

Liebherr-Australia Pty Ltd Tower Crane 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 or Services 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 these terms and conditions, written enclosures and the covering letter or letter of offer issued by LAS to the Purchaser in relation to the sale of the Goods or Services. For the avoidance of doubt, the Contract shall not be binding until the Contractor has executed the acceptance of the quotation;

"Delivery Date" means the date for delivery of the Goods or provision of Services set out in the aforesaid covering letter or letter of offer or a later date extended under clause 7 or subsequently agreed by the parties;

"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 Contractor's responsibility; or
- (g) general shortage of materials;

"Goods" or **"Services"** means the goods or services as described in the covering letter or letter of offer;

"Large Business" means a Purchaser which employs more than 100 people or has a turnover for the last income year of more than \$10 million;

"Purchaser" means the purchaser of the Goods or Services under this Contract;

"Purchase Price" means the purchase price for the Goods or Services described in the aforesaid covering letter or letter of offer as varied by or under these terms excluding payment or reimbursement by Purchaser of government fees and taxes under these terms; and

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

2. Goods Specifications

2.1 Goods or Services shall be supplied in accordance with these terms and conditions and the specification set out in the Contract, and the Purchaser is responsible for satisfying itself as to their suitability for the Purchaser's application.

2.2 Where the Purchaser is not a Small Business Contract, the Contractor shall not be bound by any statement concerning the scope of supply, performance or characteristics of Goods or Services unless expressly incorporated in the Contract.

2.3 The Contractor's quotation is to be read in conjunction with any technical specification provided to the Purchaser. However, where the Purchaser is not a Small Business Contract, the Contractor reserves the right to modify or change the design of the Goods without notifying any party and without obligation in regard to modification of other Goods of the same model.

3. Price and Payment

3.1 In consideration of the Contractor delivering the Goods or providing the Services, and subject to clauses 3.2 to 3.4, the Purchaser must pay to the Contractor the whole of the Purchase Price plus any taxes or charges payable.

3.2 For exports from Australia, the Purchaser shall pay to the Contractor the amount of any GST or similar sales taxes at the rate applicable to the Purchase Price unless the Purchaser provides satisfactory proof of export 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.

- 3.3 If any law or regulation comes into force after the date of the Contractor's tender, which increases or reduces the cost of performing the Contract, the Purchase Price shall be adjusted accordingly. All taxes, duties, fiscal obligations and other related costs, which are present or in future in force including any GST are at the Purchaser's account.
- 3.4 If the quotation is "subject to exchange rate variation", then the final Purchase Price may differ from that contained in the quotation. The exchange rate variation, either favourable or unfavourable, is to the Purchaser's account. The Purchaser can request the Contractor to fix the exchange rate at any time after placing the order to pay the foreign currency amount specified in the quotation.
- 3.5 If the applicable payment date and/or payment period is not complied with by the Purchaser, the Contractor shall be authorised to charge and invoice the Purchaser, without the need for any notification to this effect, with an annual finance interest charge of: a) ten percent (10%) per annum where these terms are not a Small Business Contract; or b) two (2%) per annum above the prevailing official cash rate as determined by the Reserve Bank of Australia in all other cases, of the past due balances, together with all other costs (including but not limited to reasonable attorney's fees) incurred by the Contractor as a result of or in relation to the non-compliance of the Purchaser with the payment terms. The annual finance interest charge and related costs referred to in this clause is not in lieu of any other remedy that the Contractor may have against the Purchaser under any other agreement with the Purchaser and/or at law.
- 3.6 Without limiting the Contractor's other rights under this Contract, if any invoice is not paid by the Purchaser by the due date for payment:
- (a) where these terms and conditions are not a Small Business Contract, the Contractor may, in its sole discretion, cancel delivery of the Goods or provision of Services; and
 - (b) the Contractor will be entitled to list the Purchaser's payment default(s) with the Credit Reference Association of Australia or other relevant credit reference organisations, which the Purchaser acknowledges may affect their credit rating.

