

# Liebherr-Australia Pty Ltd Component Sale Terms and Conditions

## 1 General

1.1 Liebherr-Australia Pty Ltd ACN 007 970 452 ("**Contractor**") agrees to sell, and the purchaser agrees to buy the Goods ("**Purchaser**") on and subject to the express terms of this Contract; and to the fullest extent not prohibited by law, no other terms including terms implied by law form part of this Contract, unless agreed and accepted in writing by the duly authorised representative of the Contractor.

1.2 In this Contract:

**"Authorisation"** includes but is not limited to application for import licence, performance of transport, performance of services, labour, temporary import licence for tools or other equipment of the Contractor necessary to perform the Contract or part of the Contract;

**"Business Day"** means any day that is not a Saturday or Sunday or a public holiday in South Australia;

**"Contract"** means the contract for the sale and purchase of the Goods between the Contractor as seller and Purchaser as purchaser comprising:

- (a) these express terms;
- (b) the Contractor's quotation for the Goods accepted by the Purchaser ("**Quotation**");
- (c) the Contractor's machine order confirmation or acknowledgement (if any) to the Purchaser for the Goods ("**Acknowledgement**");
- (d) a variation to the Contract agreed in writing by the parties; and
- (e) any other document expressly referred to by the Contractor as part of the contract for the sale and purchase of the Goods.

**"Event of Default"** means any event referred to in clause 14.1(a) to (e) both inclusive;

**"Force Majeure Event"** means any circumstances beyond the reasonable control of the parties including but not limited to:

- (a) acts of god, earthquake, tempest, unusual adverse climatic conditions;
- (b) labour conflicts or industrial disputes;
- (c) fires and explosions;
- (d) action or failure to act of public services or government authorities;
- (e) acts of war, sabotage, embargoes, insurrection, riots, breach of peace;
- (f) transportation interruptions or delays beyond the Contractors responsibility; or
- (g) general shortage of materials;

**"Goods"** means the goods as described in the Quotation;

**"Insolvent Event"** in relation to the Purchaser means:

- (a) an administrator or controller (each within the meaning of section 9 of the Corporations Act 2001 (Cth) or in the case of New Zealand, the equivalent positions or capacities) is appointed over the Purchaser or any of its assets;
- (b) an application for a winding up order is made against the Purchaser and is not dismissed or withdrawn with fourteen (14) days of lodgement;
- (c) a winding up order is made or a winding up resolution is passed in relation to the Purchaser; or
- (d) the Purchaser enters into an arrangement with its creditors;

**"Modern Slavery"** has the meaning given to that term under the Modern Slavery Law;

**"Modern Slavery Law"** means the Modern Slavery Act 2018 (Cth) and any other equivalent laws of any state/territory; and

**"Small Business Contract"** means a small business within the meaning of section 23(4) of the *Australian Consumer Law*

## 2 Sale and Purchase

- 2.1 The Goods are sold and supplied by the Contractor to the Purchaser and the Purchaser purchases the Goods on and subject to the terms of the Contract including the specifications set out or referred to in the Contract. The Purchaser agrees that it has satisfied itself as to the suitability of the Goods for the Purchaser's intended application and has not relied on any statement or representation by Contractor concerning the scope of supply, performance or characteristics of the Goods unless expressly incorporated in the Contract.
- 2.2 The Contractor reserves the right to modify or change the design of the Goods prior to delivery of the Goods without notifying any party and without obligation in regard to modification of other Goods of the same model.
- 2.3 The Goods are built according to the laws, codes, rules and standards applicable in the country of their manufacture.

