

## 1 Interpretation

- (a) In this Agreement, unless the context indicates otherwise:
- (i) a reference to a party to this Agreement includes the party's successors, permitted substitutes and permitted assigns;
  - (ii) a reference to a document or agreement (including a reference to this document) is to that document or agreement as amended, supplemented, varied or replaced;
  - (iii) a reference to legislation or to a provision of legislation is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
  - (iv) if any day on or by which a person must do something under this document is not a Business Day, then the person must do it on or by the next Business Day;
  - (v) a reference to 'month' means calendar month;
  - (vi) the word, 'includes' and any variation is to be read as if followed by the words 'without limitation'; and
  - (vii) this Agreement is not to be interpreted against the interests of a party because that party was responsible for the drafting of it or a part of it.

## 2 Agreement

- (a) Subject to clause 2(b), the following documents form the entire agreement between the parties:
- (i) the Purchase Order;
  - (ii) these terms and conditions; and
  - (iii) any other documents referred to in the Purchase Order
- (Agreement).** Any statement, representation or promise made in any document, negotiation, discussion regarding the Goods or the Services has no effect except to the extent expressly set out or incorporated by reference in the Agreement.
- (b) If Delta Coal and the Supplier enter into a subsequent agreement for the supply of the Goods or Services (**Specific Agreement**) then the Specific Agreement shall also form part of the Agreement between the parties.
- (c) This Agreement applies, and will continue to apply to the Goods and Services, despite any subsequent purchase order, terms and conditions on an invoice, or any other terms and conditions, issued by the Supplier regarding the Goods or the Services.
- (d) Any inconsistency, discrepancy or ambiguity between the documents listed in clause 2(a), will be resolved by giving precedence to the document highest in the list except if a Specific Agreement has been entered into, in which case will take precedence and except to the extent directed by Delta Coal under clause 2(e).
- (e) Delta Coal may direct the Supplier as to the interpretation to be followed and the Supplier must comply with that direction.

- (f) Except as provided in this Agreement, the Supplier will not be entitled to claim as a result of or in connection with any ambiguity or discrepancy in this Agreement or any direction by Delta Coal under clause 2(e).
- (g) Any review, comment, approval or non-approval of any document does not relieve the Supplier of any of its obligations or liabilities under this Agreement.
- (h) Delta Coal may direct the Supplier at any time to vary, amend, increase, decrease, omit or change the quality, character, extent or amount of the Goods or Services, including the Delivery Date of the Goods or Services (**Variation**). If Delta Coal decreases or omits any Goods and Services, it may provide those Goods & Services itself, or procure them from others. If the parties cannot agree the adjustment to the Price, Delta Coal will price the Variation using reasonable rates and prices.

## 3 Quality

- (a) The Supplier must obtain all permits, approvals and licenses required by Law to supply the Goods and perform the Services.
- (b) The Supplier warrants that the Goods or the Services:
- (i) comply with the Law and applicable Australian Standards; and
  - (ii) are fit for the purposes for which goods or services of the same kind are commonly supplied and for any other purpose made known to the Supplier.
- (c) The Supplier warrants that the Goods:
- (i) are new, of merchantable quality and free from defects in materials and workmanship;
  - (ii) conform precisely in quality, quantity, specification and all other respects with any description provided to Delta Coal by the Supplier or nominated by Delta Coal to the Supplier;
  - (iii) are free from all liens, charges and encumbrances of any kind; and
  - (iv) comply with any samples inspected by Delta Coal prior to or after the Purchase Order was issued.
- (d) The Supplier warrants that it is an experienced provider of services similar to the Services, and will perform the Services with all due skill and care.

## 4 Delivery and completion

- (a) Delivery will have occurred only when the Supplier has:
- (i) delivered the Goods (free of Defects) to the Site, and unless otherwise specified in the Purchase Order, unloaded the Goods at the location designated by Delta Coal or in the Purchase Order;
  - (ii) provided all documentation required by Delta Coal including any third party warranties required under clause 6(e); and
  - (iii) completed the Services (including the provision of all deliverables and products of the Services to Delta Coal) and received written confirmation of completion from Delta Coal.

