

## CONDITIONS FOR GOODS AND SERVICES

### 1. Definitions and Interpretation

In these Conditions the following words have the following meanings unless the context otherwise provides:

**"Agreement"** means the agreement between Flender and the Customer consisting of the Offer and these Conditions;

**"Additional Goods and Services"** means any Goods and / or Services requested by the Customer in addition to those set out in the Offer;

**"Affiliate"** of a party shall mean a corporation, company or other entity, now or in the future, directly or indirectly,

- (a) owned or Controlled by the party, or
- (b) owning or Controlling the party, or
- (c) owned or Controlled by the same corporation, company or other entity as the party;

**"Australian Consumer Law"** means the Australian Consumer Law set out in schedule 2 of the *Competition and Consumer Act 2010* (Cth);

**"Authorisation"** means an approval, consent, declaration, direction, exemption, notarisation, licence, permit, certificate, waiver or other authorisation, however described, required by any Law and includes any renewal or amendment;

**"Business Day"** means Monday through Friday (inclusive) excluding gazetted public holiday in the State or Territory where the Site are located.

**"Change of Law"** means the enactment, adoption, promulgation, modification, determination, Authorisation or repeal (including any change in interpretation or application by competent authorities), of, or in respect of, any Law which occurs after the date of Flender's Offer;

**"Commencement Date"** means the earlier of the commencement date set out in the Offer, or if none is stated, then the date that Flender confirms the Customer's order or the date that Flender commences provision of the Services or supply of the Goods;

**"Conditions"** means the Conditions for Goods and Services set out in this document;

**"Confidential Information"** means information (in any form) which is by its nature confidential, is designated by a party to be confidential, the recipient knows or ought reasonably to know is confidential, information comprised in or relating to IP Rights, information relating to the business, computer systems or affairs of either party, the content of any correspondence, discussions, negotiations and agreements between any of the parties and the existence of such correspondence, discussions, negotiations and agreements;

**"Contact Centre"** means the telephone support facility provided by Flender for reporting by the Customer of its Services requirements;

**"Contamination"** means any contamination not generated by Flender or as a result of hazardous materials brought onto the Site by Flender;

**"Contract Price"** means the price payable by the Customer to Flender for the Goods and Services as specified in the Agreement as may be varied in accordance with the Agreement and where applicable may be calculated using the Schedule of Rates;

**"Control"** of a corporation, company or other entity shall mean to have, directly or indirectly, the power to direct or cause the direction of the management and policies of a corporation, company or other entity, whether:

- (a) through the ownership of voting securities entitling to the right to elect or appoint, directly or indirectly, the majority of the board of directors, or a similar managing authority;
- (b) by contract; or
- (c) otherwise.

**"Customer"** means the person for whom or which work under the Agreement is performed;

**"Customer Representative"** means the person who has authority to represent the Customer under the Agreement;

**"Consumer"** has the meaning given in section 3 of the Australian Consumer Law. The Customer will be acquiring goods/services as a Consumer if:

- (a) The amounts paid or payable for the goods does not exceed \$40,000; or
- (b) The goods are of a kind ordinarily acquired for personal domestic or household use or consumption;

Notwithstanding the above, the Customer will not be acquiring goods and/or services as a Consumer if the Customer acquires the goods and/or services:

- (a) For the purposes of re-supply; or
- (b) For the purposes of using them up and transforming them, in trade or commerce
  - (i) In the course of a process of production or manufacture; or
  - (ii) In the course of repairing or treating other goods or fixtures on land;

**"Defect"** means an error or defect in the Goods and Services, due to faulty material or workmanship for which Flender is responsible;

**"Defects Liability Period"** has the meaning set out in clause 15;

**"Delivery Date"** means the final date by which the Services must be performed and the Goods must be delivered under the Agreement;

**"Equipment"** means any equipment at the Site upon which the Services will

be performed;

**"Emergency Breakdown Equipment"** means equipment owned by Flender for temporary replacement of non-functioning equipment;

**"Flender"** means Flender Pty Ltd (ABN 48 625 556 587) or its related body corporate (as that term is defined in section 50 of the *Corporations Act 2001*) that submits the Flender Offer;

**"Flender Offer"** means a written offer by Flender to perform the work under this Agreement;

**"Flender's Personnel"** mean all persons engaged by Flender to perform the work under the Agreement;

**"Force Majeure Event"** means any event beyond the reasonable control of a party including the following events:

- (a) acts of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, revolution, insurrection, military or usurped power or terrorism;
- (b) ionising radiation or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;
- (c) contamination caused by any hazardous or toxic materials or waste (including asbestos) existing on the Site prior to the date of the Agreement or brought onto the Site after this date by or on behalf of the Customer (other than contamination caused by Flender or Flender's Personnel);
- (d) shipping congestion at port of loading/unloading, blockades, embargos, shortage of transport, import restrictions or currency restrictions;
- (e) act (or failure to act) of authorities (unless such act is the requirement of authorities to either party to comply with any mandatory Law in force at the time of signature of the Agreement), non-approval of export licence for the work under the Agreement, or epidemic, Change of Law;
- (f) sabotage, strikes, lockouts, go-slow or any other industrial dispute or disturbance;
- (g) Acts of God including all severe weather conditions, natural disasters, earthquakes, volcanic activity, hurricanes, cyclones, floods, fires, tsunamis and lightning strikes; and
- (h) epidemics, pandemics, quarantines and any events or impacts that flow from those events

**"Goods"** means the goods to be supplied by Flender under this Agreement, as specified in the Offer (including any Additional Goods and Services and On Site Spares) as may be varied by the parties in writing from time to time;

**"GST"** has the meaning given to it in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any regulations made pursuant to the Act;

**"Insolvency Event"** means:

- (a) in relation to a company, that the company: (i) is insolvent; (ii) has an administrator, controller, liquidator, provisional liquidator; receiver, receiver and manager, mortgagee in possession or other like officer appointed to it or over all or any of its assets; (iii) experiences any analogous event having a substantially similar effect; and
- (b) in relation to an individual, that he or she: (i) is insolvent; (ii) enters into a debt agreement or personal insolvency agreement; or (iii) commits an act of bankruptcy or is bankrupt;

