

**GENERAL CONDITIONS OF CONTRACT
FOR SUPPLY OF GOODS AND/OR SERVICES
[Transport & Infrastructure – Maintenance & Pavements]**

1. APPLICATION

1.1 The contract between Downer and the Customer for the Supply (Contract) comprises:

- (a) These General Conditions of Contract (“Conditions”); and
- (b) the Quote.

1.2 In this Contract:

Business Day means any day other than a Saturday, Sunday or public holiday.

Change of law means when any legislation, regulation, by-law, ordinance, standard, award or order comes into effect or is changed, including but not limited to any new tax, duty or other impost or change in the rate of any tax, duty or other impost.

Consequential Loss means loss of use, profit, revenue, business, business opportunity or anticipated profit, revenue, business or business opportunity and damage to goodwill, reputation or share price.

Contract has the meaning given in clause 1.1.

Contract Price means the amount payable by the Customer to Downer in consideration for the Supply as set out in the Quote (as may be adjusted from time to time pursuant to the terms of the Contract).

Customer Information means all documents, instructions, drawings, geotechnical and survey information, reports, materials, approvals, permits, authorisations, licences, customs clearances, or other information or materials provided by Customer for the purposes of the Quote and/or Supply.

Dispute has the meaning given in clause 17.1.

Downer means Downer EDI Works Pty Limited (ABN 66 008 709 608) of Level 2, T3, Trinita Business Campus, 39 Delhi Road, North Ryde, Sydney NSW 2113.

Force Majeure means act of God, act or omission of government, war, terrorism, blockade, embargo, hostilities, act of terrorism, fire, earthquake, flood, explosion, accident at sea, exceptionally inclement weather, industrial condition, sabotage or commotion, epidemic, pandemic or by any cause (whether similar or not to any of the above events) beyond the reasonable control of the party whose performance is affected.

Goods means the goods (if any) to be supplied under the Contract.

Insolvency Event means any one of the following circumstances where a party:

- (a) is (or states that it is) an insolvent under administration or insolvent (each defined under the *Corporations Act 2001* (Cth));
- (b) is in liquidation, provisional liquidation, under administration or wound up or has had a controller appointed to its property;

- (c) is subject to any arrangement, assignment, moratorium or composition, protected from creditors under statute or dissolved;
- (d) has an application or order has been made, resolution passed, proposal put forward, or any other action is taken which is preparatory to or could result in any of (a), (b) or (c) above;
- (e) is taken to have failed to comply with a statutory demand;
- (f) is the subject of an event described in section 459C(2)(b) or section 585 of the *Corporations Act 2001* (Cth); or
- (g) is otherwise unable to pay its debts when they fall due; or
- (h) something having a substantially similar effect to (a) to (g) happens under the law of any jurisdiction in relation which the other party reasonably believes may prejudice its rights, or the other party's obligations, under the Contract.

Intellectual Property Rights means all right, title and interest in and to any copyrights (including without limitation all rights conferred under statute, common law or equity in relation to any intellectual property including written material, literary works, computer programs, software code, process developments, formats, screen layouts, artistic works), registered and unregistered inventions (including patents), registered and unregistered trademarks, registered and unregistered designs, circuit layouts, confidential information, know how and show how, and all other legal, equitable or other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields, whether currently existing or created in the future.

Interest Rate has the meaning given in clause 6.2.

Customer means the customer entity specified in the Quote.

Services means the services (if any) to be provided under the Contract

Supply means the supply of Goods and/or Services the subject of the Contract.

Technical Information has the meaning given in clause 12.1.

Quote means the quotation, submission, proposal, offer (including the cover letter) issued by Downer to the Customer in connection with the Supply.

2. QUOTE

- 2.1 Unless a different timeframe is specified in the Quote, the Customer has 30 days to accept the Quote (“**Offer Period**”). Downer may vary or withdraw its Quote at any time during the Offer Period prior to acceptance in writing by the Customer. Upon acceptance in writing, the Contract becomes binding.
- 2.2 Customer acknowledges and agrees that the Contract Price may be subject to adjustment by Downer at any time if:

- (a) the quantifies and/or the scope of works outlined in the Quote are varied for any reason;
- (b) there is an increase in the cost to Downer for the provision of the Supply as a result of a variation in exchange rates or Change in Law between the date of Downer's Quote and the date of delivery;
- (c) the program or schedule is not specified at the time of Quote and/or is varied for any reason;
- (d) there is any error, omission, ambiguity, discrepancy, inadequacy or other issue with the Customer Information; and/or
- (e) as otherwise provided in the Quote.

