

ESM RESOURCES PTY LTD

PURCHASE ORDER TERMS AND CONDITIONS



ESM Resources Pty Ltd trading as ESM Resources Pty Ltd and ESM Group (**ESM, we, us, our**) and the Supplier (**you, your, yours**)

agree that the Supplier will supply the Goods and/or the Services to the ESM Group on these Terms and Conditions.

1. CONTRACT

- 1.1 The Purchase Order that we issue to you together with these Terms and Conditions form the Contract between you and us.
- 1.2 You agree to be bound by the Contract on the first to occur of the following events: you supply the Goods or commence performing the Services; you accept the Purchase Order, whether verbally or in writing; or you submit a payment claim to us.
- 1.3 The Purchase Order prevails in case of any inconsistency with these Terms and Conditions.
- 1.4 In entering into the Contract, we make no representation or guarantee as to the quantity, quality, regularity or profitability of the Goods and/or Services that we may engage you to supply or perform.
- 1.5 If you supply terms and conditions with any quotation, email or other communication, or by reference to any website, or with the Goods or Services (including printed on consignment notes or other documents), those terms and conditions will be of no legal effect and will not constitute part of the Contract (even if a representative of the ESM Group signs those terms and conditions or annexes the terms and conditions to the Purchase Order).

2. GOODS AND SERVICES

- 2.1 You must ensure that any Goods and/or Services that you supply under the Contract: are manufactured, supplied and/or carried out to a high standard in accordance with industry best practice; comply with all relevant Legislative Requirements, building codes and Australian Standards; are supplied in accordance with any specifications and timeframe set out in the Purchase Order (including any Delivery Date) or otherwise notified to you by us; are accompanied on delivery by all relevant quality documentation, operations manuals and third party warranties; and are supplied in accordance with any directions given by us to you.

3. TIME FOR PERFORMANCE

- 3.1 Time is of the essence in relation to the supply of the Goods and/or Services.
- 3.2 You must take all reasonable steps to prevent delay.
- 3.3 You must supply the Goods and carry out the Services by any Delivery Date and in accordance with any program that we notify to you.
- 3.4 We may update the program from time to time. You must comply with any updated program notified by us to you in connection with the Contract.
- 3.5 If requested by us, you must provide us with a program within 5 days of the date of the Purchase Order or our request, whichever occurs earlier.
- 3.6 You must notify us of any event that may lead to an actual or potential delay in the supply of the Goods and/or Services and its cause within 3 days of the occurrence of the event.
- 3.7 You may be entitled to an extension to the Delivery Date, provided that the delay is notified to us in accordance with this clause 3, is caused by a breach of the Contract by ESM Group and is not attributable to you.

4. PERFORMANCE

- 4.1 You must obtain in your name all permits, registrations and licences necessary for you to perform your obligations under the Contract.
- 4.2 You must deliver the Goods to, and carry out the Services at, the Site, the Delivery Address or any other location specified by us, by the Delivery Date.
- 4.3 You must, when delivering the Goods and/or performing the Services: ensure that you or your Personnel are available to deliver the Services on a full-time basis from the date of issue of the Purchase Order until the completion of the Services; not interfere with our activities or the activities of any of our other contractors or any other third party at the Site; and comply with, and ensure that your Personnel comply with, all directions and orders given by or on behalf of us at the Site.
- 4.4 The Goods and/or Services must comply strictly with the Specification.
- 4.5 Except where the client is a member of the ESM Group, you must not, and must ensure that your Personnel do not, communicate with our client or take instructions from our client or any third party in connection with the Goods and/or Services and your other obligations under this Contract, unless we consent in writing.
- 4.6 We are entitled to reject any of the Goods and/or Services that do not comply with the Specification or the requirements of the Contract.