**"IP Rights"** means all intellectual property and industrial rights of any description including without limitation all rights conferred by statute, common law or equity (whether or not registered) in relation to inventions (including patents), trademarks, designs, copyright, circuit layout rights, trade secrets, know-how and confidential information and all other rights of a proprietary nature created as a result of intellectual activity in the industrial, scientific, literary and artistic fields;

**"Law"** means any applicable statute, rules, regulations, by-laws, codes, standards, ordinances, licences, orders, official policies, directions, requests, requirements, Authorisations and guidelines in force from time to time, whether made by a State, Territory, the Commonwealth or local government or by regulatory departments, bodies, instrumentalities, Ministers, agencies, or statutory authorities;

**"Major Failure"** in respect of goods, has the meaning defined in section 260 of the Australian Consumer Law, and in respect of services, has the meaning defined in section 268 of the Australian Consumer Law;

**"Order"** means a written order for Goods and Services from the Customer in accordance with an Offer, in the form required by Flender from time to time;

**"On Site Spares"** means those spares held on Site by the Customer including those held on consignment from Flender;

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

**"Response Times"** means the response times if any set out in the Offer;

**"Restricted Site Access"** refers to the situation where Flender is not able to access the Site to commence work or deliver the Goods;

**"Schedule of Rates"** means Schedules of charging rates calculated on an hourly or other basis as set out in A Flender Offer and varied in accordance with the Agreement;

**"Services"** means the Services to be provided by Flender to the Customer under the Agreement, as specified in the Offer (including any Additional

Services) as may be varied by the parties in writing from time to time;

“**Services Materials**” means material and equipment brought onto Site by Flender for use in performing the work under this Agreement and includes, without limitation service manuals, schematics, diagnostics software, tools and parts;

“**Site**” means the Customer’s premises at which Flender is to perform the work under this Agreement;

“**Software**” means any software supplied by Flender to the Customer for use in or in connection with the Goods and Services and includes, as applicable: (a) the machine-executable object code version of the software; (b) any microcode (firmware) embedded in the Goods and Services; (c) any related user documentation; and (d) any adaptation, copy, derivation, development, enhancement, improvement, modification, translation, Update or Upgrade of that software;

“**Update**” means any software supplied by Flender which has been produced primarily to overcome defects in, or to improve the operation of the Software (including bug fixes and patches) without significantly improving the functionality or performance of that software; and

“**Upgrade**” means any software supplied by Flender which has been produced primarily to extend, alter or improve the Software, by providing additional functionality or performance enhancements;

“**Taxable Supply**” has the meaning given to it in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*;

“**Taxes**” means all taxes including without limitation GST, excise duties, stamp duties, customs duties and other government charges, imposts and levies; and

“**Term**” means the term of the Agreement as set out in the Flender Offer, (or if no term is stated, 12 months) as extended or terminated in accordance with the Agreement.

## 1.2 Interpretation

In the Agreement, unless otherwise indicated to the contrary:

- (a) a reference to the Agreement or any other document or agreement, includes any variation, replacement or novation of them;
- (b) the use of the word “includes” or “including” shall be interpreted to mean “includes” or “including” without limitation;
- (c) headings are for ease of reference only and do not affect interpretation;
- (d) the singular includes the plural and vice versa;
- (e) a reference to “\$” or “dollars” is to Australian dollars;
- (f) a reference to a party to this Agreement or another agreement or document includes the party’s successors, permitted substitutes and permitted assigns (and, where applicable, the party’s legal personal representatives);
- (g) where a word or phrase is defined, other parts of speech and grammatical forms of that word or phrase shall have corresponding meanings;
- (h) a reference to all or any part of a Law includes that Law as amended, consolidated, re-enacted or replaced from time to time;
- (i) if a payment or other act is required to be made or done on a day which is not a Business Day, the payment or act must be made or done on the next following Business Day; and
- (j) a reference to a ‘person’ includes a firm, partnership, joint venture, association, unincorporated body, corporation or other entity.

## 1.3 Flender’s rights and remedies

Flender’s rights and remedies in this Agreement are in addition to those conferred by Law.

## 2. OFFER, ACCEPTANCE AND VARIATIONS

### 2.1 Offer and acceptance

- (a) These Conditions form part of the Flender Offer in which they are referred to or to which they are attached. Notwithstanding any acceptance by Flender of any order from the Customer that may contain any provision inconsistent with or purporting to vary or reject any of these Conditions, any contract arising from any such acceptance shall be subject to these Conditions unless and to the extent only that Flender expressly agrees in writing to any variation.
- (b) Unless previously revoked by written notification to the Customer, the Flender Offer shall remain valid for the period stated in the Flender Offer or, if no period is stated, for thirty (30) days from its date.

### 2.2 Variations

The Customer may request Flender to vary the work to be performed by Flender under the Agreement to an extent contemplated by, and capable of being carried out under, the provisions of the Agreement. Flender shall as soon as practicable after receiving such request notify the Customer:

- (a) whether the proposed variation can be effected; and
- (b) if it can be effected:
  - (i) Flender’s offer including its quote for the cost of performing the proposed variation, including any delay or disruption costs and payment terms; and
  - (ii) Flender’s estimate of the impact of the variation on the Delivery Date.

If the Customer accepts Flender’s offer for the proposed variation, Flender shall perform the variation and the cost shall be added to or deducted from the Contract Price. The Delivery Date shall be extended as a result of any delay incurred by Flender due to the performance of the requested variation.

## 3. Specifications and drawings

### 3.1. Not part of Agreement

Unless expressly agreed in writing all descriptions, specifications, drawings, dimensions and weights submitted with Flender’s Offer are approximate only. All descriptions, illustrations and data contained in catalogues, price lists and other promotional material are only intended to present a general idea of the products described and do not form part of the Agreement.

### 3.2. Provision of necessary information

The Customer shall, within 7 days from the date of the Customer’s order, provide Flender with all information and other things reasonably required by Flender from the Customer to enable work under the Agreement to start and be carried out without delay or interruption, otherwise clause 17(e) shall apply.

### 3.3. Approval of drawings

Drawings or other information requiring the Customer’s approval shall be approved, amended or rejected and returned to Flender within 7 days of the date of receipt (or within such other time period as may be agreed in writing by Flender), otherwise clause 17(e) shall apply.

### 3.4. Incorrect information

The Customer shall be responsible for and bear the cost of any alteration to the Goods and Services necessitated by any discrepancy, error or omission in any drawings, specifications or other information supplied or approved by the Customer.

