

# BMP Engineering Pty Ltd ACN 061 793 146

## Supplier Terms & Conditions

### 1 Definitions

In these conditions:

**"Agreement"** means these Terms, the PO issued by BMP and any attachments included with or referred to in the PO, including any BMP Specifications and BMPE-QA-067 Requirements;

**"Background IP"** means, the Intellectual Property Rights owned by a party which are in existence prior to the commencement of this Agreement;

**"BMP"** means BMP Engineering Pty Ltd ACN 061 793 146;

**"BMPE-QA-067 Requirements"** means the document titled "BMP Engineering Pty Ltd Purchasing Flow Down Requirements" given by BMP to the Supplier;

**"BMP Specifications"** means any specifications for the manufacture of the Goods comprising drawings, plans, designs, illustrations and descriptive matter given by BMP to the Supplier;

**"Confidential Information"** means all information disclosed by or on behalf of BMP to the Supplier pursuant to this Agreement (including but not limited to know-how, trade secrets, ideas, marketing strategies, pricing, client and operational information), but excludes information that the Supplier can clearly establish by written evidence:

- is or becomes known to the Supplier from a third party without an obligation to maintain its confidentiality;
- is or becomes generally known to the public through no act or omission of the Supplier; or
- is independently developed by the Supplier without the use of BMP's information;

**"Documentation"** means all documents prepared by or developed by or on behalf of, or provided to, the Supplier in the course of or arising out of the supply of the Goods (including the BMP Specifications and all documents, designs, plans, specifications, computer readable disks, tapes, other machine-readable records, models and samples prepared, received, processed or generated by or on behalf of the Supplier) other than documents which are for the sole purpose of its own records;

**"Goods"** means the goods to be supplied by the Supplier to BMP as specified in the PO;

**"GST"** has the meaning given in *A New Tax System (Goods and Services Tax) Act 1999* as amended;

**"Insolvency Event"** means where a party:

- is an individual, and commits an act of bankruptcy, has a bankruptcy petition presented against it or is made bankrupt; or
- is a corporation, and is, or declares that it is insolvent, or is unable to pay its debts as and when they fall due or has a liquidator appointed to it;

**"Intellectual Property Rights"** means statutory and other proprietary rights in respect of trade marks, designs, patents, circuit layouts, copyright, confidential information, know how, manufacturing processes, circuit layouts and all other rights with respect to intellectual property as defined in Article 2 of the Convention Establishing the World Intellectual Property Organisation of July 1967;

**"Law" or "Laws"** means acts, ordinances, regulations, by-laws, proclamations and subordinate legislation made under, by or pursuant to any commonwealth or state statute (including amendments to such legislation), or a requirement of any Authorities (including but not limited to any licence, permit, consent, approval, determination, certificate or other requirement), affecting the Goods or the ordinary or intended use of the Goods;

**"Non-Conformity"** means, in relation to the Goods, a specific non-compliance with or variation from the BMP Specifications or BMPE-QA-067 Requirements;

**"PO"** means a purchase order for the Goods issued by BMP to the Supplier;

**"PPSA"** means the *Personal Property Securities Act 2009* (Cth) as amended;

**"Price"** means the price for the Goods as specified in the Quote;

**"Quote"** means the quote submitted by the Supplier to BMP in response to BMP's request for a proposal to supply the Goods;

**"Supplier"** means the party cited in the PO as the supplier of the Goods to BMP; and

**"Terms"** means these Supplier Terms & Conditions.

### 2 Basis of Agreement

**2.1** BMP may submit a PO, together with any BMP Specifications and THE BMPE-QA-067 Requirements, to the Supplier from time to time. These Terms, together with any BMP Specifications and BMPE-QA-067 Requirements:

- are incorporated into each PO;
- will be deemed accepted by the Supplier by its acceptance of the PO; and
- will solely and exclusively govern the supply of Goods by the Supplier to BMP, regardless of any term in any document or any document provided by the Supplier that may have any effect inconsistent with this clause 2.1.

**2.2** An Agreement between BMP and the Supplier for the supply of Goods is formed when the Supplier accepts, in writing or electronic means, a PO from BMP.

**2.3** If there is any inconsistency between these Terms, the PO, the BMP Specifications and the BMPE-QA-067 Requirements, the inconsistency must be resolved in accordance with the following order of priority:

- BMPE-QA-067 Requirements;
- BMP Specifications;
- Terms; and
- PO.

