

STANDARD TERMS OF ENGAGEMENT

WEBSITE REFERENCE COPY

These terms and conditions govern the provision of goods and services (**the Works**) by Heavy Welding Specialists Pty Ltd ABN 36 665 705 313 (**HWS, we, us or our**) for a Customer that engages HWS to provide those Works. These terms and conditions, together with the other Engagement Documents, form the Contract between HWS and the Customer. By issuing or accepting a Work Order, or by directing HWS to commence the Works, the Customer agrees to be bound by these terms and conditions.

1. Nature of the Contract

1.1 Contract Documents

- (a) The Contract comprises the following Engagement Documents:
- (i) these terms and conditions;
 - (ii) HWS's quotation or proposal for the Works;
 - (iii) the Work Order issued or accepted in respect of the Works; and
 - (iv) the Schedule of Rates.
- (b) To the extent of any ambiguity, discrepancy, error or inconsistency between the Engagement Documents, they take precedence in the order they are listed in clause 1.1(a).
- (c) These terms and conditions prevail over any terms put forward by the Customer, including any terms contained or referred to in a purchase order, tender, request, instruction or the Customer's own standard conditions of contract. No such terms are binding on HWS unless HWS expressly accepts them in writing. The fact that HWS commences or carries out the Works is not, and must not be treated as, acceptance by HWS of any terms put forward by the Customer.
- (d) If the Customer identifies any ambiguity, discrepancy, error or inconsistency in the Engagement Documents, it must promptly notify HWS in writing. HWS will, within a reasonable time, give the Customer a written direction resolving the matter. Any additional work or change arising from that direction is treated as a Variation.
- (i) any design, specification, drawing, instruction, calculation or methodology provided or specified by the Customer or its consultants;
- (ii) any material, plant or equipment supplied or specified by the Customer;
- (iii) the work of the Customer or any Other Contractor;
- (iv) Works carried out at the Customer's insistence against HWS's recommendation; or
- (v) the condition of the Site, access to the Site, and any information about the Site, to the extent represented or provided by the Customer,
- and the Customer must not rely on HWS in respect of any of those matters unless HWS has agreed in writing to accept that responsibility.
- (d) Any inspection, review, comment, approval or direction by the Customer does not relieve the Customer of responsibility for the matters in clause 2.1(c) and does not constitute acceptance by HWS of responsibility for them.
- (e) Where HWS carries out the Works in accordance with a design, specification, instruction or methodology provided or specified by the Customer, HWS is not liable for any defect or loss arising from that design, specification, instruction or methodology.

1.2 Relationship of the Parties

- (a) HWS carries out the Works as an independent contractor. Nothing in the Contract creates a partnership, joint venture, agency or employment relationship between the parties.

2. Standard of the Works

- (a) HWS will carry out and complete the Works:
- (i) with reasonable care and skill;
 - (ii) using materials that are reasonably fit for their intended purpose, unless the Customer specifies or supplies other materials;
 - (iii) in accordance with the Engagement Documents; and
 - (iv) in compliance with all applicable laws.
- (b) HWS warrants that it is suitably qualified, competent and experienced to carry out the Works and that it holds all licences and registrations required by law to carry out the Works.
- (c) HWS is not responsible for, and gives no warranty or assurance in respect of:

3. Pre-commencement and Access

- (a) Before HWS is required to commence the Works, the Customer must:
- (i) where a deposit is required by HWS, pay the deposit;
 - (ii) issue a Work Order or purchase order for the Works;
 - (iii) provide all information, drawings, specifications, approvals, permits, services and free-issue materials reasonably necessary for HWS to carry out the Works; and
 - (iv) where the Works are not taking place at the Workshop:
 - A. provide HWS with safe, clear and unobstructed access to the Site and to all areas reasonably necessary for HWS to carry out the Works;
 - B. arrange and pay for any Site induction, Customer or third-party training required for HWS to access the Site.
- (b) HWS will commence the Works on the sooner of the Commencement Date or within a reasonable time after the Customer has done the things required by clause 3.1(a).
- (c) If access, information, materials or anything else required under clause 3.1(a) is not provided by the Commencement Date, or is provided in an incomplete or defective form, HWS is entitled to

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an extension of time and to recover from the Customer its additional costs (including standby, idle time, remobilisation and demobilisation) in accordance with the Schedule of Rates .

