

# Terms and Conditions of Sale of Material

## 1 Evidence of Contract

The Contract is evidenced by the Purchaser's Order, Western Power's Acceptance of that Order and these Terms and Conditions of Sale of Material.

## 2 Sale and Purchase

In consideration of payment of the Purchase Price (plus GST), Western Power sells to the Purchaser and Purchaser buys from Western Power the Material on these Terms and Conditions of Sale of Material.

## 3 Statutory Requirements

The Purchaser must at its own expense, comply with all applicable statutory requirements including all Acts, regulations, by-laws, orders and lawful directions for the transport, storage, use and disposal of the Materials.

## 4 Assignment

- (a) The Purchaser must not assign the benefit of the Contract or any part of it, without the prior written approval of Western Power.
- (b) Assignment includes any change in the ownership of the Purchaser.
- (c) Western Power will not unreasonably withhold consent to an assignment provided that:
  - (i) the assignor satisfies Western Power that the proposed assignee is financially and technically capable of performing all the obligations of the assignor under the Contract; and
  - (ii) the assignee signs a deed of assumption and covenant in terms required by Western Power to be bound by the terms of the Contract in place of the assignor.
- (d) Approval to assign does not relieve the Purchaser from liability or obligation under the Contract and does not operate as a release.

## 5 Risk and Property

- (a) Risk in the Material (including risk of Loss or theft) will pass to the Purchaser upon the dispatch of notification to the Purchaser that the Material (or if applicable, Supplier Lead Time Material) is available for collection.
- (b) Property in the Material does not pass to the Purchaser until the Purchaser pays Western Power the Purchase Price in full, plus GST.
- (c) From the time that the Material is collected by or on behalf of the Purchaser until payment, the Purchaser:

- (i) holds the goods (in a fiduciary relationship with Western Power) as bailee only; and
  - (ii) must not resell or transfer possession of the goods.
- (d) If the Purchaser:
- (i) fails to pay the Purchase Price in full plus GST when due;
  - (ii) pays for the goods by cheque (in whole or in part) and that cheque is not met on presentation;
  - (iii) commits any act of bankruptcy, becomes bankrupt, or is insolvent under administration, as defined in section 9 of the Corporations Act;
  - (iv) is or becomes insolvent within the meaning as given by any of section 9 and subsection 95A(2) of the Corporations Act or regulation 7.5.02 of the Corporations Regulations; or
  - (v) has a controller appointed, as defined in section 9 of the Corporations Act, in respect of any of the Purchaser's property,
- then Western Power may:
- (vi) enter onto the premises where the goods are situated; and
  - (vii) repossess the goods, notwithstanding that the goods may have been affixed to any structure by Western Power or the Purchaser and if necessary for that purpose, may sever the goods from any structure to which they may have been affixed.
- (e) If Western Power repossesses the goods, it reserves the right to resell them.
- (f) The Purchaser must also indemnify and keep Western Power indemnified against all Claims or Losses arising as a result of or in relation to Western Power exercising its rights under:
- (i) this clause;
  - (ii) under any other term, express or implied, of these conditions; or
  - (iii) otherwise at law or in equity,
- and any bank or other costs, charges or expenses incurred by Western Power resulting from any Purchaser's cheque not being met on presentation.



## 6 Indemnity

The Purchaser must indemnify and keep Western Power indemnified against all Claims or Loss arising from personal injury, death or damage to property caused to any person whatsoever including Western Power to the extent caused directly or indirectly by any negligent act or omission of the Purchaser or its subcontractors resulting from the:

- (a) loading of the Material at the Location;
- (b) transportation or storing of the Material; or
- (c) use or disposal of the Material.

## 7 Quotations/Prices

- (a) Any quotation or price information obtained by the Purchaser from Western Power (for example, from Western Power's Online Quotation System) only remains valid during the month during which it is obtained (errors and omissions exempted).
- (b) A quotation or price information is not to be construed as an offer to sell but as an invitation to treat.