### 3.5. Responsibility for Authorisations

In the absence of any agreement to the contrary, the Customer shall be responsible for obtaining and providing all Authorisations necessary for performance of the Agreement at the Customer’s cost.

## 4. Services

- (a) Flender will perform the Services during the Term, commencing on the Commencement Date.
- (b) Hours of service are as described in the Flender Offer or are otherwise Flender normal working hours. If Flender performs Services outside its normal working hours, then it may charge the Customer for any additional costs in accordance with the Schedule of Rates or, if no Schedule of Rates applies then at reasonable rates and prices.
- (c) Flender will perform all Services under the Agreement in accordance with Flender occupational, health, safety and environment policies and procedures. Any costs associated with specialist safety equipment or requirements shall be paid by the Customer.
- (d) The Customer may request Flender to provide Additional Goods and Services and if Flender agrees to perform them, the Agreement will also govern those Additional Goods and Services.
- (e) Flender will use reasonable endeavours to provide the Services within the Response Times (if any).
- (f) The Services only include those Services set out in the Offer and any agreed Additional Goods and Services. Unless otherwise agreed, the following services are not included in the Contract Price and, if Flender agrees to perform them, may be charged as Additional Goods and Services:
  - (i) correction of faults caused by lightning damage or electromagnetic interference;
  - (ii) correction of faults caused by misuse, negligence or failure to observe the instructions for the Equipment or by unauthorized modifications or alterations to the Equipment;
  - (iii) correction of faults caused by matters external to the Equipment such as those resulting from any failure or fluctuation of the electricity supply and any other fault which is not the result of fair wear and tear;
  - (iv) the provision of more than one specialist engineer who, due to the circumstances, are required to attend the Site, diagnose the fault and perform repair Services;
  - (v) replacement of consumable materials such as batteries for the Equipment;
  - (vi) any alterations or extensions to the Equipment requested by the Customer; and
  - (vii) civil or structural defects or faults in the Equipment or catastrophic failure including catastrophic failure of large rotating plant.

## 5. Information and Communication

- (a) The Customer must at such times as reasonably advised by

Flender, furnish to Flender sufficient information to enable the work under the Agreement to proceed promptly and without interruption.

- (b) The Customer must be responsible for the accuracy and completeness of the information supplied by the Customer and its representatives. In the event of any error or omission in this information supplied, the Customer shall be responsible and shall bear the cost of any alterations or variations required to the work under the Agreement.

## 6. Intellectual Property Rights

### 6.1. Ownership of Intellectual Property Rights

Ownership of the Software and all IP Rights developed, subsisting or created by Flender in connection with the Goods, Services and Software (including without limitation any training materials, sketches, designs, reports, plans, drawings, specifications, samples, models, patterns, photographs, graphics, logos, artworks, documents, patents or records) shall remain the exclusive property of Flender or Flender's third party suppliers or licensors. Flender grants to the Customer a non-transferable and non-exclusive licence to use such Intellectual Property Rights for the sole purpose of operation and maintenance of the specific Customer facility or Goods (as the case may be and including any Additional Goods) that is the subject of this Agreement. The Customer shall promptly execute, at the request of Flender, all documents and do all such other acts as may be necessary to give effect to this clause. Flender shall under no circumstances be obliged to provide any source codes to the Customer.

#### 6.1A Software Licence

- (a) If any Software is supplied by Flender, the Customer's use of that Software shall be governed by the terms of the associated licence. If there is no separate licence, the Customer is hereby granted a non-exclusive, non-transferable licence to use that Software in conjunction with the Goods and Services. This licence does not extend any right to the Customer in respect of source code to the Software and is without prejudice to any licence fees provided for in the Agreement.
- (b) The Customer shall not directly or indirectly reverse assemble or reverse compile the whole or any part of any Software or otherwise attempt to:
  - (i) defeat, avoid, bypass, remove, deactivate or otherwise circumvent any software protection mechanisms in the Software; or
  - (ii) derive any source code from the Software.
- (c) The Customer shall not (without Flender's prior written consent):
  - (i) modify the Software or merge all or any part of the Software with any other software;
  - (ii) copy or reproduce the Software by any means or in any form; or
  - (iii) make the Software available to any third party.
- (d) Subject to Flender's Defects Liability Period obligations under clause 15:
  - (i) Flender is not obliged to provide Updates or Upgrades under the Agreement; and
  - (ii) Flender reserves the right to charge the Customer for any Updates or Upgrades supplied by Flender.
- (e) To the extent permitted by Law, Flender may refuse to provide maintenance or support services for the Goods, Services and Software if the Customer refuses to accept any Update or Upgrade recommended by Flender.

### 6.2. Indemnity

- (a) Flender shall indemnify the Customer against any claims which the Customer is legally liable for, in respect of any infringement of a third party's copyright or registered design, trademark or patent, the specification of which is published prior to the date of Flender's Offer, relating to any part of the work supplied by Flender (except if the part is based on a design specified by the Customer, or if the claim is due to use of the part not in accordance with the Agreement or use of the part in conjunction with goods not supplied by Flender) ("Infringing Part"). Flender's obligation to indemnify the Customer against claims is subject to the Customer:
  - (i) giving Flender prompt written notice of the claim;
  - (ii) not making any admission or prejudicing Flender's defence of the claim or Flender's ability to negotiate a satisfactory settlement;
  - (iii) allowing Flender the opportunity to control (at Flender expense) the conduct of the defence and any negotiations for the settlement of the claim; and
  - (iv) giving Flender (at Flender's expense) such assistance and information as may reasonably be required by Flender to assist Flender with the conduct of the defence and any negotiations for the settlement of the claim.

(b) Flender's obligation to indemnify the Customer under the Agreement shall be reduced to the extent that:

- (i) an act or omission of the Customer (or of the Customer's employees, officers, agents, consultants or other contractors), has contributed to the loss or damage; and
- (ii) the Customer has failed to mitigate its loss; and shall cease two years after the earlier of termination or expiry of the Agreement or completion of the work under the Agreement.

## 6.3. Remedies

- (a) Flender shall, at its option, either replace or modify the Infringing Part with a non-infringing part or procure for the Customer the right to use such Infringing Part.
- (b) The remedies set out in this clause 6 shall be the sole and exclusive remedy of the Customer and represent the full extent of Flender's liability for infringement of intellectual property rights.