**2.4** The Supplier acknowledges and agrees that it is not the exclusive supplier of the Goods or any goods similar or identical to the Goods to BMP, and BMP may procure the Goods and similar or identical goods from any other third party.

### 3 Supply of Goods

#### 3.1 Supply of Goods

- The Supplier agrees to supply the Goods to BMP in accordance with the Agreement.
- The Supplier warrants that any information, documents or files (including the BMP Specifications and BMPE-QA-067 Requirements) provided by or on behalf of BMP are suitable and complete for the provision of the Goods and the Supplier must immediately advise BMP in writing if this material is in any way unsuitable or deficient.
- The Supplier must fully and completely inform itself of all of BMP's requirements for the Goods and must comply with all instructions given by BMP regarding the Goods.
- The Supplier acknowledges that BMP may appoint a representative to carry out all of BMP's functions and to give directions under this Agreement.
- The Supplier will notify BMP at least 90 days before ceasing production of any goods to enable BMP to analyse potential needs for and to place a final PO for the relevant goods.

#### 3.2 Delivery of Goods

- The Supplier must arrange for the delivery of the Goods to BMP as specified in the PO. The Goods must be received on the dates and at the destination specified in the PO. Time is of the essence.
- If the Supplier proposes any change to the date or dates for delivery of the Goods for any reason, the Supplier must immediately give written notice to BMP, who may in its absolute discretion accept or reject any such proposal.
- If the Supplier fails to deliver the Goods by the date or dates specified in this Agreement or agreed by BMP pursuant to clause 3.2(b), or fails to comply with this Agreement, then BMP may without prejudice to any of its other rights under this Agreement:

- cancel all or part of the PO;
- refuse to accept the Goods; and
- procure similar goods elsewhere,

and the Supplier will be liable for all additional costs and losses incurred by BMP as a consequence of such failure (including the costs incurred by BMP by reason of such failure and any delay damages which BMP may be liable to pay to its principal or head contractor).

#### 3.3 Acceptance of Goods

- Acceptance of the Goods is subject to BMP's approval. BMP reserves the right to inspect any or all Goods prior to despatch from the Supplier's premises or on or after delivery. Such inspection does not imply acceptance of Goods by BMP.
- If within 14 days of the delivery of the Goods BMP determines that the Goods are not acceptable, BMP may at the Supplier's expense either:
  - rectify the Goods to a condition acceptable to BMP or return the Goods to the Supplier and may deduct the costs of such repair or return in accordance with clause 4.3; or
  - return the Goods to the Supplier with a Corrective Action Request (CAR) to rectify the Goods; or
  - reject the Goods by giving written notice to the Supplier and returning the Goods to the Supplier at the Supplier's sole cost.
- If BMP returns the Goods to the Supplier pursuant to clause 3.3(b)(i):
  - the Supplier must complete the works required under the CAR in respect of the Goods in the time specified in the CAR; and
  - clauses 3.3(a) and 3.3(b) will apply to BMP's acceptance of the repaired Goods.
- If BMP rejects the Goods pursuant to clause 3.3(b)(ii), BMP will have no further obligation to pay the Price (or any part of the Price then outstanding).
- BMP may, in its sole discretion, agree in writing to accept certain Goods with a Non-Conformity. If BMP accepts Goods with a Non-Conformity, BMP will issue an official written concession to the Supplier (**BMP Concession**) in respect of the specific Goods with the applicable Non-Conformity. The BMP Concession will apply on in respect of the specific Goods which are specified in the BMP Concession, and will not apply in respect of any Goods of the same type.
- If the Supplier identifies a Non-Conformity with the Goods, whether before or after the Goods are delivered to BMP, the Supplier must immediately notify BMP in writing including by providing full particulars of the relevant Non-Conformity. On receipt of such notice, BMP may at its election proceed in accordance with clause 3.3(b) or 3.3(d).
- Title to, property and the risk in Goods will pass from the Supplier to BMP on the earlier of:
  - BMP inspecting and accepting the Goods; and
  - BMP paying for the Goods.
- The Supplier must do all things to provide to BMP (and its successors, customers, assignees, purchasers and users of the Goods) the benefit of all warranties, guarantees and undertakings in respect of the Goods:
  - directly from the Supplier; and
  - from the manufacturer and supplier(s) of the Goods.

### 4 Price and payment

#### 4.1 Price fixed

The parties agree that the Price:

- is fixed and is not subject to rise and fall by reason of changes in the cost of labour, plant, equipment, materials, freight, insurance, customs, duty, currency exchange rates or otherwise, except as expressly set out in this Agreement;
- includes all GST, and costs associated with the delivery of the Goods to BMP; and
- includes minor or ancillary items not expressly mentioned in the PO which are necessary for the satisfactory completion of and provision of the Goods.

