



# Terms and Conditions of Sale – MIPEC Marine Consultants & Surveyors

This document applies to the sale of any Goods and Services by MIPEC Marine Consultants & Surveyors Pty Ltd ACN 052 266 912 (MCS) except in the case where a stand alone contract exists.

## 1 Definitions

In this document:

'Business Day' means a day other than a Saturday, Sunday or official holiday in Gladstone.

'Buyer' means the entity identified as such in the Invoice.

'Conditions of Sale' means this document.

'Consequential loss means any financial, economic or consequential loss (whether direct or indirect) including, but not limited to:

- (a) loss of actual or anticipated profits or revenue;
  - (b) loss by reason of shutdown or non operation;
  - (c) loss of opportunity or productivity;
  - (d) increased capital or financing;
  - (e) increased operational costs;
  - (f) increased costs of borrowing; or
  - (g) exemplary or punitive damage,
- (a) whether caused by or in relation to breach of contract (including any indemnity), warranty, tort, product liability or strict liability.

'Contract' means the contract between MCS and the Buyer for the supply of Services (including any Supplies) or the supply of Goods by MCS to the Buyer, which unless MCS expressly agrees in writing otherwise, comprises the Invoice and these Conditions of Sale.

'Goods' means the Goods identified as such in the Invoice.

'PPSA' means the *Personal Property and Securities Act 1999* (Qld).

'PPSA Information' means any information or documents (including copies of such documents), which are in existence or may be entered into in the future, of the kind mentioned in section 275(1) PPSA.

'Price' means the price for the Services (including any Supplies) or Goods identified as such in the Invoice or an amount calculated in accordance with the Schedule of Rates.

'Invoice' means the Invoice issued by MCS for the supply of the Services or Goods.

'Services' means the Services (including any Supplies) identified as such in the Invoice.

'Schedule of Rates' means the rates for the Services or Goods identified as such in the Invoice.

'Supplies' means any goods, materials or items supplied by MCS with the Services identified as such in the Invoice.

## 2 Quotation and contract

The Buyer acknowledges that the supply of Services or Goods by MCS to the Buyer is subject to these Conditions of Sale.

Unless the express terms of a quotation provide otherwise, no quotation issued by MCS constitutes an offer to supply Services or Goods referred to within the quotation. MCS may vary any aspect of a quotation issued by it, including any prices and these Conditions of Sale, at any time prior to the formation of a contract for the supply of Services or Goods referred to in the quotation.

Any purchase order submitted by the Buyer in response to any quotation of MCS will not be binding on MCS and no contract will be formed between MCS and the Buyer unless and until MCS accepts the purchase order and acknowledges this acceptance to the Buyer.

The Buyer agrees that, except as expressly agreed in writing by MCS:

- (a) any offer to supply Services or Goods by MCS is conditional on the Buyer's acceptance of these Conditions of Sale;
- (b) any acceptance by MCS of an offer by the Buyer to acquire Services or Goods from MCS is given on the condition that the Buyer accepts these Conditions of Sale; and
- (c) the Invoice and these Conditions of Sale constitutes the entire agreement between MCS and the Buyer; and
- (d) any terms and conditions proposed by the Buyer in connection with the supply of Services or Goods by MCS are expressly excluded, including any term or condition in any prior or subsequent Invoice or communication from the Buyer.

## 3 Supply of Services

All times quoted to the Buyer for the supply of the Services are estimates only and under no circumstance is MCS liable for any loss, damage or delay arising from any late performance of the Services. For the avoidance of doubt, time is not of the essence of this Contract.

Where MCS supplies the Services by instalments and MCS fails to perform the Services by the quoted day for any one of the instalments, the Buyer can not terminate this Contract with regard to the remaining Services to be supplied.

## 4 Supply of Goods

All times quoted to the Buyer for the supply of the Goods are estimates only and under no circumstance is MCS liable for any loss, damage or delay arising from any late supply of the Goods. For the avoidance of doubt, time is not of the essence of this Contract.

