be enforced as a breach of contract or Claim in tort (including negligence), in equity, under statute, or otherwise at law.

**72.2** In each subcontract it enters into in relation to the Supply, the Contractor must include provisions that, to the extent permitted by law, effectively exclude the operation of the Proportionate Liability Legislation in relation to all rights, obligations or liabilities arising under or in relation to that subcontract.

**72.3** If the Proportionate Liability Legislation does apply, then:

- (a) the Contractor acknowledges and agrees that, for the purposes of the Proportionate Liability Legislation, the Contractor is entirely and solely responsible for any failure to take reasonable care on the part of any of its officers, employees, agents or subcontractors; and
- (b) the Contractor indemnifies Keller in respect of any Loss suffered by Keller as a result of any difference between:
  - (i) the amount of any Loss suffered or incurred by Keller which, but for the Proportionate Liability Legislation, Keller would have been entitled to recover from the Contractor; and
  - (ii) the liability of the Contractor to Keller as determined by any court under the Proportionate Liability Legislation.

**73. Security of Payment Legislation**

**73.1** Any Payment Claim (including accompanying documentation) submitted by the Contractor pursuant to the Security of Payment Legislation must:

- (a) strictly comply with the Agreement and the Security of Payment Legislation; and
- (b) be submitted to Keller and state in bold capital letters the words prescribed by the relevant Security of Payment Legislation in the State or Territory where the work the subject of the payment claim is undertaken.

**73.2** The Contractor must:

- (a) promptly give Keller a copy of any notice the Contractor receives from any of its suppliers and subcontractors under any section of the Security of Payment Legislation; and
- (b) procure that each of its suppliers and subcontractors promptly gives Keller a copy of any notice that the supplier or subcontractor receives from another person under any section of the Security of Payment Legislation.

**73.3** If Keller becomes aware that any supplier or subcontractor to the Contractor is entitled under the Security of Payment Legislation to suspend performing work for the Contractor, Keller may:

- (a) pay the supplier or subcontractor such money that is, or may be, owing to the supplier or subcontractor for work forming part of the Supply; and
- (b) deduct the amount so paid from amounts owing to the Contractor or otherwise recover the sum so paid.

**73.4** The Contractor indemnifies Keller against any Loss suffered or incurred by Keller arising out of:

- (a) a suspension by a supplier or subcontractor; and
- (b) a failure by the Contractor to comply with clause 73.2.

**73.5** The Contractor agrees that the amount set out in the Payment Schedule in accordance with clause 40.6 is, to the extent permitted by and for the purposes of the relevant Security of Payment Legislation, the amount of the "progress payment" calculated in accordance with the terms of the Agreement, which the Contractor is entitled to in respect of the Agreement.

**73.6** The Contractor must not at any time, without the written consent of Keller, divulge or suffer or permit its servants, sub-suppliers or agents to divulge to any person any communication, submissions or statement made or evidence used or relied upon by Keller in an adjudication application.

**73.7** The Contractor's obligation in clause 73.6 continues to apply in any subsequent proceedings before a court, arbitrator, expert or tribunal, except where the Contractor is required by Legislative Requirement to disclose the communication, submissions, statement or evidence in those subsequent proceedings.

**73.8** If the Contractor refers a Payment Claim to adjudication under the Security of Payment Act, then:

- (a) the amount of any determination by the adjudicator appointed under the Security of Payment Act in respect of that Payment Claim ('determination') will be the Contractor's maximum entitlement and Keller's maximum liability in relation to the work, matters or things comprising that Payment Claim; and
- (b) the Contractor is not entitled to make, and Keller is not liable for, any Claim for an amount in excess of the amount of the determination.

**74. Exclusion of Prevention Principle**

The Parties agree that the principle of law known as the prevention principle does not apply to any circumstance, action, direction, inaction or omission which might otherwise cause any Completion Date or Delivery Date to be set at large.