## 8 Purchaser's Order

- (a) The Purchaser's Order will remain valid for acceptance by Western Power for 20 Business Days from the date of the Order.
- (b) Any condition in the Purchaser's Order which has the effect of or purports to have the effect of limiting or excluding liability of the Purchaser or which otherwise varies these Terms and Conditions of Sale is of no contractual force or effect unless agreed in writing between the Purchaser and Western Power.

## 9 Payment

- (a) The Purchase Price is fixed and firm.
- (b) Where Western Power's Tax Invoice specifies a Deposit is payable by the Purchaser, the Deposit (plus GST) stated on Western Power's Tax Invoice must be paid to Western Power by the Purchaser within 5 days of the date of the Tax Invoice (or as otherwise agreed in writing).
- (c) The Deposit will be applied to the Purchase Price to reduce the balance owing. The balance of the Purchase Price (plus GST) must be paid to Western Power by the date specified on the Tax Invoice (or, if there is no date specified, within 30 days of the date the Tax Invoice was issued by Western Power).
- (d) The Purchaser acknowledges and agrees that should the Purchaser cancel the Order:
  - (i) the Deposit may be retained by Western Power as compensation for Loss suffered as a result of the cancellation of the Order, up to the amount of the Deposit;

- (ii) the Deposit (or any portion thereof) will only be refunded to the Purchaser to the extent that Western Power has not suffered Loss due to the cancellation of the Order; and
  - (iii) Western Power will provide a summary of any Loss deducted from the Deposit upon request.
- (e) Where no Deposit is payable, the full Purchase Price (plus GST) stated on Western Power's Tax Invoice must be paid to Western Power by the date specified on the Tax Invoice (or, if there is no date specified, within 30 days of the date the Tax Invoice was issued by Western Power).
- (f) In default of payment according to the Contract:
  - (i) the whole of the Purchase Price in every other Contract for the sale and purchase of Materials made between Western Power as seller and the Purchaser, as purchaser, becomes immediately due and payable without demand;
  - (ii) interest at the rate equal to the Reserve Bank of Australia's large business variable indicator lending rate plus 3% per annum, calculated daily, accrues on the Purchase Price or the unpaid balance of the Purchase Price until the whole of the Purchase Price has been paid; and
  - (iii) Western Power is entitled (but is not required) to set off the Purchase Price, interest and costs payable by the Purchaser to Western Power under the Contract and any other contract against moneys that are due and payable by Western Power to the Purchaser under any contract or agreement.
- (g) Western Power must, where applicable, prepare and submit to the Purchaser a reconciliation account of all set-offs applied in each calendar month, within 14 Business Days of the end of each calendar month.
- (h) If Western Power is unable to fulfil the Order for any reason, it may cancel the Order by giving Notice to the Purchaser. In that event, Western Power will refund any amounts paid by the Purchaser in respect of the cancelled Order within 20 Business Days of the cancellation notice.

## 10 Collection of Material

- (a) If the Purchaser nominates a Required By Date in the Purchaser's Order that is at least 5 Business Days after the date of Acceptance of the Order, then Western Power must make the Material (except Supplier Lead Time Material) available for collection on the Required by Date.
- (b) Supplier Lead Time Material must be made available for collection as soon as possible on or after the Required By Date.

- (c) Western Power will notify the Purchaser at the time that the Material (or, if applicable, Supplier Lead Time Material) is available for collection by the Purchaser.
- (d) Western Power will permit the Purchaser access to the Location to load, transport and remove the Material from the Location during Western Power's normal opening hours on a Business Day.
- (e) If the Purchaser does not collect the Material within 20 Business Days of the Required By Date (or such later date that Western Power notifies the Purchaser that the Material is available for collection) then a storage charge applies at the rate of \$5.00 (plus GST) per square metre per day from the Required By Date.
- (f) If the Purchaser does not collect Material which is Supplier Lead Time Material within 40 Business Days of the Required By Date (or such later date that Western Power notifies the Purchaser that the Material is available for collection) then the Parties agree that:
  - (i) the Order is deemed to have been cancelled by the Purchaser;
  - (ii) Western Power may retain any Deposit paid by the Purchaser in accordance with clause 9(d); and
  - (iii) Western Power may sell or otherwise dispose of the Supplier Lead Time Material to a third party.

