



## Terms and Conditions for Commercial Orders (Supplies, Services and Blanket Orders)

**1. DEFINITIONS.** As used throughout these terms and conditions, the following terms shall have the meanings set forth below.

- (a) “**Buyer**” means HEATHGATE RESOURCES PTY LTD.
- (b) “**Order**” means the purchase order or subcontract issued by Buyer to Seller to which these terms and conditions are affixed.
- (c) “**Seller**” means the person, firm, or corporation executing the Order with Buyer and who will furnish the supplies or services provided for herein.

Except as otherwise provided in these terms and conditions, the term “**subcontract**” includes purchase orders issued by Seller under the Order, but does not include Seller’s employment relationships.

All references to “**works**,” “**supplies**,” “**articles**,” “**products**,” or “**items**” shall include “**services**,” if the Order, wholly or in part, provides for the furnishing of services.

**2. INDEPENDENT CONTRACTOR.** Seller is, and shall be deemed to be, an independent contractor and not an agent or employee of Buyer either expressly or impliedly. The Order shall not constitute, create, give effect to, or imply a joint venture, pooling arrangement, partnership, formal business organisation or any type of permanent relationship of any kind beyond the specific purposes stated herein. Nothing in the Order shall grant to either party the right to make commitments of any kind for, or on behalf of, the other party.

**3. PACKING AND SHIPMENT.** Deliveries shall be made as specified, without additional charge for boxing, crating, carting, or storage unless otherwise specified. Goods shall be suitably packaged to secure the lowest transportation costs and in accordance with the requirements of common carriers and be packaged to ensure against damage from weather or transportation. Buyer’s Order number and symbols must be plainly marked on all invoices, packages, bills of lading and shipping orders. Packing lists shall accompany each shipment showing materials. Buyer’s count or weight shall be final and conclusive on shipments not accompanied by packing lists.

**4. INSPECTION.** Buyer shall be permitted to inspect Seller’s manufacture, fabrication and testing. For these purposes, and upon reasonable advance notice, Seller shall provide access to Seller’s facilities to enable Buyer and its representatives to perform inspections and to determine Seller’s orderly, timely and satisfactory compliance with the requirements of the Order.

Inspections and design or planning reviews performed or not performed by Buyer shall not relieve Seller from responsibility to perform all inspection tests and quality assurance measures nor otherwise to comply with the requirements of the Order.

Any work, or item, which fails to meet the Order requirements may be rejected. If delivered to Buyer’s destination, rejected work or items shall be removed promptly at Seller’s expense.

**5. DELIVERY. TIME OF DELIVERY UNDER THE ORDER IS OF THE ESSENCE.** If Seller fails to adhere to the delivery schedule set forth in the Order, and Buyer must therefore demand a more expeditious means of transportation than specified in the Order, Seller shall be liable for the difference in such transportation cost. This in no way affects any other rights and remedies available to Buyer related to such delivery.

Unless otherwise noted on the Order, the date of delivery shall mean the date the item is to be delivered at Buyer’s facility or an alternative delivery point nominated by Buyer, or if the Order is for services, the date the services are to be completed.

Buyer’s needs are for the quantities specified within the Order. Items delivered in excess of the quantities ordered result in substantial administrative expense to Buyer. Therefore, articles delivered under the Order in excess of the quantity specified may be retained by Buyer at no additional cost. Buyer is under no obligation to notify Seller of any over shipments.

**6. TITLE AND RISK OF LOSS.** Subject to [clause 8](#), title shall pass to Buyer at the destination or at the time specified in the Order. Acceptance and passage of title shall not impair the right of Buyer to inspect and reject any item.

Seller shall assume and bear the risk of any loss of, or damage to, the supplies covered hereby until delivered at the specified destination.

Seller shall bear all risks as to rejected items after notice of rejection.

**7. WARRANTY.** Notwithstanding inspection and acceptance by Buyer of supplies furnished under the Order, all supplies furnished under the Order will be free from defects in material or workmanship and will conform with all requirements of the Order. Seller warrants that supplies ordered to specifications hereunder will conform to the specifications and to any drawings, samples, or other description furnished or adopted by Buyer in connection with the Order. If supplies are not ordered to such specifications, Seller warrants that they will be fit for the purpose intended. All articles purchased hereunder are warranted to be merchantable, to be of good material and workmanship, and to be free from defect for a period of one year after delivery and acceptance by Buyer. All such warranties and guarantees, if any,

shall survive inspection or test, acceptance, and payment. All statutory warranties shall apply. Warranties shall run to Buyer, its successors, assigns, and customers. Seller further warrants that all work and services called for herein shall comply with the requirements of the Order and shall conform to the highest standards applicable to them.

