

## **1 APPLICATION OF TERMS**

These terms are the only terms upon which PWCS is prepared to deal with the Supplier and together with the PO they form the Contract to the exclusion of all other terms (other than the terms of any Relationship Agreement). No terms contained in any document of the Supplier will form part of the Contract and the Supplier waives any right to rely on such terms.

## **2 QUALITY**

The Supplier must:

- (a) perform the Services or deliver the Goods in accordance with the Contract ensuring that the Goods/Services comply with Legal Requirements and any applicable Australian Standards;
- (b) at all times exercise due skill, care and diligence in preparing and delivering the Goods or performing the Services;
- (c) supply the Goods/Services in a competent manner and in accordance with the Contract, any induction given and the reasonable directions of PWCS;
- (d) not do or cause or allow to be done anything that would materially and adversely affect PWCS' rights concerning the site, or any property on the site.

## **3 DESCRIPTION**

- (a) The Goods/Services must comply with the specifications and the description in the PO, and must correspond with any sample of Goods provided by the Supplier.
- (b) PWCS may vary the Goods/Services by a subsequent PO or POs and the Goods/Services must comply with the specifications and the description in the PO. The Supplier must not otherwise vary the Goods/Services.

## **4 DELIVERY**

Stores Delivery Hours for the Carrington and Kooragang stores are:

- (a) For Goods not requiring a forklift or a crane for unloading- 7:00am to 11:30am on Tuesday, Wednesday, and Thursday;
- (b) For heavy Goods requiring a Forklift or a crane to unload must be planned by contacting stores on [store@pwcs.com.au](mailto:store@pwcs.com.au) at least two (2) business days in advance. If Port Waratah are not notified, delivery may be rejected.

The Supplier must:

- (c) ensure all Goods delivered are appropriately restrained on vehicles in accordance with Legal Requirements including the standards are detailed in the National Transport Commission's "Load Restraint Guide (2018)" **Note:** <https://www.ntc.gov.au/codes-and-guidelines/load-restraint-guide>
- (d) deliver the Goods/Services in the area specified by PWCS on the specified date for delivery and in accordance with PWCS' directions;
- (e) ensure there is no damage to the Goods, the site or any party's property on the site;
- (f) when delivering Goods, provide full documentation identifying the contents of each package delivered and comply with cl 12; and
- (g) store its property in a safe manner according to PWCS' directions.

## **5 INSPECTION**

Provided PWCS complies with all reasonable safety measures required by the Supplier, PWCS is at all reasonable times and at its own expense entitled (but is under no obligation) to:

- (a) inspect Goods before they are despatched from the Supplier's premises to a site, and before PWCS agrees to accept delivery of them;
- (b) inspect Services (and any related works) being carried out by the Supplier at a site.

## **6 ACCEPTANCE**

- (a) PWCS will not be deemed to have accepted:
  - (i) Goods until PWCS has had a reasonable time to inspect them after delivery; or
  - (ii) Services until PWCS has had a reasonable time to inspect and test them.
- (b) If PWCS deems, acting reasonably, any Goods to be defective, PWCS may reject the defective goods by returning them to the Supplier or making good the defective goods.
- (c) Without limiting cl 21, if PWCS deems, acting reasonably, any Services to be defective, PWCS may reject the defective service by giving notice to the Supplier, with a proposed rectification strategy.
- (d) At PWCS' option and request, the Supplier agrees, in respect of any defective Goods rejected by PWCS under cl 6(b), to:

- (i) refund to PWCS any payments made by PWCS (including any freight charges) in respect of any defective Goods that PWCS rejects; or
- (ii) make good any defective Goods that PWCS rejects; or
- (iii) reimburse PWCS for any reasonable expense incurred in making good defective Goods.