4. Purchaser's General Obligations

- 4.1 The Purchaser shall provide on time, any approval, instruction, material, access to site or other thing which may be required in relation to the performance of the Contractor's obligations, and which is not expressly stated to be the Contractor's responsibility.
- 4.2 Any Authorisation required by any authority in the country of installation or commissioning to allow the Contractor to perform its obligations under this Contract shall be obtained by the Purchaser prior to the delivery of Goods or provision of Services and at no cost for 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 at the Purchaser's place of business or at some other place specified by the Purchaser. The Contractor shall give written notice to the Purchaser of the date of delivery of the Goods or provision of Services. 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.
- 5.5 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.
- 5.6 The Purchaser grants to the Contractor a charge over the Goods as security for amounts owing by the Purchaser to the Contractor in relation to the Goods.
- 5.7 The Contractor may enforce the charge by repossessing and selling the Goods. For the purpose of enabling the Contractor to repossess the Goods, the servants or agents of the Contractor may enter upon any place where the Goods may be found.
- 5.8 If property and title have passed and the Goods are in the possession of the Contractor, the Contractor shall hold the Goods as bailee for the Purchaser and shall not be liable to the Purchaser for any damage or loss howsoever caused including without limitation damage or loss arising from the negligence of the servants or agents of the Contractor.
- 5.9 While the Goods are in the possession of the Purchaser and property and title have not passed, the Purchaser shall clearly identify the Goods as belonging to the Contractor and the Purchaser may only use the Goods in accordance with the Contractor's directions. The Purchaser must not modify, sell or otherwise remove, dispose or grant to a third party any interest (including any security interest) in the Goods and shall retain the Goods in good condition and allow the Contractor unrestricted access to them for the purposes of inspection, protection or removal.
- 5.10 While the Goods are in the possession of the Purchaser and property and title have not passed, should the Purchaser become bankrupt or insolvent or likely to be bankrupt or insolvent, the Contractor shall be entitled to claim the Goods and have them sold in compliance with the provisions of any applicable laws and regulations to the extent that it is necessary for the Contractor to do so in order to protect its legitimate business interests.
- 5.11 If the Purchaser fails to comply with any term of this Contract or any other agreement between the Contractor and the Purchaser, or if the Purchaser becomes bankrupt or insolvent or likely to become bankrupt or insolvent, the Contractor or the Contractor's agent may, acting reasonably and only to the extent necessary to protect the

Contractor's legitimate business interests, in addition to any other rights and remedies:

- (a) request that the Purchaser return the Goods to the Contractor and the Purchaser shall immediately comply with such request;
- (b) enter any land or building owned, occupied, or used by the Purchaser, to search for and re-take possession of the Goods; and/or
- (c) sell the Goods subject to compliance with applicable laws and regulations.

5.12 Nothing in the Contract shall entitle the Purchaser to return the Goods unless the Contractor has requested that the Goods be returned.

5.13 The Purchaser acknowledges receipt of a copy of the Contract and waives any right it may have to receive from the Contractor, a copy of any financing statement, financing change statement or verification statement that is registered, issued, or received at any time in relation to the Contract.

5.14 The Purchaser will not change its name without giving the Contractor ten (10) days' notice of what its new name will be.

6. Variations

6.1 Unless provided otherwise in the Contract, no variation to the Contract may be made unless agreed in writing by the Contractor and the Purchaser.

6.2 If any variation increases or reduces the cost to the Contractor of performing the Contract, then the Purchase Price shall be adjusted accordingly.

6.3 A variation will not be effective until an agreement on price and delivery is reached between the parties.

7. Quality Assurance and Control of Goods Under Manufacture

7.1 Unless provided otherwise in the Contract, the Contractor's standard quality control procedures shall apply to the Goods or Services delivered pursuant to the Contract.

7.2 All costs for the Purchaser's representative(s) to witness the quality control tests shall be for the Purchaser's account.

8. Warranty

8.1 Where the Purchaser is not a Small Business Contract, the Purchaser unconditionally agrees that, as between the Contractor and the Purchaser, the Goods are purchased in an "as is, where is" condition as at their delivery, and the Contractor neither makes nor gives any warranties, guarantees or representations, expressed or implied, arising by law or otherwise, with respect to the Goods, including but not limited to:

- (a) any implied warranty as to condition, design, merchantability or fitness for use or operation;
- (b) any implied warranty arising from performance, course of dealing or usage of trade;
- (c) any obligation, liability, right, claim or remedy in tort, whether or not arising from the Contractor's negligence, actual or imputed; or

- (d) any obligation, liability, right, claim or remedy for loss of or damage to the Goods, for loss of use, revenue or profit with respect to the Goods, for any liability of the Purchaser to any third party, or for any other direct, incidental or consequential damages,

and all such warranties, guarantees, representations, obligations, liabilities, rights, claims or remedies, express or implied, statutory or otherwise, are expressly excluded to the extent that the Contractor may lawfully do so under applicable law.

8.2 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.

8.3 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.

8.4 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 and Descriptive Documents

9.1 The Contractor shall retain the ownership of its studies, drawings, software models and any documents issued and communicated to Purchaser, or of which the Purchaser may have had knowledge in fulfilment of the Contract. Such information and documents may be used only by the Purchaser and exclusively for execution of the Contract and operation, maintaining, adjusting and repairing the works. These documents and information shall be treated as confidential and shall not be distributed, published or generally communicated to any third party without prior express permission in writing by the Contractor.