**8. SPECIAL TOOLS.** If prices are stated separately for dies, tools, and/or patterns acquired by Seller for the purpose of filling the Order (each a “**Special Tool**”), such Special Tools shall be properly identified by Seller as such. Title shall pass to Buyer upon payment for the Special Tool. If a Special Tool is needed for the manufacture by Seller of an Order, then Seller will hold such Special Tool in good condition, normal wear and tear excepted, and hand over to Buyer, as applicable, at the completion of the Order unless Buyer directs Seller in writing to dispose of such Special Tool.

**9. BUYER-FURNISHED PROPERTY AND MATERIAL.** Property and material furnished by Buyer to Seller for use in performance of the Order is to be held by Seller for mutual benefit and if the materials are damaged or not satisfactorily accounted for, Seller will pay for all such property and materials.

Seller shall properly mark and account for all Buyer property.

**10. PAYMENT.** (a) Seller shall provide Buyer with an invoice in respect of work performed in accordance with the Order during a calendar month within seven (7) days of the end of that calendar month. Seller’s invoice shall be posted to Buyer’s Adelaide office or emailed in a pdf format to [accounts@heathgate.com.au](mailto:accounts@heathgate.com.au) (faxed invoices will not be accepted).

(b) Seller’s invoice shall state Seller’s ABN and otherwise be in a form that complies with the *A New Tax System (Goods and Services Tax) Act 1999* (Cth). Non-complying invoices will be subject to a withholding tax in accordance with the applicable legislation in force from time to time.

(c) Subject to [clauses 10\(a\) and 10\(b\)](#), Buyer shall pay any undisputed amount owing to Seller within thirty (30) days of the end of the calendar month in which the work performed and invoiced by Seller occurs.

(d) Buyer shall be entitled at all times to set off any amount owing at any time from Seller to Buyer (or any of its affiliated entities) against any amount payable by Buyer (or any of its affiliated entities) to Seller.

**11. ACCEPTANCE.** Any one of the following methods will constitute acceptance of the Order by Seller: (a) acknowledgement in writing; (b) commencement of performance by Seller; or (c) delivery in whole or in part of the items or services called for under the Order. Seller’s acceptance of the Order creates a binding contract between Buyer and Seller, which shall be governed by the provisions of the Order together with these terms and conditions. No condition stated by Seller in its acknowledgement of the Order, quotation or any other document provided by Seller shall be binding upon Buyer if in conflict or inconsistent with, or in addition to the terms and conditions of the Order, unless expressly accepted in writing by an authorised representative of Buyer’s Purchasing Department. The rights and obligations described in the Order shall survive completion of and final payment of the Order.

**12. CHANGES.** (a) An authorised representative of Buyer’s Purchasing Department may at any time without notice to the sureties, if any, issue written directions to Seller requiring additional work within the general scope of the Order, or directing the omission of or variation in work covered by the Order or any amendment thereto. If any such direction results in a material change in the amount or character of the work under the Order, an equitable adjustment in the Order price and other such provisions of the Order as may be affected shall be made and the Order shall be modified in writing accordingly. Any claim by Seller for an adjustment under this [clause 12](#) must be asserted in writing within fifteen (15) days from the date of receipt by Seller of the notification of change.

(b) Whether made pursuant to this [clause 12](#) or by mutual agreement, changes shall not be binding upon Buyer until agreed to in writing by an authorised representative of Buyer’s Purchasing Department. The issuance of information, advice, approvals, or instructions by Buyer’s technical personnel or other representatives shall be deemed expressions of personal opinions only and shall not affect Buyer’s and Seller’s rights and obligations hereunder unless the same is in a writing which is signed by an authorised representative of Buyer’s Purchasing Department and which expressly states that it constitutes a modification or change to the Order.

(c) Seller shall proceed with prosecution of the work in accordance with any written direction issued under the Order.