5. SUPPLIER EQUIPMENT

- 5.1 Unless otherwise specified in the Purchase Order, you must supply all vehicles, equipment and materials (Supplier Equipment) required to perform the Services.
- 5.2 The Supplier Equipment must: meet any vehicle requirement or other Specification set out in the Purchase Order; be registered, at your expense; and be made available to us for inspection on our request.
- 5.3 You must, at your expense: mechanically maintain and repair the Supplier Equipment; ensure that any vehicles used in supplying the Goods and/or Services are roadworthy, compliant with all laws and maintained in good order and condition; ensure that the Supplier Equipment is maintained and presented in good and clean condition; and pay all running costs associated with the Supplier Equipment.
- 5.4 You must immediately cease using the Supplier Equipment and Materials if we direct you to do so because in our opinion it is unsafe to use or otherwise requires repairs, maintenance, inspection or testing.

6. PRICE

- 6.1 The price for the Goods and/or Services is the price stated in the Purchase Order (Price).
- 6.2 The Price excludes GST but includes any other applicable taxes, customs, excise and import duties, tariffs, fees, levies, charges, costs or expenses that you incur in connection with the Contract, including transport, packing and insurance costs.
- 6.3 Unless otherwise agreed in writing the Price is fixed and firm, and not subject to adjustment due to rise and fall, currency fluctuation, escalation in equipment, material or labour costs or any other reason.

7. PAYMENT

- 7.1 You must claim payment for the Services by submitting payment claims to us at the times stated in the Purchase Order or, if no times are stated, monthly by the last day of the month.
- 7.2 Each payment claim must comply with the following: state the Purchase Order number; be addressed to the accounts payable contact specified on the Purchase Order; be a tax invoice; be correctly dated; list the particular Goods and/or Services supplied; be supported by relevant records to enable us to verify the amount claimed; and include any information required by the Security of Payment Act.
- 7.3 On our request, you must provide additional relevant records to calculate and verify the amount stated in your payment claim, within the time requested.
- 7.4 You will not be entitled to payment under this Contract until you have: complied with clauses 7.1, 7.2 and 7.3; supplied the Goods/and or Services in accordance with the Contract; and complied with all other obligations under the Contract including providing quality documentation, warranties and manuals.
- 7.5 If you submit an invoice earlier than the time for submission under clause 7.1, the invoice will be deemed to have been submitted at the stated time for payment claims.
- 7.6 If we dispute the amount claimed for payment, within 15 Business Days of receiving the payment claim, we will: determine the amount payable; provide a payment schedule to you, explaining the reasons for any difference between the amount determined and the amount claimed; and pay any undisputed amounts in accordance with clause 7.9.
- 7.7 Without limiting clause 7.6, we may issue a revised payment schedule at any time correcting or modifying a previous payment schedule, including as a result of the provision of information under clause 7.3.
- 7.8 We may deduct from or set off against any monies which may be, or become, payable to you any costs, expenses or damages which are due from you to us, or which we have incurred or reasonably consider we might incur, whether under this Contract, any other agreement or otherwise at law.
- 7.9 Subject to clauses 7.3 to 7.8 we will pay the amount determined as payable into your nominated bank account in accordance with the payment terms stated in the Purchase Order or, if no terms are stated, within 45 days of the end of the month in which the payment claim was submitted.
- 7.10 We will not pay interest on any overdue amount unless required by legislation, in which case interest will be paid at rate set by the legislation.
- 7.11 Payment by us of all or any part of a payment claim is on account only and is not approval of the Goods and/or Services.
- 7.12 You must be registered for GST.

8. WARRANTIES

- 8.1 You represent and warrant that: the Goods and/or Services will be supplied in accordance with all applicable laws, regulations, codes and standards; the Goods and/or Services and the Supplier Equipment strictly comply with the Specifications; the Goods are manufactured from new materials and are of merchantable quality; the Goods and/or Services are free from all Defects; you will, and will ensure your Personnel will, exercise the standards of diligence, due care and skill normally exercised by a prudent and similarly qualified and competent supplier supplying equivalent goods or services; the Goods and/or Services are fit for the purpose for which goods and/or services of the same kind are commonly supplied; all Personnel are appropriately qualified, competent and skilled to perform the part of the Services for which they are engaged; any equipment used by you to deliver the Services, including the Supplier Equipment, is in safe working condition, complies with all Legislative Requirements and will be operated by suitably qualified, licensed and accredited Personnel.