Where MCS supplies the Goods by instalments and MCS fails to provide the Goods by the quoted day for any one of the instalments, the Buyer can not terminate this Contract with regard to the remaining Goods to be supplied.

## 5 Prices

The Buyer must pay MCS the Price and any other amounts payable to MCS for the supply of the Services or Goods in accordance with these Conditions of Sale.

Unless MCS specifies otherwise in writing to the Buyer the Price and all prices quoted by MCS are exclusive of all taxes, levies, duties, and tariffs (whether direct or indirect).

If MCS is liable to pay any taxes, levies, duties, or tariffs in connection with the supply of any Goods or Services, the Buyer will pay MCS the amount for which it is liable.

## 6 Invoicing and payment

MCS will issue invoices to the Buyer for the Services and for the Goods and Supplies monthly or upon completion of the Services or provision of the Goods and Supplies.

Unless otherwise stipulated the Buyer will pay MCS the amount specified in the invoices issued by MCS, without set off or deduction, within 30 days of issue of each invoice.

MCS may fax or email an invoice to the Buyer. The invoice will be deemed to be received on the date the invoice is faxed or emailed.

Payments are to be made by electronic funds transfer (EFT) to:

- |                |                                      |
|----------------|--------------------------------------|
| (i) Bank:      | ANZ                                  |
| (ii) Favour of | MIPEC Marine Consultants & Surveyors |
| (iii) BSB      | 014-580                              |
| (iv) Account # | 348870218                            |
| (v) Reference  | Invoice Number                       |

Where MCS has agreed in writing to payment by instalment, the Buyer must pay each instalment on the dates agreed. If the Buyer defaults in paying any instalment, the full amount of the Price will become immediately due for payment.

If any amount due by the Buyer is in arrears, the Buyer must pay, in addition to the consideration for the Services or Goods, interest on the amount in arrears at the rate 10% per annum, compounded monthly, until the full amount of the invoice, together with all accrued interest, has been paid.

If the Buyer disputes any amount purportedly owed by it to MCS under these Conditions of Sale, the Buyer must nevertheless pay the amount of the invoice to MCS. After the dispute is resolved, if it is agreed or determined that MCS has been paid more than it was entitled to claim under these Conditions of Sale, the amount that has been agreed or determined will be paid by MCS to the Buyer within 30 days after the agreement or determination is made.

At MCS's option, MCS may require that all or some payments for Services or Goods be guaranteed by a bank guarantee in a form and from a financial institution acceptable to MCS. MCS will return any bank guarantee as soon as payment has been received in full.

## **7 Title and risk**

Title to any Supplies, provided with the Services, and any Goods supplied do not pass to the Buyer until the Buyer pays MCS the full amount owed by the Buyer under the Contract.

Risk in the Supplies and Goods will remain with the Buyer at all times.

## **8 Personal Property Securities Act**

In this clause, the following words have the respective meanings given to them in the PPSA: account, financing statement, financing change statement, purchase money security interest, register, registration, security interest and verification statement.

The Buyer acknowledges that these Conditions of Sale create a security interest under the PPSA in the Goods (which may be a purchase money security interest) and consents to MCS effecting a registration on the PPSA register in relation to any Security Interest contemplated by these Conditions of Sale.

The Buyer must pay all costs, expenses and other charges incurred, expended or payable by MCS in relation to the filing of a Financing Statement or Financing Change Statement in connection with these Conditions of Sale.

The Buyer must not charge the Goods in any way or grant or otherwise give any interest in the Goods while they remain the property of MCS, nor allow any third party to acquire a Security Interest in the Goods.

If the Buyer makes a payment to MCS at any time whether in connection with the supply of Goods or otherwise, MCS may apply that payment to first satisfy obligations that are not secured, then obligations that are secured, but not by a purchase money security interest, in the order in which those obligations were incurred, and then obligations that are secured by a purchase money security interest, in the order in which those obligations were incurred.