**13. WRITINGS REQUIRED.** (a) No notice, order, direction, determination, requirement, consent, approval, or ratification under the Order shall be of any effect unless provided in writing.

(b) No oral statement of any person whatsoever shall in any manner or degree, modify or otherwise affect the terms of the Order.

(c) No extra charge of any kind, or change in the price or schedule or terms and conditions of the Order will be allowed unless specifically agreed to in writing by an authorised representative of Buyer's Purchasing Department.

**14. RECORDS.** Seller agrees that its manufacturing plant, or such part of any manufacturing plant as may be engaged in the performance of this Order, and its books, documents, papers and records shall at all reasonable times be subject to examination and audit by any person designated by Buyer. Such books and records shall be maintained by Seller for a period of five (5) years after final payment is made under the Order.

**15. STOP WORK ORDER.** Buyer may, at any time, by written notice to Seller, require Seller to stop all or part of the work called for by the Order for a period of ninety (90) days after such notice is delivered to Seller. Within ninety (90) days after such notice is delivered to Seller, or within any extension of the period to which the parties have agreed, Buyer shall either: (a) withdraw the notice and direct Seller to resume work, in which event Seller may be entitled to receive an equitable adjustment in the Order price or schedule or both, provided a claim for such an adjustment shall be submitted by Seller within thirty (30) days after the end of the period of work stoppage; or (b) terminate the work and the Order or part thereof.

**16. TERMINATION FOR CONVENIENCE.** (a) Buyer may, at its option, terminate the Order, in whole or in part, for Buyer's convenience, by written notice, including fax notice to Seller, effective at date of sending. Upon termination hereunder, Seller shall (1) forthwith stop work under the Order on the terminated portion thereof and place no further orders or lower-tier subcontracts hereunder, (2) terminate or, if so directed by Buyer, assign to Buyer, orders or subcontracts outstanding hereunder, and (3) take any necessary action to protect property in Seller's possession in which Buyer has or may acquire an interest, and direct subcontractors to do the same. Within three (3) months after receipt of such notice of termination, Seller will prepare and submit to Buyer in writing its claim for reimbursement of costs resulting from the termination. Such claim which shall include termination costs, if any, from lower-tier subcontractors, is to be in accordance with the requirements of Buyer hereinafter set forth. If the parties cannot agree within a reasonable time upon the amount of fair compensation to Seller for Seller's performance of the terminated Order, Buyer will pay Seller, without duplication:

(i) The Order price for articles which have been completed and delivered to Buyer or otherwise disposed of as Buyer may direct. In the event the Order price includes packaging and transportation costs and the completed articles have not been packaged and transported at the time of termination, an equitable adjustment will be made to the Order price for such articles.

(ii) The actual costs incurred by Seller prior to termination which are properly allocable or apportionable, under good Australian commercial accounting practices consistent with Seller's usual accounting procedures, to the terminated portion of the Order other than articles whose price is paid under subclause 16(a), except that when the Order provides for progress payments, settlement of Seller's costs shall be on the basis of actual progress made through the termination date. Notwithstanding the provisions of this subclause 16(a)(ii) and subclause 16(b)(iii) below, if the Order provides for fixed hourly rates, Buyer shall pay Seller without duplication the hourly rates fixed in the Order times the number of hours actually expended in conformity with the provisions of the Order.

(iii) Reasonable expenses actually incurred by Seller in settling Seller's terminated orders and subcontracts hereunder, as approved by Buyer, and in protecting property in which Buyer has or may have an interest.

(iv) Such allowance for profit on the work performed as may be reasonable and allocable under the circumstances; provided, however, that if it appears that Seller would have incurred a loss if the Order had not been terminated, no profit shall be allowed and Buyer's payments pursuant to subparagraph (ii) above will be reduced by the proportionate amount of such loss as the terminated portion of the Order relates to the entire Order.

(b) Payments under this clause 16, including all payments made under the Order prior to the termination, shall in no event exceed the aggregate price specified in the Order. Seller will transfer title to and deliver on Buyer's instructions any property the cost of which is reimbursed under subclause 16(a)(ii) above or, with Buyer's approval, may retain the same at an agreed price or sell at any approved price and credit or pay the amount so agreed or received as Buyer directs. Buyer may audit all elements of any termination claim including all elements of claims submitted under any orders and subcontracts that Seller has terminated in accordance with this clause 16.