- 8.2 You must, at your cost, immediately rectify or replace (at our discretion) any Defective Goods or Services notified by us to you prior to the expiration of the Defects Liability Period, within the time specified in the notice.
- 8.3 If you do not rectify or replace the Defective Goods or Services within the time specified or if we reasonably consider that we need to rectify or replace Defective Goods and/or Services then we may do so or engage a third party to do so, without ESM Group Purchase Order Terms and Conditions notifying you. The cost of doing so will be a debt due and immediately payable by you to us.
- 8.4 If we elect to accept Defective Services on one occasion, that election does not oblige us to accept any other Defective Services and does not limit any of our other legal rights in respect of those Defective Services.
- 8.5 You consent to: our assignment of any or all of the above warranties to any of our clients, related companies or entities in the ESM Group; and us holding on trust and enforcing the rights and obligations in this Contract on behalf of our clients, related companies and entities in the ESM Group.
- 9. LIABILITY AND INDEMNITY**
- 9.1 You are liable for, indemnify and will keep us indemnified against all Loss, and hereby release us from any claim, action, suit, proceeding or demand, arising directly or indirectly out of this Contract or the supply of the Goods and/or Services, including: death of, or personal injury to, any person; loss or damage to any property; and liability connected with any breach of the Contract except to the extent caused or contributed to by any wrongful act or omission by us.
- 9.2 To the extent permitted by law, our liability to you arising out of or in connection with the Contract is limited to the Price.
- 9.3 We are not liable to you for any indirect or consequential losses arising out of the Contract, including any loss of revenue, loss of profit, loss of production, loss of use of any plant or facility, business interruption of any nature, loss of business opportunity, loss of business reputation, loss of contract, payment of liquidated sums, penalties or damages or any other indirect or consequential loss.
- 10. TITLE AND RISK**
- 10.1 You are responsible for the care of the Services until the payment of the Price.
- 10.2 Risk in the Goods passes to the ESM Group upon delivery, inspection and acceptance of the Goods at the Delivery Address.
- 10.3 If loss or damage occurs to the Goods and/or Services during the period of your care or risk, you must, at your cost, rectify such loss or damage.
- 10.4 Unencumbered legal title in the Goods and/or Services passes to ESM Group upon the earlier of payment or delivery, inspection and acceptance of the Goods at the Delivery Address.
- 10.5 You acknowledge that we have a purchase money security interest in the Goods (and any proceeds derived from the Goods) and may register that security interest. You must provide all information and take all other steps required by us to perfect that interest and effect that registration. You agree to waive your rights under section 157 of the Personal Property Securities Act 2009 (Cth) (PPSA) and that, to the extent permitted by law, section 95 and chapter 4 of the PPSA shall not apply.
- 11. TERMINATION**
- 11.1 To the extent permitted by law, we may terminate the Contract or reduce the scope of the Goods and/or Services if you: fail to remedy any breach of your obligations under the Contract within 3 Business Days of receiving written notice from us requiring you to do so; being a corporation, become insolvent, or have an administrator, controller or liquidator appointed under the Corporations Act 2001 (Cth), or have receivers or managers appointed; being an individual, are unable to pay your debts when they fall due or have a trustee in bankruptcy appointed; or cease or threaten to cease to carry on business, in which case our liability to you will be limited to payment of the Price for the Goods and/or Services supplied prior to termination.
- 11.2 In addition to our other rights under clause 11, we may terminate all or any part of the Contract by written notice to you at any time for any reason, in our absolute discretion.
- 11.3 On receipt of a notice of termination, you must immediately: cease performance of the Services to the extent specified in the termination notice; and take all possible action to mitigate any costs incurred by you as a result of the termination.
- 11.4 If we terminate the Contract under clause 11.2: you are entitled to payment of the Price for the Services supplied prior to termination but not already paid for or any Goods ordered and not able to be cancelled; you are not entitled to the Price of the Goods and/or Services or to any compensation for that cancellation other than as specified in clause 11.4; and the compensation payable under clause 11.4 must not exceed the Price of the relevant Goods and/or Services.
- 11.5 Termination of the Contract does not affect or prejudice any legal or contractual rights that accrued prior to termination.