If the Buyer fails to comply with any obligation under these Conditions of Sale then, without limiting the remedies available to MCS:

- (a) upon request by MCS, the Buyer must return the Goods;
- (b) the Buyer authorises MCS and any person authorised by MCS to enter premises where the Goods may be located to take possession of the Goods; and
- (c) MCS may retain, sell or otherwise dispose of the Goods.

The Buyer agrees to the extent permitted under the PPSA, the Buyer has no right:

- (a) to receive notice of removal of an accession under the PPSA;
- (b) under Chapter 4 of the PPSA; or
- (c) under the PPSA to receive a copy of any verification statement or financing change statement under the PPSA.

The Buyer must unconditionally ratify any actions taken by MCS under this clause.

## **9 Intellectual property**

MCS retains all intellectual property and associated rights in the Services or Goods supplied and in any material or documents supplied with the Services or Goods.

The Buyer agrees that it has no right, title, licence or any interest whatsoever in or to any MCS's intellectual property.

## **10 Confidentiality**

Each party must ensure that it and its employees, agents and subcontractors do not, without the prior written approval of the other, either during the supply of the Services or Goods after the expiry of these Conditions of Sale, disclose or give to any person any Confidential Information of the other, except as required by law or the requirements of a stock exchange.

The Buyer and MCS are entitled to disclose Confidential Information to related bodies corporate, any joint venture in which the parties or any related bodies corporate have an interest and its professional advisers but only if disclosed under a similar duty of confidentiality.

Confidential Information means all written or oral communications, documents and other Information (whether on computer disk, visual presentation or otherwise).

Each party agrees to keep the PPSA Information in strict confidence and not disclose that information, except in circumstances required by sections 275(7)(b) or (e) PPSA, provided that where sections 275(7)(b) or (e) require such disclosure, the party that is required to disclose the information gives all available notice to the other party to allow that party to legally challenge the required disclosure and takes all available steps (whether required by the other party or not) to maintain such PPSA Information in confidence.

Each party agrees not to authorise the disclosure of any PPSA Information to any third party pursuant to section 275(7)(c) PPSA or request information under section 275(7)(d) PPSA unless the other party to these Conditions of Sale explicitly agrees.

## **11 Force majeure**

If MCS is directly or indirectly affected in the performance of any obligation under these Conditions of Sale by an event or circumstance which is beyond the reasonable control of MCS, MCS will not be in breach of (and, accordingly, will not be liable under) the Contract for not performing, or for the manner of its performance of, that obligation for the period of time during which and to the extent that MCS is so affected.

## **12 Warranties**

The Buyer acknowledges that it has satisfied itself that the Services and Goods are suitable for the Buyer's purposes and acknowledges that it has not relied upon any warranty or representation from MCS concerning the Services or Goods.

Except as expressly set out in this Contract, MCS does not give and is not bound by or subject to any condition, term, warranty, guarantee, representation or obligation in connection with this Contract or in connection with the Services or Goods, whether such condition, term, warranty, representation or obligation is implied by virtue of any statute, the common law, equity, custom or trade usage or otherwise.

This clause does not exclude, restrict or modify any condition, term, warranty, representation or obligation which is imposed under or by virtue of any applicable statute, statutory rule or regulation to the extent to which such condition, warranty, term, obligation or liability cannot lawfully be excluded, restricted or modified. If any condition, term, warranty, representation or obligation is implied in this Contract and can not be lawfully excluded, to the extent permitted by law, the liability of MCS for breach of that condition, term, warranty, representation or obligation is limited to the cost of re-performing the Services or re-supplying the Goods.

MCS warrants that any Services supplied under this Contract will be performed by suitably qualified and experienced personnel exercising due care, skill and diligence.

MCS warrants that any Goods supplied under this Contract will conform in all material respects to the description of the Goods included in the Invoice, and against failure due to defects in materials and workmanship affecting performance for the warranty period of 6 months from the date of providing the Goods. Goods not manufactured by MCS which are

warranted separately by their respective manufacturers are not warranted by MCS and MCS will assign to the Buyer whatever rights MCS obtains under such warranties.