(c) In no event will Seller be entitled to reimbursement for any cost incurred subsequent to the effective date of termination except for those allowed by subclause 16(a)(iii) above, nor shall Seller be allowed to recover any cost incurred prior to termination unless such cost was allocated to the Order in accordance with usual and customary accounting procedures applicable in the absence of termination of orders. Specifically, but not exclusively, no recovery will be allowed of any loss referred to in clause 16A.

**16A. EXCLUDED LOSS.** Despite any other provision of the Order or these

terms and conditions, Buyer will have no liability to Seller in connection with the Order or these terms and conditions or the supplies the subject of the Order (whether under contract, in tort, under statute or otherwise at law or in equity) for loss not arising naturally according to the usual course of things, loss of profit or the opportunity to earn profit, unabsorbed administrative expenses or other overhead costs, or continuing costs.

**17. TERMINATION FOR DEFAULT.** (a) Buyer may terminate all or any part of the Order if Seller breaches any of the terms hereof including warranties or fails to make progress as to endanger performance of the Order in accordance with its terms. Termination hereunder shall be effected by written notice to Seller.

(b) In the event Buyer terminates the Order in whole or in part as provided hereinabove, Buyer may procure, upon such terms and in such manner as Buyer deems appropriate, supplies or services similar to those so terminated, and Seller shall be liable to Buyer for any excess costs for such similar supplies or services, provided that Seller shall continue the performance of the Order to the extent not terminated under the provisions of this clause 17.

(c) Except with respect to defaults of subcontractors at any tier, Seller shall not be liable for excess costs if the failure to perform the Order arises out of causes beyond the control and without the fault or negligence of Seller. If the failure to perform is caused by the default of a subcontractor at any tier, and if such default arises out of causes beyond the control of both Seller and the subcontractor, and without the fault or negligence of either of them, Seller shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit Seller to meet the required delivery schedule.

(d) If the Order is terminated for default, Buyer may require Seller to transfer to Buyer title and possession in the manner and to the extent directed by Buyer of (1) any completed items, and (2) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as Seller has specifically produced or acquired for the performance of such part of the Order as has been terminated; and Seller shall, upon direction of Buyer, protect and preserve property in possession of Seller in which Buyer has an interest. Payment for completed items delivered and accepted by Buyer shall be at the Order price. Payment for manufacturing materials delivered to and accepted by Buyer and for the protection and preservation of property shall be in the amount agreed upon by Seller and Buyer. Buyer may withhold from amounts otherwise due Seller for such completed supplies or manufacturing materials, such sum as Buyer determines to be necessary to protect Buyer against loss because of outstanding liens or claims of former lien holders.

(e) If, after notice of termination of the Order under the provisions of this clause 17, it is determined for any reason that Seller was not in default under the provisions of this clause 17, or that the default was excusable under the provisions of clause 17(c), the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the Termination for Convenience clause 16 and the Order shall be equitably adjusted to compensate for such termination and the Order modified accordingly.

(f) The rights and remedies of Buyer provided in this clause 17 shall not be exclusive and are in addition to any others provided by law or equity or the Order.

**18. DATA.** If the Order is for research, development, or experimental work, all data, notes, drawings, designs, sketches, specification, records, and memoranda of every description in any physical or electronic form relating to the work hereunder or any part thereof as Seller shall produce, and all copies of the foregoing, shall be the property of Buyer and subject to inspection by Buyer at all reasonable times and shall be delivered to Buyer or otherwise disposed of by Seller as Buyer may direct from time to time.

**19. PROPRIETARY INFORMATION.** (a) Seller shall not, during the term of the Order or thereafter, divulge to anyone other than Buyer (or such other persons as Buyer designates in writing), or, except in the performance of the Order, make use of information or knowledge relating to details of the business, or any other confidential or proprietary information, of Buyer or its affiliates, suppliers, or customers which Seller shall have obtained because of the Order. Seller shall take all reasonable measures to protect such confidential or proprietary information, which measures shall be at least equal to those with which Seller protects its own confidential or proprietary information. All proprietary rights embodied in designs, tools, patterns, drawings, information data, and equipment supplied by Buyer under the Order are reserved to Buyer and their use is restricted to the work to be performed hereunder. Seller agrees to retain in confidence and return to Buyer on completion of the Order, all designs, drawings, specifications, and technical information of every kind belonging to Buyer and furnished to Seller in connection with the Order.