- (d) The Customer warrants that it has the right to grant HWS, and those engaged by HWS, access to the Site for the purpose of carrying out the Works.

4. Care of the Works and Risk

- (a) HWS is responsible for the care of that part of the Works it has carried out, from the time it carries out that part until Practical Completion, but only to the extent of loss or damage caused by the negligent act or omission of HWS or those for whom HWS is responsible.
- (b) The Customer is responsible for:
- (i) the Site and everything on or in it, including existing structures, plant, equipment, services and materials, including the Works;
 - (ii) loss of or damage to the Works, or to any property, caused by the Customer, an Other Contractor, or any matter outside HWS's reasonable control; and
 - (iii) the care and maintenance of the Works after Practical Completion.
- (c) HWS is not liable for loss of or damage to the Works, the Site or any property of the Customer or any third party to the extent it is caused or contributed to by the Customer, an Other Contractor, incomplete or defective information or materials provided or specified by the Customer, or an Excepted Risk.
- (d) Where loss or damage is caused by an Excepted Risk, any rectification carried out by HWS at the Customer's written direction is a Variation.

5. Time for Completion

- (a) HWS will use reasonable endeavours to complete the Works by the Date for Practical Completion.
- (b) The Date for Practical Completion is subject to extension in accordance with clause 19.
- (c) Liquidated damages are not payable by HWS unless a rate for liquidated damages is expressly set out in the Work Order and agreed in writing by HWS. If liquidated damages are agreed, they:
- (i) are the Customer's sole and exclusive remedy for late completion of the Works;
 - (ii) accrue only for the period after the Date for Practical Completion (as extended under clause 19) up to the actual date of Practical Completion that is attributable to HWS; and
 - (iii) are capped at the maximum amount stated in the Work Order and, in any event, must not exceed 5% of the Contract Price.
- (d) HWS is not liable for liquidated damages, or for any other liability for late completion, for any delay caused by the Customer or Other Contractor, or any matter that entitles HWS to an extension of time.

6. Programming and Adverse Weather

- (a) HWS will provide reasonable information about the programming of the Works on the Customer's reasonable written request. Any programme provided by HWS is indicative only and does not impose a fixed obligation on HWS unless expressly agreed in writing.
- (b) Where HWS attends Site and the Works cannot proceed, or are cancelled or suspended for the day, because of weather, Site conditions, the act or omission of the Customer or an Other Contractor, or a direction of the Customer, HWS is entitled to payment at the applicable rates for the hours its personnel and plant attend Site, together with any associated standby, remobilisation and demobilisation costs.
- (c) HWS is entitled to an extension of time for delay caused by inclement weather, or by conditions resulting from inclement weather.

7. Payment

7.1 Payment

- (a) On HWS issuing an invoice the Customer must pay HWS the amounts calculated using the Schedule of Rates, or as otherwise specified in the Work Order, plus GST, for the Works carried out by HWS as set out in the invoice.
- (b) Where all or part of the Works are Construction Works:
- (i) Invoices issued by HWS will constitute payment claims under the SOP Act;
 - (ii) HWS may submit a payment claim at monthly intervals, or at such other intervals as are stated in the Work Order, for the Works carried out, together with any amounts for Variations, delay costs and other amounts due to HWS under the Contract.
 - (iii) The Customer must pay the amount claimed in full within 14 days after the payment claim is submitted, or within any shorter period required by the SOP Act.
 - (iv) HWS will submit each payment claim to the address or email nominated by the Customer and will include reasonable particulars of the amount claimed, which may include dates worked, personnel, hours, docket numbers, the Site and the Work Order number.
 - (v) The parties acknowledge the SOP Act applies to the Contract as it pertains to Construction Works and nothing in the Contract limits, or is intended to limit, HWS's rights or entitlements under that Act.