- 12. INSURANCE**
- 12.1 Prior to commencing the supply of the Services and for as long as you have obligations outstanding under the Contract, you must effect and maintain and ensure that all of your Personnel effect and maintain, at your own expense:
- all insurances specified in the Purchase Order;
 - workers' compensation and occupational/industrial disease and any other insurance required by any Legislative Requirement relating to your workers' compensation liability to any person;
 - employers' liability/common law insurance for an amount of \$20 million to cover Loss arising out of the supply of the Goods and/or Services in respect of persons employed or engaged or deemed to be employed by you;
 - if you are a sole trader or the Goods and/or Services will be supplied or performed by working directors, income protection or cover under clause 12.1(b) and/or private accident and illness insurance to cover any of your working directors, for a period of up to 104 weeks on any one claim;
 - general third-party public and products liability insurance covering your operations including liability arising from unregistered mechanically propelled vehicles, with a limit of liability of not less than \$20 million any one occurrence and unlimited in the aggregate, extending cover to us as principal or providing insurance for us as principal in respect of our liability arising out of your acts or omissions;
 - if the Contract requires you to use or provide for use of motor vehicles, motor vehicle insurance with a limit of liability of not less than \$20 million for each and every claim;
 - an insurance policy covering the Goods and any plant and equipment provided by the ESM Group while at your risk and your plant and equipment (including hired plant and equipment) for 100% of replacement value for accidental loss, destruction and damage at all times (including while in transit) and other risks as we may reasonably require from time to time;
 - if the Contract requires you to perform any operations using hazardous substances, pollution liability insurance with a limit of liability of not less than \$10 million for each and every claim;
 - if the Services include professional services, professional indemnity with a limit of liability of not less than \$10 million for any one occurrence; and all necessary insurance cover for all risks arising out of the performance of your obligations under the Contract.
- 12.2 The insurance referred to in clauses 12.1(b), 12.1(c), 12.1(e) and 12.1(f) must extend to indemnify us as principal and provide a waiver by the insurer of all rights of subrogation, action or relief against us.
- 12.3 You must give us a copy of the policy documents and certificates of currency of the insurances referred to in clause 12.1 as a condition precedent to your entitlement to: access the Site or Delivery Address; make a payment claim; and payment of the Price.
- 12.4 If you do not comply with your obligations under clause 12, we ESM Resources may take out and maintain relevant insurance and the cost will be a debt due and payable by you to us.
- 12.5 Insurance will not limit your liabilities or obligations under the Contract.
- 12.6 You must notify us immediately if any incident occurs that is likely to give rise to a claim under any policy of insurance effected by you under the Contract and must keep us fully informed of all subsequent developments regarding that claim.
- 13. PERSONNEL**
- 13.1 You must comply with all relevant Legislative Requirements in relation to your Personnel, including: work health and safety laws; and the Fair Work Act 2009 (Cth) and any other workplace or industrial laws concerning the employment of workers, income tax, workers' compensation, annual leave, long service leave or any award, order, determination or agreement of a competent industrial or specialist tribunal.
- 13.2 You indemnify and will continue to indemnify us against any claims made by any of your officers, employees or agents in respect of any such law, award, order, determination or agreement with which you are required to comply.
- 13.3 We may object to any Personnel who, in our opinion, are not qualified, competent or skilled to supply the relevant part of the Goods and/or Services in respect of which they are engaged, or who engage in misconduct. You must remove and immediately replace such Personnel with a suitable replacement.
- 14. SITE**
- 14.1 This clause 14 applies to the extent you or your Personnel are required to be on, or in the vicinity of, the Site.
- 14.2 You must: comply, and ensure your Personnel comply, with all Legislative Requirements and all policies, standards, rules and procedures in force from time to time, including in relation to HSE at the Delivery Address, at the Site or any other place where the Goods are delivered or Services are being performed; ensure that your Personnel carry photographic identification (such as a current drivers' licence) at all times; submit and amend any HSE management plan(s) that we require (including