(b) Notwithstanding the foregoing subclause 19(a), Seller shall have no obligation with respect to any confidential or proprietary information which Seller can demonstrate (i) was in Seller's rightful possession free of any obligation of confidence prior to its first receipt from Buyer, (ii) is publicly

known through no fault of Seller, (iii) is obtained from a third person who had a right to disclose it, or (iv) was independently developed without access to any confidential or proprietary information of Buyer.

(c) No private data, proprietary designs, ideas, or information of Seller is to be provided to Buyer. Buyer accepts no obligation of confidence to Seller with respect to ideas, data, information, or designs divulged by Seller or equipment, operations, or designs witnessed by Buyer at Seller's plant. Seller authorises Buyer to reproduce Seller's copyrighted material, at no cost to Buyer, for the purpose of including such material in documents provided to Buyer's customers, or prospective customers, in the normal course of Buyer's business. In the absence of further written agreement duly signed by both parties to the Order, all information which passes from Seller to Buyer shall be treated as nonconfidential, including material provided in written form and marked by the originator as being confidential or private.

(d) Seller grants to Buyer a non-exclusive, royalty free licence (including the right to sub-license) to use any documents, drawings, software or other information (in any form) provided or made available by, or on behalf of, Seller to Buyer, either before or after the Order date, which are relevant to the Order or these terms and conditions or the supplies the subject of the Order (including Buyer's use of those supplies).

**20. PATENT RIGHTS.** If the Order is for, or includes, experimental, development, or research work, to be performed in accordance with special requirements of Buyer, Seller agrees to disclose and on request to assign to Buyer inventions conceived or first actually reduced to practice in the course of or under the Order.

**21. ADVERTISING, USE OF NAME.** Seller shall not, without first obtaining the written consent of Buyer, in any manner advertise or publish the fact that Seller has furnished or contracted to furnish to Buyer the articles or services provided for in the Order. Seller agrees that it shall not use Buyer's name or logo, nor any adaptation or variation thereof, in any manner whatsoever (including, but not limited to, website(s), press releases, reference lists, or similar public announcements concerning the Order or projects contemplated by the Order), without Buyer's prior written consent in each instance.

**22. INDEMNITY.** (a) Seller agrees to indemnify Buyer against any liability, including costs and expenses, for (i) any asserted trademark, copyright, or patent infringement arising from the manufacture, use, or sale of any articles furnished to Buyer under the Order, except where such articles are in accordance with Buyer's detailed design or specification and Seller gives prompt notice to Buyer of such claims which come to Seller's attention, (ii) any breach of any warranty of Seller hereunder, and (iii) any damages incurred by Buyer or any third party as a result of or arising out of the manufacture, use or sale of articles furnished by Seller under the Order.

(b) To the maximum extent permitted by law, the parties agree to exclude the operation of Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) in relation to any rights, obligations or liabilities arising in connection with the Order or these terms and conditions.

**23. PRECAUTIONS, INDEMNITY, AND INSURANCE.** In addition to Seller's obligations set forth in clause 22, Seller will defend Buyer at Seller's expense from any suit or action, criminal or civil, arising out of Seller's performance of the Order, or that of its officers, directors, employees or agents. Further, Seller shall procure and maintain during the term of the Order and at its expense insurance in sufficient amounts to ensure its obligations and liabilities hereunder. Such insurance shall include at a minimum the following:

(a) Automobile liability insurance protecting Seller from automobile bodily injury and property damage liability with limits of at least \$10,000,000 per person and \$10,000,000 per occurrence for bodily injury and \$10,000,000 per occurrence for property damage.

(b) Insurance of goods the subject of the Order for their replacement value against loss or damage, including loss or damage in transit to the specified destination, and if the Order requires Seller to unload the goods, also such unloading.

(c) Public and product liability for loss or damage to property (other than property required to be insured by clause 23(a), death or, illness of or injury to any person (other than liability which the law requires to be covered under a workers' compensation insurance policy) for an amount per occurrence of at least \$20,000,000.