- (b) The Supplier must achieve Delivery by the Delivery Date and in any case expeditiously and without delay.
  - (c) If the Goods or the Services are not Delivered by the Delivery Date, Delta Coal will be entitled to claim as a debt due all costs, losses, expenses and damages which it suffers or incurs for each day that Delivery is delayed beyond the Delivery Date, until the earlier of:
    - (i) termination of the Agreement by Delta Coal; or
    - (ii) Delivery is achieved.
  - (d) The Supplier is entitled to an extension of time to the Delivery Date if a Delay Event causes a delay to Delivery, provided the Supplier notifies Delta Coal in writing of the cause, expected duration and its efforts to minimise the effect of the Delay Event, within 3 Business Days of when the Supplier should have become aware of the Delay Event, failing which the Supplier will not be entitled to any extension of time to the Delivery Date.
  - (e) Delta Coal will reasonably determine what, if any, extension of time will be granted to the Supplier and will notify the Supplier accordingly.
  - (f) The Supplier is not entitled to claim any costs for delay or disruption (whether the delay or disruption arises out of a Delay Event or otherwise).
  - (g) The Supplier may not subcontract any of its obligations without the prior consent of Delta Coal. Despite any consent, the Supplier remains responsible for all acts and omissions of its subcontractors and must ensure that they comply with all applicable terms and conditions of the Agreement.
- (d) Unless otherwise stated in the Purchase Order, the Supplier warrants that for the period offered by the Supplier or a period of 12 months, whichever is longer, from the completion of Delivery (**Warranty Period**), it will at its cost repair or replace any Defective Goods or re-perform any Defective Services. Such replacements, repairs or re-performance must be carried out at the times notified by Delta Coal and so as to minimise any inconvenience to users of the Site.
  - (e) The Supplier must do all things necessary to ensure that Delta Coal has the benefit of any warranties given by any third parties in respect of the Goods and must give Delta Coal all documentation relating to such warranties. Such third party warranties are in addition to the warranties of the Supplier.
  - (f) If the Supplier fails to take action as and when directed under clause 6(a), Delta Coal may, without further notice to the Supplier, engage a third party to replace or repair Defective Goods or re-perform Defective Services and all costs and damages suffered by Delta Coal in connection with the Supplier's failure shall be a debt due and payable to Delta Coal.

## 5 Security

- (a) If required by Delta Coal, the Supplier must provide the Security specified in the Purchase Order.
- (b) Within 10 Business Days of Delivery, Delta Coal shall release 50% of the value of the Security.
- (c) Within 10 Business Days of the end of the Warranty Period, Delta Coal shall release any Security then held by Delta Coal provided that there are no moneys owed from the Supplier to Delta Coal.

## 6 Defective goods and services

- (a) If Delta Coal determines that any of the Goods or Services are unsatisfactory, defective, of inferior quality or workmanship or fail to meet any requirements of this Agreement, (**Defective**) the Supplier must do any of the following, at its own cost, as determined by Delta Coal in its absolute discretion:
  - (i) re-take possession of the Defective Goods and refund the Price for the Defective Goods to Delta Coal;
  - (ii) Deliver replacements of the Defective Goods or re-perform the Defective Services; or
  - (iii) repair the Defective Goods or remedy the Defective Services,and reimburse Delta Coal any loss or damage it has incurred or suffered as a result of the supply of the Defective Goods or performance of the Defective Services.
- (b) The rights under clause 6(a) are in addition to any other rights of Delta Coal under the Agreement or at Law.
- (c) If Delta Coal requires the Supplier to re-take possession of Defective Goods, the Supplier must collect the Defective Goods within 7 days from when notified by Delta Coal, failing which Delta Coal may (but is not obliged to) return the Defective Goods to the Supplier at the Supplier's cost and risk.