**SCHEDULE – BUILDING CODES**

**1. BUILDING CODE 2016 (CTH)**

**1.1** This clause applies if the Project is Commonwealth Funded Building Work.

**1.2** Alternative 1 applies if the Contract Sum is \$25,000.00 or less, otherwise Alternative 2 applies.

**Alternative 1**

**1.3** The Building Code applies to the Project. By agreeing to undertake the Work, the Contractor will be taken to have read and to agree to comply with the Building Code.

**Alternative 2**

**1.4** In this clause the following definitions apply:

- (a) **ABCC** means the body referred to in subsection 29(2) of the BCIIIP Act.
- (b) **ABC Commissioner** means the Australian Building and Construction Commissioner referred to in subsection 15(1) of the Act.
- (c) **BCIIIP Act** means the Building and Construction Industry (Improving Productivity) Act 2016.
- (d) **Building Code** means the Code for the Tendering and Performance of Building Work 2016, which is available at <https://www.legislation.gov.au/Details/F2016L01859>.
- (e) **Building Contractor** has the same meaning as in the BCIIIP Act. “
- (f) **Building Industry Participant** has the same meaning as in the BCIIIP Act.
- (g) **Building Work** has the same meaning as in subsection 3(4) of the Building Code.
- (h) **Commonwealth Funded Building Work** means Building Work in items 1-8 of Schedule 1 of the Building Code.
- (i) **Enterprise Agreement** has the same meaning as in the Fair Work Act 2009.
- (j) **Exclusion Sanction** has the same meaning as in subsection 3(3) of the Building Code.
- (k) **Related Entity** has the same meaning as in subsection 3(2) of the Building Code.
- (l) **Subcontractor** means a Building Contractor or Building Industry Participant who the Contractor has entered, or proposes to enter, into a sub-subcontract with to undertake any of the Works.
- (m) **Works** means Commonwealth Funded Building Work that is the subject of this Agreement.

**1.5** The Contractor declares as at the date of commencement of this Agreement in relation to the Work, that it and its Subcontractors:

- (a) are not subject to an Exclusion Sanction; and
- (b) unless approved otherwise by the ABC Commissioner, are not excluded from performing Building Work funded by a state or territory government.

**1.6** The Contractor

- (a) declares as at the date of commencement of this Agreement in relation to the Works; and
- (b) must ensure that during the term of this Agreement in relation to the Works, that it and its Subcontractors:
  - (c) comply with the Building Code;
  - (d) are not covered by, and do not have Related Entities covered by, an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code; and
  - (e) will only use products in relation to the Works that comply with the relevant Australian standards published by, or on behalf of, Standards Australia.

**1.7** Without limiting and notwithstanding clause 1.6(c), the Contractor will ensure that remedial action is taken to rectify any behaviour on the part of it and its Subcontractors that is non-compliant with the Building Code.

**1.8** The Contractor must every six months during the term of this Agreement advise Keller whether:

- (a) it has in the preceding 6 months or since it last advised Keller, whichever is the earliest, had an adverse decision, direction or order of a court or tribunal made against it for a breach of a designated building law, work health and safety law or the Migration Act 1958; or

- (b) it or its Related Entities have in the preceding 6 months or since it last advised Keller, whichever is the earliest:
  - (i) been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) to a Building Contractor or Building Industry Participant; or
  - (ii) owed any unsatisfied judgement debts to a Building Contractor or Building Industry Participant.
- 1.9** Compliance with the Building Code does not relieve the Contractor from responsibility to perform this Agreement, or from liability for any defect in the Works arising from compliance with the Building Code
- 1.10** The Contractor must notify the ABCC of any breach or suspected breach of the Building Code as soon as practicable but no later than 2 Business Days after becoming aware of the breach or suspected breach and of the steps proposed to be taken to rectify the breach.
- 1.11** The Contractor acknowledges the powers and functions of the ABC Commissioner and the ABCC under the BCIIIP Act and the Building Code and will ensure that it and its Subcontractors comply with any requests made by the ABCC and the ABC Commissioner within those powers and functions, including but not limited to requests for entry under section 72 of the BCIIIP Act, requests to interview any person under section 74 of the BCIIIP Act, requests to produce records or documents under sections 74 and 77 of the of the BCIIIP Act and requests for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.
- 1.12** The Contractor must only enter into a subcontract for any of the Works where:
  - (a) the Subcontractor has submitted a declaration of compliance in substantively the same form as the model declaration of compliance applicable to contractors and subcontractors in relation to the Building Code (located in Part 4 in the document titled Model Clauses Type B, available on the ABCC website ([www.abcc.gov.au](http://www.abcc.gov.au))); and
  - (b) the subcontract with the Subcontractor contains clauses in substantively the same form as the model contract clauses applicable to contractors and subcontractors in relation to the Building Code.
- 1.13** The Contractor must ensure that it and its Subcontractor comply with clauses contained in the subcontract referred to in clause 1.12(b).