2.3 Any specifications, illustrations, drawings, data, dimensions and weights submitted by Downer with its Tender (or which are publicly available) which Downer has indicated are preliminary or subject to further review or confirmation are illustrative, approximate and are not representative of fitness for purpose and do not form part of the Contract unless expressly confirmed by Downer.

3. SCOPE OF SUPPLY

- 3.1 The Customer is responsible for satisfying itself as to the fitness for purpose of the Supply for the Customer's application.
- 3.2 Downer is not bound by, and the Customer acknowledges it has not relied on, any representation, warranty or statement by Downer whether concerning the scope of work, performance or characteristics of the Goods or the Services or otherwise unless expressly incorporated in the Contract.

4. DOWNER'S GENERAL OBLIGATIONS

- 4.1 Downer will carry out the Supply in accordance with the requirements of the Contract and by the time(s) required by the Contract, as such time(s) may be extended, from time to time, as provided for in the Contract.
- 4.2 Downer will ensure that the Supply conforms to the requirements of the Contract.

5. CUSTOMER'S GENERAL OBLIGATIONS

- 5.1 The Customer must pay Downer the Contract Price in accordance with the Contract.
- 5.2 The Customer must provide to Downer, in a timely manner and so as to avoid any delay to Downer, any Customer Information, civil works, access and other things which may be required by Downer in relation to the performance of Downer's obligations and which is not expressly stated in the Contract to be Downer's responsibility.
- 5.3 The Customer acknowledges and agrees that the Quote has been prepared by Downer in reliance on the Customer Information.
- 5.4 The Customer must provide to Downer any approval or comment with respect to drawings submitted by Downer to the Customer within seven (7) days from the date of the submission by Downer of such drawings unless some other time is provided for in the Contract.
- 5.5 If Downer considers any Customer Information:
 - (a) contains any errors, omissions, ambiguities or discrepancies; or

- (b) is not sufficient to enable Downer to provide the Supply in accordance with the Contract and the provision of which is not reasonably considered by Downer to be within the responsibility of Downer under the Contract,

Downer may advise the Customer who must then provide such further assistance, information or other particulars as necessary in the circumstances or as requested by Downer, as the case may be.

- 5.6 The Customer bears the risk of any increase in the Contract Price and/or variations to the program or scope for any errors, omissions, ambiguities or discrepancies, or other deficiencies in the Customer Information.

6. PRICE AND PAYMENT

- 6.1 Unless otherwise provided in the Quote:
 - (a) the Contract Price includes the cost of delivery of any Goods or the performance of the Services (as applicable), as at the date of the Contract;
 - (b) Downer may submit invoices at the times provided for in the Contract. If the Contract provides for progress claims, the amount claimed in each invoice will be the amount determined in accordance with the Contract or if no provision is made in the Contract, the value of Goods supplied, or Services or other work performed under the Contract up to the date of the invoice; and
 - (c) the Customer must pay each invoice within 30 Business Days of receipt of the invoice.
- 6.2 Downer may, in its discretion, elect to levy interest on any moneys outstanding from the Customer on and from the date by which an invoice becomes payable until the date on which such outstanding moneys are paid. The interest rate is the maximum per annum commercial overdraft indicator rate determined by the Commonwealth Bank of Australia plus 3%, accruing daily.
- 6.3 Downer retains ownership in any Goods forming part of the Supply until payment is made for the Supply and for all other goods and services supplied by Downer. If the Supply or any part thereof is sold by the Customer prior to payment and if they shall become constituents of other goods or services, then the proceeds of the sale thereof shall be the property of Downer.

7. GST

- 7.1 Words or expressions used in this clause 7 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in this clause 7.
- 7.2 Any consideration to be paid or provided for a supply made under or in connection with this Contract does not include an amount on account of GST.
- 7.3 Despite any other provision in the Contract, if a party (for the purposes of this clause 7 only, **Supplier**) makes a supply under or in connection with this Contract on which GST is imposed:
 - (a) the consideration payable or to be provided for that supply under this Contract but for the application of this clause 7 (**GST exclusive consideration**) is increased by, and the recipient of the supply (**Recipient**) must also pay to the Supplier, an amount equal to the GST payable by the Supplier on that supply; and

- (b) the amount by which the GST exclusive consideration is increased must be paid to the Supplier by the Recipient without set off, deduction or requirement for demand, at the same time as the GST exclusive consideration is payable or to be provided.