JAs and SWMS); attend all induction courses that we require, at your cost; comply with any Site requirements that we communicate to you; and permit us to have access to your premises, documentation, data and Personnel as necessary to enable us to verify, monitor and audit your compliance with this clause 14.

- 14.3 You will not have exclusive possession of any part of the Site and will only be granted access to the Site to the extent necessary for the performance of the Services.
14.4 You must cooperate and coordinate your performance of your obligations under the Contract, and not interfere, with other contractors and persons on the Site, in accordance with clause 4.3.

15. HSE REQUIREMENTS

- 15.1 You must comply with: ESM Group HSE policies and standards as may be communicated to you and amended from time to time; and all relevant HSE Legislative Requirements and guidelines.
15.2 You must ensure that you have prepared, submitted and obtained our approval in relation to a job safety analysis (JSA) and safe work method statement (SWMS) prior to accessing the Site or commencing the Services.
15.3 Any approval of a JSA or SWMS may be subject to site-specific conditions in our absolute discretion.
15.4 You must, and must ensure that your Personnel, adhere to any site-specific permits, procedures, JSAs and other reasonable HSE requirements notified to you.
15.5 You must ensure that any Supplier Equipment used in the performance of the Services complies with all Legislative Requirements.
15.6 You must ensure that all of your Personnel hold any relevant industry safety training card (blue card/white card) and are equipped at all times with the following personal protective equipment, prior to commencement of the Services: safety helmet; safety footwear; hi-vis vest; safety glasses; long sleeved shirt and long trousers; and any other Site-specific requirement that we communicate to you.

16. INTELLECTUAL PROPERTY AND CONFIDENTIALITY

- 16.1 You warrant that any design, equipment, methods of working and documentation used or produced by you in connection with the Services does not infringe any IP Right.
16.2 Ownership of all IP Rights used or created under the Contract or in the provision of the Services vests in us on creation. We grant you a non-exclusive, transferable, royalty free, revocable and perpetual licence to use such IP Rights to supply the Services.
16.3 You indemnify us for all loss and expense incurred as a result of a breach of this clause 16.
16.4 You agree that the terms of this Contract are confidential and you will not disclose any information regarding the Contract, its existence, subject matter or its terms, or acquired as a result of the Contract, to any third party (including by making any media release) without our prior written consent.

17. DISPUTE RESOLUTION

- 17.1 If any dispute arises between you and us in any way relating to this Contract or its subject matter, the following must occur, as a condition precedent to the commencement of any litigation or arbitration: we must confer within 3 Business Days of one of us giving written notice to the other that a dispute has arisen (Dispute Notice); in conferring, we will identify our dispute and what each of us says should be done to resolve the dispute; if we cannot resolve our difference or agree on a method for resolving it, we must then submit the dispute for mediation by a mediator nominated by the Resolution Institute, with the mediator's costs shared equally between us but otherwise on terms determined by the nominated mediator.
17.2 If the dispute is not resolved within 4 weeks of the Dispute Notice either party may commence legal proceedings.
17.3 Nothing in clause 17.2 prevents a party from applying for urgent interim or temporary relief.
17.4 We agree that for the purposes of any adjudication under the Security of Payment Act in relation to the Contract or the Services the authorised nominating authority will be the Resolution Institute.

