



*Hofmann Engineering Pty. Ltd.*

## **Standard Conditions of Contract**

### **1. PRECEDENCE:**

1.1 These conditions take precedence over any other terms or conditions implied or presented on your documentation, unless agreed in writing and authorised by Hofmann Engineering Pty. Ltd. hereinafter called “us”, “we” or “our”.

### **2. THE SERVICES**

2.1 Promised delivery dates are made in good faith and are based on shop-loading at the time of quotation. If delivery is important it must be negotiated at the time of order.

2.2 Liquidated Damages will be accepted only if confirmed, in writing by us. In all cases, Force Majeure shall apply.

2.3 If the performance of the Services is delayed beyond a reasonable period for any reason other than a breach of this Contract by us then within 14 days of Written Communication you must:

- (a) extend the date for which we must complete any portion or all of the Services affected by the delay (if there is such a date) for such period as is reasonable in the circumstances;
- (b) pay us a reasonable sum of money to cover the fees, normal and reasonable expenses and disbursements, costs, losses and damages suffered by us as a result of the delay; and

If the parties cannot agree upon a reasonable extension period and an appropriate additional sum within 21 days of the Written Communication then those matters shall be determined pursuant to clause 9.

2.4 The parties acknowledge and agree that if we cause a delay of the type referred to in clause 3.5, then any entitlement to us under clause 2.3 will be reduced proportionately having regard to the impact of our default.

### **3. PAYMENT**

3.1 Provided this Contract commences within 30 clear days from the date of the Quotation, you must pay us the Fees as set out in this clause 3. If the Contract commences after 30 clear days then, within 14 days of commencement we have the right to provide you with a new quotation, which will become the Quotation for the purposes of this Contract.

3.2 We will issue our Tax Invoices to you at the end of each month for that part of the Services we have provided for that month.

3.3 Within 30 days from the date of each Tax Invoice you must either:

- (a) pay the full amount contained in the Tax Invoice; or
- (b) dispute all or part of the Tax Invoice under clause 3.6.

3.4 If you do neither of the things required by clause 3.3 then:

- (a) apart from other rights, we have the right to either or both:
  - (i) suspend any or all of the Services until payment in full is received; and
  - (ii) terminate this Contract under clause 10 (which we can do at any time before or during any suspension); and

(b) you are obliged to pay to us all of the costs (including legal fees on a solicitor and own client basis), expenses, loss or damages incurred or suffered by us in collecting from you the unpaid amount.

3.5 Unless we both otherwise agree in writing you cannot set off (whether in law or otherwise) any amount that is or may be owing from us to you against any money that you must pay us under clause 3.3.

3.6 If you dispute all or any part of the amount claimed in a Tax Invoice then, within 30 days from the date of the Tax Invoice, you must:

(a) pay us that portion of the amount stated in the Tax Invoice which you do not dispute; and

(b) for that portion of the Tax Invoice in dispute, comply with clause 9.

3.7 Until you have paid us all of the Fees we will remain the owner of any goods, materials, documents or any other thing we may have prepared, produced, manufactured or acquired in providing the Services.

3.8 The Fees are exclusive of all Taxes. You must pay all Taxes levied on the provision of the Services.

3.9 If any Deductions in relation to Taxes may be available directly or indirectly to you or us, we shall adjust the Fees to reflect any savings or refunds (including interest awarded) to the maximum allowable extent.

3.10 Unless expressed to be inclusive of GST (in which case the Fees will not be increased by the amount of GST payable) the Fees do not include GST and, in addition to the Fees, you are to pay us the amount of GST payable on our Services at the same time as you pay the Fees.

3.11 If any of the Fees are a reimbursement to us for an acquisition from a third party on which we are entitled to claim an input tax credit, the amount you are required to pay is to be reduced by the amount of the input tax credit we are entitled to.

#### **4. CHANGES TO THE LAW**

If after the date of this Contract there is a change in any Law and that change directly or indirectly increases or decreases the Fees you must pay us then the Fees will be increased or decreased accordingly.

#### **5. QUALITY**

5.1 In providing the Services, we will exercise the degree of skill, care and diligence normally exercised by our peers in our industry at the time the Services are rendered. No other warranty or representation, whether express or implied, is included in this Contract except for those warranties and representations which by law may not be excluded.

5.2 If you discover a defect in the Services within 6 months, or an agreed period as confirmed in writing on your Purchase Order, from the date of shipment from our premises of the defective Services, or if no such shipment, then the date of delivery of the defective Services and the defect was caused by us, then you must advise us by Written Communication of the defect within 7 days of that discovery and allow us the opportunity to rectify the defect.

