

Supply of Goods and/or Services

1. DEFINITIONS

In the Contract:

Background IP means any Intellectual Property Rights of the Supplier (or licensed to the Supplier by a third party) which were in existence before the date of the Contract or which come into existence after the date of the Contract other than in connection with the Contract.

Contract means these terms and conditions for the supply of Goods and/or Services and the Purchase Order.

Delivery Address means the place for delivery of the Goods or performance of the Services as specified on the Purchase Order.

Delivery Date means the date on which the Goods must be delivered by or the Services must be performed by as specified on the Purchase Order.

Goods means the goods to be supplied by the Supplier as described in the Purchase Order.

GST has the meaning given to that term in the GST Act.

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

Intellectual Property Rights means all copyright and analogous rights (including moral rights), all rights in relation to inventions (including patent rights), registered and unregistered trademarks (including service marks), registered designs, confidential information (including trade secrets), know-how, circuit layouts and all other rights throughout the world resulting from intellectual activity in the industrial, scientific or artistic fields, including (a) all rights in all applications to register these rights; and (b) all renewals and extensions of these rights.

Invoice has the meaning given in clause 9(a).

Notice Period has the meaning given in clause 17(b).

Price means the price as set out in the Purchase Order.

Purchase Order means the order placed by Thunderbird or an authorised representative of Thunderbird with the Supplier that incorporates these terms and conditions for the supply of Goods and/or Services by reference.

Security Interest means any lien, mortgage, encumbrance, charge or security interest within the meaning of the *Personal Property Securities Act 2009* (Cth) or other third party right or claim.

Site means the Delivery Address.

Supplier means the entity to which the Purchase Order is issued and which is named as Supplier on the Purchase Order.

Services means the services to be supplied by the Supplier and as described in the Purchase Order.

Thunderbird means:

- (a) Thunderbird Operations Pty Ltd ACN 611 351 743; or
- (b) Kimberley Mineral Sands Pty Ltd ACN 623,201,507; and
- (c) any Related Body Corporate (as defined in the *Corporations Act 2001* (Cth)) of either entity stated in sub paragraph 1(a) or 1(b).

Warranty Period means the period of 24 months for Goods and 12 months for Services commencing on the date of supply of the Goods or the date of the performance of the Services.

2. THE CONTRACT

- (a) The Contract is formed when the Supplier accepts a Purchase Order or provides the Goods and/or Services.
- (b) The parties intend to contract for the supply of Goods and/or Services only on the terms of the Contract. If the Supplier provides terms and conditions (including, without

limitation, those printed on a quotation, consignment note, correspondence or other document) with or in connection with the supply of Goods and/or Services described in the Purchase Order, whether before or after the supply of the Goods and/or Services, they will be of no legal effect and will not constitute part of the Contract (even if any representative of Thunderbird signs the document or the terms and conditions comprised in the relevant document).

- (c) In the event of inconsistency, the order of precedence of documents comprising the Contract is:
 - (i) the Purchase Order including any 'Special Conditions' stated on the Purchase Order; and
 - (ii) these terms and conditions.
- (d) The Contract continues until the Goods are supplied and/or the Services are performed in accordance with the Contract unless terminated earlier in accordance with the Contract.

3. SUPPLY OF GOODS AND/OR PERFORMANCE OF SERVICES

- (a) In consideration of payment of the Price by Thunderbird, the Supplier agrees to supply and deliver the Goods to, and/or perform the Services at, the Site, by the Delivery Date in accordance with the Contract.
- (b) The Supplier must supply and maintain, at its cost, everything the Supplier requires to supply the Goods and/ or perform the Services in accordance with the Contract, including, but not limited to, all personnel, goods, tools, equipment, materials, authorisations and insurance required to be effected and maintained in accordance with clause 14.

4. WARRANTIES

- (a) The Supplier warrants that the Goods and Services will:
 - (i) be of merchantable quality and free from defects;
 - (ii) be new, as at the Delivery Date (unless otherwise specified in the Contract);
 - (iii) match the description in the Purchase Order;
 - (iv) be of the same nature and quality as the sample or demonstration given, if the Supplier gave Thunderbird a demonstration or sample of the Goods or Services;
 - (v) be fit for the specific purpose for which those Goods and/or Services are intended to be used as specified in the Purchase Order, or if no purpose is specified, for the purpose for which those Goods and/or Services would ordinarily be used;
 - (vi) comply with the requirements of the Contract, any law and the standards of Standards of Australia Limited applicable to those Goods and/or Services;
 - (vii) not infringe the Intellectual Property Rights of any third party;
 - (viii) be free from any Security Interests, and that the Supplier has complete ownership of the Goods;
 - (ix) be performed in such a way as to comply with all applicable Thunderbird policies and procedures;
 - (x) not interfere with the activities of Thunderbird or any other person on the Site; and
 - (xi) in the case of Services, be performed safely, with all due care and diligence, in accordance with all of Thunderbird's policies and procedures, all lawful directions and orders given by any Thunderbird representative, and in a skilful and competent fashion by appropriately qualified and trained personnel.

