

PURCHASE ORDER TERMS AND CONDITIONS



PARTIES

Port of Newcastle Operations Pty Limited (ABN 13 165 332 990) as trustee for the **Port of Newcastle Unit Trust** (ABN 97 539 122 070) of Level 4, 251 Wharf Road, Newcastle NSW 2300 (**PON**)

and

Supplier named in the Purchase Order (**Supplier**)

RECITALS

1. PON requires the Supplier to supply PON with the Goods and/or Services.
2. This Contract sets out the terms on which the parties agree that the Supplier will supply the Goods and/or Services to PON.

TERMS

1 Definitions and interpretation

1.1 Definitions

In this Contract:

- a) **Business Day** means any day other than:
 - I. a Saturday, Sunday or public holiday in Newcastle; or
 - II. 27, 28, 29, 30 or 31 December.
- b) **Claim** includes any claim, allegation, demand, remedy, cause of action, suit, right, proceeding, order or judgment.
- c) **Completion** means, as relevant, the stage when, in the reasonable opinion of the Superintendent, the:
 - I. Goods have been delivered to the Delivery Point, safely unloaded and accepted by PON (including as being Defect-free);
 - II. Services have been completed and are Defect-free; and
 - III. Supplier has satisfied all other obligations identified in this Contract or the relevant Purchase Order as being conditions precedent to Completion.
- d) **Confidential Information** means information revealed by or on behalf of a Disclosing Party to a Receiving Party that:
 - I. is by its nature confidential;
 - II. is marked or designated as confidential at the time of its disclosure; or
 - III. the Receiving Party knows or ought to know is confidential.
- e) **Contract** means these Terms, the Purchase Order and all documents referred to within either of them.
- f) **Cure Plan** has the meaning in clause 17.5.
- g) **Date for Completion** means the date identified as such in the relevant Purchase Order, as adjusted in accordance with this Contract.
- h) **Date of Completion** means the date notified to the Supplier as such in writing by the Superintendent.
- i) **Defaulting Party** has the meaning in clause 17.1.
- j) **Defect** means any:
 - I. defect or deficiency in materials or workmanship;
 - II. omission, shrinkage or fault;
 - III. aspect of the Goods or Services that is not strictly in accordance with this Contract; or
 - IV. damage to the Goods.
- k) **Defects Liability Period** means, unless otherwise stated in the Purchase Order, 12 months commencing on the Date of Completion, as extended in accordance with this Contract.
- l) **Deliverables** means the deliverables described in the Purchase Order.
- m) **Delivery Point** means the delivery point nominated in the Purchase Order or such other point on or near the Site that is notified to the Supplier by the Superintendent.
- n) **Disclosing Party** means a party who directly or indirectly discloses its Confidential Information to a Receiving Party.
- o) **Environment** includes land, water, atmosphere, climate, sound, odour, taste, the biological factor of animals and plants and the social factor of aesthetic.
- p) **Existing Operations** means all infrastructure, assets and improvements on or about the Port and operations undertaken by or on behalf of PON.
- q) **Goods** means the goods described in the Purchase Order.
- r) **Hazardous Materials** means all material, including asbestos, perfluorinated alkyl substances, polyfluorinated alkyl substances, perfluorooctane sulphonate and perfluorooctinate acid and any form of organic or chemical matter, whether solid, liquid, gas, odour, heat, sand,

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- vibration, radiation or substance, which makes or has the capacity to make the Environment:
- I. unsafe or unfit for habitation or occupation by persons or animals;
 - II. degraded in its capacity to support plant life;
 - III. contaminated; or
 - IV. otherwise environmentally degraded.
- s) **Law** includes all Acts, ordinances, regulations, by-laws, orders, awards, proclamations, approvals, authority requirements and associated fees and charges applicable to this Contract.
- t) **Loss** means:
- I. all damages, Claims, fees, losses, liabilities, costs, charges, outgoings, payments and expenses, including legal fees on an indemnity basis and disbursements and costs of investigation, litigation, settlement, judgment and interest; and
 - II. to the fullest extent permitted by Law, fines and penalties.
- u) **Modern Slavery** means any act that constitutes an offence in relation to slavery, forced labour, involuntary servitude, debt bondage, human trafficking or other slavery-like exploitation as prohibited or defined as a modern slavery offence under any Modern Slavery Law.
- v) **Modern Slavery Law** means the *Modern Slavery Act 2018* (Cth) and similar Laws in other jurisdictions.
- w) **Payment Claim** has the meaning in clause 16.1.
- x) **Payment Schedule** has the meaning in clause 16.2.
- y) **Personnel** means, in relation to:
- I. PON, its officers, employees, agents and contractors (excluding the Supplier); or
 - II. the Supplier, its officers, employees, agents and contractors and persons for whom the Supplier is otherwise responsible or vicariously liable in relation to PON.
- z) **Policies and Procedures** means all applicable PON policies and procedures which are issued to the Supplier as part of the Purchase Order.
- aa) **Port** means the Port of Newcastle, including all land and water within its boundaries (as delineated in the *Ports and Maritime Administration Regulation 2012* (NSW)).
- bb) **PPSA** means the *Personal Property Securities Act 2009* (Cth).
- cc) **Price** means the price set out or determined in accordance with the Purchase Order.
- dd) **Purchase Order** means a document issued to the Supplier by PON which specifies Goods and/or Services to be supplied to PON by the Supplier.
- ee) **Receiving Party** means a party who receives Confidential Information directly or indirectly from a Disclosing Party.
- ff) **Security Interest** means a mortgage, charge, lien, pledge, security interest, title retention, trust, preferential right or encumbrance, and includes that term as defined in the PPSA.
- gg) **Scheduled Amount** has the meaning in clause 16.2.
- hh) **Services** means:
- I. the Services described in the Purchase Order; and
 - II. all services that are reasonably necessary or incidental to them.
- ii) **Site** means the site identified in the Purchase Order.
- jj) **Superintendent** means the person identified as such in the Purchase Order or any replacement notified to the Supplier by PON.
- kk) **User** means any user or occupier of or visitor to any Existing Operations.
- ll) **Variation** means any change to the Goods and/or Services, including any change in character or quality or additions, reductions or omissions.
- mm) **WHS Laws** means the *Work Health and Safety Act 2011* (NSW) and *Work Health and Safety Regulation 2017* (NSW) as amended and updated.