## 11 Inspection of Material

- (a) Western Power will allow the Purchaser to inspect the Materials in a Contract on reasonable notice, prior to collection.
- (b) The Purchaser must inspect or be deemed to have inspected all Material prior to collection and is deemed to have knowledge of and accept all defects and omissions to the Materials subsequently collected, that would reasonably have been apparent on inspection.
- (c) The Purchaser has no Claim against Western Power for Loss for defects and omissions in the Materials that would reasonably have been apparent on inspection.
- (d) Within 48 hours of collection, the Purchaser must give Western Power written notice of all defects and omissions in the Materials that were not reasonably apparent on inspection prior to collection. However, in the case of Hidden Defects, the Purchaser must give Western Power written notice of all Hidden Defects in the Materials as soon as the Purchaser becomes aware of the Hidden Defect. Western Power's sole obligation to the Purchaser for those defects and omissions is to:
  - (i) replace the Material;
  - (ii) repair the Material; or
  - (iii) pay for the Material to be repaired,

at its election.

## 12 Part Supply

- (a) Western Power reserves the right to supply the Materials by one load or delivery or by a number of consecutive loads or deliveries (as it stipulates in its Acceptance of the Purchaser's Order).
- (b) Unless otherwise stipulated, there will be one load or delivery (which may comprise a number of separate items, parcels or packages).
- (c) The Purchaser is not entitled to revoke an Order or to compensation if Western Power elects to supply the Materials by more than one load or delivery.
- (d) If Western Power supplies the Materials by more than one load or delivery it may issue a Tax Invoice in respect of each load or delivery which is payable in full by the Purchaser within 20 Business Days of the date of the Tax Invoice unless the Contract provides otherwise.

## 13 Returns

- (a) If Western Power elects to replace or repair Materials according to Clause 11 then the Purchaser must first return all the affected Materials to the Location, at Western Power's expense.
- (b) Western Power will only accept re-delivery of Materials within 20 Business Days of collection by the Purchaser and provided that there are no additional defects to the Materials, attributable to the Purchaser.

## 14 Dimensions, Performance Data and Other Descriptive Details

- (a) Photographs, drawings, illustrations, weights, dimensions and any other particulars provided by Western Power approximate the Material offered but may be subject to alteration without notice.
- (b) Any performance data provided by Western Power or a manufacturer is an estimate only and should be construed accordingly.
- (c) Unless agreed to the contrary in writing, Western Power reserves the right to supply an alternative brand or substitute product when necessary.

## 15 Intended Purpose

The Purchaser warrants that it has satisfied itself that the Material is fit for its intended purpose and for the Purchaser's own purposes.

## 16 Warranty and Disclaimers

To the extent that any Prescribed Terms permit:

- (a) the liability of Western Power in respect of a breach of a Prescribed Term relating to the Material or any part is limited at the option of Western Power to the replacement or repair of the Material or any part or payment of the cost of repairing or replacing the Material or any part;

- (b) in these conditions the Purchaser must not under any circumstances have any cause of action against or right to Claim or recover from Western Power for, or in respect of, any Loss of any kind whatsoever caused directly or indirectly by any defect in material or workmanship of, or any other defect whatsoever in, or unsuitability for, any purpose of the Material or any part, or by default or negligence on the part of Western Power or of any servant, contractor or agent of Western Power relating to the supply of, or otherwise concerning products or any part;
- (c) Western Power's liability for any breach of any warranty or of any term, express or implied, of any contract in relation to any Material, will not extend in any circumstances to loss of profits, or other economic loss, or to loss arising from negligence or any other tort, in any case, whether direct, indirect, special, consequential or otherwise.