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- (b) The Supplier must pass on the benefit of any manufacturer's warranty applicable to the Goods and/or Services. If required by Thunderbird, the Supplier must sign any documents as Thunderbird reasonably requires, in order to secure for Thunderbird, the benefit of that warranty or warranties.
- (c) This clause 4 survives termination or expiry of the Contract.

5. REJECTION OF GOODS OR SERVICES

- (a) Without affecting any other right or remedy of Thunderbird, if, during the Warranty Period, any of the Goods and/or Services do not comply with the Contract, or are otherwise defective, whether or not Thunderbird has already accepted the Goods and/or Services in accordance with clause 6, the Supplier must:
 - (i) repair the Goods or re-perform or make good the defective Services; or
 - (ii) remove the Goods from the Site and deliver replacement Goods to the Site; or
 - (iii) un-install the Goods, remove them from the Site, make good any damage to the Site and deliver replacement Goods to the Site,or, if Thunderbird so requires, instead of delivering replacement Goods or re-performing the Services refund all money paid by Thunderbird in respect of the defective Goods or Services. Thunderbird has the same rights in respect of replacement or repaired Goods and re-performed Services, as it had in respect of the Goods and/or Services which were originally supplied.
- (b) If the Supplier fails to do any of the things notified by Thunderbird under this clause within 7 days of receiving the notice, Thunderbird may do those things or have them done by a third party at the expense of the Supplier.
- (c) This clause 5 survives termination or expiry of the Contract.

6. DELIVERY AND RISK AND TITLE

- (a) The Supplier must deliver the Goods to the Site or perform the Services by the Delivery Date and must ensure that, in the case of Goods, the Goods are suitably packed to avoid damage in transit or in storage, clearly marked for delivery and that a packing list which itemises the Goods is included in each package of Goods for delivery.
- (b) As soon as the Supplier becomes aware or reasonably expects that the Goods and/or Services will not be provided by the Delivery Date, the Supplier must immediately notify Thunderbird in writing, the reason for the delay, and the expected duration of the delay.
- (c) Thunderbird will provide the Supplier access to the Site as required to perform its obligations under this Contract.
- (d) Title in the Goods passes to Thunderbird upon payment of the Price and risk in the Goods passes to Thunderbird when the Goods are delivered to the Site.
- (e) All Goods and/or Services will be inspected by Thunderbird within a reasonable time after the Goods are delivered and/or Services are performed at the Site, but Thunderbird will not be required to accept the Goods and/or Services unless it is reasonably satisfied with them.
- (f) Thunderbird is not liable to pay for those Goods and/or Services rejected, damaged by inspection or costs associated with inspection or rejection of the Goods and/or Services.

7. MATERIALS AND EQUIPMENT

Where Thunderbird provides its own materials or equipment to the Supplier for use in connection with the supply of Goods or performance of Services:

- (a) the materials and equipment will be and will remain the property of Thunderbird;
- (b) the Supplier must keep the materials and equipment free from any Security Interests;
- (c) the Supplier must maintain all of the materials and equipment in good working order and condition (subject to fair wear and tear);
- (d) the Supplier may only use the materials and equipment solely in connection with the supply of Goods or performance of Services and must return them to Thunderbird immediately on termination or expiry of the Contract or when they are no longer required to supply the Goods or perform the Services (whichever is the earliest to occur); and
- (e) any damage to or loss of the materials or equipment will be made good at the Supplier's sole expense.

8. PRESERVATION OF RIGHTS

Neither the rejection of, or the failure of Thunderbird to in any way reject, the Goods and/or the Services, nor the acceptance of the Goods under clause 6, nor the making of any payment, will prejudice any rights Thunderbird may have against the Supplier arising in any way in relation to failure by the Supplier to provide the Goods and/or Services in accordance with the Contract or otherwise affect the Supplier's warranties, liabilities or obligations under the Contract or at law.