1.2 Interpretation

In this Contract:

- a) a reference to any document includes all variations to or replacements of it;
- b) the singular includes the plural and vice versa;
- c) a reference to a person includes its executors, administrators, successors, substitutes and assigns;
- d) a reference to time is to time in Newcastle
- e) if a period is specified, it is to be calculated exclusive of the day on which the relevant notice is given or event occurs;

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- f) if the day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day (as appropriate);
- g) if a word or phrase is defined in this Contract, its other grammatical forms have corresponding meanings;
- h) general words are not limited by the use of the words 'including' or 'includes';
- i) headings do not form part of and are not to be used in interpreting this Contract;
- j) a reference to 'dollar' or '\$' is to Australian dollars;
- k) measurements must be in the legal units of measurement of Australia;
- l) all communications between the parties must be in English; and
- m) unless stated otherwise in this Contract, PON and the Superintendent may exercise their discretions and rights under this Contract in their absolute discretion.

1.3 Ambiguity of discrepancy

- a) If the Supplier discovers any ambiguity or inconsistency within or between any document(s) that form this Contract, it must promptly notify the Superintendent in writing.
- b) Following its receipt of a notice under clause 1.3a), the Superintendent must give the Supplier a direction as to the interpretation that applies and the Supplier must comply with such direction.
- c) If compliance with a direction under clause 1.3b) causes the Supplier to directly incur more or less cost than it otherwise would have incurred, the reasonable difference must be assessed by the Superintendent and added to or deducted from the Price (as applicable).
- d) Unless otherwise directed by the Superintendent in writing, the terms of the Purchase Order prevail over these Terms.

2 Contract

This Contract is formed on the earlier of the Supplier accepting or commencing its performance of a Purchase Order issued to it by PON.

3 Primary obligations

3.1 Supplier's obligations

The Supplier must:

- a) unless otherwise directed by the Superintendent in writing, commence performing this Contract on its formation in accordance with clause 2;
- b) diligently progress the performance of this Contract in accordance with its terms; and
- c) achieve Completion by the Date for Completion.

3.2 PON's obligations

PON must:

- a) provided that the Supplier has:
 - I. provided the Superintendent with acceptable evidence of its compliance with clause 15; and
 - II. complied with all other conditions precedent to access,give the Supplier sufficient access to the Site to allow it to perform this Contract in accordance with its terms; and
- b) pay the Supplier the Price in accordance with this Contract.

4 Representations and warranties

4.1 General

The Supplier warrants and repeats on each day of the term of this Contract that:

- a) it has full power and authority to execute and perform this Contract in accordance with its terms;
- b) the Supplier:
 - I. will at all times:
 - A. be suitably qualified, skilled and experienced; and
 - B. perform this Contract:
 - aa. exercising the highest level of skill, care and diligence;
 - bb. in accordance with its terms and all PON directions and relevant Laws; and
 - II. has done everything that would be expected of a prudent, competent and experienced supplier in assessing the risks it is assuming under this Contract and ensuring that the Price and Date for Completion contain allowances to protect it against these risks eventuating;
- c) all relevant Supplier Personnel will be suitably qualified, trained, licensed, skilled and experienced;
- d) it enters into this Contract based on its own investigations, examinations and determinations;

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- e) it is not aware of any actual or threatened Claim or circumstance that could prohibit or hinder its performance of this Contract;
- f) all Goods will, on their delivery:
 - I. be free of Security Interests;
 - II. comply with this Contract and all relevant Australian Standards;
 - III. be new, Defect-free, of merchantable quality and fit for the purposes stated in the Purchase Order;
 - IV. be comprised of materials of the highest quality;
 - V. be free of viruses and harmful or malicious code; and
 - VI. have a life expectancy commensurate with that expected of the same or similar goods;
- g) all Goods will remain Defect-free until the end of the Defects Liability Period;
- h) it and its Personnel will at all times comply with all Policies and Procedures and PON directions;
- i) it is aware that maximising work health and safety and ensuring the Supplier's and PON's compliance with the WHS Laws is of utmost importance to PON;
- j) it is aware that a breach of applicable WHS Laws means that the Supplier may be prohibited from working on future PON assets and/or projects;
- k) PON will have the full benefit of and be able to directly enforce all manufacturer's warranties applicable to the Goods from the date of their delivery to the Delivery Point;
- l) it does not enter into this Contract as the trustee of a trust;
- m) where some or all of the Price is not fixed, it will perform this Contract so as to maximise value for money to PON; and
- n) it is able to comply with this Contract without the need for a Variation.

4.2 Supplier acknowledgements

The Supplier acknowledges and agrees that PON enters into this Contract relying on the warranties included in clause 4.1 and would not have done so without them.

5 Goods

5.1 Application

This clause 5 applies where this Contract involves the

supply of Goods by the Supplier.