## 7 Title and risk

- (a) Risk in the Goods passes to Delta Coal on Delivery.
- (b) Title to the Goods passes to Delta Coal on payment or Delivery (whichever occurs first).

## 8 PPSA

- (a) In this clause, the words 'Accession', 'Commingled', 'Financing Statement', 'Grantor', 'Personal Property', 'Proceeds', 'Security Interest' and 'Verification Statement' have the meanings given to them in the PPSA.
- (b) The parties acknowledge that this Agreement may constitute a Security Interest in favour of Delta Coal.
- (c) If Delta Coal determines that this Agreement (or a transaction in connection with it) is or contains a Security Interest, the Supplier agrees to do anything (including obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) which Delta Coal asks and considers necessary for the purposes of:
  - (i) ensuring that the Security Interest is enforceable, perfected and otherwise effective;
  - (ii) enabling Delta Coal to apply for any registration, complete any Financing Statement or give any notification, in connection with the Security Interest; or
  - (iii) enabling Delta Coal to exercise rights in connection with the Security Interest.
- (d) Delta Coal is not required to give any notice under the PPSA (including notice of a Verification Statement) unless the notice is required by the PPSA to be given (even though the parties have waived the right to receive notice).
- (e) The Supplier must notify Delta Coal as soon as the Supplier becomes aware of any of the following:
  - (i) if any Personal Property which does not form part of Delta Coal's Personal Property becomes an Accession to Delta Coal's Personal Property and is subject to a Security Interest in favour of a third party;
  - (ii) if any of Delta Coal's Personal Property is located or situated outside Australia or, upon request by Delta Coal, of the present location or situation of any of Delta Coal's Personal Property; or
  - (iii) if the Supplier parts with possession of Delta Coal's Personal Property.
- (f) The Supplier must not:

- (i) create any Security Interest or lien over any Personal Property that Delta Coal has an interest in (other than Security Interests granted in favour of Delta Coal);
  - (ii) sell, lease or dispose of its interest in Personal Property that Delta Coal has a Security Interest in;
  - (iii) give possession of the Supplier's Personal Property that Delta Coal has a Security Interest or Delta Coal's Personal Property to another person except where Delta Coal expressly authorises it to do so;
  - (iv) permit any of Delta Coal's Personal Property to become an Accession to or Commingled with any asset that is not part of a site within Delta Coal's ownership or control; or
  - (v) change its name without first giving Delta Coal 15 Business Days notice of the new name or relocate its principal place of business outside Australia or change its place of registration or incorporation.
- (g) Everything the Supplier is required to do under this clause is at the Supplier's expense.
- (h) Neither Delta Coal nor the Supplier will disclose information of the kind mentioned in section 275(1) of the PPSA and the Supplier will not authorise, and will ensure that no other party authorises, the disclosure of such information. This clause does not prevent disclosure where such disclosure is required under section 275 of the PPSA because of the operation of section 275(7) (b), (d) and (e) of the PPSA.'

## 9 Safety and environment

- (a) The Supplier must perform its obligations with due regard for the health and safety of all persons and the protection of environment and must take all precautions necessary to protect the health and safety of all persons and the environment.
- (b) While carrying out Services or performing Delivery at the Site, the Supplier must, and must ensure that its employees, agents and Suppliers:
- (i) attend any inductions Delta Coal requires before they enter the Site or before they use any plant or equipment at the Site, as determined by Delta Coal;
  - (ii) comply with all applicable policies and procedures of Delta Coal and the Site in relation to health, safety and the environment, as well any plans Delta Coal may require the Supplier to prepare;
  - (iii) comply with all directions issued by Delta Coal or any other authorised Site supervisor; and
  - (iv) cooperate with others carrying out work at the Site and coordinate its work with the work of others so as to avoid disruption to others.
- (c) The Supplier must immediately advise Delta Coal, and provide it with a written report, if:
- (i) the Supplier reasonably believes that any part of the Site or any plant or equipment at the Site is unsafe;
  - (ii) any person engages in work practices that are likely to put safety, health or the environment at risk; or
  - (iii) an incident or accident occurs.
- (d) Entry to the Site by the Supplier and the Supplier's employees, agents and Suppliers is at their own risk and Delta Coal is not responsible for any loss or damage suffered by the Supplier and the Supplier's employees, agents and Suppliers while on the Site or any other place provided by Delta Coal in connection with the Goods or the Services.
- (e) The Supplier must, at its cost, immediately and permanently remove from the Site any person Delta Coal considers (in its

absolute discretion) is behaving in an unsafe or offensive manner.