## 6.4. Warranty by Customer

The Customer warrants that use by Flender of any design materials, documents and methods of working provided or directed by the Customer to enable Flender to perform work under the Agreement, will not cause Flender to infringe any third party's intellectual property rights and the Customer will indemnify Flender upon request for any loss or damage incurred by Flender in connection with such infringement.

## 7. Contract Prices and Payment

### 7.1. Contract Price

The Contract Price quoted by Flender is based on the quantity and scope of work specified in Flender's Offer and any minimum order values stated in Flender's Offer shall apply. If there is any variation in the quantity or scope ordered from that offered, Flender may adjust the Contract Price accordingly. If Flender's Offer states that any portion of the Contract Price is subject to adjustment after a specified reference date due to foreign exchange rate variations, rise and fall or any other circumstance and the provision sets out the mechanism for calculating such adjustment, then Flender may adjust the Contract Price in accordance with such provision.

The Contract Price includes the cost of standard packing. The cost of any special packing required by the Customer will be separately charged to and payable by the Customer.

On each anniversary of the Commencement Date, Flender may review the Contract Price and Schedule of Rates which will be applicable for the next 12 months.

### 7.2. GST and Taxes

- (a) Unless otherwise stated in the Flender Offer, the Contract Price is strictly net. The prices offered are exclusive of Taxes, which the Customer must pay in addition to the payment of other amounts due and owing under the Agreement. If GST is payable in relation to a Taxable Supply the amount payable for that Taxable Supply will be the amount payable in accordance with the Agreement plus GST. Flender and the Customer must provide each other with all documentation, including a Tax Invoice required to claim any Input Tax Credit, set-off, rebate or refund for or in relation to any GST included in any payment made under the Agreement.
- (b) In this clause, "GST", "Input Tax Credit", "Tax Invoice" and "Taxable Supply" have the meaning given to them in the GST Law.

### 7.3. Change of Law

If after the Commencement Date, the cost to Flender of performing the works under this Agreement is varied due to any Change of Law, the amount of such variation shall be added to or deducted from the prices charged under the Agreement, whichever the case may be. If the Change of Law causes delay to Flender, then the time for performance of Flender's obligations shall be extended by a period of time equal to the period of the delay.

### 7.4. Invoicing

- (a) Unless otherwise agreed between the parties in writing, Flender may invoice the Contract Price to the Customer upon delivery of the Goods to the Site and/or performance of the Services.
- (b) Flender may invoice the Customer for any variations or additional work requested by the Customer at the times agreed in writing between Flender and the Customer or any other reasonable time.
- (c) Where any other amount is payable to Flender pursuant to the Agreement, Flender may invoice such amounts as and when they occur.

### 7.5. Payment terms and credit facilities

- (a) Unless otherwise agreed between the parties in writing, the Customer shall pay all amounts invoiced by Flender within 30 days from the date of invoice.
- (b) Flender may provide credit facilities in its discretion. Flender reserves the right to withdraw credit facilities at any time prior to delivery.
- (c) Payment shall become due immediately upon the Customer suffering an Insolvency Event.

## 7.6. Payment when delivery of Goods is delayed

If delivery of any Goods is delayed by the Customer or the Customer's agents, consultants, employees, officers, representatives or other contractors, then payment of the full Contract Price for the delayed Goods shall be made by the Customer to Flender within 30 days after notification by Flender that the work under the Agreement was ready to be performed.

## 7.7. Delay or default in payment

Flender may charge interest on overdue amounts (at the rate of 3% above the 90-day Bank-accepted bills daily rate published by the Reserve Bank of Australia for the next Business Day after payment becomes due), calculated daily from the next Business Day after payment became due until the date of full and final payment of the overdue amounts. Any payment by the Customer shall be credited first against any interest so accrued and the balance of payment, if any, shall be applied in reduction of the outstanding balance of the Contract Price.

## 7.8. Trade Ins

The Customer warrants and covenants that any goods traded-in by the Customer (and set out in Flender's Offer) are the Customer's absolute and unencumbered property and the Customer agrees that any such items will become the absolute property of Flender free from all charges, liens and encumbrances from the date on which Flender takes possession of the goods and until such time risk of loss, damage or deterioration to the goods shall remain with the Customer.

## 7.9. Financing

If the Customer informs Flender that finance is to be arranged in respect of the Goods, the following shall apply:

- (a) the Customer agrees to procure a finance company to purchase the Goods and to notify Flender of the name and address of the finance company;
- (b) Flender shall forward the invoice for the Goods to the finance company and all payments by the finance company of the invoiced amount shall discharge the Customer's corresponding payment obligations for the Goods under the Agreement, but all other provisions of these Conditions shall remain in full force and effect;
- (c) if the nominated finance company does not pay the full invoiced amount that is due and owing to Flender by the due date, then Flender may forward the invoice to the Customer who shall be bound to purchase the Goods from Flender and to pay for the Goods in accordance with the Agreement; and
- (d) the Customer acknowledges that no discussion, correspondence or other communications between Flender and the Customer concerning the sources or availability of finance shall in any way affect the Customer's obligations under the Agreement.

## 8. Customer's Obligations

The Customer must:

- (a) give reasonable prior notice of the time when Flender is required to be on Site;
- (b) promptly answer all queries and provide to Flender complete and accurate information and documents that are necessary to enable it to provide the Goods and Services;
- (c) provide customs clearance and obtain and maintain any approvals, licences or permits that are necessary for the Goods and Services;
- (d) provide Flender with access to Site and take all necessary measures (including scheduling of planned Services) to ensure that Flender personnel are able to safely commence the work under the Agreement immediately upon their arrival at Site;
- (e) ensure that Flender personnel have sufficient access to the Equipment to perform the work under the Agreement in an uninterrupted manner;
- (f) supply all necessary information with regard to the location of underground cables and pipes together with static data for structures;
- (g) whilst the Equipment is operating, maintain the environmental conditions specified by the manufacturer;
- (h) ensure that the personnel operating the Equipment are properly trained in its operation;
- (i) make no attempt to modify, alter or repair the Equipment unless otherwise agreed in writing by Flender;

- (j) ensure that Flender is provided with adequate secure storage space, free from condensation, dust and heat, for the storage of any Goods and tools;
- (k) maintain the Site in a safe secure condition to ensure compliance with the requirement of all applicable Laws, and Australian Standards for occupational, health, safety, environment and to properly induct all Flender personnel to the Site;
- (l) provide adequate power supply lighting of work areas and ventilation for the performance of the work under the Agreement;
- (m) provide Flender with details of the Customer Representative; and
- (n) ensure the Customer Representative issues Flender purchase orders confirming any verbal directions to proceed in respect of any Additional Services.