## 3 Price and Payment

- 3.1 The Goods are sold and the Purchaser buys the Goods for the purchase price ("**Purchase Price**") payable by the Purchaser to the Contractor in accordance with the Contract.
- 3.2 The Purchaser must pay the Contractor a non-refundable security deposit equal to ten percent (10%) of the Purchase Price promptly after the parties have signed the Contract ("**Security Deposit**").
- 3.3 The Purchase Price shall be paid, unless otherwise agreed in writing between the parties, in the following instalments:
  - (a) the Purchaser must pay the Contractor a progress payment equal to eighty percent (80%) of the Purchase Price promptly after the Contractor notifies the Purchaser that the Goods are:
    - (i) ready for and as a condition precedent to export from the country of manufacture to Australia or New Zealand as the case may be; or
    - (ii) if the Goods are already in Australia or New Zealand as the case may be - ready for and as a condition precedent to delivery to the Purchaser,whichever occurs first; and
  - (b) the Purchaser must pay the Contractor the balance of the Purchase Price promptly after the Contractor notifies the Purchaser that the Goods have been delivered and commissioned by the Contractor for the Purchaser; and for this purpose, the Contractor shall apply the Security Deposit against the equivalent portion of the balance of the Purchase Price (unless the Security Deposit has been forfeited earlier) and the Purchaser shall pay the remaining balance.
- 3.4 If the Purchase Price or any part for the Goods is "subject to exchange rate variation", then the Purchase Price may differ from the price contained in the Quotation or Acknowledgement and any exchange rate variation either favourable or unfavourable is to the Purchaser's account.
- 3.5 Where the Purchase Price or portion of the Purchase Price is quoted or agreed in a currency other than Australian or New Zealand dollars ("**Foreign Currency**"), the Purchaser shall pay that amount in that Foreign Currency; and if applicable, the balance of the Purchase Price not agreed in the Foreign Currency shall be paid in Australian or New Zealand dollars as the case may be.
- 3.6 Except as specifically provided elsewhere in the Contract, any government fees, duty or tax on any payment by the Purchaser to the Contractor for or in connection with the Goods or on or in connection with the equipment, property or activities of the Contractor, its sub-contractors or any of their respective employees in relation the Contract levied outside the country of the Contractor is not included in the Purchase Price and shall be paid to the Purchaser in addition to the Purchase Price.
- 3.7 In addition to the Purchase Price the Purchaser shall pay to the Contractor at the same time as payment of the instalment of the Purchase Price referred to in clause 3.3(a) an amount equal to any Goods and Services Tax ("GST") or similar sales taxes payable by Contractor on or in relation to the sale and purchase of the Goods as notified by the Contractor to the Purchaser ("**GST Amount**"); but in relation to export of the Goods from the place of incorporation or registration (as the case may be) of the Contractor where the delivery point for the Goods is outside that place, the Purchaser shall pay to the Contractor in addition to the Purchase Price, the GST Amount unless satisfactory proof of export of the Goods to the delivery point is provided to Contractor within sixty (60) days in the case of Australia or twenty-eight (28) days in the case of New Zealand of delivery of the Goods by the Contractor.
- 3.8 Any GST Amount payable by Purchaser on portion of the Purchase Price paid or payable by Purchaser in a Foreign Currency shall be paid by the Purchaser to the Contractor in Australian dollars at the exchange rate for that Foreign Currency quoted to Contractor by its bankers around 10:00am Adelaide time on the day of payment of that GST Amount.

- 3.9 If any law or regulation comes into force on or after the date of the Contract which increases or reduces the cost to the Contractor of performing the Contract ("**Cost Adjustment**"), the Contractor may elect to effect the Cost Adjustment as an increase or decrease to the Purchase Price.
- 3.10 Time is of the essence for payment of the Purchase Price and for each instalment thereof and the GST Amount.
- 3.11 Without limiting the Contractor's other rights under this Agreement or at law, if any moneys payable by the Purchaser to the Contractor under the Contract are not paid by the due date for payment:
- (a) the Contractor may impose, and the Purchaser shall pay a late payment interest of i) ten percent (10%) per annum where these terms are not a Small Business Contract; or ii) two (2%) per annum above the prevailing official cash rate as determined by the Reserve Bank of Australia in all other cases on the overdue moneys up to the date of payment; or
  - (b) the Contractor may terminate this Contract wholly or partly in relation to the Goods.
- 3.12 The Contractor will be entitled to list the Purchasers' payment default(s) with the Credit Reference Association of Australia or other relevant credit reference organisations, which the Purchaser acknowledges may affect its credit rating.