- (e) PWCS' inspection, testing or acceptance of Goods/Services does not affect PWCS' rights to claim for any damage or loss suffered because of the Supplier's breach of warranty or failure to fulfil any other obligations under the Contract.
- (f) If PWCS accepts any Goods/Services from the Supplier which do not comply with the Contract, PWCS is not bound to accept future non-complying Goods/Services.

## **7 TITLE AND RISK**

Title and risk in the Goods does not pass until PWCS takes delivery of the Goods.

## **8 PERSONNEL**

- (a) The Supplier must provide suitably qualified, competent and experienced personnel with appropriate safety equipment to perform the Contract.
- (b) The Supplier and its personnel must, prior to entering a PWCS site, successfully complete all inductions and sign all undertakings required by PWCS.
- (c) The Supplier must ensure that its personnel adhere to the Contract, and PWCS' rules, practices, policies, procedures and requirements.
- (d) PWCS may, acting reasonably, direct the Supplier to remove from the site any of the Supplier's personnel or subcontractors.

## **9 SUBCONTRACTING**

Except for delivery of Goods, the Supplier may only engage a subcontractor to supply or hire on the Supplier's behalf any of the Goods/Services with the prior written approval of PWCS. The Supplier will be responsible for any acts or omissions of its subcontractors under the Contract.

## **10 AUTHORISATIONS**

The Supplier must obtain and maintain at its cost all of the authorisations (including permits, approvals, licences, certificates and standards) required to supply the Goods/Services.

## **11 PRICE**

- (a) PWCS agrees to pay the Supplier the price in the PO ("Price") for the Goods/Services in accordance with cl 12.
- (b) Unless stated otherwise in the Contract, the Price is inclusive of all costs incurred by the Supplier in complying with its obligations under the Contract including charges for packaging, packing, insurance and delivery of the Goods and any taxes.
- (c) The Price may not be increased without PWCS' prior written consent.
- (d) If PWCS varies the Goods/Services under cl 3(b), PWCS and the Supplier must negotiate a reasonable variation of the Price which can be an increase or a decrease. If there is no agreement in writing as to a variation of the Price within 20 business days of a PO which varies the Goods/Services, PWCS will, acting reasonably, determine the variation of Price.

## **12 PAYMENT AND INVOICING**

### **12.1 Payment**

PWCS will pay correctly rendered invoices within 30 days of receipt of invoice if:

- (a) the amount complies with all Legal Requirements and reflects the amount in the PO;
- (b) in PWCS' reasonable opinion, the Goods/Services supplied comply with all of the requirements in the Contract and:
  - (i) comply with the warranties in cl 16.2;
  - (ii) for the Goods, they have not been rejected by PWCS; and
  - (iii) the Supplier has not been requested to make changes to the Goods/Services to make them comply with the Contract.

### **12.2 Correctly Rendered Invoices**

An invoice is correctly rendered if:

- (a) the invoice is in accordance with the PO in all respects,
- (b) the invoice:
  - (i) identifies the Goods/Services supplied, the PWCS contact and PO number;
  - (ii) specifies the relevant location(s) and/or PWCS site(s);

- (iii) details the amount claimed and the calculation of that amount (including records of time spent by personnel verified by the Port Waratah Representative);
- (iv) certifies that the Goods/Services comply with the Contract;
- (v) includes any other details reasonably required by PWCS;
- (vi) identifies the GST exclusive amount and the GST amount separately;
- (vii) is a tax invoice for GST purposes and allows PWCS to make a claim for input tax credits
- (viii) complies with Legal Requirements.

#### 12.3 Disputed Invoices

Where PWCS considers an invoice is not correctly rendered, PWCS will issue within 10 business days a notice setting out the reasons and identifying amounts in dispute. The Supplier must cancel the old invoice and issue a new invoice for the undisputed amount. If an amount under a disputed invoice is later agreed to be payable by PWCS (resolved amount), the Supplier may add the resolved amount to the next correctly rendered invoice.