The Buyer acknowledges that its sole and exclusive remedy for non-conformance or defective Services and Goods is the correction of or the re-performance of or the re-supply of the non-conforming or defective Services and Goods, if practicable.

MCS warrants that any rectified Services or Goods will conform with the original warranty for the balance of the original warranty period.

No warranty claim will be considered by MCS unless the Buyer completes MCS's Warranty Claim Form (available upon request) and submits it to MCS within the applicable warranty period but in no event later than 10 days after the Buyer discovers (or in the exercise of reasonable diligence, ought to have discovered) the failure of the Services to conform with the warranty.

The United Nations Convention on Contracts for the International Sale of Goods does not apply to the Contract.

### **13 Liability**

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The Buyer indemnifies MCS and must keep MCS indemnified, from and against any and all claims, demands, suits, liabilities, causes of action, losses, expenses, damages or penalties, including without limitation court costs and legal fees, for personal injuries or property damage, to the extent caused or contributed to by the negligence or wilful misconduct of the Buyer.

Notwithstanding anything to the contrary in the Contract:

- (a) MCS will not be liable to the Buyer, or any other party beneficially entitled under or pursuant to the Contract (including under any indemnity), for any Consequential, indirect or economic loss or damage (including loss of actual or anticipated profits or revenues, loss by reason of shut down or non-operation, increased costs of borrowing, capital or financing, or loss of use or productivity) whether caused by or in relation to breach of contract, warranty, tort (including negligence), product liability, indemnity, contribution, strict liability or otherwise at law (even if advised of the possibility of such loss or damage);
- (b) MCS's liability under or in connection with this Contract is limited to the provision of the services again, if practicable, or the price of the service under which the liability has arisen;
- (c) no damages, whether liquidated or unliquidated, apply to this Contract; and
- (d) to the extent permitted by law, the rights and remedies in the Contract are the sole and exclusive rights and remedies available to the Buyer in connection with this Contract and the supply or failure to supply the Services or Goods.

MCS will have all rights and remedies set out in this Contract in addition to those otherwise available at law. All such rights and remedies are cumulative. The Buyer must pay all costs and expenses paid or incurred by MCS in enforcing its rights under or in connection with this Contract and the supply of the Services or Goods including, without limitation, legal fees and court costs.

### **14 Time Bar**

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Any claims against MCS by the Buyer shall be deemed to be waived and absolutely time barred upon the expiry of one year from the submission date of any Report to the Buyer.

### **15 Insurance**

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MCS maintains for itself the following insurances:

- (a) public and product liability insurance;
- (b) professional indemnity insurance;
- (c) workers' compensation insurance; and
- (d) motor vehicle insurance.

Other insurances, including contract works insurance, can be obtained by MCS at the Buyer's cost.

MCS will not name or note the Buyer as an additional insured or interested party in any of the policies of insurance maintained by MCS and will not waive any rights of subrogation.

### **16 Termination and cancellation**

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MCS may terminate the Contract:

- (a) immediately on written notice to the Buyer if the Buyer breaches any term of the Contract; or
- (b) for any reason in its absolute discretion on giving 14 days' written notice to the Buyer.

If MCS terminates this Contract in accordance with the previous paragraph, the Buyer will have no claim against MCS.

The Buyer may only terminate the Contract or cancel all or part of an order for Services or Goods with the written consent of MCS. If the Contract is terminated or an order is cancelled before commencement of the supply of the Services or Goods, the Buyer must pay to MCS an amount equal to 10% of the Price. If the Contract is terminated or an order is cancelled after commencement of the supply of the Services or Goods, the Buyer must pay to MCS the amount equal to the Price of the Services or Goods unless otherwise agreed by MCS in writing.

The Buyer agrees that it is in MCS's sole discretion whether or not MCS agrees to: terminate the Contract, cancel an order or part of an order, reduce the amount payable by the Buyer on cancellation or termination.