5.2 Delivery

The Supplier must:

- a) ensure that all Goods are:
 - I. free of Hazardous Materials unless otherwise agreed in the Purchase Order;
 - II. delivered by persons who hold all relevant licences and qualifications;
 - III. packed and labelled in accordance with all relevant Laws and PON directions;
 - IV. packed in a manner that avoids damage during their transit, unloading and storage; and
 - V. accompanied by appropriate delivery documents, including:
 - A. details of the Purchase Order number on each package;
 - B. a full description of the Goods; and
 - C. all documentation necessary for PON to verify the Goods at the time of their delivery; and
- b) deliver the Goods to the Delivery Point:
 - I. by the Date for Completion;
 - II. on the Business Day notified to the Superintendent no less than 5 Business Days prior to the proposed Date of Completion; and
 - III. between the hours specified in the Purchase Order or, if none are specified, between 8:30am and 5.00pm.

5.3 Basis for delivery

If the Purchase Order does not specify otherwise, the Supplier:

- a) must deliver all Goods in one shipment;
- b) is responsible for all costs associated with delivering the Goods to the Delivery Point; and
- c) must:
 - I. show all such costs as a separate item on its Payment Claim in respect of the Goods; and
 - II. support all claims for freight charges with copies of freight tax invoices.

5.4 Offsite inspection and testing

- a) PON and its nominees:
 - I. must be given full and free access at all times to inspect the manufacture and supply of Goods;

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and

- II. have the right to reject Goods in manufacture that do not comply with this Contract.
- b) Any inspection or failure to inspect by PON will not relieve the Supplier of any obligation under this Contract and a failure to reject a Good does not constitute acceptance of it.

5.5 Inspection and testing onsite

- a) Acceptance of Goods by PON is subject to the relevant Goods passing all inspections and testing specified in this Contract.
- b) If PON believes delivered Goods do not comply with this Contract, without limiting its other rights, it may:
 - I. direct the Supplier (at its cost) to repair or replace the defective Goods within a nominated period; or
 - II. if:
 - A. it is not reasonable for the Supplier to repair the defective Goods; or
 - B. the Supplier fails to comply with a direction under clause 5.5b)I,

reject the defective Goods and direct the Supplier to immediately remove all rejected Goods from the Site and refund all amounts paid to it by PON in respect of them.

5.6 Risk and title

- a) Risk in Goods passes to PON once the relevant Goods are:
 - I. safely unloaded and properly secured at the Delivery Point; and
 - II. inspected and signed for by the Superintendent.
- b) Signed delivery dockets are not evidence of PON's acceptance of the quality or quantity of Goods.

6 Services

6.1 Application

This clause 6 applies where this Contract involves the performance of Services by the Supplier.

6.2 Site access

If the performance of any Services requires access to the Site by the Supplier or any of its Personnel:

- a) PON must provide the Supplier with access to the Site sufficient to allow it to perform this Contract in accordance with its terms promptly after the

Supplier has:

- I. provided the Superintendent with acceptable evidence of its compliance with clause 15; and
- II. complied with all other conditions precedent to access included in this Contract; and
- b) all such access is conditional upon the Supplier and its Personnel:
 - I. giving the Superintendent no less than 3 Business Days' prior notice of its intention to access the Site, including full details of:
 - A. the purpose of the access;
 - B. who will access the Site;
 - C. the duration of the access;
 - D. any impact on Existing Operations; and
 - E. all other information required by PON;
 - II. fully co-operating with, and coordinating its activities with the Existing Operations;
 - III. ensuring that all access is during the hours directed by PON and otherwise in accordance with the Policies and Procedures and PON directions (including PON signs);
 - IV. providing sufficient proof where required by PON that it or any of its Personnel who may access the Site are fully and currently vaccinated against COVID-19;
 - V. keeping all relevant areas clean and tidy and such that they can be immediately used by Users once the Supplier leaves the Site;
 - VI. ensuring that all things used in performing Services on the Site are safe and secure, not accessible to third parties and do not pose a risk to any person or property;
 - VII. obtaining PON's prior written consent to any:
 - A. crane or heavy loading activity on or near the Site; or
 - B. activity that involves ground penetration, infrastructure construction or deconstruction or the obstruction of road, rail or access areas on the Site;
 - VIII. not interfering with any Existing Operations without the prior written consent of the Superintendent; and
 - IX. immediately notifying the Superintendent of any accident, hazard, near miss, unsafe work practice, oil spill, dumping or Environmental incident, discovery of antiquities, suspicious

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activity or any similar activity observed on the Site.

6.3 Deliverables

- a) The Supplier must provide the Deliverables to PON:
 - I. by the Date for Completion; and
 - II. in accordance with this Contract and PON's directions.
- b) Title in a Deliverable passes to PON upon payment by PON for it in accordance with clause 16.
- c) The Supplier acknowledges and agrees that:
 - I. PON does not assume or owe any duty of care to the Supplier and is not required to check any Deliverable; and
 - II. any review of, comment on or direction by PON in relation to a Deliverable does not relieve the Supplier of any of its liabilities and responsibilities in respect of it.

6.4 Removal of Personnel

PON may direct the Supplier to remove any Supplier Personnel from the Site who, in PON's reasonable opinion:

- a) are incompetent, negligent or guilty of misconduct or otherwise acting in breach of this Contract; or
- b) fail to comply with a direction of PON or the Superintendent or a relevant Law,

and the Supplier must:

- c) immediately comply with such direction; and
- d) promptly replace such person with an equally qualified and experienced person approved by the Superintendent in writing, such approval not to be unreasonably withheld.