9.2 The Contractor shall retain the exclusive ownership of the studies performed by same, or by its representatives or subcontractors, for execution of the order.

10. Intellectual Property Right Infringement

The Contractor shall be liable to the Purchaser for all damages and costs awarded against the Purchaser for the infringement of any intellectual property right granted or registered at the effective date of the Contract in the country of destination of the Goods specified in the Contract (or, if none be specified, in the country of the Contractor) and resulting from the use or sale of the Goods but this liability shall not apply to any infringement which is due to the association or combination of the Goods with any other article, apparatus or device or to any Goods or parts thereof made to designs supplied by the Purchaser. This liability is conditional on the Purchaser giving the Contractor prompt written notice of any claim for infringement and permitting the Contractor (at the Contractor's expense) to conduct on the Purchaser's behalf any litigation or negotiations in respect

thereof. The foregoing states the Contractor's entire liability for intellectual property right infringement.

11. Limitation of Liability

11.1 Where the Purchaser is not a Small Business Contract,, then notwithstanding anything expressed or implied to the contrary in these terms and conditions or elsewhere, neither the Contractor, the Contractor's related body corporates, the Contractor's sub-contractor nor their respective employees or agents shall be liable to the Purchaser or third parties, whether by way of indemnity or by reason of any breach of Contract, tort (including but not limited to the negligence of the Contractor, the Contractor's related body corporates or its sub-contractors or their respective officers, employees or agents), breach of statutory duty or otherwise (and the Purchaser hereby holds harmless and indemnifies the Contractor, its sub-contractors and their respective employees and agents) for:

- (a) any loss of profit, loss of use, loss of production, loss of contracts, increase in operating costs or other financial or economic loss or any indirect or consequential loss or damage whatsoever that may be suffered by the Purchaser or the Contractor or any other person other than for eventual liquidated damages when stated in the Contract.
- (b) damage to or rectification of defects in the Goods after the end of the warranty specified in Clause 8.
- (c) any loss of or damage to property of or used by the Purchaser.

11.2 Where the Purchaser is a Large Business, the total liability of the Contractor on all claims of any kind for any loss or damage resulting from its performance or lack of performance under the Contract shall not in any event exceed the amount equal to the Purchase Price, or two million dollars (AUD\$2,000,000), whichever is the lower.

11.3 Where the Purchaser is not a Small Business Contract, the Purchaser shall indemnify the Contractor against any and all claims in respect of or consequent to:

- (a) pollution or release of substances capable of causing harm to living organisms or interference with ecological systems arising from the Goods or Services, except where caused by the negligence of the Contractor;
- (b) any loss, damage or liabilities excluded under clause 11.1; or
- (c) any third-party loss or damage caused by or arising from this Contract, any performance or breach thereof by the Contractor, any conduct including omissions of the Contractor in relation to this Contract, the sale or supply of the Goods or Services to the Purchaser or the use of the Goods.

11.4 For the purpose of this clause, the Contractor is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons, firms or companies who are or may from time to time become sub-contractors, employees or agents as aforesaid and to such extent all such persons, firms or companies shall be, or be deemed to be parties to the Contract.

12. Force Majeure

12.1 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.

12.2 In case one party considers that an event shall be considered as a Force Majeure Event may affect the provision of Goods or Services, 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.

12.3 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.

12.4 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, in which event the provisions of the termination Clauses 13.2 or 14.2 (as the case may be) shall apply.

13. Termination by the Purchaser

13.1 Where the Purchaser is not a Small Business Contract, the Purchaser may, by giving not less than fifteen (15) days' written notice, be entitled to terminate the Contract for Contractor's default in the following cases:

- (a) the Contractor repeatedly neglecting to perform its material obligations under the contract and failing to comply within a reasonable time with the Purchaser's notice to make good such neglect,
- (b) the Contractor becoming bankrupt or insolvent,
- (c) the Contractor assigning the Contract or sub-contracting the whole of the works without the Purchaser's consent.

13.2 In case of termination by the Purchaser under clause 13.1 above, the Purchaser shall pay to the Contractor the outstanding balance of the contract value of Goods and Services which have been received by the Purchaser from the Contractor up to the termination date (if any). Such payment shall be made within thirty (30) days following the termination notice.