#### 4.2 Price

Subject to clause 3.3(d) and to BMP being satisfied that:

- the Supplier has provided the Goods in accordance with this Agreement;
  - the Supplier has complied with each of its obligations under this Agreement; and
  - it has received a proper tax invoice from the Supplier in respect of any claim for payment of the Price,
- and subject to clause 4.3, any other right of set off that BMP has, BMP will pay the Supplier the Price within thirty 30 days of receipt of the relevant Goods or as otherwise set out in the PO.

#### 4.3 Set off

BMP may deduct from moneys due to or claimed by the Supplier, or recover from the Supplier as a debt due and payable:

- any debt or other moneys due from the Supplier to BMP; and
- any claim to money which BMP may have against the Supplier whether for damages (including liquidated damages imposed on BMP by any party in relation to the Goods arising from a claim by BMP that the Goods have been delayed by the Supplier) or in respect of any amount indemnified by the Supplier under clause 8.2 or otherwise,

whether under the Agreement or otherwise at law relating to the Goods.

### 5 Termination and Suspension

(a) Either party may terminate an Agreement:

- immediately on written notice to the other party where an Insolvency Event occurs in relation to the other party; or
  - on 14 days written notice to the other party where the other party is in breach of its obligations under an Agreement and such breach is not remedied within 30 days of written notice that specifies the breach.
- If BMP terminates an Agreement pursuant to clause 5(a):
    - BMP will not be required to make any further payment under the Agreement (if any is so payable) in respect of Goods that have not been delivered as at the effective date of termination; and
    - BMP is not responsible for any loss or damage suffered by the Supplier as a consequence of such termination; and
  - If the Supplier terminates this Agreement pursuant to clause 5(a), BMP must pay the Supplier the Price for all Goods delivered up to the effective date of termination.
  - If this Agreement is terminated by either party pursuant to clause 5(a), the Supplier must immediately deliver to BMP all Documentation and Confidential Information belonging or relating to BMP.
  - BMP may, without reason or cause and without any claim for extra cost or otherwise by the Supplier, direct the Supplier to suspend the supply of Goods prior to the Goods being delivered. BMP may direct the Supplier to resume the supply of Goods which have been suspended pursuant to this clause.

## 6 Non-solicitation

### 6.1 Definitions

For the purposes of this clause 6, **Customer** means any business, person, firm, company or organisation who is a current or former client of BMP and to whom BMP has:

- (a) provided the Goods or goods that are the same as or similar to the Goods; or
- (b) tendered or quoted to provide the Goods or goods that are the same as or similar to the Goods.

### 6.2 Supplier Non-Solicitation

The Supplier will not:

- (a) directly or indirectly accept work from a Customer to provide any goods or services to that Customer which are the same as or similar to the Goods or to carry on business with an Customer in any manner which may adversely affect the business of BMP;
- (b) directly or indirectly approach any Customer to solicit or canvass, seek or entice business from that Customer; or
- (c) counsel, procure or otherwise assist any person to do any of the acts referred to in clause 6.2(a) and 6.2(b),

from the date of the PO and for the periods ending on the following dates:

- (d) 1 year after the date of the PO;
- (e) 9 months after the date of the PO;
- (f) 6 months after the date of the PO;
- (g) 3 months after the date of the PO,

either:

- (h) on the Supplier's own account;
- (i) jointly with or on behalf of any person, firm or company; or
- (j) as a consultant, contractor, agent, employee, manager, director, shareholder, member, partner, joint venturer participant, or in any other capacity;

in any of the following areas:

- (k) within Australia;
- (l) within Queensland, New South Wales and Victoria; or
- (m) within New South Wales and Victoria; or
- (n) within Victoria.

### 6.3 Provisions severable

Each sub-clause of clause 6.2 must be read and construed and will have effect as if it were a separate independent clause with each such paragraph being severable from the others to the extent that any such paragraph will be invalid or unenforceable for any reason. If a prohibition or restriction contained in clause 6.2 is void or voidable by either party or unenforceable or illegal, but would not be void or voidable or unenforceable or illegal as aforesaid if it were read down, and it is capable of being read down, it will be read down accordingly, and if notwithstanding the foregoing, a prohibition or restriction contained in clause 6.2 is still void or voidable or unenforceable or illegal:

- (a) if the prohibition or restriction would not be void or voidable or unenforceable or illegal as aforesaid if a word or those words (as the case may be) were omitted, that word or those words are hereby severed; and
- (b) in any other case, the whole of the prohibition or restriction is hereby severed,

then the remainder of this clause has full force and effect.