6.5 Inspection and testing

- a) PON and its nominees:
 - I. must be given full and free access at all times to inspect the performance of the Services; and
 - II. have the right to reject Services that do not comply with this Contract.
- b) Any inspection or failure to inspect by PON will not relieve the Supplier of any obligation under this Contract and a failure by PON to reject a Service does not constitute acceptance of it.
- c) If PON believes a supplied Service does not comply with this Contract, without limiting its other rights, it may:

- I. direct the Supplier (at its own cost) to reperform the relevant Service within a nominated period; or
- II. if:
 - A. it is not reasonable for the Supplier to reperform the defective Service; or
 - B. the Supplier fails to comply with a direction under clause 6.5c)I),

reject some or all of the relevant Services and require the Supplier to immediately refund all amounts paid to it by PON in respect of such Services.

7 Delay

- a) The Supplier, must, within 5 days after becoming aware of anything which may or will delay the delivery of Goods or performance of Services by the Date for Completion, give a written notice to the Superintendent that details the:
 - I. cause of the delay;
 - II. estimated duration of the delay; and
 - III. actions the Supplier has taken or proposes to take to overcome or mitigate the delay,

and the Supplier must use reasonable endeavors to mitigate the delay.
- b) The Supplier is entitled to such reasonable extension of time to the Date for Completion as the Superintendent assesses, if it:
 - I. complies with clause 7a);
 - II. is delayed in achieving Completion by the Date for Completion by:
 - A. a breach of this Contract by, or negligent act or omission of, PON;
 - B. a Variation, other than a Variation for the convenience of the Supplier or to overcome its breach;
 - C. a direction issued pursuant to clause 1.3b);
 - D. a suspension of this Contract in circumstances where the Supplier is entitled to its costs under clause 13; or
 - E. inclement weather;
 - III. did not cause or contribute to the delay; and
 - IV. used reasonable endeavours to overcome or mitigate the delay.

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8 WHS and inductions

8.1 General

The Supplier must, and must ensure that all of its Personnel, at all times comply with all PON directions and applicable Laws and Australian Standards relevant to work health and safety.

8.2 Inductions

- a) Where directed by PON, all Supplier Personnel who access the Site must hold a current PON Level 1 and Level 2 induction card prior to doing so.
- b) All inductions required by this clause 8.2 must be arranged by the Supplier by emailing PON at inductions@portofnewcastle.com.au and providing all necessary documentation.

8.3 Legal obligations

In performing this Contract, the Supplier must:

- a) comply with its obligations under the WHS Laws as a person conducting a business or undertaking;
- b) conduct all relevant risk assessments and put in place measures to, so far as is reasonably practicable, eliminate or minimise risks to work, health and safety arising from such performance;
- c) ensure that, if a Law requires that:
 - I. the Supplier consult, cooperate and coordinate its activities with other duty holders who may have obligations in relation to the Site or Existing Operations, it does so;
 - II. a person:
 - A. be authorised or licensed to carry out a particular activity, that person is so authorised or licensed and complies with all conditions of such authorisation or licence; or
 - B. has prescribed qualifications or experience or, if not, is supervised by a person who has prescribed qualifications or experience, that person has the required qualifications or experience or is so supervised; or
 - III. a workplace, plant, substance or design, or work or class of work, be authorised or licensed, that thing is so authorised or licensed;
- d) not direct or allow a person to carry out a particular activity unless such person satisfies clause 8.3c);
- e) without limiting the Supplier's obligations under this Contract or at Law, provide the

Superintendent with:

- I. all information and documentation directed by the Superintendent to enable PON to comply with its obligations under the WHS Laws; and
- II. copies of all:
 - A. notices and communications issued to the Supplier by a regulator or to a subcontractor by a health and safety representative of the Supplier; and
 - B. notices, communications and undertakings given by the Supplier or a subcontractor to a regulator,in connection with or related to this Contract:
 - C. within 3 days after such direction, receipt or submission (as the case may be); or
 - D. immediately in the case of a notifiable incident;
- f) if directed by the Superintendent or required by a WHS Law, produce evidence of all approvals, authorisations, licences, prescribed qualifications and experience, or any other information relevant to work, health and safety, to the satisfaction of the Superintendent before the Supplier or any of its Personnel commence supplying Goods and/or performing Services;
- g) ensure that, before the Supplier or anyone on its behalf accesses the Site, the:
 - I. Supplier and its Personnel complete all inductions required by PON; and
 - II. Supplier:
 - A. prepares a work, health and safety plan that addresses safe work method procedures and work, health and safety requirements relating to the performance of the Services; and
 - B. provides the following documents to the Superintendent and keeps a copy of them on the Site at all times:
 - aa) risk assessment / safe work method statement;
 - bb) work, health and safety plan; and
 - cc) all other documents outlining the safe use of any Good or provision of any Service;
- h) where it is to provide inductions to any of its Personnel, ensure that such inductions comply with all relevant Laws and Australian Standards;

and

- i) instruct, train, provide information to and supervise all Personnel delivering Goods or performing Services to ensure that they at all times:
 - I. follow safe work practices and procedures; and
 - II. take reasonable care of their health and safety and that of anyone who may be affected by anything they do or fail to do in connection with this Contract.

8.4 Supplier's liability

The Supplier must not do anything which puts or could put PON or the Supplier in breach of any WHS Law and acknowledges and agrees that:

- a) a breach of this clause 8 will constitute a material breach for the purposes of clause 17.2b); and
- b) its compliance with this clause 8 does not:
 - I. relieve it of its responsibilities to PON under this Contract or at Law; or
 - II. constitute verification or acceptance by PON of the adequacy of the Supplier's systems or documentation.