7.2 Late Payment

- (a) If the Customer does not pay an amount in full by the due date specified in the invoice, HWS may, without limiting its other rights:
- (i) charge interest on the overdue amount at the rate of the Reserve Bank of Australia target cash rate plus 6% per annum, calculated daily from the due date until the date the amount is paid in full;
 - (ii) on 5 Business Days' written notice, suspend the Works or reduce the rate of progress of the Works until the overdue amount is paid in full; and

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- (iii) recover from the Customer its costs, including debt recovery and legal costs on a solicitor and own client basis, that it incurs in recovering the overdue amount.
- (b) A suspension under clause 7.2(a)(ii) does not affect HWS's other rights. HWS is entitled to an extension of time and to the reasonable costs of the suspension and of remobilisation arising from the suspension.

7.3 Set-off

- (a) The Customer may set off against an amount due to HWS only an amount that is due and payable by HWS to the Customer that has either been agreed by HWS in writing or been determined to be payable by a Court or under clause 22.
- (b) Except as permitted by clause 7.3(a), the Customer must not withhold, set off, deduct or retain any amount from a payment otherwise due to HWS.
- (c) HWS may set off any amount due to it against any amount it owes the Customer.

7.4 Title and Risk in Materials

- (a) Title in materials and goods supplied by HWS does not pass to the Customer until HWS has been paid in full for those materials and goods. Risk in those materials and goods passes to the Customer on collection by the Customer or delivery to the Site.
- (b) The Customer acknowledges that these terms constitute a security agreement for the purposes of the *Personal Property Securities Act 2009* (Cth) and that HWS may register its interest in materials and goods supplied by it. The Customer will do anything reasonably required by HWS to enable HWS to perfect and maintain that interest.

7.5 Guarantees

- (a) As a condition of providing any credit or commencing the Works, HWS may require any of the following:
 - (i) a completed credit application;
 - (ii) a personal guarantee and indemnity from one or more directors where the Customer is a company or other body corporate.

7.6 Security.

- (a) As security for its obligations under the Contract, the Customer charges in favour of HWS all of the Customer's present and future right, title and interest in any real property and personal property.
- (b) The Customer must, on request, sign all documents and do all things reasonably required by HWS to register, perfect, maintain or enforce the charge in subclause 7.6, including signing any mortgage, caveat, security agreement, financing statement, financing change statement or other document required for registration with the Titles Registry, the PPSR or any other relevant authority.
- (c) For the purpose of giving effect to subclause (b) and securing performance of the Customer's obligations under this guarantee and indemnity:
 - (i) the Customer irrevocably appoints HWS and each director, secretary and authorised officer of HWS, severally, as the Customer's attorney to sign any document and do any act or thing the Customer is required to sign or do under

subclause (b), but has failed or refused to sign or do within five (5) business days after written request from HWS.

- (ii) The power of attorney granted under this subclause (c) is given for valuable consideration, including the consideration provided by HWS under the Contract, and as security for the performance of the Customer's obligations under the Contract. The power of attorney is irrevocable for the purposes of section 15 of the *Powers of Attorney Act 2003 (NSW)* and remains irrevocable for so long as any money remains owing by the Customer to HWS or any other obligation of the Customer secured by the Contract remains undischarged.
- (iii) The Customer ratifies and confirms anything lawfully done by an attorney under this subclause (c). HWS and each attorney appointed under this subclause may exercise the powers conferred by this subclause even if the attorney has a conflict of interest or duty or derives a benefit from the exercise of the power.