## 10 Price and payment

- (a) The Price is fixed and not subject to any increase whatsoever except to the extent expressly set out in the Agreement.
- (b) Unless expressly agreed in writing by Delta Coal, the Price includes all things necessary to supply the Goods and Services Free Into Store (FIS) and in accordance with the Agreement including:
- (i) labour, tools, equipment and materials;
  - (ii) complying with all Laws and obtaining all permits, licenses and insurance;
  - (iii) packaging and transport; and
  - (iv) all taxes, duties, levies, excise and other government fees and charges (other than GST).
- (c) The Supplier may only issue a claim for payment on the date or at the time set out in the Purchase Order, and if no date or time is set out, then on or before the last day of the month in which the Goods or Services are supplied (**Payment Claim**). All Payment Claims must be in accordance with the lump sum, rates or units comprising the Price.
- (d) Where a Payment Claim is made before the date or time referenced in the Purchase Order that the Payment Claim shall not be taken to be submitted until the date or at the time referenced in the Purchase Order.
- (e) Delta Coal will pay the Supplier the Price in respect of the value of the Goods or the Services Delivered in accordance with the Agreement at the end of the month following the month in which the Supplier's Payment Claim is received, except that if Delta Coal intends to pay less than the amount claimed in a Payment Claim, it may:
- (i) give the Supplier a payment schedule within 10 Business Days of receipt of the Supplier's Payment Claim setting out the amount it proposes to pay;
  - (ii) pay the amount of the payment schedule (if any); and
  - (iii) if the balance of the Payment Claim is disputed and if the resolution of the dispute determines that Delta Coal is to pay an amount to the Supplier, Delta Coal will pay that amount within 30 days.
- (f) If requested by Delta Coal, the Supplier must submit a statutory declaration which states that as at that date, no wages or other moneys are due and owing by the Supplier to employees, agents, Suppliers or creditors of the Supplier in connection with the supply of any Goods or Services. If such request is made by Delta Coal, Delta Coal may not pay any Supplier Payment Claims until a satisfactory statutory declaration has been submitted.

## 11 Set off

Delta Coal may set off against any payment due to the Supplier any amount which Delta Coal determines the Supplier is liable to Delta Coal, whether for expenses or damages, howsoever that liability may have arisen. If the amount payable by Delta Coal is insufficient to discharge the liability of the Supplier, Delta Coal may (without limitation to its rights under this Agreement or at Law) have immediate recourse to the Security given under clause 5.

## 12 GST

- (a) The consideration for a Supply made under or in connection with the Agreement does not include GST. If a

Supply made under or in connection with this Agreement is a Taxable Supply, then at or before the time the consideration for the Supply is payable:

- (i) the Recipient must pay the Supplier an amount equal to the GST for the Supply (in addition to the

consideration otherwise payable under this document for that Supply); and

- (ii) the Supplier must give the Recipient a Tax Invoice for the Supply.

- (b) If either party has the right under this document to be reimbursed or indemnified by another party for a cost incurred in connection with this Agreement, that reimbursement or indemnity excludes any GST component of that cost for which an Input Tax Credit may be claimed by the party being reimbursed or indemnified, or by its Representative Member, Joint Venture Operator or other similar person entitled to the Input Tax Credit (if any).
- (c) Capitalised terms in this clause 12 have the same meaning as in the GST Act.