9 Subcontracting and Assignment

- a) The Supplier must not subcontract any of its obligations under this Contract without the prior written consent of the Superintendent, which may be granted subject to conditions, and the Supplier is liable for the acts and omissions of its subcontractors as if they were its own.
- b) Neither party may assign a right or interest under or in connection with this Contract without the prior written consent of the other party, such consent not to be unreasonably withheld.

10 Confidential Information and Media

- a) Subject to clause 10b), a Receiving Party must not, without the prior written consent of the Disclosing Party, divulge or permit its Personnel to divulge to any person (other than to its Personnel who require such information to enable them to properly perform this Contract) any Confidential Information of the Disclosing Party.
- b) Clause 10a) does not apply to the disclosure of Confidential Information of a Disclosing Party:
 - I. which is made public through no default of the Receiving Party or any of its Personnel; or
 - II. the disclosure of which is:
 - A. required by Law; or

B. made to a court or tribunal in the course of proceedings to which the Receiving Party is a party.

- c) The Supplier must not make any public announcement or disclose any information concerning PON, any of its Personnel, this Contract, the Port or any Existing Operations for distribution through any media without the Superintendent's prior written consent.

11 Intellectual Property Rights and Moral Rights

11.1 Warranties

The Supplier warrants and repeats on each day of the term of this Contract that the:

- a) use, maintenance, modification, destruction and/or repair of any Good, Deliverable and/or Service by or on behalf of PON will not infringe any intellectual property right or moral right; and
- b) Supplier has obtained unequivocal waivers or consents from all authors of moral rights incorporated into any Good, Deliverable or Service sufficient to permit:
 - I. the Supplier to perform all of its obligations under this Contract; and
 - II. PON to deal with any such thing as it thinks fit.

11.2 Intellectual Property Rights

- a) All intellectual property rights arising out of or in connection with the performance of this Contract by or on behalf of the Supplier vest in PON on their creation (including those created before the date of this Contract) and nothing in this Contract confers on the Supplier any ownership or intellectual property rights in anything supplied to it by or on behalf of PON.
- b) PON grants to the Supplier a non-exclusive licence to use such intellectual property rights for the purpose of performing this Contract.

12 Variations

12.1 General

- a) The Superintendent may, at any time prior to the Date of Completion, issue a notice to the Supplier:
 - I. entitled 'Variation Request'; and
 - II. requesting that the Supplier provide it with a quote to undertake the proposed Variation, and the Supplier must provide such quote in accordance with the request.
- b) The Supplier must not vary any obligation under this Contract unless:

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- I. the Superintendent accepts in writing a quote received from the Supplier in response to a 'Variation Request'; or
- II. the parties otherwise agree a Variation in writing.

12.2 Cost

Where the Supplier submits a quote in response to a Variation Request, the relevant Variation must be priced using the following descending order of precedence:

- a) prior agreement between the parties;
- b) relevant rates or prices in this Contract;
- c) relevant rates or prices in a schedule of prices, even though not included in this Contract; or
- d) reasonable rates or prices determined by the Supplier.

12.3 Deemed Variations

- a) Where the Supplier considers that a direction given by the Superintendent constitutes a Variation even though it is not identified as such by the Superintendent, the Supplier must notify the Superintendent in writing as soon as reasonably practicable after receiving the direction and before giving effect to it.
- b) Where the Supplier gives a notice to the Superintendent in accordance with clause 12.3a), the Superintendent must notify the Supplier in writing within 5 Business Days thereafter whether the direction constitutes a Variation.
- c) If the Supplier fails to give a notice in accordance with clause 12.3a), it is barred from bringing any Claim against PON in respect of the relevant direction.

13 Suspension

- a) PON may, in its absolute discretion, direct the Supplier to suspend performing all or part of this Contract and the Supplier must comply with such direction, including as to timing.
- b) The Supplier must recommence performing the suspended obligations as soon as practicable after being directed to do so by PON in writing and, in any event, within 7 days after receiving a direction from PON to do so.
- c) If the need for the suspension arises directly from PON's negligent act or omission or breach of this Contract and causes the Supplier to be delayed or incur additional costs, the Supplier may claim:

- I. an extension of time in accordance with clause 7; and
- II. such additional costs as are reasonably incurred by the Supplier as a direct result of the suspension, provided that:
 - A. such costs are claimed by the Supplier by written notice to the Superintendent within 5 days after the cessation of the suspension;
 - B. such costs are substantiated to the reasonable satisfaction of the Superintendent; and
 - C. the Supplier has taken all reasonable steps to mitigate the effects of the suspension.

14 Defects

- a) The Supplier must correct all Defects at its cost and in a manner that causes as little inconvenience to Users as is possible.
- b) If, prior to the expiration of the Defects Liability Period, PON discovers or believes there is a Defect in any Good, Service or Deliverable, it may give the Supplier an instruction requiring it to correct the Defect and the Supplier must comply with such direction (which may include dates for commencement and completion).
- c) If a Defect is not rectified in accordance with a direction issued pursuant to clause 14b), PON may, without prejudice to any other right it may have, rectify the Defect itself or have others do so and all associated costs will be a debt due and payable from the Supplier to PON.
- d) Once a Defect is rectified, a separate defects liability period of the same length as the original Defects Liability Period will apply in respect of all work undertaken to rectify the Defect, commencing at 4:00pm on the date such work is completed. Notwithstanding the remainder of this clause 14d), all Defects Liability Periods then on foot will automatically expire on the date that is 36 months after the Date of Completion.