8. Variations

- (a) The Customer may request a Variation by written notice to HWS. Within a reasonable time after receiving the request, HWS will advise the Customer of the effect of the proposed Variation on the Contract Price and on the Date for Practical Completion where specified.
- (b) HWS is not obliged to commence a Variation until the price for the Variation and any extension of time have been agreed in writing, unless the Customer directs HWS in writing to proceed with the Variation, in which case the Variation is valued under clause 8.1(d).
- (c) If HWS considers that it has been directed or required to carry out work that is a Variation, or that any act, omission, direction or instruction of the Customer (including a change to the Works, a change to the method, sequence or timing of the Works, or Site conditions differing from those represented by the Customer) has caused HWS to incur additional cost or time, that work or matter is a Variation. HWS's entitlement to be paid for a Variation, and to an extension of time for it, is not affected by the absence of a written direction from the Customer.
- (d) The value of a Variation is:
 - (i) the amount agreed in writing by the parties; or
 - (ii) failing agreement, the reasonable value of the Variation calculated using the Schedule of Rates where applicable, together with a reasonable allowance for overheads, supervision and profit.
- (e) Where the Work are Construction Works, amounts payable for a Variation are included in HWS's next payment claim.

9. Defects Liability

- (a) HWS will, within a reasonable time, rectify any Defect in the Works that is notified to it in writing by the Customer during the Defects Liability Period.
- (b) HWS is not liable for, and is not required to rectify, any defect, fault, deterioration or damage to the extent it is caused by:
 - (i) any design, specification, drawing, instruction or material provided or specified by the Customer or its consultants;

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- (ii) fair wear and tear, corrosion, misuse or a failure to maintain,
 - (iii) alteration of or interference with the Works by any person other than HWS;
 - (iv) the work of the Customer or an Other Contractor;
 - (v) Site conditions; or
 - (vi) an Excepted Risk.
- (c) Before engaging any other person to rectify a Defect or otherwise interfere with the Works, the Customer must give HWS written notice of the defect and a reasonable opportunity to inspect and rectify it. If the Customer interferes with the Works or engages another person to rectify a Defect without giving HWS that notice and opportunity, HWS has no liability for the cost of that rectification or for the Defect in accordance with clause 10.2.
- (d) Rectification of a defect, fault or damage that is not HWS's responsibility is a Variation.
- (e) This clause 9 states HWS's sole obligation, and the Customer's sole remedy, in respect of Defects in the Works.

10. Warranties and Limitation of Liability

10.1 Warranties

- (a) HWS warrants it will carry out the Works in accordance with clause 2.
- (b) To the maximum extent permitted by law, all warranties, conditions and guarantees that would otherwise be implied into the Contract are excluded. Where legislation implies a warranty, condition or guarantee that cannot lawfully be excluded, HWS's liability for breach of it is limited, at HWS's option, to supplying the relevant Works again or paying the reasonable cost of having the relevant Works supplied again.

10.2 Limitation of Liability

- (a) To the maximum extent permitted by law, HWS is not liable to the Customer, whether in contract, tort (including negligence), under statute or otherwise, for any:
- (i) loss of profit, loss of revenue, loss of production, loss of use, loss of opportunity, loss of contract, loss of anticipated savings or loss of goodwill; or
 - (ii) indirect, consequential, special or economic loss or damage,
- however arising in connection with the Contract or the Works.
- (b) To the maximum extent permitted by law, HWS's total aggregate liability to the Customer arising out of or in connection with the Contract and the Works, however arising, is limited to the lesser of the sum actually paid to HWS for the relevant Works and the amount (if any) stated in the Work Order as the limit of HWS's liability.
- (c) HWS's liability to the Customer is reduced proportionately to the extent that any loss or damage is caused or contributed to by the Customer, or by the employees, agents, consultants or Other Contractors of the Customer.
- (d) The Customer must make any claim against HWS in connection with the Works within 12 months after the Date for Practical Completion. After that time HWS has no liability to the Customer in respect of the claim.

- (e) Nothing in this clause 10 limits or excludes any liability that cannot lawfully be limited or excluded.

11. Coordination and Cooperation

- (a) HWS will cooperate with the Customer and comply with its reasonable directions for the coordination of the Works provided those directions are consistent with the Engagement Documents.
- (b) The Customer is responsible for coordinating the activities of Other Contractors and for ensuring that the Site, and the work of Other Contractors, is in a condition that allows HWS to carry out the Works.
- (c) If a direction of the Customer, or an act or omission of the Customer or an Other Contractor, requires HWS to carry out the Works in a different manner, sequence or timing, or otherwise causes HWS additional cost or delay, HWS is entitled to a Variation and to an extension of time.
- (d) A direction of the Customer that is not given in writing must be confirmed by the Customer in writing within 3 Business Days. HWS may act on an oral direction, and the absence of written confirmation by the Customer does not affect HWS's entitlements.