#### 12.4 Set off

PWCS may, acting reasonably, withhold, retain or set off from any payment due to the Supplier under the Contract amounts PWCS deems necessary to protect it against any costs, expenses and damages for which the Supplier may be liable under or in connection with the Contract. This right does not limit PWCS' right to recover those amounts in any other way.

### 13 GOODS AND SERVICES TAX

#### 13.1 Interpretation

Words or expressions used in this cl 13 are defined in Commonwealth legislation concerning tax and tax arrangements for the supply of the Goods/Services.

#### 13.2 Consideration is GST inclusive

Any consideration to be paid for a supply made under or in connection with the Contract, unless described as 'GST exclusive', is deemed to include an amount of GST.

#### 13.3 Gross up of consideration

Despite any other provision in the Contract, if a party (GST Supplier) makes a supply under or in connection with the Contract on which GST is imposed and is specifically described in the Contract as 'GST exclusive':

- (a) the consideration payable or to be provided for that supply under the Contract but for the application of this cl 13 (GST exclusive consideration) is increased by, and the recipient of the supply (Recipient) must also pay to the GST Supplier, an amount equal to the GST payable by the GST Supplier on that supply; and
- (b) the amount by which the GST exclusive consideration is increased must be paid to the GST Supplier by the Recipient without set off, deduction or requirement for demand, at the same time as the GST exclusive consideration is payable.

#### 13.4 Reimbursements

If a payment to a party under or in connection with the Contract is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party is entitled for that loss, cost or expense.

#### 13.5 Adjustment Events

If, at any time, an Adjustment Event arises for any supply made by a party under the Contract, a corresponding adjustment must be made between the parties for any amount paid under cl 13.3. Payments to give effect to the adjustment must be made between the parties and the GST Supplier must issue a valid Adjustment Note in relation to the Adjustment Event.

### 14 WITHHOLDING TAX

If a law requires PWCS to deduct an amount in respect of taxes from a payment under the Contract, then PWCS agrees to deduct the amount for the taxes and pay an amount equal to that amount to the relevant authority as required by applicable law. Any amount withheld is deemed to have been paid to the Supplier on the date on which the remainder of the payment is paid to the Supplier. The Supplier has no claim against PWCS for any amounts withheld and paid to the Commissioner of Taxation under this cl.

### 15 INSURANCE

- (a) The Supplier must effect and maintain any insurance required by Legal Requirements in connection with the supply of Goods/Services or by PWCS under any Relationship Agreement.
- (b) Before the Supplier commences the supply of Goods/Services and whenever requested by PWCS, the Supplier must produce evidence

to PWCS' satisfaction that the insurances required have been effected and maintained.

- (c) If the Supplier fails to produce evidence of insurance, PWCS may, acting reasonably, effect and maintain one or more insurance policies, and the costs of such insurance will be a debt due and payable from the Supplier to PWCS. PWCS may withhold payment to the Supplier and/or suspend the supply of Goods/Services until evidence of compliance with insurance obligations is produced or PWCS is reimbursed for debt.

### 16 WARRANTIES & INDEMNITY

#### 16.1 Supplier Warranties

The Supplier warrants that the Supplier:

- (a) has met the insurances and compliance requirements in the Contract;
- (b) will exercise due skill, care and diligence in preparing and delivering the Goods or carrying out the Services;
- (c) will comply with any material conditions imposed by an authorisation.

#### 16.2 Supplier warranties about the Good or Services

- (a) The Supplier warrants that all Goods/Services supplied will be of merchantable quality and fit for the purpose for which PWCS intends to use them.
- (b) The Supplier warrants that Goods will be free of encumbrances at the time of delivery and remain so until PWCS accepts ownership of them under cl 7.

#### 16.3 Continuing Representation

The representations and warranties set out in cls 16.1 and 16.2 survive the termination of the Contract.