5.3 If we receive your Written Communication under clause 5.2 then, subject to clauses 5.4 to 5.8 we must:

(a) decide either to receive goods for repair/replacement or repair the goods on site

(b) if returned for repair/replacement, accept the goods which you must return to the point of delivery at your cost..

- (c) commence the rectification of the defect within 14 days of receiving your Written Communication or any later period as agreed between the parties; and
- (d) rectify the defect or replace at our cost and, if goods have been rectified/replaced at our premises, return them to point of delivery.

5.4 To the extent permitted by law, we are not required to rectify nor are we liable to you in any way for any defect:

- (a) which was not caused directly by us;
- (b) if any goods, materials or any other thing supplied by us in providing the Services is manufactured by someone else; or
- (c) if we receive your Written Communication under clause 5.2 either after 7 days of you discovering the defect or after such period as defined in clause 5.2 from the date of shipment from our premises of the defective Services, or if no such shipment, then the date of delivery of the defective Services.
- (d) if repairs or alterations have been carried out by other than us during the Warranty Period.

5.5 If at the time the Contract commenced the Services include:

- (a) design work but not the manufacturing of a prototype to test that design; or
- (b) design work and the manufacturing of a prototype to test that design, but the manufacturing of a prototype is later deleted from our scope of the Services

and you engage someone other than us to manufacture what is contained in that design, then to the extent permitted by law:

- (c) we do not take any responsibility for the quality of that design or of what is manufactured; and
- (d) we are not liable to you for any defect in the design or what is manufactured nor any Claim in connection with such defect.

5.6 The manner in which we rectify any defect shall be at our sole and absolute discretion. Unless the parties otherwise agree in writing, we will rectify the defect within a reasonable time period having regard to our workload at the relevant time and other relevant circumstances.

5.7 If you supply us with any goods, material, patterns, tooling, documents or any other things in connection with us providing the Services then we:

- (a) will take all reasonable care and provide adequate storage but we will not be responsible for any loss or damage. Insurance of such goods, materials, patterns, tooling, documents or any other things is your responsibility; and
- (b) without limiting clause 5.7(a) and to the extent permitted by law, if such goods, materials, patterns, tooling or any other things are lost or damaged during any manufacturing process (including heat treatment) then we are only liable to repeating the manufacturing process. You must provide the relevant goods, materials, patterns, tooling or any other things at your cost should you require us to repeat that manufacturing process.

5.8 If you supply us with any information (including documents) in connection with us providing the Services then you acknowledge that unless the parties agree otherwise, we are:

- (a) entitled to rely on the accuracy of such information;
- (b) not required to review or confirm the accuracy of such information; and
- (c) to the extent permitted by law, not liable to you for any and all Claims in connection with any inaccuracy of such information.

5.9 You may be entitled to access our premises for the purpose of inspecting the Services provided that:

- (a) you give us at least 2 clear days Written Communication;
- (b) your access is limited to one 30 minute visit per week during normal business hours or as agreed in writing on your purchase order;
- (c) you are accompanied by one of our employees;
- (d) you comply with our safety requirements; and
- (e) you do not take any photographs or video footage unless you obtain prior written permission from one of our senior management employees.

## **6. LIABILITY**

6.1 Subject to clauses 6.2 and 6.3, our liability to you for any and all Claims is the lesser of:

- (a) the Fees;
- (b) if applicable, the amount recovered by us under our professional insurance policy which is in effect at the time the relevant Services are performed; and
- (c) if applicable, the amount recovered by us under our product liability insurance policy which is in effect at the time the relevant Services are performed.

You hereby release us and our agents, employees and consultants from any or all liability to you for any and all Claims above the limit of our liability in this clause 7.1.

6.2 Subject to clause 6.3, we are not liable to you for any and all Claims:

- (a) for Consequential Loss; or
- (b) if we receive your Written Communication of the Claim after 6 clear months, or after such period as defined in clause 5.2 from the date of shipment from our premises of the relevant Services to which the Claim relates, or if no such shipment, then the date of delivery of the relevant Services.

You hereby release us and our agents, employees or consultants from any or all liability to you for all Claims under this clause 6.2.

6.3 Clauses 6.1 and 6.2 are without limitation to the operation of clauses 5.4 to 5.8 and apply to the extent permitted by law.

## **7. INTELLECTUAL PROPERTY RIGHTS**

7.1 In providing the Services we have the right to use design and manufacturing techniques (including software) owned or developed by us. We shall remain the owners (including the owners of the Intellectual Property Rights) to such design and manufacturing techniques (including software) during and after the commencement of this Contract.