12. Site, Health and Safety

12.1 Site

- (a) The Customer grants HWS, its personnel and its subcontractors a non-exclusive licence to enter and remain on the Site for the purpose of carrying out the Works and exercising HWS's rights under the Contract.
- (b) The Customer must ensure that the Site is a safe working environment and must provide HWS with all information about Site conditions, hazards and services relevant to the Works.

12.2 Health and Safety

- (a) The Customer is responsible for the duties of the principal contractor for the Site under the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2017* (NSW), and where the Customer is not the principal contractor, the Customer is responsible for ensuring the principal contractor performs those duties. This includes the overall management and control of the Site.
- (b) HWS will comply with the Customer's reasonable site safety rules that are notified to HWS in advance, provided those rules are consistent with applicable law.
- (c) Each party will promptly notify the other of any incident, hazard or notifiable event relating to the Works of which it becomes aware.
- (d) HWS is entitled to payment, at the applicable rates in the Schedule of Rates, for the time its personnel reasonably spend completing Site inductions and Customer or third party training required by the Customer or the Site.

12.3 Working Hours

- (a) HWS will carry out the Works during the working hours stated in the Work Order or as otherwise agreed in writing. Work undertaken on weekends or outside regular business hours or any other change to working hours directed by the Customer will be a Variation and charged in accordance with the Schedule of Rates.

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13. Site Cleaning

- (a) HWS will remove rubbish and debris arising from the Works and will leave its work area in a reasonably clean and tidy condition.
- (b) HWS is not responsible for cleaning, or for the cost of cleaning or the removal of rubbish or debris that does not arise from the Works, or that arises from the work of the Customer or an Other Contractor.

14. Insurance

- (a) The Customer is responsible for taking out and maintaining insurance for the Site, any existing structures, the works as a whole, and the Customer's own property and liabilities.
- (b) HWS's insurance does not cover, and HWS is not responsible for insuring, any of those matters.

15. Indemnity

- (a) HWS indemnifies the Customer against liability for personal injury to or death of any person, and for loss of or damage to real or tangible property, to the extent that the injury, death, loss or damage is caused by the negligent act or omission of HWS or those for whom HWS is responsible in carrying out the Works.
- (b) The Customer indemnifies HWS against liability for personal injury to or death of any person, and for loss of or damage to real or tangible property, to the extent that the injury, death, loss or damage is caused by the negligent act or omission of the Customer, or of the employees, agents, consultants or Other Contractors of the Customer.
- (c) A party's liability under an indemnity in this clause 15 is reduced proportionately to the extent that the relevant injury, death, loss or damage is caused or contributed to by the other party or by those for whom the other party is responsible.
- (d) Neither party is liable under an indemnity in this clause 15 for any loss or damage of a kind described in clause 10.2(a).

16. Confidentiality

- (a) Each party will keep confidential the confidential information of the other party that it receives in connection with the Contract and will use that information only for the purpose of performing its obligations under the Contract, except to the extent that disclosure is required by law, or the information is or becomes public other than through a breach of the Contract, or the disclosing party consents in writing.
- (b) Nothing in the Contract restricts HWS from carrying out work for any other person, including any client, customer, contact or related entity of the Customer, or from using the general skills, know-how and experience it gains in carrying out the Works.
- (c) Neither party will make any public or media statement about the Contract or the other party without the other party's prior written consent, except as required by law.

17. Suspension and Termination

17.1 Suspension by the Customer

- (a) The Customer may direct HWS in writing to suspend the carrying out of the Works. HWS is entitled to an extension of time, and to the reasonable costs of suspension, standby and remobilisation, arising from a suspension other than a suspension caused by HWS's breach of the Contract.

- (b) If a suspension directed by the Customer continues for more than 10 Business Days, HWS may terminate the Contract by written notice to the Customer.