### 6.4 Provisions reasonable

Each party warrants that it understand the provisions of this clause 6 and/or has received independent legal advice with respect to the provision of this clause 6, and considers such provisions to be fair and reasonable and that such provisions go no further than reasonably necessary to protect the goodwill of the parties.

### 6.5 Acknowledgement

The Supplier unconditionally and irrevocably acknowledges and agrees that the Price paid (or to be paid) to the Supplier under this Agreement constitute valuable consideration in exchange for the obligations and restraints imposed on the Supplier pursuant to clause 6.2 of this Agreement.

## 7 Intellectual Property and Information

### 7.1 Background IP

- (a) The parties acknowledge and agree that nothing in an Agreement affects any party's existing rights in any Background IP.

- (b) Subject to:

- (i) each party's compliance with the Agreement; and
- (ii) any restrictions specified in an Agreement,

each party grants to the other a non-exclusive, royalty-free revocable licence to use (excluding the right to sub-licence) that party's Background IP solely in connection with the Agreement and solely for the purpose for which it was provided and in accordance with the terms of the Agreement.

- (c) The parties acknowledge and agree that, unless otherwise notified by BMP:

- (i) BMP owns all the Intellectual Property Rights in the BMP Specifications; and
- (ii) BMP grants the Supplier an exclusive, perpetual, royalty-free revocable licence to use (excluding the right to sub-licence) the BMP Specifications solely for the purpose of supplying the Goods to BMP pursuant to this Agreement.

### 7.2 Intellectual Property in the Goods and Documentation

- (a) The Supplier warrants in favour of BMP that:

- (i) the Goods do not, and the supply of the Goods to BMP will not, not infringe any Intellectual Property Rights of any person; and
- (ii) the Goods are genuine, and not counterfeit products; and
- (iii) to the extent the Goods contain Intellectual Property Rights of any other person, the Supplier has the written approval of the owner of those Intellectual Property Rights to use those Intellectual Property Rights in respect of the Goods.

- (b) Unless requested to be delivered to BMP, upon completion of the Goods, the Supplier must archive and maintain in safe custody all Documentation in its possession for a period of seven years.

### 7.3 Information and publicity

The Supplier must not disclose and must use its best endeavours to ensure that its employees do not disclose to any person or make public information obtained by it relating to this Agreement (including Confidential Information) or the Goods or the business of BMP without the prior written approval of BMP. This clause 7.3 will continue to bind the Supplier after the Goods have been provided or after termination of this Agreement.

## 8 Warranties and Liability

### 8.1 Warranties

The Supplier warrants that:

- (a) all Goods supplied to BMP under an Agreement:
  - (i) comply with the PO and the BMP Specifications;

- (ii) comply with all relevant Laws, will meet or exceed any relevant Australian Standard and are fit for the purpose for which they are intended;
  - (iii) are of merchantable quality;
  - (iv) are safe;
  - (v) are new and free from defects, encumbrances, or fault; and
  - (vi) include appropriate and correct warnings and instructions; and
  - (vii) do not infringe any Intellectual Property Rights of any person; and
- (b) the Supplier will at all times:
    - (i) exercise all care, skill, attention and diligence and will employ techniques of a high standard in accordance with best industry practice; and
    - (ii) ensure that every person utilised by the Supplier is competent, appropriately qualified and is, where relevant, registered with or licensed by the appropriate statutory or professional body; and
    - (iii) comply with all Laws.