If the Customer does not comply with its obligations under this clause, then the Delivery Date and the time for performing the Services shall be extended until such time as the Customer's obligations are fulfilled and the Customer shall pay Flender the reasonable costs incurred by Flender due to such delays.

## 9. Services Materials

- (a) Unless otherwise stated in the Offer all Services Materials, with the exception of On Site Spares, retained or brought onto the Site under the Agreement are the property of and include proprietary information of Flender.
- (b) The Customer acknowledges that the Services Materials may only be used by Flender's personnel and are to be returned to Flender upon termination of the Agreement but that Flender has the right to remove such materials from the Site at any time.
- (c) The Customer acknowledges and agrees that parts replaced during performance of the work under the Agreement shall become the property of Flender and it may dispose of such parts as it deems fit. Replacement parts used in the Services may be new or refurbished.
- (d) If Emergency Breakdown Equipment is made available by Flender to the Customer, Flender may at a later time replace the Emergency Breakdown Equipment with a permanent replacement or the repaired original Equipment or part.

## 10. Title and Risk

### 10.1. Passing of risk

- (a) Risk to the Goods shall pass to the Customer upon delivery to Site and from then the risk of damage, deterioration or loss of or to the Goods from any cause whatsoever shall pass to the Customer.
- (b) On Site Spares shall be at Customer's risk at all times.

### 10.2. Passing of title

Title and property in the Goods shall remain with Flender, and the Customer holds the Goods as bailee and fiduciary agent, until such time as full payment is made to Flender of all amounts due and owing by the Customer to Flender.

### 10.3. Right of recovery

If the Customer fails to make payment of any amounts due and owing to Flender, or an Insolvency Event occurs with respect to the Customer, then Flender may recover the Goods. For that purpose Flender's representatives may enter upon the premises where Flender reasonably suspects the Goods are located in order to effect recovery. Flender shall have the right to resell or otherwise dispose of the Goods so recovered without reference to the Customer.

## 11. Delivery terms

### 11.1. Incoterm

Unless otherwise stated in the Agreement, the Goods are supplied Delivery Duty Paid to the Site according to INCOTERMS 2020 (as amended from time to time) and delivery shall take place when the Goods are delivered to the Site, cleared for import and not unloaded. The Customer shall do everything necessary to take delivery of the Goods at the Site.

### 11.2. Storage

If after a period of 7 days from the date of notification that the Goods are ready for delivery, delivery is delayed for any reason beyond Flender's reasonable control, Flender may arrange for storage of the Goods at Flender's premises or elsewhere. The Customer shall pay all associated costs including all applicable storage, insurance, demurrage and handling costs.

### 11.3. Partial deliveries

Flender reserves the right to make partial deliveries and to separately

invoice them unless otherwise agreed between the parties in writing.

## 12. Performance, Inspection and tests

### 12.1. Performance

- (a) Flender shall supply the Goods and perform the Services in accordance with the Agreement.
- (b) Any performance figures given by Flender are based on Flender's experience and are such as Flender expects to obtain on testing. Subject to recognised tolerances applicable to such figures, Flender shall not be liable if such figures are not attained unless Flender has specifically guaranteed them in writing.
- (c) Where Flender has agreed to performance figures but does not achieve such figures, that shall be regarded as a Defect and Flender shall make good any such Defect in accordance with clause 15. Flender liability, if any, shall in any case be limited as provided in clause 16.

### 12.2. Inspections and acceptance tests

- (a) If Flender has agreed to perform any inspections or acceptance tests under the Agreement, they will be performed in accordance with Flender's standard inspection and acceptance testing procedures and will be carried out at the place of manufacture or at another location at Flender's option. Flender shall bear the cost of performing any inspections and acceptance tests which Flender specifies will be borne by Flender in Flender's Offer.
- (b) Flender may agree to carry out additional inspections or acceptance tests requested by the Customer. If Flender does so, the Customer shall bear the cost of such additional inspections and acceptance tests and the time for performance of Flender's obligations shall be extended by a period equal to the time required to perform such additional inspections or acceptance tests.
- (c) If Flender agrees to perform inspections or acceptance tests witnessed by the Customer, the Customer must arrange for a representative to attend the designated test site at the designated time. If the Customer does not do so, Flender may proceed with carrying out the witnessed inspections and acceptance tests in the absence of the Customer's representative and such inspections and acceptance tests shall be deemed to have been made in the Customer's presence.
- (d) Flender shall not be responsible for any expenses incurred by the Customer or the Customer's representative arising out of or in connection with any inspections or acceptance tests.
- (e) If during any such inspections or acceptance tests, Goods are found to have any Defect, Flender shall make good such Defect (as if it had occurred during the Defects Liability Period) in accordance with clause 15. Flender's liability, if any, shall be limited as provided for in clause 16.
- (f) Goods will be deemed to have passed any inspections and acceptance tests and to have been accepted by the Customer if the Goods are put into commercial use.

## 13. Term

The Agreement shall be effective for the Term commencing on the Commencement Date. The Term shall be extended automatically for further periods of twelve (12) months on each anniversary of the Commencement Date, unless either party gives the other party 90 days' notice in writing prior to expiry of the term that it does not wish the Agreement to be renewed.

## 14. Suspension and Termination

### 14.1. Right to terminate

- (a) Either party may terminate the Agreement:
  - (i) with immediate effect, by notice to the other party if the other party suffers an Insolvency Event; or
  - (ii) commits a material breach of the Agreement and fails to diligently pursue a proper course of action to remedy the breach within 21 days (or such longer period as is reasonable given the nature of the breach) after receipt of a notice from the non-defaulting party specifying the details of the breach and requesting remedy of same.
- (b) Without limiting the foregoing, Flender may also terminate the Agreement with immediate effect, by notice to the Customer, if the Customer has not paid an amount due and owing under the Agreement.
- (c) Any action taken by Flender under this clause shall not invalidate the Agreement or prejudice any of the rights, powers and remedies of Flender, whether under the Agreement or otherwise at law.