9. INVOICING AND PAYMENT

- (a) Upon acceptance of the Goods and/or completion of the Services, the Supplier must provide to Thunderbird a valid tax invoice (**Invoice**) for the Price, which must comply with the requirements of the GST Act and include (without limitation):
 - (i) a reference to a valid Purchase Order;
 - (ii) a detailed description of the Goods supplied and/or Services performed;
 - (iii) the Price of the Goods and/or Services, broken down to reflect any Price components on the Purchase Order;
 - (iv) the amount of any applicable GST;
 - (v) a Thunderbird contact name and Site; and
 - (vi) an individual reference number for Thunderbird to quote with remittance of payment.
- (b) Thunderbird will pay each Invoice that complies with clause 9(a) 30 days from the Invoice date unless otherwise stated on the Purchase Order, except:
 - (i) without limiting any other right or remedy, Thunderbird may withhold payment of the amount in dispute where Thunderbird disputes the Invoice until the dispute is resolved in accordance with clause 17;
 - (ii) Thunderbird is not obliged to pay any amount on the Invoice if the Goods or Services (or any part of them) are defective or it has any other claim in relation to them; and
 - (iii) Thunderbird may reduce or withhold any payment due to the Supplier by any amount which the Supplier must pay Thunderbird, including costs, charges, damages and expenses and any debts owed by the Supplier to Thunderbird on any

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account whatsoever. This does not limit Thunderbird's right to recover those amounts in any other way.

10. ASSIGNMENT AND SUBCONTRACTING

The Supplier must not, without the prior written consent of Thunderbird, assign any or all of the Supplier's rights or obligations under the Contract or subcontract all or part of the supply of Goods and/or performance of Services to any other party.

11. INDEMNITY

- (a) The Supplier indemnifies, and keeps indemnified, Thunderbird, and the directors, officers, employees, agents and contractors of Thunderbird, from and against any loss, liability, cost, damage or expense suffered or incurred arising from or in connection with the supply of Goods or the performance of the Services including, without limitation:
 - (i) the breach of any of the Supplier's obligations, warranties or representations under the Contract;
 - (ii) the misconduct or negligent act or omission of the Supplier or its contractors, employees, officers, agents or invitees, in the provision of the Goods or the performance of the Services;
 - (iii) the loss of, or any damage to, any property of any person;
 - (iv) the death of, or injury to any person; and
 - (v) the breach of the Intellectual Property Rights of any third party.
- (b) The Supplier's liability to indemnify Thunderbird, and the directors, officers, employees, agents and contractors of Thunderbird under clause 11(a) will be reduced to the extent that the loss, liability, cost, damage or expense is directly caused by the negligent act or omission of Thunderbird or the directors, officers, employees, agents and contractors of Thunderbird.
- (c) The rights and obligations under this clause 11 continue after termination or expiry of the Contract.

12. TERMINATION

- (a) A party may immediately terminate the Contract by notice in writing to the other party if the other party:
 - (i) breaches any term under the Contract and such breach is not remedied within 14 days of notice being given to the party to remedy the breach (unless such breach is not able to be remedied);
 - (ii) breaches any law relating to the supply of the Goods or Services;
 - (iii) becomes insolvent; or
 - (iv) is convicted of a criminal offence.
- (b) In addition to any other rights of termination available to Thunderbird, Thunderbird may terminate the Contract by giving 14 days' notice to the Supplier, in which case, subject to Thunderbird being reasonably satisfied that the Supplier has complied with its obligations under the Contract, Thunderbird will pay the Supplier:
 - (i) amounts that are properly due and payable to it for the Goods supplied and/or Services performed prior to the date of termination;
 - (ii) all verifiable work in progress; and
 - (iii) all direct, verifiable and reasonable expenses incurred up to the date of the notice of termination,

incurred in compliance with the Contract, and which cannot be reversed or mitigated by the Supplier applying best efforts.

- (c) If the Contract is terminated pursuant to clauses 12(a) or 12(b), the Supplier must cease the supply of the Goods and/or Services the subject of the Purchase Order and must deliver all Goods and/or Services in progress or completed as Thunderbird may request.
- (d) Unless expressly stated otherwise, termination of the Contract in accordance with clause 12 does not affect the rights or obligations of a party which have accrued prior to termination.
- (e) The Supplier may terminate the Contract with 14 days prior written notice to Thunderbird, if Thunderbird fails to make a payment due in accordance with clause 9(b) for 3 consecutive calendar months.

13. TAXES

- (a) If GST is imposed on any supply made by the Supplier under or in connection with the Contract, the Supplier may (subject to the provision of the Invoice) recover from Thunderbird, in addition to the Price, an amount equal to the GST payable in respect of that supply.
- (b) The Supplier shall be solely responsible for all other taxes or levies imposed on the Supplier under law that arise out of the supply of Goods and/or performance of Services.