7.2 We shall also own the Intellectual Property Rights that may exist in the documents or any other things we create and the goods or any other things we manufacture in providing the Services. Once we have been paid in full for the Services, you alone shall have an irrevocable royalty free licence to use such documents, goods or other things for the purpose for which the Services were provided. You shall not use such documents, goods or other things for any purpose or location for which they were not originally intended.

7.3 Each party warrants to the other that any designs, materials, documents, methods of working or other information they provided to the other party shall not infringe any Intellectual Property Right.

7.4 Subject to clauses 6.1 and 6.2, each party shall immediately indemnify the other against any costs (including legal costs on a solicitor and own client basis), expenses, loss or damages incurred or suffered by the other in connection with any actual or alleged infringement of any Intellectual Property Right.

## **8. CONFIDENTIALITY**

8.1 Subject to clauses 8.2 and 8.3, each party agrees to keep the terms and conditions of this Contract and any information supplied by one party to the other under this Contract confidential. A party may only disclose confidential information of the other party to another person provided that:

- (a) the disclosing party obtains the other party's consent; and
- (b) the person receiving the confidential agreement also agrees in writing to be bound by this clause 8.

8.2 Confidential information does not include information which:

- (a) was at or after the time of disclosure part of the public domain through no act or omission of either us or you;
- (b) become available to us or you from a third party who did not acquire such confidential information under an obligation of confidentiality either directly or indirectly from either us or you; or
- (c) was known to us at the time of disclosure by you and vice versa.

8.3 Each party may disclose:

- (a) information as is required by law to be disclosed; and
- (b) confidential information in confidence to that party's financiers, insurers or professional advisers.

## **9. DISPUTES**

9.1 Notice of Dispute

- (a) If a Dispute arises then:
- (b) either party may give Written Communication to the other party giving full particulars of the Dispute and that party's view of the correct position in relation to that Dispute; and
- (c) if that Written Communication is given, the Dispute must be determined under the procedure in this clause 9.

9.2 Executive Negotiation

Every Dispute must, if not resolved within 14 days after a Written Communication is given under clause 9.1(a) or within such longer period of time as the parties may agree in writing, be referred to an authorised representative of each party who must meet and undertake genuine and good faith negotiations with a view to resolving the Dispute.

9.3 Mediation

If all efforts at resolving the Dispute under clause 9.2 fail within 21 days after the giving of the Written Communication under clause 9.1(a) or within such longer period of time as the parties may agree in writing, the Dispute must be submitted to mediation in accordance with the Mediation and Conciliation Rules published by the Institute of Arbitrators and Mediators Australia or any replacement rules from time to time.

9.4 Costs

Each party will:

- (a) bear its own costs in respect of any mediation; and
- (b) pay one-half of the mediator's costs.

9.5 Expedited Arbitration

- (a) If all efforts at resolution of the Dispute under clause 9.3 fail within 28 days after the giving of the Written Communication under clause 9.1(a) or within such longer period of time as the parties may agree in writing, the Dispute must be referred to expedited arbitration.

- (b) The expedited arbitration will be conducted before a person to be:
  - (i) agreed between the parties; or
  - (ii) failing Contract within 35 days after the giving of the Written Communication under clause 9.1(a), appointed by the President for the time being of the Institute of Arbitrators and Mediators Australia.
- (c) For disputes or differences in which the quantum is less than \$100,000 the arbitration will be by the submission of documents alone unless both parties agree otherwise.
- (d) To the extent that they are not inconsistent with this Contract, the Rules for the Conduct of Commercial Arbitration published by the Institute of Arbitrators and Mediators Australia or any replacement rules from time to time will apply to the arbitration.
- (e) Each party may be represented by a legal practitioner at any arbitration hearing and this is the Contract referred to in section 20 of the *Commercial Arbitration Act 1985* (WA).

#### 9.6 Survive Termination

This clause 9 will survive the termination of this Contract.

### 10. TERMINATION

10.1 Either party may terminate this Contract in the event of substantial breach by the other party of its obligations under it or when an Insolvency Event occurs. The only pre-condition to this right to terminate is if the party electing to terminate this Contract:

- (a) provides a Written Communication to the other party specifying the breach and requiring the breach to be remedied within the time stated in the Written Communication (which shall not be less than 14 days); and
- (b) the breach has not been remedied within the period given in that Written Communication.

10.2 If we terminate this Contract pursuant to clause 10.1, without limiting our other rights we have the right to repossess any goods, materials, documents or any other thing we have provided to you in providing the Services even if such goods, materials or any other thing have become a permanent fixture.