(d) If the Order is for engineering or other professional service or Seller designs the goods the subject of the Order (or selects the goods such that Buyer is relying on Seller to select goods that are suitable for their intended purpose), professional indemnity insurance with a limit no less than \$10,000,000.

(e) Such insurance of employees as may be required by any workers' compensation act or other law, regulation or ordinance which may apply in the circumstances.

For (a), (b) and (c) above, such policies shall name Buyer as additional insured when requested by Buyer.

Seller shall furnish to Buyer certificates of insurance setting forth the amount(s) of coverage, policy number(s) and date(s) of expiration for insurance maintained by Seller and, such certificates will provide that Buyer shall receive thirty (30) days' prior written notification from the insurer of any termination or reduction in the amount or scope of coverage. Seller's purchase of appropriate insurance coverage or the furnishing of certificates of insurance shall not release Seller of its obligations or liabilities under the Order. In the event of Seller's breach of this provision, Buyer shall have the right to cancel the undelivered portion of any goods or services covered by the Order and shall not be required to make further payments except for conforming goods delivered or services rendered prior to cancellation.

If Seller's work under the Order involves operations by Seller on Buyer's premises, Seller agrees to take all proper precautions in its operations against the occurrence of injury to any person or damage to property, and to be responsible for and to hold Buyer harmless from all loss and any claim by reason of injury, including death, to any person or damage to property in connection with such work, and from all fines, penalties, or loss incurred by reason of failure to comply with this clause 23.

**24. PROPERTY INSURANCE.** Seller shall secure and maintain for the benefit of Buyer, insurance against any loss or damage of all property in which Buyer has an interest hereunder. Coverage will be provided on an all risk basis and value will be at replacement cost.

**24A. TRAVEL COSTS.** Unless otherwise noted in the Order, reasonably and properly incurred travel costs shall be reimbursed at cost provided airfare cost does not exceed the cost of economy airfare. Buyer may at its sole discretion note in the Order that it will provide for, and cover the cost of, Seller's accommodation and travel to and from Buyer's site.

**25. TAXES.** Except as stated in the Order or these terms and conditions, the Order price is deemed to include provision for all costs, expenses, fees, duties, excises, imposts, levies and taxes incurred by Seller in performing its obligations under these terms and conditions.

**25A. GST.** (a) Terms defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning when used in this clause.

(b) If GST is payable on a Taxable Supply made under, by reference to or in connection with the Order or these terms and conditions, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration. This clause 25A does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive.

(c) No payment of any amount pursuant to the Order or these terms and conditions, and no payment of the GST Amount where the Consideration for the Taxable Supply is expressly agreed to be GST inclusive, is required until the supplier has provided a Tax Invoice or Adjustment Note (as the case may be) to the recipient.

(d) Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.

(e) This clause 25A will continue to apply after expiration or termination of the Order or these terms and conditions.

**26. SUBCONTRACTING.** Seller will obtain written consent from an authorised representative of Buyer's Purchasing Department before subcontracting the Order or any substantial portion thereof. Buyer's consent may be subject to any conditions which Buyer in its absolute discretion imposes. Seller agrees that any consent by Buyer in accordance with this clause 26 does not relieve Seller of any liabilities or obligations to Buyer. The parties acknowledge that the purchase of raw materials or standard commercial articles is not a subcontract within the meaning of this article.

**27. FORCE MAJEURE.** Neither Seller nor Buyer shall be liable for any failure or delay in performing its obligations hereunder, or for any loss or damage resulting therefrom, due to: (a) acts of God, war, riot, embargos, acts of civil or military authorities, fire, flood, epidemics, or unusually severe weather affecting either party; or (b) similar causes beyond their control and which are not foreseeable or causes beyond the reasonable control of their subcontractors which are not foreseeable.

**28. COMPLIANCE WITH LAWS.** Seller understands and acknowledges that Buyer is committed to compliance with all domestic and foreign laws affecting its business and operations. Seller agrees that in performing its duties under the Order, Seller will conduct itself in strict adherence to all applicable laws, rules and regulations.

nature of any hazards associated with the manufacture, handling and transportation of such hazardous materials and will comply with all relevant laws, regulations and other requirements applicable to the supply of those types of material.