14. INSURANCE

- (a) The Supplier must, for so long as any obligations remain in connection with the Contract, effect and maintain, at its own expense all appropriate policies of insurance including, but not limited to the following unless the Purchase Order specifies otherwise (each policy to note Thunderbird's interest as a 'Principal'):
 - (i) where the Services require the Supplier to provide a motor vehicle, motor vehicle insurance policy to cover third party liability for an insured sum of not less than \$20,000,000 for each claim;
 - (ii) public and products liability insurance in relation to legal liability for loss of, loss of use of, damage to or destruction of real or personal property, death or bodily injury, and disease and sickness in each case in an amount not less than an amount to \$50,000,000 for each claim, and unlimited in the amount of aggregate claims;
 - (iii) workers' compensation insurance in compliance with all applicable laws to cover the Supplier and each of the Supplier's employees; and
 - (iv) where the Services include design services, professional indemnity insurance in an amount not less than an amount to \$5,000,000 for each claim, such policy to be maintained for a period of 7 years after the completion of the Services.
- (b) Upon request by Thunderbird, the Supplier will provide Thunderbird with proof of insurance acceptable to Thunderbird.
- (c) The Supplier must ensure that, in relation to any insurance policy required to be maintained under clause 14(a), it:
 - (i) does not do or omit to do or allow to be done, any act or omission whereby any of the insurances referred to in clause 14(a) may be prejudiced, vitiated, or rendered void or voidable;

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- (ii) does not cancel or materially vary the policy in a manner adverse to its obligations under the Contract, or allow an insurance policy to lapse, without the prior consent, in writing, of Thunderbird;
 - (iii) immediately notifies Thunderbird of any event which may result in an insurance policy lapsing or being cancelled or vitiated, rendered void or voidable;
 - (iv) gives full, true and particular information to the insurer of all matters and things the non-disclosure of which might in any way prejudice or affect any such policy or the payment of all or any benefit; and
 - (v) whenever a claim is made under any policy referred to in clause 14(a), the Supplier must pay any excess or deductible payable as a consequence.
- (d) If the Supplier fails to effect or maintain any insurances required by this clause 14, then Thunderbird may:
- (i) effect and maintain those insurances;
 - (ii) pay the necessary premiums; and
 - (iii) recover from the Supplier any amounts paid under clause 14(b), until the Supplier has complied with its obligations under this clause 14.

15. CONFIDENTIALITY

- (a) The Supplier must keep confidential:
 - (i) any information or details relating to the Contract or Thunderbird's business affairs and operations; and
 - (ii) any other information designated by Thunderbird as confidential or received by the Supplier in circumstances implying an obligation of confidentiality or reasonably expected to be confidential.
- (b) This clause 15 does not apply to the disclosure of information to comply with any law, the requirements of any government agency or stock exchange or to information that is already in the public domain, provided that prior to such disclosure the disclosing party gives notice to the other party with full particulars of the proposed disclosure.
- (c) This clause 15 shall survive termination or expiry of the Contract.

16. INTELLECTUAL PROPERTY

- (a) Subject to this clause 16, all Intellectual Property Rights in the Background IP of the Supplier remain vested in the Supplier.
- (b) The Supplier grants to Thunderbird a non-exclusive, perpetual, royalty-free, irrevocable, transferable licence (with the right to assign and sub licence) to use the Background IP of the Supplier to the extent necessary to use the Background IP of the Supplier.
- (c) The Supplier warrants that:
 - (i) use by it of any Intellectual Property Right arising from or in connection with the supply of Goods or Services will not infringe any Intellectual Property Right of any third party;
 - (ii) it is able to licence the Intellectual Property Rights in the Background IP of the Supplier as described in clause 16(b); and
 - (iii) use by Thunderbird (or any assignee or sub-licensee) of the Background IP of the Supplier in accordance with the Contract will not infringe any Intellectual Property Right of any third party or breach any law.
- (d) This clause 16 shall survive termination or expiry of the Contract.

17. DISPUTES

- (a) If a dispute arises in connection with this Contract, a party must give to the other party a dispute notice specifying the dispute and requiring its resolution under this clause 17.
- (b) If the dispute is not resolved within 7 days after the notice of dispute is given to the other party (**Notice Period**), the dispute is by this clause submitted to mediation, which is to be conducted in Perth, Western Australia. The Institute of Arbitrators Australia Rules for the Mediation of Commercial Disputes, as amended by this clause apply to the mediation, except where they conflict with this clause in which case this clause will prevail to the extent of any conflict.
- (c) If the parties have not agreed upon the mediator and the mediator's remuneration within 7 days after the Notice Period:
 - (i) the mediator is the person appointed by; and
 - (ii) the remuneration of the mediator is the amount or rate determined by, the President of the Law Society of Western Australia or the President's nominee, acting on the request of either party to the dispute.
- (d) Where the dispute is not resolved within 28 days after the appointment of the mediator, any party may after then, but not earlier, commence proceedings in any court of competent jurisdiction in Western Australia.
- (e) This clause 17 does not prevent either party from obtaining any injunctive, declaratory or other interlocutory relief from a court, which may be urgently required.

18. COSTS

Each party will bear its own legal and other costs and expenses incurred in connection with the negotiation, preparation and execution of the Contract.

19. GOVERNING LAW

The laws of Western Australia apply to the Contract and the Courts of Western Australia have non-exclusive jurisdiction to determine any proceedings in relation to the Contract.