7.4 If a payment to a party under 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.

7.5 The Recipient need not make a payment for a taxable supply made under or in connection with the Contract in respect of a taxable supply until the Supplier has given the Recipient a tax invoice for the supply to which the payment relates.

8. COMPLETION

8.1 Times for performance of the Supply are subject to change in accordance with this Contract and/or as provided in the Quote..

8.2 Downer is entitled to a reasonable extension of time for the performance of its obligations under the Contract where the delay is caused by any event or occurrence which is outside the reasonable control of Downer.

8.3 The Customer must pay Downer the reasonable costs incurred by Downer (including off-site and on-site overheads) as a result of obstruction and/or delay caused by any matter referred to in clause 8.2.

8.4 In the event the Customer fails to make payment when it is due, Downer may suspend performance of the Contract until such time as payment is made and Downer is entitled to a corresponding extension of time for performance.

8.5 Unless expressly stated in the Contract, failure to achieve the stated times for performance shall not entitle the Customer to damages for delay (whether liquidated or unliquidated).

9. VARIATIONS

9.1 Subject to clauses 2.4, 6.3 and 9.3, the Supply may only be varied by agreement of the parties in writing.

9.2 Variations to the Supply will be valued in the following order:

- (a) in accordance with the schedule of rates for labour and variations included in the Contract (if any);
- (b) in accordance with Downer's schedule of rates for labour and variations (a copy of which may be inspected at the office of Downer and a copy of which will be issued to the Customer on request) existing at the time of the Supply; or
- (c) valued at a reasonable rate and any rates usually charged by Downer for similar work will be deemed to be reasonable.

9.3 Where any of the matters referred to in clause 8.2 require a change in the Supply or the conditions in which Downer is to perform its obligations under the Contract, then Downer is entitled to vary the Supply or its other obligations under the Contract in such manner as Downer reasonably considers necessary, and the value of such variation calculated in accordance with clause 9.2 will be added to or deducted from the Contract Price, as the case may be.

10. WARRANTY AND STANDARD OF PERFORMANCE

10.1 Downer warrants that:

- (a) it will perform all Services with reasonable care and skill to the standard acceptable amongst skilled professionals providing for reward similar duties; and
- (b) all Goods supplied will be of acceptable quality and workmanship.

10.2 The Customer must give to Downer notice in writing of any defect or deficiency in the Goods or Services within 10 Business Days after the date of delivery of the Goods or date of performance of the Services and Downer will rectify the defect or deficiency by either repairing or replacing the Goods or reperforming the Services as it determines in its absolute discretion. The obligations of Downer under this clause 10.2 are the sole and exclusive obligations and liabilities of Downer in respect of the warranties in clause 10.1.

10.3 Downer's obligation under clause 10.2 does not extend to:

- (a) any defect or deficiency caused by:
 - (i) fair wear and tear;
 - (ii) designs, specifications and items which are outside Downer's scope of Supply;
 - (iii) accidents, misuse, neglect, lack of proper use; or
 - (iv) repairs or modifications to the Goods or Services which have been made without Downer's approval;
- (b) where Downer has not been given prompt notice by the Customer of the appearance of the defect or deficiency and a reasonable opportunity to investigate it; or
- (c) notifications received after the expiry of the relevant period in clause 10.2.

10.4 The undertakings and obligations of Downer under this clause 10 are in place of, and exclude, to the fullest extent permitted by law, all other warranties and conditions, whether oral, written, statutory, express or implied (including implied warranties or conditions as to fitness for purpose and acceptable quality).

11. INSURANCE

11.1 Downer will effect and maintain all insurances required by law.

12. DRAWINGS AND DOCUMENTATION

12.1 All designs, drawings and other technical information relating to the Supply, including any software provided by Downer under the Contract and the Intellectual Property Rights therein (**Technical Information**), is and will remain the property of Downer.

12.2 At Downer's request, the Customer must return to Downer or destroy all Technical Information supplied by Downer together with any copies made.