15 Insurance

The Supplier must, before commencing its performance of this Contract:

- a) effect and maintain the following insurances with reputable insurers:
 - I. public liability insurance:
 - A. for \$20 million per claim;
 - B. in the joint names of the parties; and
 - C. from the date on which this Contract is

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formed under clause 2 until the expiration of the last Defects Liability Period;

II. where stated in the Purchase Order or the Supplier is supplying Goods:

A. product liability insurance:

- aa) for \$10 million per claim;
- bb) in the joint names of the parties; and
- cc) from the date on which this Contract is formed under clause 2 until the expiration of the last Defects Liability Period; and

B. transit insurance:

- aa) until risk in the Goods passes to PON;
- bb) for the full replacement value of the relevant Goods against loss or damage, including unloading; and
- cc) in the joint names of the parties;

III. where stated in the Purchase Order or the Supplier is performing professional services, professional indemnity insurance:

- A. for \$5 million per claim and in the annual aggregate; and
- B. from the date on which this Contract is formed under clause 2 until 7 years after the expiration of the last Defects Liability Period;

IV. workers compensation insurance:

- A. as required by Law; and
- B. from the date on which this Contract is formed under clause 2 until the expiration of the last Defects Liability Period;

V. compulsory third party and comprehensive motor vehicle insurance:

- A. in respect of all motor vehicles used in performing this Contract;
- B. for \$20 million per claim; and
- C. from the date on which this Contract is formed under clause 2 until the expiration of the last Defects Liability Period; and

VI. if the performance of this Contract involves the use of watercraft or a marine platform or the construction or repair of a marine asset:

- A. marine liability insurance in the joint names of the parties; and
- B. ship repairer's liability insurance and/or

protection indemnity insurance,

that:

- C. adequately covers all marine works; and
- D. is for \$20 million per claim;

- b) ensure that all subcontractors have insurances equivalent to those required by clause 15a) to the extent relevant to the subcontractor's work;
- c) provide the Superintendent with certificates of currency satisfactory to the Superintendent proving that all insurances required by this clause 15 are current, and thereafter as a condition precedent to payment provide such certificates as directed by the Superintendent; and
- d) ensure that any insurance policy required to be in the joint names of the parties includes a cross liability clause in which the insurer agrees to waive all rights of subrogation or action against any of the persons constituting the insured.

16 Payment

16.1 Payment Claims

Subject to clause 16.7, the Supplier must give the Superintendent or its nominee (as agent for PON) claims for payment on account of the Price and any other amount payable by PON to the Supplier under this Contract (**Payment Claim**):

- a) on the Date of Completion or, where the relevant supply or Services span(s) more than one month, on the 25th day of the month in which the relevant Goods are supplied or Services performed;
- b) that identify the Goods and/or Services to which it relates, including the Purchase Order number and amount claimed; and
- c) in a form and containing all other information reasonably required by PON.

16.2 Payment Schedule

If PON intends to pay an amount less than the amount claimed in a Payment Claim, within 10 Business Days after receiving a Payment Claim, the Superintendent or its nominee must issue to the Supplier a payment schedule (**Payment Schedule**) which:

- a) states the value of the Goods supplied or Services performed in accordance with this Contract and for which payment has not previously been made;
- b) identifies any amounts PON is entitled to retain, deduct, withhold or set off from moneys otherwise due to the Supplier; and

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- c) states the amount, if any, PON proposes to pay to the Supplier (**Scheduled Amount**) and the reasons for the difference.

16.3 Payment

- a) Subject to clauses 16.7, PON must pay the Supplier the Scheduled Amount within 15 Business Days after receipt by the Superintendent of the relevant Payment Claim.
- b) If a Payment Schedule shows an amount owing by the Supplier to PON, the Supplier must pay such amount to PON within 5 Business Days after receipt by the Supplier of the Payment Schedule.

16.4 No Waiver

Failure by the Superintendent to set out in a Payment Schedule an amount PON is entitled to retain, deduct, withhold or set-off will not prejudice PON's right to subsequently exercise its right to retain, deduct, withhold or set-off any amount under this Contract.

16.5 Payment on Account

Payment under clause 16.3 is not evidence of the value of Goods supplied or Services performed or that Goods have been supplied or Services performed in accordance with this Contract or an admission of liability and is payment on account only.

16.6 GST

- a) Unless otherwise stated, all amounts referred to in this Contract are exclusive of GST.
- b) Despite any other provision of this Contract, if a party becomes liable to pay GST in connection with any supply it makes under this Contract, it must add the GST amount relevant to that supply by identifying such amount in a tax invoice issued to the other party. On receipt of that tax invoice, the other party must pay the amount of the supply plus the GST amount in accordance with this Contract.

16.7 Set-off

PON may withhold, set-off or deduct from moneys otherwise due to the Supplier under this Contract any debt or other moneys due from the Supplier to PON under or arising out of this Contract.

17 Termination

17.1 Notice of default

Subject to clause 17.2, if a party is in breach of this Contract (**Defaulting Party**), the other party may give a written notice to the Defaulting Party directing it to remedy the breach and stating:

- a) that it is a notice under this clause 17.1;

- b) the breach relied upon; and
- c) that the breach must be remedied by the end of the reasonable period stated in the notice.

17.2 Termination for breach

If a Defaulting Party:

- a) does not remedy a breach the subject of a notice under clause 17.1 by the end of the period stated in the notice; or
- b) commits a breach that is incapable of remedy or multiple breaches that are together incapable of remedy,

the other party may immediately terminate this Contract by written notice to the Defaulting Party.