14. Termination by the Contractor

14.1 Where the Purchaser is not a Small Business Contract, 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 not less than fifteen (15) days' 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 as payments become due and payable;
 - (b) failed to accept the Goods except for non-compliance with the description or specifications of the Goods and details of such non-compliance are given by the Purchaser to the Contractor at tendered delivery;
 - (c) failed to meet its obligations under the Contract;
 - (d) become bankrupt or insolvent;
 - (e) a receiver is appointed or entered into voluntary administration;
 - (f) failed to obtain unconditional finance approval for the purchase where such approval is required;
 - (g) assigned or transferred all or part of its rights or obligations under the Contract without the Contractor's prior written consent; or
 - (h) in the reasonable opinion of the Contractor, the Purchaser is unable to pay amounts due as and when they become payable.
- 14.2 Where the Purchaser is not a Small Business Contract, the Contractor shall be deemed to have given and 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 In case of termination by the Contractor under clause 14.1, the Purchaser shall pay to the Contractor an amount calculated as follows:
- (a) the outstanding balance of the Contract value for the Goods and Services which have been delivered or performed and of those Goods which are then capable of being delivered; and
 - (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 to be agreed between the parties which shall not be less than ten (10%) percent.
- 14.4 The costs incurred by the Contractor after the date of notice of termination in performing work 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 to be agreed between the parties which shall not be less than ten (10%) percent.
- 14.5 The parties agree that the costs will include but not be limited to:
- (a) if the Goods are prior to ex-factory shipment, then costs associated with preparation for long term storage, storage costs, handling costs and interest.
 - (b) if the Goods are prior to shipment from the country of origin, then all costs specified in clause 14.5(a) plus inland freight from the factory to the port, preparation for long term storage at the departure port, port storage costs and interest.
 - (c) if the Goods are prior to clearance by customs with the shipment placed on bond storage, then all costs specified in clauses 14.5(a) and (b) 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.
- 14.6 For the avoidance of doubt, the Contractor must use reasonable endeavours to mitigate losses and see the Goods to a third party.
- 14.7 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) 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
 - (c) the Contractor is free to deal with the Goods as it sees fit.
- ## 15. General Clauses Concerning Termination
- 15.1 Termination of the contract in whole or in part however occasioned shall not affect or prejudice the provisions of clauses 5, 8, 11, 13, 14 and 15 herein.
- 15.2 In case of termination, the Contractor shall be entitled to 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.
- ## 16. Commercial in Confidence
- This Contract is commercial in confidence and is not to be copied, disclosed or transmitted by the Purchaser in whole or in part to a third-party without the prior written permission of the Contractor.
- ## 17. Quotations
- 17.1 Quotations for Goods and Services are valid for thirty (30) days from date of quotation, except if otherwise agreed in writing.
- 17.2 Quotations are subject to prior sales by the Contractor until written order confirmation by the Contractor is issued.
- 17.3 Upon receipt of a purchase order from the Purchaser, the Contractor will issue a detailed order confirmation which, subject to your agreement will represent a binding contract.
- ## 18. Dispute Process
- 18.1 Each party has a general obligation to co-operate in good faith.

- 18.2 A party claiming that a dispute has arisen must notify the other party of the dispute and provide details of the dispute (“**Dispute Notice**”).
- 18.3 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.
- 18.4 If senior management does not resolve the dispute in accordance with clause 18.3 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.
- 18.5 If the dispute is not resolved under clause 18.4 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.
- 18.6 Any information or document disclosed under this clause 18 shall be kept confidential and shall only be used in attempt to resolve the dispute.
- 18.7 Each party shall bear its own costs of complying with this clause 18 and will share equally the costs of the mediation.

19. General

- 19.1 This Contract represents the entire agreement between the parties in relation to the Goods and Services and there are no other representations expressed or implied. The Contract supersedes any previous agreement including both written and verbal agreements in relation to the subject matter hereof.
- 19.2 South Australian law governs these terms, and the Customer submits to the non-exclusive jurisdiction of the courts of that State.
- 19.3 In the case of any conflict or inconsistency between these terms and the aforesaid covering letter or letter of offer, these terms shall prevail to that extent.
- 19.4 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.
- 19.5 The warranties, covenants, undertakings, agreements or other obligations of a party shall not merge or be extinguished on any completion or settlement in terms of this Contract but shall remain in full force and effect.
- 19.6 Where the Purchaser is not a Small Business Contract, 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 Goods 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. The provisions of this Contract shall continue for the benefit of and shall bind the successors and permitted assigns of the parties.
- 19.7 The ownership of all intellectual property rights (including but not limited to all rights to copyright) in all drawings, plans, designs, specifications or any other material used in relation to the Goods (however recorded or stored) is and will remain vested in the Contractor.
- 19.8 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.