#### **4 Purchaser's General Obligations**

- 4.1 The Purchaser shall provide or procure to be provided to the Contractor in a timely fashion all Purchaser and third-party approval, instruction, material, access to site or other thing which may be required by the Contractor for or in relation to the performance of any of the Contractor's obligations under the Contract and which is not expressly stated to be the Contractor's responsibility.
- 4.2 Unless otherwise agreed in writing as part of the Contract, any Authorisation required by any authority in the country of delivery, commissioning or use of the Goods to allow or in connection with allowing the Contractor to perform any of its obligations under this Contract shall be obtained by the Purchaser in a timely fashion and at no cost to the Contractor including, but not limited to, application for import licence, performance of transport, performance of services, labour, temporary import licence for tools or other equipment of the Contractor.

#### **5 Delivery, Acceptance and Transfer of Title and Risk**

- 5.1 All risks of loss or damage to the Goods shall pass to the Purchaser upon delivery of the Goods, unless otherwise provided in the Contract.
- 5.2 Delivery terms shall be interpreted in accordance with INCOTERMS 2000.
- 5.3 All information in respect of delivery ex-factory, shipping, transportation and commissioning are made in good faith, but no guarantee or other assurance explicit or implied is given.
- 5.4 The Contractor will deliver the Goods to the Purchaser and the Purchaser will accept the delivery of the Goods:
- (a) at a place agreed in the Contract; and
  - (b) in the absence of express agreement, at the Contractor's place of business nominated by the Contractor.
- 5.5 The Contractor may give prior written notice to the Purchaser of the date of delivery of the Goods.
- 5.6 The Purchaser shall provide to the Contractor upon request evidence that the Purchaser has insured the Goods against all insurable risks as requested by the Contractor.
- 5.7 Notwithstanding delivery of the Goods to the Purchaser, property in and title to the Goods shall pass to the Purchaser when the Purchaser pays the Purchase Price in full to the Contractor in accordance with the Contract.
- 5.8 Where the Purchaser is not a Small Business Contract, then upon the occurrence of an Event of Default, the Contractor may, for the purposes of any security interest arising or created in the Goods under or in relation to the Contract granted by the Purchaser in favour of the Contractor by operation of the PPSA, repossess and sell the Goods (and enter the Purchaser's premises for the purpose of doing so) and shall be entitled to exercise and enforce all rights granted by the PPSA in relation to such security interest in favour of the Contractor as the secured party.
- 5.9 Whilst the Goods are in the possession of the Purchaser and property and title thereto have not passed to the Purchaser under the Contract:

- (a) the Purchaser shall clearly identify the Goods as belonging to the Contractor; and
  - (b) the Purchaser must only use the Goods for the use intended by the manufacturer thereof and in accordance with the manufacturer's recommendations and directions; the Purchaser cannot modify, sell or otherwise remove, dispose or grant to a third party any interest (including any security interest) in the Goods and shall maintain the Goods in good condition and allow the Contractor unrestricted access to them for the purposes of inspection, testing, protection or removal.
- 5.10 Where the Purchaser is not a Small Business Contract, and if an Event of Default occurs before title to and property in the Goods passes to the Purchaser the occurrence of such Event of Default constitutes a repudiation by the Purchaser of the Contract whereupon the Contractor may, in addition to any other rights and remedies the Contractor may have at law or under the Contract:
- (a) terminate the Contract by giving the Purchaser written notice to that effect whereupon the Purchaser shall return the Goods to the Contractor forthwith; and
  - (b) enter and the Purchaser consents to the Contractor or its agent entering any land or building owned, occupied, or used by the Purchaser, to search for and re-take possession of the Goods.
- 5.11 Property in and title to the Goods shall pass to the Purchaser when the Purchaser pays all amounts payable by the Purchaser to the Contractor in relation to the Goods.
- 5.12 If the Contract is governed by the law of:
- (a) New Zealand:
    - (i) PPSA refers to the Personal Property Securities Act 1999 (NZ);
    - (ii) the Purchaser agrees that sections 114(1)(a), 117(1)(c), 133 and 134 PPSA shall not apply on the enforcement by the Contractor of any security interest created or provided for by these Contract; and
    - (iii) waives any rights it may have under sections 116, 119, 120(2), 121, 125, 129 and 131 of the PPSA on such enforcement; or
  - (b) South Australia:
    - (i) PPSA refers to the Personal Property Securities Act 2009 (Cth);
    - (ii) the parties contract out of all the provisions mentioned in section 115(1) PPSA (except sections 123 and 128) and section 116(2) PPSA; and
    - (iii) Purchaser hereby waives its right to receive from Contractor a notice of a verification statement referred to in section 157(1) PPSA.
- 5.13 The Purchaser will not change its name, company number or business number without giving the Contractor at least ten (10) days' prior notice of its proposed new name or number.
- 5.14 Unless this Contract states otherwise, the Purchaser enters into the Contract in its own right and not as trustee of any trust; if Purchaser enters into the Contract as trustee of a trust, the Purchaser shall disclose forthwith to the Contractor that fact and the Purchaser's Australian or New Zealand (as the case may be) Business Number of the trust and any security interest created by or arising under the Contract in or over the Goods shall apply to the Goods as property of that trust.