#### 16.4 Indemnity

The Supplier indemnifies PWCS for any loss whatsoever (including, but not limited to, consequential loss and damage, and fines, penalties or charges) arising directly or indirectly out of:

- (a) the performance or breach of the Contract;
- (b) claims by a third party arising out of the Supplier's acts or omissions under the Contract;
- (c) personal injury or death of any person (including the Supplier and its personnel);
- (d) loss of, damage to or loss of use of any property;
- (e) the breach of any Legal Requirements; and
- (f) any act, default or omission of any person, except to the extent that the loss is caused by PWCS' own negligence or breach, or that of its servants, employees or agents or is not otherwise recoverable by law. These indemnities survive the completion or termination of the Contract.

### 17 INTELLECTUAL PROPERTY

#### 17.1 Intellectual Property Rights in works

The Supplier assigns to PWCS all intellectual property rights in any material created in the course of performing its obligations under this Contract, except to the extent material is pre-existing material of the Supplier at the date of the Contract. The Supplier grants PWCS a perpetual, non-exclusive, non-transferable, irrevocable, royalty-free licence to use such material in any manner for the purpose of PWCS carrying on its business.

#### 17.2 Intellectual Property warranty

The Supplier warrants that it will not infringe the intellectual property rights of any person in providing the Goods/Services.

#### 17.3 Indemnity

The Supplier must (either directly itself or by procuring sub-contractors to do so):

- (a) at PWCS' request and sole option, defend at its cost all Infringement Claims and provide assistance reasonably required by PWCS relating to Infringement Claims;
- (b) indemnify PWCS against all costs, losses, damages and expenses that PWCS may sustain or incur as a result of an Infringement Claim; and
- (c) satisfy any settlement of or judgement given in an Infringement Claim.

### 18 CONFIDENTIALITY

- (a) Each party undertakes that it will not (except as necessary to comply with its obligations under the Contract) disclose to any person any information of or relating to the other party including the terms of the Contract.
- (b) Nothing in the Contract prohibits disclosure of information which:

- (i) is in the public domain otherwise than as a result of a breach of this cl 18;
  - (ii) is received from a third party provided that it was not acquired directly or indirectly by that third party as a result of a breach of this cl 18;
  - or
  - (iii) is required to be disclosed by law or government having authority over a party.
- (c) The obligations under this cl 18 survive termination of the Contract.

## **19 DISPUTES**

- (a) A party must comply with this cl 19 before commencing litigation.
- (b) Where a party considers that a dispute exists, that party must give the other party a written Notice of Dispute within 10 business days, detailing the nature of the dispute.
- (c) Within 10 business days after the service of a Notice of Dispute the CEO of PWCS, or their delegate and the Supplier's business owner, must confer at least once to attempt to resolve the dispute and, failing resolution, to attempt to agree on an alternative method of resolving the dispute. Nothing in this cl 19 prevents either party commencing proceedings to seek interlocutory relief or to avoid the expiry of any applicable limitations period.

## **20 TERMINATION**

### **20.1 For breach**

Either party may terminate the Contract with immediate effect, by giving written notice to the other party if the other party breaches a provision of the Contract and:

- (a) if the breach is capable of remedy, fails to remedy the breach within a reasonable time (not exceeding 10 Business Days) after receiving notice of the breach; or
- (b) the breach cannot be remedied.

### **20.2 For convenience**

- (a) PWCS may, at any time without cause terminate the Contract by written notice.
- (b) If PWCS terminates the Contract under this cl, PWCS must, subject to cl 20.2(c), pay to the Supplier:
  - (i) any amounts payable to the Supplier for the performance of the work under the Contract in accordance with the Contract;
  - (ii) an amount to compensate the Supplier for those costs reasonably and necessarily incurred by the Supplier in consequence of the termination of the Contract.
- (c) PWCS will not be liable to make any payment to the Supplier:
  - (i) for the loss of prospective profit or consequential costs, loss or damage; or
  - (ii) in excess of the amount that would have been paid had the work under the Contract been completed however, the Supplier must do its best to minimise these costs to PWCS.