*If this Order is a Cost Type order (e.g. Time & Material, Labour hour), clauses 41 to 44 shall also apply.*

**41. PAYMENTS UNDER COST REIMBURSABLE LINE ITEMS.** (a) If this is a cost reimbursement type order or if the Order specifies fixed hourly rates for services, a statement of accounts or invoice, shall be sent to Buyer's Accounts Payable Department monthly. Invoices tendered for payment shall show the monthly rate of expenditure by labour classification as well as other costs allowable under the Order. Delays in receiving a statement or invoice, and errors and omissions on the statement, will be considered just cause for deferring payment without losing discount privilege.

(b) Seller shall promptly notify Buyer's Accounts Payable Department of any overpayment received by Seller under this Order. Overpayments identified by either Buyer or Seller shall be refunded to Buyer in the manner it directs.

(c) Seller shall submit a final invoice to Buyer within ninety (90) days after completion of the Order. If Seller fails to submit a final invoice within the time specified, Buyer may determine the total amount due to Seller under the Order and issue a unilateral modification to the Order. Amounts paid by Buyer in excess of the total amount due to Seller shall be refunded to Buyer within forty-five (45) days of Seller having received the unilateral modification.

(d) Seller agrees to maintain books, records, documents, and other evidence (hereinafter called "records") to the extent and in such detail as necessary to properly reflect all costs of labour, materials, equipment, supplies and service, and other expenses for which reimbursement is claimed. Seller will make available at the office of Seller at all reasonable times during the duration of the Order and until five (5) years after final payment, any of the records for inspection, audit, or reproduction by an authorised representative of Buyer. Buyer may also extend or shorten the retention period by amending the Order in writing.

**42. WITHHOLDING.** On Time and Material orders, Seller agrees to the withholding of five percent (5%) of the Order price not to exceed \$50,000 in order to ensure the submission of all documents required to close-out of the Order. Seller agrees to the withholding of fifteen percent (15%) or \$50,000, whichever is less, of the Order price on cost reimbursement orders in order to ensure the submission of all documents required to close-out the Order. Withholdings shall commence with the first invoice and cease with the earlier of having reached the ceiling amount or the issuance of a completion invoice.

**43. ACCOUNTING SYSTEM.** By acceptance of the Order, Seller certifies that Seller's accounting system can segregate costs adequately to allow for a sufficient audit of costs incurred by line item detail.

**44. CREDIT.** Seller shall credit to Buyer, either as a cost reduction or by cash refund, the applicable portion of any income, rebate, allowance, or other credit related to cost for which Seller has been reimbursed by Buyer.

*If this Order is a contract labour order, clauses 45 to 47 shall also apply*

**45. PERSONNEL UNDER LABOUR ORDERS.** Buyer may interview, test, and evaluate the qualifications of any person nominated for work under a contract labour Order, and may reject any such individual. If any such individual is rejected by Buyer, Seller shall supply additional candidates in a timely manner.

**46. INVENTIONS AND COPYRIGHT AGREEMENT FOR LABOUR ORDERS.** If the Order is for contract labour, Seller's personnel shall execute an inventions and copyright agreement (in a form approved by Buyer in its absolute discretion) under which all work performed by Seller shall be construed as work performed by employees of Buyer, and a special contract employee acknowledgment form shall be assigned.

**47. INDEMNITY FOR LABOUR ORDERS.** In addition to Seller's obligations in clauses 22 and 23, if the Order is for contract labour: (a) Seller indemnifies Buyer and will keep Buyer indemnified against any claim, action or proceeding of any nature or kind ("Claim") and any loss, damage, liability, cost, expense or judgment in relation to a Claim ("Loss") arising out of, in connection with or otherwise related to, the performance or breach of the Order by the Seller, including (without limiting the generality of the foregoing): (i) a negligent, reckless, intentional or other act or omission of the Seller, its employees, agents, contractors or servants; (ii) personal injury, taxation, employer's liability and third party liability; (iii) any liability imposed on Buyer either under legislation, common law or equity; and (iv) any employee, agent, contractor or servant of Seller being deemed to be an employee of Buyer; and (b) Seller will notify Buyer as soon as practicable of any Claim or potential Claim to which this clause applies.

**29. APPROVALS, AUTHORISATIONS AND LEGISLATIVE REQUIREMENTS.** Seller must, in performing its obligations under the Order and these terms and conditions, obtain all necessary approvals and authorisations and comply with and satisfy all applicable legislative requirements and any conditions of applicable approvals and authorisations which apply to the recipient of the relevant approval or authorisation.