## 6 Storage

- 6.1 If the Purchaser does not take delivery of the Goods as contemplated by the Contract, the Contractor shall be entitled but without prejudice to the Contractor's rights at law in such circumstances:
- (a) to store the Goods at a place of business of the Contractor; or
  - (b) to put the Goods into storage with a third party at the expense of the Purchaser and the Purchaser appoints the Contractor as the agent of the Purchaser to contract for and on behalf of the Purchaser for the storage of the Goods and the Purchaser shall confirm everything done by the Contractor for that purpose. If the Contractor places the goods into storage with a third party, the Purchaser shall pay to the Contractor all storage charges upon presentation of a warehouse receipt.
- 6.2 The Contractor shall give written notice to the Purchaser of the commencement of storage and the rates of storage, and the Purchaser shall pay the storage charges.

- 6.3 Where the Purchaser is not a Small Business Contract, and if the Contractor stores the Goods at a place of business of the Contractor, the Purchaser shall pay to the Contractor storage charges calculated from day to day at a rate specified by the Contractor.
- 6.4 The Contractor may sue the Purchaser for and recover storage charges accrued from time to time as a debt due by the Purchaser to the Contractor whether the charges are for storage at the Contractor's premises (notwithstanding the lien conferred by these terms and conditions or by legislation) or in respect of storage by a third party whether or not such charges have been paid by the Contractor to the third party.

## **7 Variations**

- 7.1 No variation to the Contract can be made unless agreed to in writing by the Contractor and the Purchaser.
- 7.2 If any variation increases or reduces the cost to the Contractor of performing the Contract, then the Purchase Price shall be adjusted accordingly.
- 7.3 The time for performance by the Contractor of any of its obligations under the Contract shall be extended in order to take into account the effect of any variation on the Contractor.

## **8 Warranty**

- 8.1 Where the Purchaser is not a Small Business Contract, then to the fullest extent permitted by law, all terms implied by law as to the fitness for purpose, merchantability, defects and absence of defects, performance, quality and compliance with applicable standards, codes and laws of the Goods are hereby excluded.
- 8.2 New Goods are sold subject to the Contractor's warranty certificate(s), the terms of which form part of this Contract.
- 8.3 Where the Purchaser is not a Small Business Contract, then in relation to used or second-hand Goods, the Goods are sold on an "as is, where is" basis with no warranty given whether express or implied as to fitness for purpose, merchantability, defects and absence of defects, performance, quality and compliance with applicable standards, codes and laws.
- 8.4 If the Contract is governed by the law of New Zealand, the Contractor and Purchaser agree that the provisions of the Consumer Guarantees Act 1993 (NZ) does not apply to the sale of Goods pursuant to this Contract; and the Purchaser certifies that it is acquiring the Goods for the purposes of:
- (a) a business; or
  - (b) resupplying the Goods in trade; or
  - (c) consuming the Goods in the course of production or manufacture.
- 8.5 The Purchaser covenants and agrees that it selected the fire suppression system installed in the Goods without relying on any advice or recommendation of the Contractor and requested the Contractor to install the fire suppression system.
- 8.6 Where the Purchaser is not a Small Business Contract, then the Contractor makes no warranty either express or implied including any warranty of merchantability or fitness for a particular purpose with respect to the fire suppression system. The only warranty applicable to the fire suppression system is the limited warranty separately furnished by the manufacturer of the fire suppression system, a copy of which will be provided to the Purchaser by the Contractor and the terms of which are incorporated herein by reference.
- 8.7 Where the Purchaser is not a Small Business Contract, then at all times on and from the delivery of the Goods, it is solely the Purchaser's responsibility to safety check the Goods prior to operation of the Goods.