## **21 DEFECTS LIABILITY**

- (a) The defects liability period for works performed by the Supplier as part of Services is the period specified in the PO. Where no such period is specified it is 12 months from the date on which PWCS accepts the Services. For the purpose of this cl 21 only PWCS is taken to have accepted the Services on the date which is the later of:
  - (i) 4 weeks after the Supplier has completed the Services; or
  - (ii) 4 weeks after the Supplier has made good any defective Services
    - 1. under cl 6(d); or
    - 2. under this cl 21.
- (b) If PWCS gives notice to the Supplier of any defect in the works during the defects liability period, the Supplier must promptly and at its cost rectify such defect.
- (c) This cl 21 does not limit the other rights of PWCS in respect of any defect in the works.

## **22. MISCELLANEOUS PROVISIONS**

### **22.1 Governing law**

The Contract is governed by the laws of New South Wales and each party irrevocably and unconditionally submits to the jurisdiction of the courts of New South Wales.

### **22.2 Notices and other communications**

A notice, demand, consent or communication under the Contract must be in writing, in English and signed by a person duly authorised by the sender

and hand delivered or sent by prepaid post or email to the recipient's contact address or email address specified in the PO, as varied by any notice given by the recipient to the sender.

### **22.3 Force Majeure**

- (a) If a Force Majeure Event occurs, and it affects either party (Affected Party), the Affected Party may give the other party a written notice of the Force Majeure Event and notifying that the obligations of the Affected Party are suspended to the extent that they are affected by the event, from the date of the written notice until cessation of the Force Majeure Event.
- (b) On cessation of the Force Majeure Event, the Affected Party must within a reasonable time give written notice to the other party of the cessation of the event; and resume performance of the obligations suspended as a result of the event.

### **22.4 Assignment**

- (a) PWCS may assign any of its rights under the Contract or may novate its rights and obligations under this agreement without the consent of the Supplier. The Supplier must execute all documents necessary to give effect to any novation or assignment permitted under this cl 22.4(a).
- (b) The Supplier must not assign, sub-licence or novate the Contract or any right under the Contract unless it has PWCS' written consent (which must not be unreasonably withheld). PWCS may grant consent subject to conditions considered reasonably necessary by PWCS to protect its legal, commercial or financial interests.

### **22.5 Successors and permitted assigns**

The Contract is binding upon and takes effect for the benefit of the parties, and their respective successors and permitted assigns.

### **22.6 Relationship**

The Supplier is an independent supplier for the purposes of the Contract and nothing in the Contract creates a relationship of partnership, joint venture or employer and employee.

### **22.7 Timing**

Time is of the essence in the performance of the Supplier's obligations under the Contract which must be performed by a specified time and/or date. The Supplier must immediately notify PWCS of any anticipated delays.

## **DEFINED TERMS**

**Goods** means the goods described in the Purchase Order ("PO"), including any part(s) of them.

**Force Majeure Event** means an event beyond the control of a party which causes delay in the performance of that party's obligations under the Contract and which cannot be prevented or remedied by that party's exercise of a high standard of care and diligence, and includes without limitation any public health order made in connection with the COVID 19 pandemic.

**Legal Requirements** means binding legal requirements such as acts (including but not limited to *Work Health and Safety Act 2011* (NSW), the *Competition and Consumer Act 2010* (Cth), the *Fair Trading Act 1984* (NSW)), regulations, by-laws, orders, local laws, statute, and mandatory codes, decisions or directions of any competent authority, government department, regulatory body, minister or agency.

**Relationship Agreement** means an existing standing offer, preferred supplier, sole supplier or similar agreement between the Supplier and Port Waratah Coal Services Ltd ABN 99 001 363 828 (PWCS).

**Services** means the services described in the PO, including any part(s) of them.

**Supplier** means the individual(s) or entity identified in the PO as the supplier.