### 14.2. Right to suspend

If any of the events referred to in clause 14.1 happen to the Customer, Flender may elect to suspend the performance of the

whole or any part of the remaining work to be performed under the Agreement. This suspension right is in addition to any other rights and remedies available to Flender at law. The Delivery Date shall be extended by a period equal to the period of any such suspension. The Customer shall pay Flender all additional costs and expenses which are suffered or incurred by Flender by reason of any such suspension.

### 14.3. Recourse of security

If the Customer has provided any security under the Agreement and Flender exercises any rights under clause 14.1 Flender may have recourse to any security given or monies paid by the Customer under the Agreement and apply this against the loss and/or damages incurred by Flender as a result of having to exercise such rights.

### 14.4. Termination by the Customer for Flender default

In case of termination by Customer for Flender default under this clause, Flender is only entitled to be paid the Contract Price for any Goods delivered and Services performed to the date of termination. This clause sets out the sole and exclusive rights and remedies of the Parties in such circumstances.

### 14.5. Termination by Flender

In the event of termination by Flender, the Customer shall pay to Flender the Contract Price in full plus any additional costs and expenses reasonably incurred (including demobilisation costs and the cost of any Flender's Personnel who become redundant because of the termination) less any savings due to such earlier termination. The Customer shall be entitled to obtain any fully completed work in its conditions at the point in time Flender has received or as the case may be has issued the termination notice.

## 15. Defects Liability

### 15.1. Defects Generally

Subject to clause 15.5, Flender shall rectify any Defects which occur during the Defects Liability Period, at its option, by repair, replacement or supply of equivalent Goods and Services (or by payment of the cost of doing so), provided always that:

- (a) the Customer notifies Flender of the Defect in writing as soon as the Customer becomes aware of or should have become aware of the Defect;
- (b) the Goods and the equipment or system in respect of which the work under the Agreement have been carried out have been properly handled, used, operated and maintained in accordance with instructions issued by Flender or if no instructions have been issued, in accordance with good industry practice;
- (c) such Defects are not caused by incorrect use of operating material or lubricants, faulty civil or mechanical work, unsuitable soil conditions or any other chemical, electrochemical and/or electrical influences which have not been provided for in the Agreement;
- (d) the Goods are not a consumable, not liable to deterioration or do not have a low rated service life;
- (e) no unauthorised repair or alteration to the Goods has been made (as applicable);
- (f) such Defects are not caused by the use of equipment and/or material supplied by the Customer; and
- (g) such Defects are not due to fair wear and tear, improper storage, excessive heating, mechanical vibration, overloading or contravention of prevailing standards and regulations applicable to electrical work.

### 15.2. Purchaser's obligation with respect to repair or replacement

Where the Customer has notified Flender of an alleged Defect in accordance with clause 15.1, the Customer shall, at Flender's request:

- (a) promptly return the Defective part to Flender for repair; or
- (b) do those things necessary to enable Flender to repair or replace the Defective part on behalf of the Customer (including giving Flender access to any premises where the Defective parts are located).

Unless otherwise agreed between the parties, the removal of Defective parts and the installation of any repaired, replacement or equivalent parts shall be performed by the Customer at the Customer's risk and expense. Where any Defective part has been replaced, that Defective part shall become the property of Flender upon its removal. All replacement parts shall become the property of the Customer upon installation.

### 15.3. Exclusive remedy

To the extent permitted by Law and subject to clauses 15.5 to 15.7:

- (a) Flender's obligation to rectify Defects in accordance with this clause shall be the Customer's sole and exclusive remedy and represents the full extent of Flender's liability for Defects; and

- (b) all representations, warranties and conditions of any kind, whether express or implied (including any warranties and conditions of merchantability and fitness for a particular purpose or arising from a course of dealing or usage or trade) relating to the Goods and Services that are not contained in the Agreement are excluded.

**15.4. Defects Liability Period**

The Defects Liability Period:

- (a) For Goods shall be 12 months after risk in the Goods has been transferred to the Customer;
- (b) For Overhauls shall be based on Scope of Work
- (i) Parts that have been replaced - 12 months after risk in the equipment has been transferred back to the Customer
- (ii) Labour – 12 months after risk in the equipment has been transferred back to the Customer;
- (c) For Field Services shall be 90 days from the date this service was performed; and
- (d) For Services excluding Overhauls and Field Service shall be as stated in the valid quotation provided to the Customer

**15.5. Implied conditions, warranties and consumer contracts**

Nothing in this clause is intended to exclude any conditions, guarantees or warranties implied into the Agreement, or any remedies made available to the Customer, by the provisions of the Australian Consumer Law or by any other Federal, State or Territory Laws to the extent that such implied conditions, guarantees, warranties or remedies may not be excluded by express agreement.

**15.6. Where goods/services supplied to a Customer**

In addition to the above, if any supply of goods and/or services under this Agreement to the Customer is a supply to a Consumer, then the following applies:

- (a) Flender's goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. The Customer is entitled to a replacement or refund for a Major Failure and compensation for any other reasonably foreseeable loss or damage. The Customer is also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a Major Failure.
- (b) Flender provides the Defect Liability Period cover under clause 15.1 in addition to the Customer's rights under the Australian Consumer Law. The Customer must make any claim under that cover by notifying Flender in accordance with clause 15.1(a) in writing at the address set out under clause 15.6(c).
- (c) The Defects Liability cover is given by:
- Name: Flender Pty Ltd (ABN 48 625 556 587)  
Business Address: 160 Herring Road, Macquarie Park, NSW 2113, Australia  
Telephone Number: (02) 9491 5139  
Email address: [ordermanagement.au@flender.com](mailto:ordermanagement.au@flender.com)
- Flender will pay the Customer's reasonable, direct expenses of claiming under this clause. The Customer shall submit details and proof of its expense claim to Flender for consideration.

**15.7. Supply to a Consumer of goods and services not ordinarily for personal, domestic or household use or consumption**

If the Customer is a Consumer or deemed to be a "consumer" under the Laws referred to in clause 15.5 above, and the goods or services to be supplied by Flender are not of a kind ordinarily acquired for personal, domestic or household use or consumption, then Flender's liability for breach of any condition, guarantee or warranty implied by such Law shall to the extent permitted by such Laws be limited to:

- (a) In the case of goods – to the repair of the goods, or, at Flender's option, the replacement of the goods or the supply of equivalent goods or to the payment of the cost of repair, replacement or supply of equivalent goods; and
- (b) In the case of services – to the resupply of those services or payment of the cost of having those services resupplied.