17.3 Termination for convenience

Without prejudice to any of PON's other rights under or arising out of this Contract, PON may at any time, for its convenience and for any or no reason, terminate this Contract by giving no less than 10 days' written notice to the Supplier to this effect.

17.4 Costs

- a) If this Contract is terminated pursuant to clause 17.3, the Supplier will, subject to clause 16.7, be entitled to be paid, the:
 - I. amount which would have been payable to the Supplier (if any) if this Contract had not been terminated and the Supplier had submitted a Payment Claim to PON in respect of Services performed and Goods supplied to the termination date; and
 - II. cost of goods and materials reasonably ordered or purchased by the Supplier in anticipation of performing all of this Contract and for which the Supplier is legally bound to pay, provided that unencumbered title in all such things vests in PON upon such payment.
- b) The amounts the Supplier is entitled to under clause 17.4a) are a limitation on PON's liability to the Supplier arising out of, or in connection with, the termination of this Contract under clause 17.3 and the Supplier must not bring any other Claim against PON arising out of, or in connection with such termination.

17.5 Cure Plan

Without limiting PON's rights under the remainder of this clause 17, to the extent that the Supplier is in breach of this Contract:

- a) the Supplier must prepare and submit a written plan to address and correct such breaches (**Cure**

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Plan):

- I. within 7 days after its receipt of a notice under clause 17.1; and
- II. that addresses the following, as a minimum:
 - A. the incident(s) which gave rise to the relevant breach(s);
 - B. the steps taken by the Supplier to mitigate the impact of the relevant breach(s); and
 - C. the steps that will be taken in future by the Supplier to ensure that it does not commit further breach(s) of this Contract; and
- b) if the Supplier fails to submit a Cure Plan that is acceptable to PON acting reasonably, PON may:
 - I. exercise its rights under clause 17.2; and/or
 - II. prohibit the Supplier from working on any future PON assets and/or projects.

18 Indemnities

The Supplier must indemnify PON from and against all Losses it suffers or incurs in connection with or arising out of any:

- a) loss of (including loss of use of) or damage to real or personal property to the extent caused or contributed to by the Supplier or any of its Personnel;
- b) illness, injury to or death of any person to the extent caused or contributed to by the Supplier or any of its Personnel;
- c) infringement or alleged infringement of intellectual property rights or moral rights of any person arising out of or in connection with the Supplier's performance of this Contract;
- d) non-compliance by the Supplier or any of its Personnel with any Law;
- e) abandonment of some or all of this Contract by the Supplier;
- f) wilful, unlawful or negligent act or omission by the Supplier or any of its Personnel; or
- g) breach by the Supplier or any of its Personnel of a duty of confidence owed under this Contract or at Law.

19 Liability

The parties agree that, to the fullest extent permitted by Law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to any and all rights, obligations and liabilities under or arising out of this Contract.

20 Modern Slavery, Fraud and Corruption Prevention

- a) The Supplier must:
 - I. not engage in Modern Slavery or do anything that would be an offence under the Modern Slavery Law;
 - II. comply with all applicable Modern Slavery Laws and PON's policies concerning Modern Slavery;
 - III. keep sufficient records to enable PON to verify the source of supply of Goods and/or Services;
 - IV. upon request, provide the Superintendent with reasonable access to its records and premises for the purposes of assessing the Supplier's compliance with the Modern Slavery Laws;
 - V. report to the Superintendent any actual or suspected instance of Modern Slavery in the supply chain of any Good and/or Service; and
 - VI. cooperate with PON (to the extent required by PON) to facilitate training of its Personnel on compliance with Modern Slavery Laws.
- b) The Supplier must immediately notify PON of any corrupt activity or suspected corrupt activity of which the Supplier becomes aware by written notice to:
 - I. PON's Chief Executive Officer and Executive Manager; or
 - II. Integrity Counts Hotline (pon@integritycounts.ca or 1800 263 215), in accordance with PON's whistleblower policy.

21 Disputes

- a) If a dispute or difference arises between the parties in respect of any fact, matter or circumstance arising out of or in connection with this Contract, or either party's conduct before the Contract (**Dispute**), the Dispute must be determined in accordance with this clause 21.
- b) Where such Dispute arises, either party may give notice in writing (**Notice of Dispute**) to the other party specifying:
 - I. the Dispute;
 - II. particulars of the party's reasons for being dissatisfied; and
 - III. the position which the party believes is correct.
- c) The representatives of PON and the Supplier must, within 5 Business Days of serving a Notice

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- of Dispute, meet and undertake genuine and good faith negotiations with a view to resolving the Dispute.
- d) Whether or not negotiations have taken place under clause 21c), if the Dispute is not resolved within 10 Business Days after the service of a Notice of Dispute, the Dispute must be referred to senior executives of each party (as nominated by each party) who must:
- I. meet and undertake genuine and good faith negotiations with a view to resolving the Dispute; and
 - II. if they cannot resolve the Dispute, use reasonable endeavours to agree upon a procedure to resolve the Dispute.
- e) If the senior executives of each party have not resolved the Dispute or agreed on an alternative process for resolving the Dispute within 25 Business Days after a notice is given under clause 21b), either party may commence court proceedings in respect of the Dispute.
- f) Despite the existence of a Dispute, each party must continue to perform its obligations under this Contract.
- g) This clause will not prevent either party from seeking urgent injunctive or interlocutory relief.