## **9 Drawings, Descriptive Documents and Data Collection**

- 9.1 The Contractor retains ownership of its studies, drawings, software models and any documents issued and communicated to Purchaser for or in connection with the Goods; such information and documents if issued to the Purchaser may be used only by the Purchaser and exclusively for the operation, maintenance and inspection of the Goods by the Purchaser.
- 9.2 Except to the extent that such documents and information are in the public domain through no breach or default by the Purchaser, these documents and information shall be treated as confidential by the Purchaser and shall not be distributed, published or generally communicated to any third party by the Purchaser without prior express written permission of the Contractor.

- 9.3 The Contractor's Goods may incorporate both hardware and software that records, analyses, and transmits Goods related data that monitors diagnostic information regarding the Goods and use the use and activity for which the Goods are used ("**Machine Data**"). The Contractor may collect and utilise the Machine Data:
- (a) to provide services to the Purchaser;
  - (b) to check and support the Goods;
  - (c) to identify or evaluate the use of the Goods; or
  - (d) to support the Contractor's product improvement and development.

The Purchaser expressly agrees that the Contractor may store the Machine Data and manipulate or aggregate the Machine Data as the Contractor elects. The Contractor will not disclose the Machine Data to third parties in a manner that would allow a third party to identify a customer from whose Goods the Machine Data has been obtained. If, in the course of collecting the Machine Data, the Contractor becomes aware that the Goods may have been used contrary to applicable manufacturer's specifications and/or applicable laws, the Contractor may, but shall not be under any obligation, to inform the Purchaser of such use. The Contractor does not warrant the security of the Machine Data against interception by unauthorised third parties as a result of transmission.

- 9.4 Clause 9.3 shall apply to other members of the Contractor's group and authorised third parties, in and insofar as this is necessary to facilitate the collection, storage and use of the Machine Data for the purposes of the Contractor.

## 10 Intellectual Property Right Infringement

- 10.1 Throughout the Purchaser's use or ownership of the Goods, the Purchaser shall promptly notify the Contractor if the Purchaser becomes aware of any actual or potential third party claim against it or the Contractor concerning alleged infringement of any third party patent, design, copyright, trademark or confidential information in relation to the Goods ("**Claim**"); and in the event of any such Claim, the Contractor may perform one of the following actions at its own expense and option:
- (a) modify or replace any alleged infringing part of the Goods to avoid any future infringement;
  - (b) secure for the benefit of the Contractor and the Purchaser irrevocable and fully paid licenses at the Contractor's cost for the alleged infringing part of the Goods without the need to modify or replace the alleged infringing part.
- 10.2 Where the Purchaser is not a Small Business Contract, the Contractor shall have no liability or obligation to the Purchaser to the extent that any Claim of alleged infringement is based upon any use of the Goods in connection with or in combination with any goods, equipment, devices, or software not supplied by the Contractor, or any improper handling, storage, operation, or use of the Goods by the Purchaser or any third party.
- 10.3 Where the Purchaser is not a Small Business Contract, then the foregoing constitutes the Purchaser's exclusive and entire remedy against the Contractor with respect to the infringement and alleged infringement of any third party patents, copyrights, design, trademarks or other intellectual property rights in or over the Goods.
- 10.4 Where the Purchaser is not a Small Business Contract, then the Purchaser shall allow the Contractor or a member of the Contractor's corporate group nominated by the Contractor ("**Contractor Group**") to take over the defence of any Claim, in which event, the Contractor Group shall have the sole and exclusive right to control and conduct any associated negotiations, litigation, arbitration or settlement in relation to the Claim, and the Purchaser shall provide the Contractor Group with all reasonable assistance in defence of the Claim.
- 10.5 Where the Purchaser is not a Small Business Contract, if the Contractor Group elects not to take over the defence of any Claim, all reasonable costs, expenses and fees of any kind (including reasonable attorneys' fees) incurred by the Purchaser in defending the Claim, shall be reimbursed by the Contractor, but the Purchaser shall not settle the Claim or make any agreement or compromise with respect thereto without the prior written consent of the Contractor Group, which consent shall not be unreasonably withheld; and reimbursement by the Contractor of such defence costs are subject to and form part of the maximum liability amount under this Contract.