### 13 Indemnities

- (a) The Supplier indemnifies Delta Coal from any claims, demands, suits, liabilities, actions, costs, losses, expenses, damages or penalties (including legal fees on an indemnity basis), which Delta Coal may incur arising out of or in connection with:
  - (i) loss of or damage to any property of Delta Coal or third parties;
  - (ii) an exercise of the rights under clause 17(b); or
  - (iii) personal injury or death of any person,caused by whole or in part, or in connection with, any breach of contract or act or omission of the Supplier, its employees, agents or subcontractors.

### 14 Insurance

- (a) The Supplier must take out and keep current all necessary insurance policies reasonably expected of a Supplier of the Goods or the Services including (without limitation):
  - (i) public liability insurance for an amount no less than \$20 million for each and every occurrence, from the date of this Agreement until the expiry of the Warranty Period;
  - (ii) workers' compensation insurance as required by Law;
  - (iii) third party comprehensive motor vehicle insurance from the date of this Agreement until expiry of the Warranty Period;
  - (iv) if the Supplier is supplying Goods, insurance for the full replacement value of the Goods; and
  - (v) if specified in the Purchase Order, professional indemnity insurance for not less than \$5,000,000 from the date of this Agreement until seven years after the expiry of the Warranty Period.
- (b) The Supplier must provide Delta Coal with evidence of the insurances required to be effected in accordance with clause 14(a) within 3 days of a request by Delta Coal. If the Supplier does not provide the evidence of insurances within that period, Delta Coal may, after 3 days' notice in writing to the Supplier, take out such insurance itself and the cost of doing so will be a debt due and payable by the Supplier.
- (c) If any insurance policy expires during the duration of the Purchase Order, Delta Coal may withhold any Supplier Payment until valid insurance certificates have been submitted.

### 15 Consequential loss

Neither party will be liable under or in connection with this Agreement for any indirect or consequential losses or damages, loss of revenue, loss of profit, loss of production or wasted overheads, whether or not such liability arises in contract, tort (including negligence) or any other cause of action at law or in equity.

### 16 Confidential information

- (a) The Supplier must keep confidential all Confidential Information and not disclose it to any other person, except:
  - (i) with the prior written consent of Delta Coal;
  - (ii) to its professional advisers; or
  - (iii) to any of its workers who have a need to know in order to perform obligations under the Agreement.
- (b) Clause 16(a) does not apply to information that is required to be disclosed by Law or the requirements of a stock exchange, but only to the extent that the information is required to be disclosed.

### 17 Intellectual property

- (a) All information and materials given to the Supplier by Delta Coal under this Agreement is the property of Delta Coal and is only made available to the Supplier on the condition that:
  - (i) the materials are to be used only for the purposes of the Agreement; and
  - (ii) if requested by Delta Coal, all such materials and copies are promptly returned to Delta Coal or destroyed.
- (b) The Supplier gives Delta Coal a non-exclusive, transferable, perpetual, royalty free license (including the right to sub-license) to use, modify, maintain or destroy the Goods and the Services, including any information, materials or documents provided as part of, or comprised in, the Goods or the Services.
- (c) The Supplier warrants that the supply and Delivery of the Goods or the Services by it, and the exercise of the rights granted in clause 17(b) by Delta Coal or any transferee through Delta Coal, will not infringe any patent, trademark, copyright or other intellectual property right.

### 18 Termination

- (a) Delta Coal may terminate the Agreement immediately:
  - (i) on written notice to the Supplier if the Supplier becomes insolvent, commits an act of bankruptcy, appoints a liquidator, receiver, manager or controller;
  - (ii) if, in the absolute opinion of Delta Coal, the Supplier fails to remedy a breach of this Agreement within 7 days (or such other reasonable period which Delta Coal may specify) after receiving written notice from Delta Coal requiring it remedy a breach; or
  - (iii) for any reason in Delta Coal's absolute discretion for its convenience.
- (b) Except as expressly set out in clause 18(c), if Delta Coal terminates the Agreement in accordance with clause 18(a), the Supplier will not be entitled to any further payment and will have no claim, demand, suit, liability or action against Delta Coal and is not entitled to any costs, losses, expenses, damages or penalties arising out of or in connection with the Agreement or its termination or the supply of the Goods or the Services.