## **2. NSW CODE OF PRACTICE FOR THE BUILDING & CONSTRUCTION INDUSTRY**

- 2.1** This clause 2 applies if the Jurisdiction is New South Wales (but not otherwise).
- 2.2** In addition to terms defined in the Agreement, terms used in this clause have the same meaning as is attributed to them in the New South Wales Government's Implementation Guidelines to the NSW Code of Practice for the Building and Construction Industry (**NSW Guidelines**) (as published by the NSW Treasury July 2013). The NSW Code and NSW Guidelines are available at [www.industrialrelations.nsw.gov.au](http://www.industrialrelations.nsw.gov.au).

### **Primary Obligation**

- 2.3** Alternative 1 applies if the Agreement Sum is \$25,000.00 or less otherwise Alternative 2 applies.  
**Alternative 1**
- 2.4** The NSW Code and the NSW Government's Implementation Guidelines to the NSW Code of Practice for Procurement: Building and Construction ('NSW Guidelines') apply to the Project. By accepting the Purchase Order the Contractor warrants it is not precluded from entering the Agreement and performing the Work and agrees that it will be taken to have read and understood, and that it will comply with, the NSW Code and NSW Guidelines.  
**Alternative 2**
- 2.5** The Contractor must at all times comply with, and meet any obligations imposed by, the NSW Government's Code of Practice for the Building and Construction Industry (**NSW Code**) and NSW Guidelines.

- 2.6** The Contractor must notify the CCU, the Principal and Keller of any possible non-compliance with the NSW Code and NSW Guidelines and of remedial action taken, within 24 hours of becoming aware of the possible non-compliance.
- 2.7** Where the Contractor engages a subcontractor or consultant, the Contractor must ensure that that contract imposes on the subcontractor or consultant equivalent obligations to those in this clause (under the heading NSW Code and NSW Guidelines), including that the subcontractor or consultant must at all times comply with, and meet any obligations imposed by, the NSW Code and the NSW Guidelines.
- 2.8** The Contractor must not appoint or engage another party in relation to the project where that appointment or engagement would breach a sanction imposed on the other party in relation to the NSW Code or NSW Guidelines.

#### **Access and information**

- 2.9** The Contractor must maintain adequate records of compliance with the NSW Code and NSW Guidelines by it, its subcontractors, consultants and related entities.
- 2.10** The Contractor must allow, and take reasonable steps to facilitate, authorised personnel (including personnel of the CCU) to:
- (a) enter and have access to sites and premises controlled by the Contractor, including but not limited to the project site;
  - (b) inspect any work, material, machinery, appliance, article or facility;
  - (c) access information and documents;
  - (d) inspect and copy any record relevant to the Project;
  - (e) have access to personnel; and
  - (f) interview any person;
- as is necessary for the authorised personnel to monitor and investigate compliance with the NSW Code and NSW Guidelines, by the Contractor, its subcontractors, consultants, and related entities.
- 2.11** The Contractor, and its related entities, must agree to, and comply with, a request from authorised personnel (including personnel of the CCU) for the production of specified documents by a certain date, whether in person, by post or electronic means.