## 11 Compliance with Laws

- 11.1 The Purchaser warrants and represents that the Purchaser, its officers, employees, contract employees, directors and agents shall comply with all applicable laws, codes and regulations ("**Applicable Laws**").

- 11.2 Where the Purchaser is not a Small Business Contract, and without limiting any other indemnity provision set forth herein, the Purchaser shall indemnify and hold the Contractor harmless from and against all costs, loss, damage and expense, including reasonable attorney's fees, incurred by the Contractor as a result of or arising out of the breach of the above warranty.
- 11.3 Where the Purchaser is not a Small Business Contract, the Purchaser shall maintain appropriate records to substantiate its compliance with the above and provide such evidence of compliance to the Contractor as the latter may reasonably request. The Contractor may also designate independent auditors to audit the book and records of the Purchaser on a confidential basis to clear and confirm specific events of suspicion.

## **12 Limitation of Liability**

- 12.1 Where the Purchaser is not a Small Business Contract, then notwithstanding anything to the contrary in this Contract to the fullest extent permitted by law each of Purchaser and Contractor (for themselves as well as on behalf of any members of their respective company group) mutually waive against each other and release each other from all the following claims and liabilities for damages or losses arising out of or connected with the Contract and the Goods whether such claims are prospective or actual, and whether made in connection with an indemnity, a breach of the Contract or otherwise namely claims and liabilities for:
- (a) loss of production;
  - (b) loss of economic advantage or benefit;
  - (c) loss of business opportunity;
  - (d) loss of revenue (except any revenue comprising all or part of the Purchase Price or other amount expressly payable by Purchaser under the Contract or that but for a breach by Purchaser or termination of the Contract arising out of such breach would have been payable by the Purchaser to the Contractor under the Contract);
  - (e) loss of expected savings;
  - (f) loss of business (including loss or reduction of goodwill) and damage to reputation;
  - (g) loss of profits (except any profits comprising all or part of the Purchase Price or other amount expressly payable by Purchaser under the Contract or that but for a breach by Purchaser or termination of the Contract arising out of such breach would have been payable by Purchaser to Contractor under the Contract) whether direct, indirect, or consequential; or
  - (h) punitive and exemplary damages.
- 12.2 Where the Purchaser is not a Small Business Contract, then notwithstanding any other provision of this Contract and to the fullest extent permitted by law, the Contractor shall not be liable to the Purchaser and the Purchaser shall not claim, demand or litigate any cause of action against the Contractor under or in connection with this Contract or the Goods whether in contract, tort (including negligence), under statute or otherwise in respect of any single claim or claims in aggregate for any amount including interest and legal costs in excess of the Purchase Price.

## **13 Force Majeure**

- 13.1 If performance of any obligation under the Contract (other than an obligation of the Purchaser to make payment) is prevented, restricted or delayed by any Force Majeure Event, the party whose performance is affected shall be excused from and shall not be liable for failure in performance to the extent of that prevention, restriction or delay and the time for performance shall be extended accordingly.
- 13.2 In case one party considers that an event shall be considered as a Force Majeure Event may affect the provision of Goods, it shall inform the other party within a period of ten (10) Business Days counted from the date that the party was informed of or became aware of the Force Majeure Event.
- 13.3 Any reasonable additional costs due to a Force Majeure Event incurred by the Contractor to continue to perform its obligations under the Contract so far as reasonably practicable shall be certified and added to the Purchase Price.
- 13.4 If performance is delayed for more than four (4) months by any cause and the parties have not agreed upon a revised basis for continuing the work at the end of the delay, then either party may, after that period and while the cause of the non-performance still exists, terminate the Contract by giving to the other party not less than thirty (30) days' written notice.