18. GENERAL

- 18.1 This Contract constitutes the entire agreement between us with respect to its subject matter and supersedes all prior oral or written representations and agreements.
18.2 This Contract may only be varied in writing signed by us both.
18.3 You may not assign your rights or obligations arising under this Contract without our prior written consent.
18.4 A waiver by either of us of a breach of any term of this Contract does not constitute a waiver of any succeeding breach of the same or any other term.
18.5 If any provision or part provision of this Contract is invalid or unenforceable, that provision will be deemed deleted to the extent necessary and the remaining provisions of this Contract will remain in full force and effect.
18.6 To the extent permitted by law, Part 1F of the Civil Liability Act 1802 (WA) is excluded, including for the arbitration of any dispute under this Contract.
18.7 Nothing in this Contract creates a relationship of employer and employee, principal and agent, partnership or joint venture - ESM Group between us or between us and any third party including your Personnel or between you and any head client.
18.8 Neither of us has authority to act for or to bind or incur liabilities on behalf of the other than as expressly contemplated by this Contract.
18.9 The provisions of this Contract that are capable of having effect after the termination or expiry of this Contract, remain in full force and effect following its termination or expiry.
18.10 This Contract is governed by the laws of Western Australia. We both submit to the non-exclusive jurisdiction of the courts of Western Australia and any courts which hear appeals from those courts.
18.11 Each of us must promptly at our own cost do all things (including executing all documents) necessary or desirable to give full effect to the Contract.

19. DEFINITIONS

In these Terms and Conditions:

Business Day means a day except Saturdays, Sundays and public holidays in Western Australia and any other day excluded by the definition of Business Day in the Security of Payment Act.

Defect means any aspect of the Goods or the Services not in accordance with the Contract, or which is damaged, deficient, faulty, inadequate or incomplete in design, performance, workmanship, quality or make-up and Defective has an equivalent meaning.

Defect Liability Period means 11 months from the date of delivery of the Goods or completion of the Services, or such longer period specified on the Purchase Order.

Delivery Address means any address for delivery stated in the Purchase Order or otherwise notified by us to you.

Delivery Date means the date for supply of the Goods or performance of the Services stated in the Purchase Order.

Dispute means a dispute or difference arising out of or in connection with the Contract.

Dispute Notice means a written notice stating that it is issued under clause 19 and that outlines the nature of the dispute.

Goods means the Goods specified in the Purchase Order and includes any incidental services required to supply the Goods.

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

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

HSE means health, safety and environment.

IP Rights means all industrial and intellectual property rights whether protectable by statute, at common law or in equity, including all copyright and similar rights which may subsist or may hereafter subsist in works or any subject matter, rights in relation to inventions (including all patents and patent applications), trade secrets and know-how, rights in relation to designs (whether or not registrable), rights in relation to registered or unregistered trademarks, circuit layout designs and rights in relation to circuit layouts, but excludes non-assignable moral rights and similar non-assignable personal rights of authors and producers.

Legislative Requirements means any applicable statutes, regulations, by-laws, orders, industrial awards, workplace agreements, proclamations of the Commonwealth, certificates, licenses, consents, permits, approvals, codes, standards and requirements of organisations.

Loss means any loss, damage, expense, payment or liability, whether direct or indirect.

Party means ESM or the Supplier, and a reference to Parties is a reference to both of them.

Personnel means any person, employee, consultant or subcontractor engaged by you to provide all or any part of the Goods and/or Services on your behalf.

Price has the meaning given in clause 6.1.

Purchase Order means the written order issued by or on behalf of us for the supply of the Goods or Services.

ESM Resources or ESM Group means ESM and any of its related bodies corporate and end users of the Goods and or Services (where the context requires)

Security of Payment Act means the Building and Construction Industry (Security of Payment) Act 2021 (WA).

Services means the services specified in the Purchase Order and includes all necessary incidental services.

Site means the project site to which the Services relate.

Specification means all codes, standards, drawings materials schedules and specifications applicable to the Contract, referred to in the Purchase Order or otherwise incorporated into the Contract by reference and to be complied with by the Supplier.

Supplier means the supplier specified on the Purchase Order referring to or attaching these Terms and Conditions