**15.8. Software**

Notwithstanding anything in this clause, defect liability claims with regard to software are excluded:

- (a) in case of insignificant deviation of the software from the agreed characteristics;
- (b) as long as the defect cannot be reproduced by Customer in the presence of Flender;
- (c) for errors or restrictions of use originating after the transfer of risk to the Customer, in particular resulting from improper operation, usage or handling;
- (d) for errors or restrictions of use resulting from modifications, performance of maintenance not approved by Flender, or

improper interconnection with and/or integration into third party equipment unless such modifications, maintenance, or interconnection and integration was performed by Flender or its subcontractors; and

- (e) for defects in freeware, shareware or open source software.

**16. Liability****16.1. Limitation of Liability**

Notwithstanding any other provision of the Agreement and except to the extent that liability cannot be legally limited or excluded:

- (a) Flender's total aggregate liability arising out of or in connection with the Agreement, shall be limited to the Contract Price (or such other amounts as agreed between the parties in writing) per event and in the aggregate and
- (b) Flender shall under no circumstances be liable for economic loss; loss of contract; loss of profit or revenue; business interruption; loss of production; production stoppage; loss of information or data; loss of power, replacement power; cost of capital; loss of interest, damages based on the Customer's third party contracts; indirect or consequential loss or damage.

This limitation and exclusion of liability shall apply whether the liability claim is based on breach of contract, tort (including negligence), under a warranty or indemnity, under statute, in equity or otherwise. Any and all liability of Flender under or in connection with this Agreement shall cease with the expiry of the defects liability period specified in clause 15.4.

**16.2. Third Party Benefit**

Flender holds the rights under clause for itself in its own capacity, and as agent of and trustee for its Affiliates, other contractors, subcontractors, consultants, employees, directors, officers, agents and suppliers ("Associates") respectively. For the purpose of this clause, each of the entities comprising the Associates must be treated to this extent as a party to the Agreement and may plead the Agreement as a bar to any claims by the other party under the Agreement.

**17. Force Majeure and Delays**

- (a) If a Force Majeure Event prevents a party from partially or wholly complying with its obligations under the Agreement (other than payment obligations) then that party shall not be obliged to perform those obligations until it is no longer prevented from doing so and the time for performance of those obligations shall be extended by a period of time equal to the period of the delay.
- (b) If Customer suspends its obligations in this Agreement the Customer shall pay Flender for all work performed until the giving of the suspension notice as well as for all additional cost reasonably incurred due to such suspension including but not limited to waiting time, demobilization and remobilization cost as well as cost for protecting the work. Flender shall be entitled to take back the work and Customer shall be obliged to return the work upon Flender's request. The taking back, the assertion of the retention of title or of a security interest or the taking possession through legal right or process of the work by Flender shall not mean termination of the Agreement and restitution, unless expressly stated by Flender.
- (c) If a party is prevented by the Force Majeure Event or suspension from carrying out its obligations for more than 180 days, either party may terminate the Agreement by giving written notice to the other party.
- (d) If a party terminates the Agreement under this clause, the rights and obligations of the parties will cease; and the accrued rights or remedies of each party will not be affected. Upon such termination, the Customer shall pay to Flender:
- (i) all amounts due to Flender for work carried out under the Agreement;
- (ii) the cost of materials and equipment reasonably ordered by Flender for the work under the Agreement and which Flender is liable to accept (including profit and overheads);
- (iv) Flender's reasonable demobilisation costs including profits and overheads (if any); and
- (v) 30% of the balance of the Contract Price payable.
- (e) If an act or omission of the Customer (or the Customer's agents, consultants, employees, officers, representatives or other contractors), a Change of Law, Restricted Site Access, Contamination or a Force Majeure Event causes delay to Flender:
- (i) the time for performance of Flender obligations shall be extended for a period of time equal to the period of delay; and
- (ii) the Customer shall pay to Flender all additional costs including profits and expenses incurred by Flender as a result of such delay including expenditure resulting from Flender's Personnel being idle or standing by, Flender's Personnel having to be retrenched or re-employed and Flender's Personnel being required to perform work under the Agreement outside of Flender's normal working hours or undertake additional travel.

## 18. Liquidated Damages

If Flender is delayed in performing the Services or delivering the Goods by the Delivery Date due to circumstances that are caused solely by Flender and the Customer suffers loss as a result of the delay, the Customer may, for each complete week of delay claim a refund of the price payable for the delayed Goods and Services at the rate of 0.5% per week, but not more in aggregate than a total of 5.0% of the price payable for the portion of the Goods and Services which in consequence of such delay cannot be commercially and effectively used.

Such payment shall be the Customer's sole and exclusive remedy and shall be in full satisfaction of any loss suffered by the Customer due to any delay in the Goods and Services and shall be in lieu of any other right the Customer may have against Flender.

## 19. PPSA

- (a) The Customer acknowledges that the Agreement constitutes a security agreement for the purposes of the PPSA. Flender takes a security interest in all Goods supplied to the Customer under the Agreement securing the performance by the Customer of its obligations under the Agreement.
- (b) The Customer shall not create or cause to be created a security interest over, or in respect of its rights in, the Goods other than the security interest arising under the Agreement.
- (c) The parties contract out of the provisions of the PPSA allowed by section 115 of the PPSA to the following extent:
  - (i) An exercise by Flender of any right, power, or remedy, will be taken not to be under a provision mentioned in that section to the extent that the right, power or remedy is granted under any other law or statute or under these conditions unless Flender so elects.
  - (ii) Any restrictions on the exercise by Flender of a right, power or remedy or any obligation of Flender to give notice, will not apply to the extent that the section so allows.
- (d) The Customer waives its right to receive each notice which, under section 157(3) of the PPSA, it is permitted to waive.
- (e) The Customer waives its rights to receive anything from Flender under section 275 of the PPSA and agrees to not make any request of Flender under that section.
- (f) For the avoidance of doubt, Flender's security interest referred to in clause 19(a) also constitutes a security interest for the purposes of section 52(2) and 53 of the *Competition and Consumer Act 2010* (Cth).

The Customer consents to Flender perfecting its interest in any goods provided by Flender to the Customer by registration under the PPSA and agreed to do anything reasonably requested by Flender to enable it to do so.