## 17 Default of Purchaser

If the Purchaser defaults in payment of the Purchase Price or any of the Purchaser's other obligations under the Contract then in addition to any other Claim, right or entitlement that accrues to Western Power under the Contract or otherwise, it may in its sole discretion refuse to supply or further supply any Material under the Contract or any other Contract, until the Purchaser has remedied its default.

## 18 Return of Material

Subject to clause 10, in extraordinary circumstances (for example termination of a development project or insolvency) Western Power may, in its absolute discretion acting reasonably, permit the Purchaser to return Material within 3 months of the collection provided the Materials are in new and saleable condition. If the return of Material is accepted by Western Power, then a re-stocking fee of 15% of the Purchase Price of the Material applies. Return of Material to Western Power (including transport and logistics) will be at the sole cost of the Purchaser.

## 19 Policies and procedures

Prior to entry onto the Location for collection of the Material, the Purchaser must acquaint itself with and in the performance of the Contract and comply with any specific directions which may be reasonably issued by Western Power relating to Western Power's policies and procedures for the Location.

## 20 Cable Drums

Cable drums remain the property of Western Power's cable supplier and must be returned to the Location upon completion of the work.

## 21 Restructuring of Western Power

If Western Power is restructured:

- (a) by Law; or
- (b) through other means, including the:
  - (i) use of subsidiary or associated companies; or

(ii) transfer of assets, rights and liabilities, then the rights and obligations of Western Power under the Contract are assigned to and assumed by the appropriate legal entity as determined by Western Power or the successors of Western Power under the restructure.

## 22 Notice

- (a) A Notice must be legible, in writing and delivered by hand or sent by pre-paid post or email to a Party at the address, or email address for that Party set out in the Order (or to any other address or email address as specified by a Party by Notice).
- (b) Notices and other communication between the Parties, and every document required to be delivered by either Party to the other under the Contract, must be in English.
- (c) A Notice sent by post is regarded as given and received:
  - (i) if the address for the Purchaser specified in the Order is an Australian address, on the second Business Day following the date of postage; or
  - (ii) if the address for the Purchaser specified in Order is not an Australian address, on the eighth Business Day following the date of postage.
- (d) Subject to clause 22(e), an email is regarded as received one hour after it is sent, unless the sender receives notification from its or the recipient's email server that the email is undeliverable or was not delivered.
- (e) A Notice delivered or received other than on a Business Day or after 4.00pm (recipient's time) is regarded as received at 9.00am on the following Business Day, and a Notice delivered or received before 9.00am (recipient's time) is regarded as received at 9.00am.
- (f) A Notice can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee reasonably believes it to be genuine, correct and authorised by the sender.

## 23 General

### 23.1 Survival of terms

Clauses 6 (Indemnity) and 20 (Cable drums) in these Terms and Conditions of Sale of Material, survive the termination of the Contract and will continue in full force and effect.

### 23.2 Entire agreement

The Contract states all the express terms of the agreement between the Parties in respect of its subject matter. It supersedes all prior discussions, negotiations, understandings and agreements in respect of its subject matter.

### 23.3 Assignment

- (a) Subject to clauses 21 (Restructuring of Western Power) and 23.3(b), rights arising out of or under the Contract are not assignable by a Party without the prior written consent of the other Party.
- (b) The Purchaser agrees and acknowledges that Western Power will not provide written approval to assign the Purchaser's rights under the Contract unless the assignee and the Purchaser:
  - (i) acknowledge that Western Power is not the employer of the Personnel of the assignee; and
  - (ii) indemnify Western Power against any Loss suffered or incurred by Western Power in connection with the termination of employment of the Personnel due to the assignment of the Contract.
- (c) A breach of clause 23.3(a) by a Party constitutes a default and clause 17 (Default of purchaser) applies.
- (d) The Parties acknowledge that clause 23.3(a) is a prohibition on assignment and nothing in this clause 23.3 is to be construed as a mere promise by a Party not to assign without the other Party's consent.

### 23.4 No reliance

The Purchaser has not relied on any statement by Western Power not expressly included in the Contract.