### 11. GOVERNING LAW

This Contract shall be deemed to have been made in Western Australia and shall be subject to the laws of Western Australia. Subject to clause 9, the parties shall be subject to the non-exclusive jurisdiction of the courts of Western Australia and any courts that may hear appeals from those courts in relation to any proceedings concerning this Contract.

## DEFINITIONS AND INTERPRETATION

### 12. DEFINITIONS

In this Contract unless the context otherwise requires:

**"Claim"** means:

- (a) any claim, demand, proceeding, appeal, right or action of every nature whatsoever (whether actual, commenced, anticipated, threatened or potential) whether in contract, tort, equity or under any other principle of law or statute of Western Australia, Commonwealth of Australia or any other jurisdiction that a party may have now or in the future against the other party arising out of or in connection with this Contract; and
- (b) any fees, costs, losses (whether direct, indirect or economic and regardless of causation or remoteness) of any nature whatsoever and howsoever arising, suffered or incurred by a party arising out of or in connection with this Contract;

**"Consequential Loss"** includes business interruption, loss of actual or anticipated revenue, income or profits, or anticipated savings, or loss of use or production;

**"Deduction"** means exemption, reduction, allowance, credit, rebate, adjustment or other privilege;

**"Dispute"** means a dispute and/or difference between the parties in respect of any fact, matter or thing arising out of, or in connection with the Services or this Contract and includes a Claim;

**"Fees"** means the fees, costs and expenses set out in the Quotation;

**"GST"** has the same meaning as in the GST Legislation;

**"GST Legislation"** means *A New Tax System (Goods and Services) Tax Act 1999* (Commonwealth), any associated regulations and associated legislation;

**"Insolvent"** has the meaning given to it under the *Corporations Act 2001* (Commonwealth);

**"Insolvency Event"** means the point in time when a party is Insolvent and is deemed to include when:

- (a) a party informs the other party in writing or creditors generally that it is insolvent or financially unable to proceed with this Contract;
- (b) execution is levied against a party by a creditor;
- (c) notice is given of a meeting of creditors with the view to a party entering into a deed of company arrangement;
- (d) a controller or administrator is appointed;
- (e) an application is made to the court for a party's winding up and not stayed within 14 days;
- (f) a winding up order is made against a party;
- (g) a party resolves to be wound up voluntarily (except for a member's voluntary winding up); or
- (h) a mortgagee of any of a party's property takes possession of the property;

**"Intellectual Property Right"** includes any trademark or name, registered design, copyright, patent, moral right or other protected right;

**"Law"** means any and all laws, by-laws, regulations or ordinances of the Commonwealth of Australia, a State or Territory of Australia, any other relevant jurisdiction or any statutory authority;

**"Quotation"** means our written quotation attached to these Standard Conditions of Contract;

**“Services”** means the goods or the services or both described in the Quotation;

**"Tax Invoice"** has the same meaning as in the GST Legislation;

**"Taxes"** means all taxes, fees, levies, duties and charges imposed or assessed in respect of the Services by all local, state or national governmental authorities including income tax (including withholding for prescribed payments or group tax), payroll tax, statutory superannuation contributions and workers' compensation payments and contributions, sales tax, customs duty, excise tax and stamp duty; and

**"Written Communication"** means a letter, facsimile or electronic mail.

### **13. INTERPRETATION**

In this Contract, unless the context otherwise requires:

- (a) words importing the singular include the plural and vice versa;
- (b) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate any governmental agency;
- (c) a reference to a document (including this Contract) includes all amendments or supplements to, or replacements or notations of, that document;
- (d) a reference to a party includes:
  - (i) if that party is a person, that party's personal representatives, executors, administrators, successors and permitted assigns; and
  - (ii) if that party is a corporation, that party's successors and permitted assigns.
- (e) a reference to any person if that person ceases to exist is reconstituted, renamed or replaced or its powers or functions are transferred to any other person, refers respectively to the person established or constituted in its place or succeeding to its powers or functions;
- (f) any reference to a statute or statutory provision shall be deemed to include any statutory provision which supplements, amends, extends, consolidates or replaces the same or which has been supplemented, amended, extended consolidated or replaced by the same and any orders, regulations, instruments or other subordinate legislation made thereunder;
- (g) an obligation, representation or warranty on the part of two or more persons binds them jointly and severally;
- (h) an obligation, representation or warranty in favour of two or more persons is for the benefit of them jointly and severally;
- (i) 'document', 'goods', 'information' and 'services' shall each be read in the widest possible context; and
- (j) 'including' means 'including, but not limited to'.