17.2 Termination

- (a) Either party may terminate the Contract by written notice to the other party if the other party:
 - (i) is in material breach of the Contract and does not remedy the breach within 10 Business Days after receiving written notice requiring it to do so; or
 - (ii) becomes insolvent, is unable to pay its debts as and when they fall due, or has a receiver, administrator, liquidator or similar officeholder appointed.
- (b) HWS may also terminate the Contract by written notice to the Customer if the Customer fails to pay an amount that is due and payable and not the subject of a bona fide dispute and does not pay it within 10 Business Days after receiving written notice from HWS.
- (c) A party may terminate the Contract for convenience only if, and on the terms, expressly stated in the Work Order.

17.3 Consequences of Termination

- (a) On termination of the Contract, HWS will stop the Works in a safe and orderly manner, and the Customer must pay HWS for:
 - (i) all Works carried out up to the date of termination, valued in accordance with the Engagement Documents, including a reasonable allowance for overheads, supervision and profit;
 - (ii) all Variations, delay costs and other amounts due to HWS up to the date of termination;
 - (iii) the cost of materials and items properly ordered by HWS for the Works and for which HWS is liable; and
 - (iv) the reasonable costs of demobilisation where Works are being carried out on Site.
- (b) If the Contract is terminated for the Customer's breach or insolvency, the Customer must also pay HWS for the reasonable loss of profit and all other direct losses HWS incurs as a result of the termination, including the reasonable costs of demobilisation.
- (c) HWS is not required to remove its plant, equipment or materials from the Site until it has been paid all amounts due to it on termination.

18. Notices

- (a) A notice or other communication under the Contract must be in writing and given to the other party by hand, by prepaid post, or by email to the address or email address last notified by that party.
- (b) A notice is taken to be received:
 - (i) if delivered by hand, on delivery;
 - (ii) if sent by prepaid post, 3 Business Days after posting; and
 - (iii) if sent by email, at the time of sending, unless the sender receives an automated message that the email was not delivered.

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19. Delay and Extensions of Time

- (a) HWS is entitled to an extension of time to the Date for Practical Completion for any delay to the carrying out of the Works that is caused by:
 - (i) any act, default or omission of the Customer, an Other Contractor, or their respective employees, agents or consultants;
 - (ii) a Variation;
 - (iii) a suspension of the Works other than a suspension caused by HWS's breach;
 - (iv) inclement weather, or conditions resulting from inclement weather;
 - (v) a failure by the Customer to provide access, information, materials, approvals or anything else required of the Customer under the Contract; or
 - (vi) any other matter beyond HWS's reasonable control, including industrial action (other than industrial action confined to HWS's own workforce), an Excepted Risk, or an event of Force Majeure.
- (b) HWS will give the Customer written notice of a claim for an extension of time within 15 Business Days after HWS becomes aware, or ought reasonably to have become aware, of the cause of delay. The notice will state the cause of the delay and the extension of time claimed.
- (c) Within 15 Business Days after receiving HWS's notice, the Customer will give HWS written notice either granting the extension of time claimed, or stating the extension of time the Customer grants and the Customer's reasons. If the Customer does not give that notice within 15 Business Days, the extension of time claimed by HWS is taken to be granted.
- (d) Where HWS is granted an extension of time for a cause of delay described in clause 19.1(a)(i), (iii) or (v), HWS is also entitled to recover the additional costs it reasonably incurs as a result of the delay, including overheads, supervision, plant standby and prolongation costs.
- (e) The Customer may grant an extension of time at any time, for its own benefit, whether or not HWS has claimed one.

20. Assignment and Subcontracting

- (a) The Customer may not assign or novate the Contract, or any of its rights or obligations under the Contract, without HWS's prior written consent.
- (b) HWS may assign or novate the Contract, and may subcontract any part of the Works, on prior written notice to the Customer. HWS remains responsible for Works carried out by its subcontractors.