### 23.5 Consent of Party

Whenever the Purchaser requires the consent or approval of Western Power to do any thing under or in respect of the Contract, Western Power may withhold its consent or approval or give it conditionally or unconditionally in its absolute discretion unless expressly stated otherwise in the Contract. The Purchaser must comply with any conditions.

### 23.6 Prohibition, enforceability and severance

- (a) Any provision of, or the application of any provision of, the Contract or any right, power, authority, discretion or remedy which is prohibited in any jurisdiction is, in that jurisdiction, ineffective only to the extent of that prohibition.
- (b) If any term or part of the Contract is, or becomes for any reason, invalid or unenforceable at law, that term or part of the Contract is severed from the Contract without affecting the remainder of the Contract and the Contract continues to be valid and enforceable in all things.

### 23.7 Cumulative rights

The rights, powers, authorities, discretions and remedies arising out of or under the Contract are cumulative and do not exclude any other right, power, authority, discretion or remedy of Western Power.

### 23.8 Variation

A variation of any term of the Contract must be in writing and signed by the Parties.

### 23.9 Further action to be taken at each Party's own expense

Each Party must do all things and execute all documents necessary to give full effect to its obligations under the Contract and the transactions contemplated by it, including the negotiation, preparation, execution and delivery of the Contract, at its own expense unless otherwise provided in the Contract.

### 23.10 Exercise of rights

- (a) A Party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy.
- (b) A single or partial exercise of a right, power or remedy by a Party does not prevent a further exercise of that or of any other right, power or remedy.
- (c) Failure by a Party to exercise, or a delay in exercising, a right, power or remedy does not prevent its exercise.

### 23.11 Counterparts

- (a) The Contract may be executed in any number of counterparts.
- (b) All counterparts, taken together, constitute one instrument.
- (c) A Party may execute the Contract by signing any counterpart.

### 23.12 Civil Liability Act

Part 1F of the Civil Liability Act 2002 (WA) does not apply to the Contract.

### 23.13 Waiver

- (a) Waiver of any requirement, right, power, authority, discretion or remedy arising under the Contract, including those arising upon default under the Contract, must be in writing and signed by the Party granting the waiver.
- (b) A failure or delay in the exercise, or partial exercise, of:
  - (i) a right arising from a breach of the Contract; or
  - (ii) a right, power, authority, discretion or remedy created or arising upon default under the Contract,does not result in a waiver of that right, power, authority, discretion or remedy.
- (c) A Party is not entitled to rely on a delay in the exercise or non-exercise of a right, power, authority, discretion or remedy arising from a breach of the Contract or on a default under the Contract as constituting a waiver of that right, power, authority, discretion or remedy.



- (d) A full or partial waiver in respect of a breach of a term of the Contract is not a waiver in respect of further or other breaches of the same or any other term of the Contract.
- (e) This clause 23.13 may not itself be waived except by writing.

#### 23.14 Costs and expenses

Any action to be taken by either Party in performing its obligations under the Contract must be taken at its own cost and expense unless otherwise provided in the Contract.

#### 23.15 Duty

The Purchaser must pay the duty payable under the Duties Act 2008 (WA), if any, on the Contract and any copies of the Contract and any other document in connection with the Contract.

#### 23.16 Governing law and jurisdiction

- (a) The Contract is governed by the law in force in Western Australia.
- (b) Each Party irrevocably submits to the non-exclusive jurisdiction of courts exercising jurisdiction in Western Australia and courts of appeal from them in respect of any proceedings arising out of or in connection with the Contract. Each Party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

### 24 Interpretation

#### 24.1 General

In the Contract:

- (a) Headings and bold type are for convenience only and do not affect the interpretation of the Contract.
- (b) The singular includes the plural and the plural includes the singular.
- (c) Words of any gender include all genders.
- (d) Other parts of speech and grammatical forms of a word or phrase defined in the Contract have a corresponding meaning.
- (e) An expression importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any Government Agency as well as an individual.
- (f) A reference to a clause, Party, schedule, attachment or exhibit is a reference to a clause of, and a party, schedule, attachment or exhibit to, the Contract and a reference to the Contract includes any schedule, attachment and exhibit.
- (g) A reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of the legislation.