#### **Sanctions**

- 2.12** The Contractor warrants that at the time of entering into this Agreement, neither it, nor any of its related entities, are subject to a sanction in connection with the NSW Code or NSW Guidelines that would have precluded it from responding to a procurement process for work to which the NSW Code and NSW Guidelines apply.
- 2.13** If the Contractor does not comply with, or fails to meet any obligation imposed by, the NSW Code or NSW Guidelines, a sanction may be imposed against it in connection with the NSW Code or NSW Guidelines.
- 2.14** Where a sanction is imposed:
- (a) it is without prejudice to any rights that would otherwise accrue to the parties; and
  - (b) the State of NSW (through its agencies, Ministers and the CCU) is entitled to:
    - (i) record and disclose details of noncompliance with the NSW Code or NSW Guidelines and the sanction; and/or
    - (ii) take them into account in the evaluation of future procurement processes and responses that may be submitted by the Contractor, or its related entities, in respect of work to which the NSW Code and NSW Guidelines apply.

#### **Compliance**

- 2.15** The Contractor bears the cost of ensuring its compliance with the NSW Code and NSW Guidelines, including in respect of any positive steps it is obliged to take to meet its obligations under the NSW Guidelines. The

Contractor is not entitled to make a claim for reimbursement or an extension of time from Keller, the Principal or the State of NSW for such costs.

**2.16** Compliance with the NSW Code and NSW Guidelines does not relieve the Contractor from responsibility to perform the works and any other obligation under the contract, or from liability for any defect in the works or from any other legal liability, whether or not arising from its compliance with the NSW Code and NSW Guidelines.

**2.17** Where a change in the Agreement or a Variation is proposed, and that change or Variation may, or may be likely to, affect compliance with the NSW Code and NSW Guidelines, the Contractor must immediately notify Keller and the Principal (or nominee) of the change or Variation, or likely change or Variation and specify:

- (a) the circumstances of the proposed change or Variation;
- (b) the extent to which compliance with the NSW Code and NSW Guidelines will be, or is likely to be, affected by the change or Variation; and
- (c) what steps the Contractor proposes to take to mitigate any adverse impact of the change or Variation (including any amendments it proposes to a Workplace Relations Management Plan or Work Health and Safety Management Plan);

and the Principal will direct the Contractor as to the course it must adopt within 10 Business Days of receiving notice.

### **3. QLD CODE OF PRACTICE FOR THE BUILDING & CONSTRUCTION INDUSTRY**

**3.1** This clause 3 applies if the Jurisdiction is Queensland (but not otherwise).

**3.2** In addition to terms defined in the Agreement, terms used in this clause have the same meaning as is attributed to them in the Queensland Code of Practice for the Building and Construction Industry (**Queensland Code**) (as published by the Department of Justice and Attorney- General). The Queensland Code is available at <https://s3.treasury.qld.gov.au/files/oir-code-of-practice- building-and-construction.pdf>.

#### **Primary Obligation**

**3.3** The Contractor must comply with the Queensland Code.

**3.4** The Contractor must notify the Principal and Keller of any alleged breaches of the Queensland Code and of voluntary remedial action taken, within 24 hours of becoming aware of the alleged breach.

**3.5** Where the Contractor is authorised to engage a subcontractor or consultant, and it does so, the Contractor must ensure that any secondary contract imposes on the subcontractor or consultant equivalent obligations to those in this clause (under the heading Queensland Code), including that the subcontractor or consultant must comply with, and meet any obligations imposed by, the Queensland Code.

**3.6** The Contractor must not appoint or engage another party in relation to the project where that appointment or engagement would breach a sanction imposed on the other party in relation to the Queensland Code.

#### **Access and information**

**3.7** The Contractor must maintain adequate records of compliance with the Queensland Code by it, its subcontractors, consultants and related entities.

**3.8** The Contractor must allow, and take reasonable steps to facilitate, Queensland Government authorised personnel to:

- (a) enter and have access to sites and premises controlled by the Contractor, including the project site;
- (b) inspect any work, material, machinery, appliance, article or facility;
- (c) access information and documents;
- (d) inspect and copy any record relevant to the Project;
- (e) have access to personnel;
- (f) interview any person,

as is necessary for the authorised personnel to monitor and investigate compliance with the Queensland Code, by the Contractor, its subcontractors, consultants and related entities.