**30. ASSIGNMENT.** (a) Buyer may at any time assign or transfer, in whole or in part, any rights or liabilities arising hereunder without the consent of Seller. Seller must do all things reasonably required by Seller to give effect to the assignment or transfer.

(b) Seller will not assign or transfer the Order, in whole or in part, nor any payments due or to become due hereunder, without the prior written consent of Buyer. In the event written consent is granted, Seller shall promptly supply Buyer two copies of any such assignment. Payment to an assignee of any claim hereunder shall be subject to set-off or recoupment for any present or future claims which Buyer may have against Seller.

**31. DISPUTES.** In the event of any dispute arising hereunder between Buyer and Seller, Seller shall proceed with performance under the Order pursuant to the position taken by Buyer in such a dispute.

**32. APPLICABLE LAW.** The Order and any dispute arising hereunder shall be governed by the substantive and procedural laws of South Australia.

**33. LEGAL REPRESENTATION.** If it is necessary for Buyer to obtain legal representation to enforce any part of the Order, Seller agrees to bear, on an indemnity basis, the court costs and fees associated with such legal representation of Buyer.

**34. NON-WAIVER.** The failure of Buyer to insist, in one or more instances upon strict performance or to exercise any rights shall not waive or relinquish to any extent Buyer's right to assert or rely upon any such terms or rights on any future occasion.

**35. PRECEDENCE.** If any of the provisions of the Order are in conflict, the following will be the order of precedence: (a) typed provisions on the face of the Order, (b) these terms and conditions, (c) Buyer's other Order attachments, including specifications, (d) Seller's proposal or other documents only when specifically referenced on the Order. In the event of any conflicting provisions, Seller shall promptly notify Buyer thereof.

**36. ENTIRE AGREEMENT.** These terms and conditions and those on the face of the Order to which this form is attached including other specifications or documents incorporated by reference, constitute the complete and exclusive agreement between Buyer and Seller and supersede all previous negotiations, discussions, communications, representations, agreements, arrangements or understandings, whether written or oral between the parties related to the subject matter of the Order. No agreement or understanding varying or extending the terms or conditions of the Order will be binding unless executed in writing by an authorised representative of Buyer's Purchasing Department.

**37. ORDERS WITH ASSIGNMENT OF CERTAIN PERSONNEL.** If the Order contains a key personnel clause and the designated employee(s) of Seller become unavailable to perform services under the Order, a replacement for that individual with comparable abilities and qualifications shall be promptly assigned. Seller shall promptly furnish an authorised representative of Buyer's Purchasing Department with resume(s) and any other information Buyer may reasonably request to support assignment of the replacement personnel.

**38. CERTIFICATION FOR BLANKET ORDERS.** If the prices for supplies or services purchased under the Order are not specifically incorporated or set forth on the face of the Order (a so called blanket order procurement), then Seller agrees that Buyer shall be entitled to commercial discounts generally made available to Seller's customers, and warrants that the net prices of items purchased under the Order shall be no more than the prices charged to Seller's other most favored customers for like items in similar quantities when all other aspects of the transaction are the same.

**39. SELLER'S OBLIGATIONS FOR "NOT-TO-EXCEED" ORDERS.** If the Order is a not-to-exceed order, Seller agrees to perform its obligations within the "not-to-exceed" (NTE) price set forth in the Order. If at any time during performance of the Order, Seller's incurred costs plus its estimated costs to complete, are projected to exceed the total Order NTE, Seller shall immediately notify Buyer in writing giving a revised NTE. Seller shall be under no obligation to continue performance, if in doing so, the NTE shall be exceeded and Buyer shall not be obligated to pay Seller more than the NTE value, unless specifically authorised in writing by an authorised representative of Buyer's Purchasing Department. When Seller's incurred costs equal seventy-five (75%) of the NTE value, Seller shall promptly provide written notification to an authorised representative of Buyer's Purchasing Department indicating total incurred costs and projected cost to complete.

**40. SELLER'S OBLIGATIONS FOR ORDERS INVOLVING HAZARDOUS MATERIALS.** If the Order provides for the supply of hazardous materials, Seller represents and warrants that Seller understands the