21. General

- (a) The Engagement Documents record the entire agreement between the parties about the Works and supersede all prior negotiations, representations, understandings and agreements.
- (b) The Contract may only be amended in writing signed by both parties. A failure or delay by a party in exercising a right under the Contract is not a waiver of that right and a single or partial exercise of a right does not prevent any further exercise of it.

- (c) Unless otherwise stated, amounts payable under the Contract are exclusive of GST. If GST is payable on a taxable supply made under the Contract, the recipient must pay the supplier the amount of the GST in addition to the amount otherwise payable, on receipt of a valid tax invoice. Terms used in this clause have the meaning given in the GST Act.
- (d) If a provision of the Contract is void, voidable or unenforceable, it is severed to the extent necessary, and the remaining provisions of the Contract continue in full force.
- (e) The Contract may be executed in any number of counterparts, and by exchange of electronic signatures or other electronic means, each of which is valid and binding and together constitute one agreement.
- (f) The Contract is governed by the law of New South Wales. The parties submit to the non-exclusive jurisdiction of the courts of New South Wales.

22. Dispute Resolution

- (a) If a dispute arises out of or in connection with the Contract, a party may give the other party a written notice of dispute setting out reasonable particulars of the dispute.
- (b) Within 10 Business Days after a notice of dispute is given, a senior representative of each party, each with authority to settle the dispute, will meet and seek to resolve the dispute in good faith.
- (c) If the dispute is not resolved within 20 Business Days after the notice of dispute is given, either party may refer the dispute to mediation administered by the Resolution Institute. If the dispute is not resolved by mediation, either party may commence court proceedings.
- (d) This clause does not prevent a party from seeking urgent interlocutory or injunctive relief nor does it affect HWS's rights under the SOP Act where Works are Construction Works.
- (e) Despite the existence of a dispute, each party must continue to perform its obligations under the Contract, and the Customer must continue to pay all amounts that are not the subject of a bona fide dispute.

23. Definitions and Interpretation

In the Contract, unless the context requires otherwise:

Business Day means a day that is not a Saturday, Sunday or public holiday in the place where the relevant act is to be done, and does not include any day in the period from 22 December to 10 January in the following year (inclusive).

Customer means the person who engages HWS to carry out the Works.

Commencement Date means the date stated in the Work Order as the date for commencement of the Works, or, if no date is stated, the date HWS commences the Works.

Construction Works means Works undertaken pursuant to a Contract which is a construction contract such that the SOP Act applies to all or part of those specific Works.

Contract means the agreement between HWS and the Customer constituted by the Engagement Documents.

Contract Price means the total amount payable to HWS for the Works, calculated in accordance with the Engagement Documents.

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Date for Practical Completion means the date stated in the Work Order for completion of the Works or, if no date is specified, a reasonable time after commencing the Works.

Defect means a part of the Works that has not been carried out in accordance with clause 2.

Defects Liability Period is 12 months from the Date of Practical Completion unless a different period is stated in the Work Order.

Engagement Documents means the documents listed in clause 1.1(a).

Excepted Risk means any of the following: (a) any negligent act or omission of the Customer, or of the employees, agents, consultants or Other Contractors of the Customer; (b) any defect or deficiency in any design, specification, drawing, instruction, methodology or material provided or specified by the Customer or its consultants; (c) war, invasion, acts of foreign enemies, hostilities (whether war is declared or not), acts of terrorism, civil war, rebellion, revolution, insurrection, military or usurped power, martial law, or confiscation by order of a government or public authority; (d) use or occupation of any part of the Works by the Customer or an Other Contractor before Practical Completion; and (e) any risk that the Contract or the law provides is to be borne by the Customer.

Force Majeure means an event or circumstance beyond the reasonable control of a party, including fire, flood, storm, earthquake, natural disaster, epidemic or pandemic, war, terrorism, riot, embargo, and action or restriction of a government or public authority.

GST Act means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), and GST has the meaning given in that Act.

HWS means Heavy Welding Specialists Pty Ltd ABN 36 665 705 313.

Other Contractor means a contractor, subcontractor, supplier or consultant, and their employees and agents, engaged by the Customer or by the principal or head contractor for the Site, other than HWS and HWS's subcontractors.