- (h) A reference to a document includes all amendments or supplements to, or replacements or novations of, that document.
- (i) A reference to a party includes that party's successors and permitted assignees.
- (j) A promise on the part of two or more persons binds them jointly and severally.
- (k) A reference to an agreement other than the Contract includes a deed and any legally enforceable undertaking, agreement, arrangement or understanding, whether or not in writing.
- (l) No provision of the Contract will be construed adversely to a Party because that Party was responsible for the preparation of the Contract or that provision.
- (m) A reference to a body, other than a Party (including an institute, association or authority), whether statutory or not:
  - (i) which ceases to exist; or
  - (ii) whose powers or functions are transferred to another body;
 is a reference to the body which replaces it or which substantially succeeds to its powers or functions.

#### 24.2 Interpretation of inclusive expression

Specifying anything in the Contract after the words 'include' or 'for example' or similar expressions does not limit what else is included.

#### 24.3 Business Day

Where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day.

### 25 Definitions

In the Contract, except where the context otherwise requires:

**"Acceptance"** (of Order) means Western Power's written acceptance of the Purchaser's Order for Materials, communicated to the Purchaser.

**"Claim"** means a demand, action or proceeding of any nature whether actual or threatened.

**"Contract"** means a contract made by Western Power's written acceptance of the Purchaser's Order for Materials.

**"Business Day"** means a day on which banks are open for general banking business in Perth, Western Australia excluding a Saturday, Sunday or public holiday.

**"Deposit"** means the amount (plus GST) specified as a deposit in Western Power's Tax Invoice, payable by the Purchaser as part of the Purchase Price, and intended to secure the Purchaser's commitment to the Order.

**"GST"** means an amount payable in the form of a goods and services tax in accordance with the GST Act.

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

**"Government Agency"** means any government or governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, agency, Minister or entity in Western Australia or the Commonwealth of Australia.

**"Hidden Defects"** means any defects or omissions that are not apparent upon visual inspection of the unobscured material or upon the carrying out of normal checks that a prudent or skilled workman would carry out prior to installation.

**"Law"** means any act, ordinance, regulation, subordinate legislation, by-law, award or proclamation of Western Australia or the State or Territory in which the work under the Contract or any part of the Contract is being carried out.

**"Location"** means the location nominated by Western Power where the Purchaser can collect the Material.

**"Loss"** means:

- (a) any liability, cost, expense, loss, personal injury (including illness), death or damage; and
- (b) in relation to a Claim, Loss includes amounts payable on the Claim and (whether or not the Claim is successful), legal costs and disbursements on an indemnity basis.

**"Material"** means the material, goods or equipment specified in an Order to be supplied by Western Power.

**"Notice"** means a notice or other communication under the Contract.

**"Order"** means an order issued by the Purchaser to Western Power specifying the Material to be supplied by Western Power.

**"Party"** means a party to the Contract.

**"Personnel"** means the Purchaser's officers, employees, delegates, subcontractors, partners, agents and service providers of any nature.

**"Prescribed Terms"** means terms, conditions and warranties that are implied into the Contract by operation of a written law.

**"person"** includes a firm or body corporate or unincorporate as well as an individual or an officer of Western Power designated by title.

**"Purchase Price"** means the total price in Australian currency for the Material specified in an Order and/or Western Power's Acceptance, exclusive of GST.

**"Purchaser"** means the person contracted to purchase the Material specified in an Order.

**"Required By Date"** means a date nominated by the Purchaser in its Order upon which the Purchaser requests that the Material be available for collection.

**"Supplier Lead Time Material"** means Material (for example, coloured street light standards) that is not held in stock and must be ordered from a supplier.

**"Tax Invoice"** has the same meaning as that defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**"Western Power"** means Electricity Networks Corporation ABN 18 540 492 861 and includes its successors and assigns.