13. INTELLECTUAL PROPERTY RIGHTS

13.1 Downer warrants that it has all Intellectual Property Rights necessary to carry out and complete the Supply in accordance with the Contract and that the license granted by clause 13.3 does not infringe the Intellectual Property Rights of any other person. .

- 13.2 Downer will retain ownership of any Intellectual Property Rights that are created by Downer or its Subcontractors in the performance of the Contract.
- 13.3 Downer grants to the Customer a non-exclusive and non-transferable right to use the Intellectual Property Rights in the Goods, Services and other deliverables provided by Downer under the Contract for the purpose of the Customer's use and consumption of the Goods, Services and other deliverables, in the manner anticipated at the time of Downer's Tender and for no other purpose.
- 13.4 The Customer warrants that any design, materials, documents and methods of working provided by the Customer to Downer does not infringe any Intellectual Property Rights, and the Customer indemnifies Downer against any claim, costs, losses, expenses or damages that Downer may suffer or incur as a result of any infringement or any alleged infringement.

14. LIMITATION OF LIABILITY

- 14.1 Notwithstanding any other provision of the Contract, and except to the extent that liability cannot be limited or excluded at law, the total aggregate liability of Downer, its affiliates, officers, subcontractors and suppliers, agents and employees, to the Customer and the end-users, owners or beneficiaries of the Supply (if not the Customer), whether arising under or in connection with the Contract or the performance or non-performance of, or anything incidental to, the Contract and whether by way of indemnity, by statute (to the extent that it is possible to exclude such liability), in tort (for negligence or otherwise), or on any other basis in law or equity is limited and excluded as follows:]
- (a) Downer has no liability whatsoever for any Consequential Loss; and
 - (b) the total aggregate liability of Downer under or in connection with the Contract is limited to an amount equal to 5% of the Contract Price.
- 14.2 The Customer must ensure that the liability of Downer to the end users, owners or beneficiaries of the Supply (if not the Customer) is limited and excluded in accordance with this clause 14. The Customer indemnifies Downer against claims of any kind by any end user, owner or beneficiary to the extent that Downer would not be liable therefore to the Customer under the Contract if the claim had been made by the Customer.

15. FORCE MAJEURE

- 15.1 If performance by a party of any obligation under the Contract (other than the obligation of the Customer to make payment) is prevented, restricted or delayed by Force Majeure, then that party will be excused from, and will not be liable for, any failure in performance to the extent of that prevention, restriction or delay and, subject to clause 15.2, the time for performance will be extended accordingly.
- 15.2 If performance is delayed for more than four (4) months by Force Majeure and the parties have not agreed upon a revised basis for continuing the Supply 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 not less than 30 days notice in writing to the other party, and clause 16.5 will apply.

16. TERMINATION

General

- 16.1 Termination of the Contract pursuant to these Conditions is without prejudice to the rights of either party accruing up to the date of termination.

Termination for Default

- 16.2 Without limiting any other rights it may have, a party (**notifying party**) may give a written notice stating its intention to terminate the Contract pursuant to this clause 16 to the other party (**defaulting party**) in the event that the defaulting party:
- (a) abandons or repudiates the Contract;
 - (b) commits a continuing and substantial breach of the Contract;
 - (c) suspends performance of the Contract for a significant time, or fails to pay monies due under the Contract, without reasonable cause;
 - (d) purports to assign the whole of the Contract without the other party's consent; or
 - (e) is subject to, or appears likely to become subject to, an Insolvency Event.
- 16.3 Unless the defaulting party takes all practicable steps available to it to remedy or overcome the event complained of, within 20 Business Days after receipt of a notice under clause 16.2, the notifying party may by notice in writing terminate the Contract with immediate effect.

Termination Payment

- 16.4 If the Contract is terminated for any reason whatsoever, then, without prejudice to the rights of either party accruing up to the date of termination, Downer will be entitled to payment for:
- (a) all Goods delivered, all Services performed, and all other work executed to the date of termination;
 - (b) the cost of Goods and other items reasonably ordered by Downer in the expectation of completing the Supply, but not delivered (the property in which will become the Customer's upon payment of all monies then payable to Downer) and the cost of cancelling any such orders where possible;
 - (c) costs reasonably incurred by Downer in expectation of completing the Supply;
 - (d) the cost of demobilising Downer's site establishment (except where termination is due to a breach of Contract or Insolvency Event on the part of Downer); and
 - (e) the reasonable cost of return to their place of recruitment of Downer's employees engaged in work under the Contract (except where termination is due to a breach of Contract or Insolvency Event on the part of Downer).