### **17 Dispute resolution**

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If a party considers that a dispute has arisen in connection with the Contract that party must give the other party written notice detailing the nature of the dispute. Within 10 Business Days after a receipt of a notice of dispute, the dispute must be referred to the chief executive officers of the parties, or their delegates, to attempt to resolve the dispute and, failing resolution, to agree on an alternative method of resolving the dispute.

If the parties' chief executive officers, or their delegates, do not resolve the dispute, or agree to an alternative means of resolving the dispute, within 15 Business Days (or such other period as the parties may agree) after notice of the dispute is served, then either party may commence mediation by giving notice to the other party and referring the matter to an approved mediator.

The rules nominated by the approved mediator apply to any mediation under the Agreement and the parties must comply with those rules.

If 25 Business Days after notice of the dispute has been served (or such other period as the parties may agree), the parties have not resolved the dispute or agreed an alternative means of resolving the dispute either party may initiate proceedings in a court. Until such time neither party may initiate court proceedings except for urgent injunctive or declaratory relief in relation to any matter arising under the Contract.

### **18 General**

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Unless MCS expressly agrees in writing otherwise, the Invoice issued by MCS and these Conditions of Sale constitute the entire agreement between MCS and the Buyer. The Contract supersedes all previous agreements about its subject matter and embodies the entire agreement between the parties. To the extent permitted by law, any statement, representation or promise made in any negotiation or discussion, has no effect except to the extent expressly set out or incorporated by reference in this Contract.

The Contract may only be amended, altered, supplemented or cancelled with the prior written consent of MCS.

The Buyer may not assign or transfer the Buyer's rights or obligations under the Contract without MCS's prior written consent. MCS shall in its absolute discretion assign any amount owing to it by the Buyer under this Contract to any third party or third parties.

The failure of MCS to require full or partial performance of a provision of the Contract does not affect the right of MCS to require performance subsequently. A right and remedy under the Contract may only be waived or renounced, in whole or part, in writing signed by MCS. Any such waiver is effective only if supported by consideration from the Buyer and to the extent specifically set out in that waiver. A single or partial exercise of or waiver of the exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy.

A clause or part of a clause of the Contract that is illegal or unenforceable may be severed from the Contract and the remaining clauses or parts of the clause continue in force. If any clause or part of a clause is or becomes illegal, unenforceable or invalid in any jurisdiction, it is to be treated as being severed from this document in the relevant jurisdiction, but the rest of this document will not be affected.

MCS shall have the right to sub-contract any of the services provided under the Conditions, subject to the Buyer's right to object on reasonable grounds. In the event of such a sub-contract MCS shall remain fully liable for the due performance of its obligations under these Conditions.

Queensland law applies to the Contract. Each party irrevocably submits to the non-exclusive jurisdiction of the courts of Queensland and courts competent to hear appeals from those courts.

## **19 Interpretation**

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In the Contract:

- (a) a singular word includes the plural and vice versa;
- (b) a reference to a party to the Contract or any other document includes the party's successors, permitted substitutes and permitted assigns;
- (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) a reference to a document or agreement (including a reference to this document) is to that document or agreement as amended, supplemented, varied or replaced;
- (e) a reference to legislation or to a provision of legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
- (f) if any day on or by which a person must do something under this document is not a Business Day, then the person must do it on or by the next Business Day;
- (g) a reference to a person includes a corporation, trust, partnership, unincorporated body, government and local authority or agency, or other entity whether or not it comprises a separate legal entity;
- (h) a reference to Buyer includes a corporation, joint venture, trust, partnership, unincorporated body, government and local authority or agency, or other entity whether or not it comprises a separate legal entity purchasing or ordering Goods and Services from MCS ;
- (i) a reference to 'month' means calendar month; and
- (j) this document is not to be interpreted against the interests of MCS merely because it proposed this document or some provision in it or because it relies on a provision of this document to protect itself.