### 8.2 Liability

- (a) The Supplier is liable for, and indemnifies and keeps BMP indemnified against any Loss suffered or alleged to have been suffered, and any Loss incurred or alleged to have been incurred, arising out of or by reason of a breach by the Supplier of any of its obligations under this Agreement including but not limited to:
  - (i) a breach of any warranties given in clause 7.2(a) and 8.1 in any way connected with the provision (or non-provision) of the Goods;
  - (ii) any act, negligence, omission or wilful misconduct of the Supplier; and
  - (iii) the Goods supplied (to the maximum extent permitted by law); and
  - (iv) a breach of the Supplier's non-solicitation obligations pursuant to clause 6 of these Terms.
- (b) The indemnity in clause 8.2(a) extends to and includes any Loss suffered or alleged to have been suffered by BMP in the nature of loss of profit and loss of business opportunity as a result of the Supplier's breach of the Supplier's non-solicitation obligations pursuant to clause 8 of this Agreement.
- (c) The Supplier's liability under this clause will be reduced proportionately having regard to any contribution by BMP to any Loss.
- (d) BMP is not liable under this Agreement for any Loss suffered or alleged to have been suffered, or any Loss incurred or alleged to have occurred, by the Supplier or any third party, other than as a direct result of BMP's breach of its obligations under this Agreement or any negligence, or wilful or unlawful act or omission of BMP. BMP's liability will be reduced proportionately having regard to any contribution by BMP to any Loss.
- (e) Neither party will have any liability to the other for Consequential Loss.

### 8.3 In clause 8.2:

- (a) "**Loss**" means any expense, cost or damage of any kind including a fine or penalty imposed by a statutory or other authority, but excluding Consequential Loss; and
- (b) "**Consequential Loss**" means loss of expected savings, loss of profit, loss of revenue, loss of goodwill, lost or delayed production, increased financing costs, downtime, business interruption costs, or any consequential, special or indirect loss or damage, whether or not the possibility or potential extent of the loss or damage was known or foreseeable, and whether arising from a claim under indemnity, contract, tort (including negligence), statutory or otherwise.

### 8.4 Insurance

The Supplier must obtain and maintain public liability insurance with a reputable insurer for at least \$10million and insure the Goods with a reputable insurer for their full replacement cost. The Supplier must provide evidence of such insurance when required by BMP.

## 9 Disputes

- (a) If a dispute arises between the Supplier and BMP concerning any matter arising out of or in connection with this Agreement either party may give notice of that dispute to the other party.
- (b) Within 7 days of notice being given under clause 9(a), senior executives of the parties shall meet to endeavour to resolve the dispute. If the dispute is not resolved within 14 days of that meeting then the dispute shall be referred to a mediator who is agreed between the parties, or failing agreement, who is appointed by the President of the Law Institute of Victoria or its successor.
- (c) A party must not commence legal proceedings (except proceedings seeking urgent interlocutory relief) in respect of a dispute unless the dispute has been referred to mediation in accordance with this clause 9.
- (d) The existence of a dispute will not relieve the Supplier from supplying the Goods or any of its other obligations under and in accordance with this Agreement.

## 10 Force Majeure

BMP is not liable in any way howsoever arising under an Agreement to the extent that it is prevented from acting by circumstances beyond its reasonable control including, without limitation, industrial disputes, strikes, lockouts, accident, breakdown, import or export restrictions, acts of God, acts of terrorism, or acts of war. If an event of force majeure occurs, BMP may suspend or terminate any Agreement by giving the Supplier written notice.

## 11 Trustees

If the Supplier is a trustee of a trust, the Supplier acknowledges that the Trustee shall be liable for complying with the Agreement and that in addition the assets of the Trust shall be available to meet the Supplier's obligations under this Agreement.

## 12 Miscellaneous

- (a) The law of Victoria from time to time governs this Agreement. The parties irrevocably and unconditionally submit to the exclusive jurisdiction of the courts of Victoria, including the Federal Court of Australia sitting in Victoria (and of courts entitled to hear appeals from those Courts), in respect of any claims, proceedings or matters arising out of or in connection with an Agreement.
- (b) BMP's failure to enforce any of these Terms shall not be construed as a waiver of any of BMP's rights.
- (c) If any of the Terms are unenforceable they shall be read down so as to be enforceable or, if they cannot be so read down, the unenforceable terms shall be severed from these Terms without affecting the enforceability of the remaining terms.
- (d) A notice must be in writing and handed personally or sent by facsimile, email or prepaid mail to the last known address of the addressee. Notices sent by pre-paid post are deemed to be received within 3 business days of posting. Notices sent by facsimile or email are deemed received upon successful transmission.
- (e) The Supplier must notify BMP of any proposed change in the shareholdings or directorships of the Supplier at least 14 days prior to the change taking effect.
- (f) BMP may vary or amend these Terms by written notice to the Supplier at any time. Any variations or amendments will apply to all POs placed after the notice date.
- (g) The Supplier must not subcontract any part of its obligations under this Agreement without the prior written consent of BMP.

## 13 Special Conditions

These Terms are subject to any special conditions in the PO. If there is any inconsistency between the clauses in these Terms and those special conditions, the special conditions prevail to the extent of that inconsistency.