## 14 Termination by the Contractor

- 14.1 Where the Purchaser is not a Small Business Contract, and without prejudice to any other right of termination of this Contract available to the Contractor under this Contract or at law, the Contractor may, by giving written notice to the Purchaser be entitled to suspend and/or terminate the Contract when the Purchaser is or has:
- (a) failed to pay the Contractor any amount under the Contract when due;
  - (b) breaches materially any of its other obligations under the Contract;
  - (c) suffers an Insolvent Event;
  - (d) is insolvent or is deemed to be insolvent within the meaning of section 9 of the Corporations Act 2001 (Cth);
  - (e) fails to comply with its obligations under clause 11.
- 14.2 Where the Purchaser is not a Small Business Contract, the Contractor shall be deemed to have given and the Purchaser shall be deemed to have received notice of termination if the Contractor sends written notice of termination to the Purchaser at the physical address or email address of the Purchaser as provided to the Contractor by the Purchaser.
- 14.3 Where the Purchaser is not a Small Business Contract, and in case of termination by the Contractor under clauses 14.1 and 13.4 or any other provision of the Contract, the Security Deposit shall be forfeited to the Contractor and the Purchaser shall pay to the Contractor and following sum(s):
- (a) the outstanding balance of the Purchase Price of the Goods which have been delivered and of those Goods which are then capable of being delivered;
  - (b) the costs incurred by the Contractor up to the date of notice of termination in performing work on Goods which are not then in a deliverable state plus a reasonable margin thereon which in the absence of agreement by the parties shall be ten percent (10%); and
  - (c) the costs incurred by the Contractor after the date of notice of termination of the Contract and in connection with termination including but not limited to cost in respect of the retrenchment of any employees specifically employed for the Contract, shutdown and demobilisation plus a reasonable margin thereon which in the absence of agreement by the parties shall be ten percent (10%); and the parties agree that the costs referred to in this clause include:
    - (i) if the Goods are prior to ex-factory shipment, then costs associated with preparation for long term storage, storage costs, handling costs and interest.
    - (ii) if the Goods are prior to shipment from the country of origin, then all costs specified in clause 14.3(c)(i) plus inland freight from the factory to the port, preparation for long term storage at the departure port, port storage costs and interest.
    - (iii) if the Goods are prior to clearance by customs with the shipment placed on bond storage, then all costs specified in clauses 14.3(c)(i) and (ii) plus, inland freight, wharf and port charges at departure and arrival ports, preparation for long term storage at the arrival port, local freight and long-term storage costs, customs duty, bond storage cost and interest holding costs.
- 14.4 Where the Purchaser is not a Small Business Contract, then for the avoidance of doubt, the Contractor must use reasonable endeavours to mitigate losses and see the Goods to a third party.
- 14.5 Where the Purchaser is not a Small Business Contract, then on termination of this Contract by the Contractor:
- (a) the Contractor shall be entitled to retain absolutely all moneys paid by the Purchaser for or towards the Purchase Price or otherwise under this Contract;
  - (b) remove immediately all of the Contractor's equipment from the place where they are located at the time of such termination and the Purchaser shall take all steps necessary to facilitate such removal;
  - (c) each party shall be released from further performance of their respective obligations hereunder (except any obligation expressed or intended to survive termination including indemnity given by Purchaser to the Contractor) but without prejudice to any rights or causes of action at law or otherwise arising from termination by the Contractor or breach or non-performance by the Purchaser of this Contract occurring prior to termination of this Contract; and



- (d) the Contractor is free to deal with the Goods as it sees fit.

## 15 Cross Default

- 15.1 Where the Purchaser is not a Small Business Contract, any Event of Default or other financial indebtedness by the Purchaser, whether under this Agreement or another agreement with the Contractor becomes, at the sole discretion of the Contractor, immediately due and payable, or becomes capable of being declared immediately due and payable by the Contractor, before the scheduled date for payment.
- 15.2 Where the Purchaser is not a Small Business Contract, then the exercise of this clause 15 by the Contractor does not, in any way, interfere with the Contractor's right to exercise any other rights following an Event of Default by the Purchaser under this Agreement.