- 3.9** The Contractor, and its related entities, must agree to, and comply with, a request from Queensland Government authorised personnel for the production of specified documents by a certain date, whether in person, by post or electronic means.

#### **Sanctions**

- 3.10** The Contractor warrants that at the time of entering into the Agreement, neither it, nor any of its related entities, are subject to a sanction in connection with the Queensland Code that would have precluded it from tendering for work to which the Queensland Code apply.

- 3.11** If the Contractor does not comply with, or fails to meet any obligation imposed by, the Queensland Code, a sanction may be imposed against it in connection with the Queensland Code.

- 3.12** Where a sanction is imposed:

- (a) it is without prejudice to any rights that would otherwise accrue to the parties;
- (b) the State of Queensland (through its agencies and Ministers) is entitled to:
  - (i) record and disclose details of non-compliance with the Queensland Code and the sanction; and/or
  - (ii) take them into account in the evaluation of future expressions of interest or tender responses that may be lodged by the Contractor, or its related entities, in respect of work to which the Queensland Code apply.

#### **Compliance**

- 3.13** The Contractor bears the cost of ensuring its compliance with the Queensland Code. The Contractor is not entitled to make a claim for reimbursement or an extension of time from Keller, the Principal or the State of Queensland for such costs.

- 3.14** Compliance with the Queensland Code does not relieve the Contractor from responsibility to perform the works and any other obligation under the contract, or from liability for any defect in the works or from any other legal liability, whether or not arising from its compliance with the Queensland Code.

- 3.15** Where a change in the Agreement or a Variation is proposed, and that change or Variation would, or would be likely to, affect compliance with the Queensland Code, the Contractor must immediately notify Keller and the Principal (or nominee) of the change or Variation, or likely change or Variation and specify:

- (a) the circumstances of the proposed change or Variation;
- (b) the extent to which compliance with the Queensland Code will, or is likely to be, affected by the change or Variation; and
- (c) what steps the Contractor proposes to take to mitigate any adverse impact of the change or Variation, and the Principal will direct the Contractor as to the course it must adopt within 5 Business Days of receiving notice.

#### **4. WA BUILDING & CONSTRUCTION INDUSTRY CODE OF CONDUCT**

- 4.1** This clause 4 applies if the Jurisdiction is Western Australia [and the Purchase Order states that it applies] (but not otherwise).

##### **Primary Obligation**

- 4.2** The Western Australian Building and Construction Industry Code of Conduct 2016 (**BCI Code**) applies to the Agreement. [The Western Australia Building & Construction Industry Code of Conduct are available at <https://www.commerce.wa.gov.au/publications/implementation-guidelines-western-Australian-building-and-construction-code-conduct>.]

- 4.3** The Contractor must comply with the obligations of a “Building Contractor” under the BCI Code for the term of the Agreement.
- 4.4** Without limiting the generality of clause 4.3, the Contractor must:
- (a) ensure that compliance with the BCI Code is a condition of any subcontracts that the Contractor enters into in respect of the On-Site Work under the Agreement;
  - (b) do the following and ensure that its subcontractors do the following:
    - (i) provide the Building and Construction Code Monitoring Unit (**BCCMU**) with access to the subcontractor’s business premises and any other places where records, documents or information is kept by the Contractor;
    - (ii) assist the BCCMU in locating and accessing any record, document or information whether in hard copy or electronic format;
    - (iii) allow the BCCMU to speak with or interview the subcontractor’s employees or contractors;
    - (iv) allow the BCCMU to take copies of any record, document, information or other evidence whether in hard copy or electronic format;
    - (v) respond to requests for information made by the BCCMU; and
    - (vi) do not obstruct the BCCMU; and
  - (c) initiate and ensure that its subcontractors initiate voluntary remedial action aimed at rectifying BCI Code non-compliance.