## 20. Non-Solicitation

The Customer shall not, during the term of the Agreement (and for a period of 12 months after expiry of the Term) directly or indirectly solicit or entice away (or attempt to solicit or entice away) for employment any person who is engaged by Flender to perform works under this Agreement. The Customer shall indemnify Flender upon demand against all loss, costs and expenses of any nature incurred by Flender arising out of or in connection with a breach of this clause (including all costs incurred by Flender to replace such person).

## 21. Dispute Resolution

### 21.1. Notice of Dispute

If any dispute or difference occurs between the Parties arising out of or in connection with the Agreement ("a **Dispute**") shall be notified to the other party by written notice of that Dispute, giving details of the subject-matter of the dispute ("**Notice of Dispute**").

### 21.2. Escalation of dispute

Upon the giving of a Notice of Dispute, the following shall apply:

- (a) The Dispute shall be submitted for negotiation by the respective Chief Executive Officers of the parties (or their delegates);
- (b) If after twenty-one (21) days of the giving of the Notice of Dispute, the Dispute has not been resolved between the Chief Executive Officers (or their delegates) to the satisfaction of both parties, the Dispute may be referred by either party to arbitration in accordance with the Arbitration Rules of the Resolution Institute by one arbitrator who shall be a lawyer and who shall give his or her decision in writing and based on legal substance chosen by the Parties or, if they cannot agree within 42 days of the giving of the Notice of Dispute, by the Chair for the time being of the Resolution Institute.

### 21.3. Award, seat and language

The award of such arbitration shall be final and binding on both parties in accordance with legislation applying to Commercial Arbitration and judgement thereon may be entered in any court having jurisdiction. The seat of arbitration shall be Melbourne, Victoria. The language to be used in the arbitration shall be English

### 21.4. No relief from performance of other obligations

A reference to arbitration under this clause shall not relieve either

party of any other obligations under the Agreement, including, if and so far as is reasonably practicable, the obligation to take steps necessary during arbitration proceedings to ensure that the progress of the Agreement will be maintained.

## 22. Reservation

Flender's obligation to fulfil the Agreement is subject to the proviso that the fulfilment is not prevented by any impediments arising out of national and international foreign trade and customs requirements or any embargos or other sanctions.

## 23. Export Control

- (a) If the Customer transfers goods (hardware and/ or software and/ or technology as well as corresponding documentation, regardless of the mode of provision) delivered by Flender or works and services (including all kinds of technical support) performed by Flender to a third party worldwide, the Customer shall comply with all applicable national and international (re-) export control regulations. In any event the Customer shall comply with the (re-) export control regulations of the Federal Republic of Germany, of the European Union and of the United States of America.
- (b) If required to conduct export control checks, the Customer, upon request by Flender, shall promptly provide Flender with all information pertaining to particular end customer, destination and intended use of goods, works and services provided by Flender, as well as any export control restrictions existing.
- (c) The Customer shall indemnify and hold harmless Flender from and against any claim, proceeding, action, fine, loss, cost and damages arising out of or relating to any noncompliance with export control regulations by the Customer, and the Customer shall compensate Flender for all losses and expenses resulting thereof, unless such noncompliance was not caused by fault of the Customer. This provision does not imply a change in burden of proof

## 24. Confidential Information

Each party acknowledges that the Confidential Information of the other party is valuable and undertakes to keep such Confidential Information secret, to procure that its representatives keep such Confidential Information secret and to preserve the confidential nature and secrecy of such Confidential Information in its possession.

## 25. Notice

### 25.1. Form of notices

Any notice to be given under the Agreement shall be given in writing and delivered personally or sent by pre-paid post (airmail if to or from a place outside Australia) addressed to the other party at such address as a party notifies the other for the purposes of this clause.

### 25.2. Service of notices

Any notice shall be deemed to be served:

- (a) in the case of delivery in person, when delivered; and
- (b) in the case of delivery by post, 3 days (7 if to or from a place outside Australia) after the date of posting.

## 26. General

### 26.1. Precedence

If there is any inconsistency between the documents comprising the Agreement, the following order of precedence shall apply (with the document referred to in clause 26.1(a) having the highest priority):

- (a) Flender's order confirmation (if any);
- (b) any amendments to Flender's Offer or the Conditions which have been agreed between the parties in writing;
- (c) Flender's Offer (including all documents attached by Flender or which Flender agrees are incorporated by reference); and
- (d) these Conditions.

### 26.2. Severance

If the whole or any part of the Agreement is or becomes or is held to be illegal invalid or unenforceable, then the whole and each part of the clauses of the Agreement shall (to the extent necessary to avoid such illegality, invalidity or unenforceability) be interpreted read down or severed without affecting the operation of the remaining clauses.

### 26.3. Assignment

The Customer shall not assign, pledge or transfer its interest in the Agreement (or any part of it) without obtaining Flender's prior written consent. Flender may assign, pledge or transfer its interest in the Agreement (or any part of it) to an Affiliate. Flender may also assign to any person all or part of any debt owing by the Customer to Flender.

### 26.4. Amendment

- (a) The Agreement may only be varied by written agreement between the parties;
- (b) No documentation, correspondence, verbal agreement or conversation shall part of, affect or modify any aspect of Flender's Offer or the Agreement unless accepted and confirmed by Flender in writing;

- (c) These Conditions shall apply to any separable portion of Flender's Offer.

**26.5. Governing Law and Jurisdiction**

The Agreement, and to the extent permitted by law, each security interest (as defined by the PPSA) under it, shall be governed and shall be interpreted in accordance with the Laws of the State of Victoria, Australia and (subject to clause 21) the parties irrevocably submit to the non-exclusive jurisdiction of the courts of that State and to the appeal courts from them. The application of the United Nations Convention on Contracts for the International Sale of Goods, 1980 (Vienna Convention) is excluded.

**26.6. Entire agreement**

The Agreement constitutes the entire agreement between the parties as to its subject matter and the parties acknowledge that there are no other understandings, agreements, or representations whether express or implied in any way relating to the Agreement.

**26.7. Waiver**

No consent or waiver by a Party to or of any breach of any provision of the Agreement shall be construed as consent or waiver to or of any other breach of a provision of the Agreement.

**26.8. Survival**

Any indemnity or any other obligation of confidence under the Agreement is independent and survives termination of the Agreement. Any other term by its nature intended to survive termination of the Agreement will do so.