## 16 Modern Slavery

- 16.1 Neither must:
- (a) not itself directly engage in Modern Slavery, or do anything that would be an offence under the Modern Slavery Law;
  - (b) upon request by a party, provide that party with reasonable access to its records and premises for the purposes of the Modern Slavery Law;
  - (c) report to the other party any actual or suspected instances of Modern Slavery in its supply chain; and
  - (c) cooperate with the other party (to the extent reasonably required by law) to facilitate training of its employees, suppliers and sub-contractors on the Modern Slavery Law.

## 17 Dispute Process

- 17.1 Each party has a general obligation to co-operate in good faith.
- 17.2 A party claiming that a dispute has arisen must notify the other party of the dispute and provide details of the dispute ("**Dispute Notice**").
- 17.3 Within seven (7) days (or longer if agreed between the parties) after receipt by the other party of a Dispute Notice, the dispute must be referred to the senior management of the parties for resolution.
- 17.4 If senior management does not resolve the dispute in accordance with clause 17.3 within twenty-one (21) days after receipt by the other party of the Dispute Notice, the parties must refer the dispute for mediation by a mediator appointed by the parties. If the parties are unable to agree on a mediator within twenty-eight (28) days after receipt by the other party of the Dispute Notice, the mediator will be a person appointed by the then President of the South Australian Law Society.
- 17.5 If the dispute is not resolved under clause 17.4 within thirty (30) days (or any longer period agreed between the parties) after a mediator is appointed, either party may initiate proceedings in a court. Until such time, neither party may initiate court proceedings except for urgent interlocutory applications.
- 17.6 Any information or document disclosed under this clause 17 shall be kept confidential and shall only be used in attempt to resolve the dispute.
- 17.7 Each party shall bear its own costs of complying with this clause 17 and will share equally the costs of the mediation.

## 18 General

- 18.1 The Contract is governed by, and shall be construed in accordance with:
- (a) the law of South Australia for Australian Purchasers and other Purchasers excluding New Zealand; or
  - (b) the law of New Zealand for New Zealand Purchasers.
- 18.2 Any unlawful or voidable provision in this Contract shall be read down so as to be valid and enforceable or, if it cannot be read down, will be severed from this Contract without effecting the validity, legality or enforceability of the remaining provisions, provided the reading down or severing does not materially affect the purpose of or frustrate this Contract.

- 18.3 Where the Purchaser is not a Small Business Contract, then the Purchaser cannot assign in whole or part any of its rights or obligations under this Contract to any person and any attempted assignment or novation in breach of this obligation is void as between the Contractor and the Purchaser.
- 18.4 Where the Purchaser is not a Small Business Contract, then the Contractor may assign or transfer any of its rights or obligations under this Contract. Each assignee or transferee will have the same rights against the Purchaser under this Contract as if named as Contractor. Without limitation to the foregoing, Contractor may at any time without the consent of the Purchaser assign, transfer, mortgage, charge, grant a security interest over, declare a trust in respect of, or in any other way dispose of, all or any part of Contractor's rights (including rights to receive payment of money), interests, benefits, claims or title to the same under or in connection with this Contract in connection with any sale of accounts receivable arising in connection with Equipment purchased by the Purchaser under this Contract to a financier of Contractor's choice. An assignment of rights only by Contractor under this clause does not relieve Contractor from any of its obligations or liabilities arising under this Contract.
- 18.5 The parties shall keep the existence, the subject matter and the terms of this Contract confidential and no announcement or disclosure shall be made as to the existence of this Contract or its subject matter except in such form and manner and at such time as the parties agree (such agreement not to be unreasonably withheld except where it may materially prejudice the performance of this Contract) or as may be required by law or in good faith in implementing the provisions of this Contract.
- 18.6 Where the Purchaser is not a Small Business Contract, it represents and warrants in favour of the Contractor that as at the date of this Contract, it employs 100 or more full-time employees or had AUD10,000,000 or more in turnover for the last income year that ended on or before date of this Contract. In giving this representation and warranty, the Purchaser confirm that it has considered Schedule 2, Part 2-3 of the *Competition and Consumer Act 2010* (Cth).