17. DISPUTES

- 17.1 If any dispute arises between the parties in connection with the subject matter of this Contract (Dispute), either party may notify the other in writing of the Dispute with such notice to identify and provide details of the matter(s) in dispute.
- 17.2 Except as otherwise provided in this Contract, both parties must continue to perform their obligations under the Contract.

- 17.3 Upon receipt of a notice under clause 17.1, the parties will use good faith efforts to negotiate and agree a resolution to the Dispute.
- 17.4 If the Dispute remains unresolved after 20 Business Days (or such longer period as may be agreed by the parties), either party may refer the Dispute to mediation.
- 17.5 Any mediation will follow the Resolution Institute's Mediation Rules, with a mediator agreed by both parties (or, failing agreement within 5 Business Days, a mediator appointed by Downer).
- 17.6 The parties must follow the mediator's directions and bear their own costs, sharing mediation expenses equally.
- 17.7 Neither party may commence any legal proceedings in respect of a dispute unless notice has been given in accordance with clause 17.1 and at least 8 weeks have elapsed since the giving of the notice, except to seek urgent injunctive relief.

18. ENTIRE CONTRACT

- 18.1 The Contract documents listed in clause 1.2 including any written amendments signed by both parties form the entire Contract and supersede any prior understandings, correspondence and agreements, oral or written, between the parties in relation to the Supply.

19. SEVERANCE

- 19.1 If any provision or part of any provision of these Conditions is unenforceable, such unenforceability does not affect any other part of such provision or any other provision of these Conditions.

20. WAIVER

- 20.1 Any waiver by Downer of strict compliance with these Conditions is not to be deemed a waiver unless it is in writing and signed by an authorised officer of Downer.

21. NOTICES

- 21.1 Any notice required under the Contract must be:
- (a) in writing;
 - (b) addressed to the other party's authorised representative;
 - (c) must be signed for the party giving it by the party's authorised representative, attorney or solicitor;
 - (d) must be:
 - (i) delivered personally to a party;
 - (ii) sent by prepaid post to that party's address for notices;
 - (iii) emailed to the relevant email address of the party for notices.
- 21.2 Any notice under the Contract takes effect from the time when:
- (a) if delivered personally, when so delivered;
 - (b) if sent by prepaid post, 3 days after posting if within Australia or 7 days after posting for international mail;
 - (c) if emailed, at the time it is received into the recipient's email server and the sender may rely on a delivery receipt as evidence of delivery to the recipient, provided always that if any such notice is delivered or given after 4.30pm on a Business Day or on any day that is not a Business Day, such notice will be deemed to have been received at 9am on the next Business Day.

- 21.3 Verbal instructions or directions from the Customer must be confirmed in writing to Downer within 7 days.

22. GOVERNING LAW

- 22.1 This deed is governed by the governing law specified in the Quote or, if no governing law is specified, the State of Australia in which the work is performed. Each party irrevocably and unconditionally submits to non-exclusive jurisdiction of the Courts of law of that State. .

23. ASSIGNMENT AND TRANSFER

- 23.1 Neither Downer nor the Customer may assign or transfer the whole of the Contract or any interest therein or in any monies payable there under without the written consent of the other party, which must not be unreasonably withheld.
- 23.2 Nothing contained in this clause 23 prevents Downer from subcontracting any part of the Supply under the Contract as Downer deems appropriate.

24. COSTS

- 24.1 Each party will pay its own costs and expenses in connection with the negotiation, preparation, execution and performance of the Contract.

25. INTERPRETATION

- 25.1 Clause headings do not form part of, and will not be used in the interpretation of, the Contract.
- 25.2 Words in the singular include the plural and words in the plural include the singular, according to the requirements of the context.
- 25.3 Words importing a gender include every gender.
- 25.4 Reference to days is to calendar days unless stated otherwise.
- 25.5 If there is an inconsistency or ambiguity between the Conditions and the Quote, the Quote shall prevail to the extent of such inconsistency or ambiguity.