- (c) If Delta Coal terminates the Agreement in accordance with clause 18(a)(i) or (ii), any costs incurred by Delta Coal in engaging another person to complete the Supplier's obligations under this Agreement shall be a debt due and payable from the Supplier to Delta Coal.
- (d) If Delta Coal terminates the Agreement in accordance with clause 18(a)(iii), the Supplier will be entitled to the reasonable costs incurred by the Supplier in supplying the Goods or the Services up to the date of termination provided that Delta Coal receives title to any Goods that are paid for in accordance with this clause.

## 19 Relationship

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The Supplier performs its obligations as an independent contractor of Delta Coal and not as an employee, agent or partner.

## 20 General

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- (a) Where the Supplier comprises more than one person or entity, each of them shall be jointly and severally liable for the full performance of the Supplier's obligations under the Agreement.
- (b) Where any provision of the Agreement is void, illegal or unenforceable, that provision may be severed without affecting the enforceability of the other provisions in the Agreement.
- (c) The Laws in force in New South Wales apply to the Agreement and both submit to the exclusive jurisdiction of the courts of the New South Wales courts, except that the United Nations Convention on Contracts for the International Sale of Goods does not apply to the Agreement or the supply of the Goods by the Supplier.
- (d) The failure of a party to require full or partial performance of a provision of the Agreement does not affect the right of that party to require performance subsequently.
- (e) No obligation in the Agreement is waived unless it is waived in writing and signed by the parties. A single or partial exercise of or waiver of the exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy.
- (f) The Agreement may only be amended by written agreement between the Supplier and Delta Coal.

## 21 Dictionary

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In this Agreement:

**Confidential Information** means any information relating to the business or affairs of Delta Coal or its customers, whether provided to or obtained by the Supplier prior to or after issue of the Purchase Order, except information in the public domain (other than due to breach of the Agreement) or information rightfully in the possession of the Supplier and not subject to an obligation of confidentiality at the time it was obtained by the Supplier.

**Defects/Defective** has the meaning given to that term in clause 6(a).

**Delay Event** means:

- (a) delay caused by any negligent act, default or omission of Delta Coal, the Principal or Delta Coal other contractors (who are not employed by the Supplier); or
- (b) any other cause specified in the Purchase Order.

**Deliver/Delivery** means delivery of the Goods or performance of the Services in accordance with clause 4(a).

**Delivery Date** means the date set out in the Purchase Order.

**Goods** means the goods, if any, described in the Purchase Order and all applicable Technical Materials.

**GST** has the same meaning as in the GST Act.

**GST Act** means A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**Delta Coal** means Delta Coal and any of its related bodies corporate (as defined in the Corporations Act 2011 (Cth)).

**Law** includes legislation, regulations, by-laws, orders, permits, approvals, licenses, common law and equity.

**Purchase Order** means the purchase order raised by Delta Coal for the supply of the Goods and Services.

**PPSA** means Personal Property Securities Act 2009 (Cth).

**Price** means the amount payable for the Goods or the Services specified in the Purchase Order.

**Security** means a security in the form of cash or an unconditional bank guarantee from a provider acceptable to Delta Coal and in a form acceptable to Delta Coal and in an amount nominated by Delta Coal.

**Services** means the services, if any, described in the Purchase Order.

**Site** means the Chain Valley Colliery or Mannering Colliery or any other place provided by Delta Coal for the Supplier to perform work arising out of or in connection with the Goods or Services.

**Supplier** means the person described in the Purchase Order.

**Tax Invoice** has the same meaning as in the GST Act.

**Technical Materials** means all plans, designs, drawings, engineering information, data, specifications, reports, accounts, installation instructions, maintenance and operating manuals, spare parts lists and any other technical material reasonably required for the safe installation, use and maintenance of the Goods and Services.

**Variation** has the meaning given to it in clause 2(h).

**Warranty Period** means the period calculated according to clause 6(d).