22 Personal Property Securities Act

The Supplier:

- a) acknowledges and agrees that:
- I. it must provide all assistance to PON as is necessary to enable PON to exercise any right in connection with the PPSA;
 - II. it must keep PON regularly informed of any matters in relation to the PPSA as requested by the Superintendent;
 - III. it has no Claim arising out of or in connection with this clause 22;
 - IV. PON need not comply with sections 95, 118, 121(4), 125, 130, 132(3)(d) and 132(4) of the PPSA in enforcing its Security Interests under the PPSA; and
 - V. it will not exercise its rights under sections 142 and 143 of the PPSA if PON enforces a Security Interests under the PPSA;
- b) waives its right to receive Notice of Verification Statements (as defined in the PPSA) from PON;
- c) agrees to do all things PON reasonably directs to ensure that PON's Security Interests are

enforceable, perfected and otherwise have maximum effectiveness; and

- d) if and to the extent that the arrangements contemplated by this Contract give rise to a Security Interest which has or will be granted by PON in favour of the Supplier, irrevocably and unconditionally agrees that it will not itself, or will not allow another person to, perfect or take any steps to perfect that Security Interest in any manner.

23 Notices

- a) A notice, approval, consent or other communication under or in connection with this Contract is only effective if it is:
- I. in writing and in English;
 - II. signed by a person duly authorised by the sender;
 - III. addressed to the party to whom it is to be given at the relevant address in the Purchase Order;
 - IV. marked to the attention of the recipient's representative; and
 - V. either left at the recipient's address or sent to it by mail or email.
- b) Where a notice, approval, consent or other communication is:
- I. left at the recipient's address, it is taken to have been received when it is left provided it is left in the presence of a representative of the recipient; or
 - II. sent by:
 - A. mail, it is taken to have been received:
 - aa) if sent within Australia, 4 Business Days after posting; or
 - bb) to or from a place outside of Australia, 10 Business Days after posting; or
 - B. email, the *Electronics Transactions Act* 2000 (NSW) will apply to determine when it is received,

except that if, as a result of this clause 23b), a notice, approval, consent or communication will be taken to have been received on a day that is not a Business Day or after 5:00pm on a Business Day, it will be taken to be received at 9:00am on the next Business Day.
- c) Each party must promptly notify the other in writing of any change of the notifying party's address.

24 General

24.1 Contra Proferentum

No rule of construction applies to the disadvantage of a party on the basis that it put forward this Contract or any part of it.

24.2 PON may act

If the Supplier fails to perform an obligation it is obliged to perform under this Contract, PON may, on no less than 2 Business Days' prior notice in writing to the Supplier, either itself or by a third party, perform the relevant obligation and all costs incurred by PON in doing so will be due and payable to PON by the Supplier.

24.3 Entire Agreement

This Contract constitutes the entire agreement between the parties in respect of its subject matter and all prior discussions, negotiations and correspondence that are not incorporated into this Contract are expressly excluded.

24.4 Governing Law

This Contract is subject to, and is to be construed in accordance with, the laws of New South Wales.

24.5 Indemnities

- a) Each indemnity in this Contract is a continuing obligation, separate and independent from the other obligations of the parties, and survives the termination, completion or expiration of this Contract.
- b) It is not necessary for PON to incur any expense before enforcing a right of indemnity conferred on it by this Contract.
- c) The Supplier must pay PON any sum claimed by PON pursuant to an indemnity on demand from PON and without any deduction or set-off.

24.6 Joint and several liability

If the Supplier comprises two or more persons:

- a) its obligations and liabilities under or arising out of this Contract bind those persons jointly and severally; and
- b) any payment made to any one or more persons constituting the Supplier is deemed to be payment to all persons constituting the Supplier.

24.7 Survival

This clause 24 and clauses 1, 2, 4.2, 5.4b), 5.6, 6.3c), 8.4, 9a), 10, 11, 12.2, 12.3c), 14c), 15 (as it relates to the professional indemnity insurance policy), 16.4, 16.5, 16.7, 17.4, 18, 19, 21, 23 and 25 survive the expiry or

earlier termination of this Contract.

25 PON's capacity

The Supplier acknowledges and agrees that:

- a) PON enters this Contract in its capacity as trustee for the Port of Newcastle Unit Trust (**Trust**);
- b) all Loss arising under or in connection with this Contract or any Law may only be enforced against PON to the extent to which PON:
 - I. is entitled to be indemnified in respect of that loss out of the property of the Trust; and
 - II. can be satisfied out of the property of the Trust;
- c) neither the Supplier, any of its Personnel nor anyone else on the Supplier's behalf may:
 - I. claim from or commence proceedings against PON in respect of any Loss in any capacity other than as trustee of the Trust
 - II. enforce or seek to enforce any judgment in respect of any Loss against any property of PON other than property held by PON as trustee of the Trust
 - III. take any steps to procure or support the appointment of a liquidator, administrator or other similar officeholder to PON on the basis of a Loss under or arising out of this Contract, or prove in any liquidation, administration or arrangement of or affecting PON; or
 - IV. in respect of any Loss under or arising out of this Contract, appoint or take any steps to procure or support the appointment of a receiver or receiver and manager to any property of PON, other than property which is held by it in its capacity as trustee of the Trust;
- d) no attorney, agent or other person appointed in accordance with this Contract has authority to act on behalf of PON in a way which exposes PON to any personal liability
- e) this clause 25 applies despite any other provision of this Contract and extends to all Loss of PON in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to this Contract; and
- f) PON is not obliged to do or refrain from doing anything under or pursuant to this Contract unless its liability is limited in the manner set out in clauses 25a) – e).