Practical Completion means the stage when the Works are completed save for minor defects and minor omissions that do not prevent the Works from being reasonably and safely used for their intended purpose.

Schedule of Rates means the schedule of rates published from time to time by HWS.

Site means the place where the Works are to be carried out (where they are not taking place in the Workshop), as identified in the Work Order and includes any property, equipment, machinery of the Customer upon which Works have been performed by HWS.

SOP Act means the *Building and Construction Industry Security of Payment Act 1999* (NSW)

Variation means a change in the scope of the Works, including: (a) an increase, decrease, addition, substitution or omission of work; (b) a change to the method, process, sequence or timing of carrying out the Works; (c) a change to a specification or material; (d) a change to levels, dimensions or the set-out of the Works; and (e) any matter that the Contract provides is to be treated as a Variation.

Work Order means the purchase order, work order or job-specific engagement issued by the Customer and accepted by HWS, or issued by HWS and accepted by the Customer, in respect of the Works, whether in writing or provided orally.

Works means the goods and services to be supplied or carried out respectively by HWS in accordance with the Contract.

Workshop means HWS's premises at 4 Thompson Avenue, Moree NSW 2400.

In the interpretation of the Contract: a reference to legislation includes any amendment, re-enactment or replacement of it; the singular includes the plural and the reverse; headings are for convenience only and do not affect interpretation; and the Contract is not to be construed against a party merely because that party prepared it.

STANDARD TERMS OF ENGAGEMENT

Director's Guarantee and Indemnity

- (a) Where the Customer is a company, each director of the Customer company and person who signs or otherwise accepts these Terms on behalf of the Customer guarantees to HWS the due and punctual payment of all amounts payable by the Customer to HWS under or in connection with these Terms.
- (b) Each Guarantor unconditionally and irrevocably guarantees payment of the Guaranteed Money and indemnifies HWS against all loss, cost, expense and liability suffered or incurred by HWS arising from the Customer's failure to pay the Guaranteed Money when due.
- (c) HWS may recover the Guaranteed Money from a Guarantor as if the Guarantor were a principal debtor. HWS is not required to first make demand on, obtain judgment against, enforce against or exhaust any remedy against the Customer or any other person before claiming against a Guarantor.
- (d) This guarantee and indemnity is a continuing security and is not discharged by any extension of time, indulgence, compromise, variation, renewal, release, insolvency, administration, liquidation or other dealing with the Customer, any Guarantor, or any security held by HWS.
- (e) If there is more than one Guarantor, the liability of each Guarantor is joint and several. HWS may proceed against any one or more Guarantors without proceeding against the others.
- (f) As security for the Guaranteed Money, each Guarantor charges in favour of HWS all of the Guarantor's present and future right, title and interest in any real property and personal property.
- (g) Each Guarantor must, on request, sign all documents and do all things reasonably required by HWS to register, perfect, maintain or enforce that charge, including signing any mortgage, caveat, security agreement, financing statement, financing change statement or other document required for registration with the Titles Registry, the PPSR or any other relevant authority.
- (h) For the purpose of giving effect to subclause (g) and securing performance of the Guarantor's obligations under this guarantee and indemnity:
 - (i) each Guarantor irrevocably appoints HWS and each director, secretary and authorised officer of HWS, jointly and severally, as the Guarantor's attorney to sign any document and do any act or thing the Guarantor is required to sign or do under this clause, but has failed or refused to sign or do within five (5) business days after written request from HWS.
 - (ii) The power of attorney granted under this subclause (h) is given for valuable consideration, including the consideration provided by HWS under the Contract, and as security for the performance of the Guarantor's obligations under this guarantee and indemnity. The power of attorney is irrevocable for the purposes of section 15 of the *Powers of Attorney Act 2003 (NSW)* and remains irrevocable so long as any money remains owing by the Customer to HWS or any other obligation of the Customer secured by the Contract remains undischarged.
 - (iii) Each Guarantor ratifies and confirms anything lawfully done by an attorney under this subclause (h). HWS and each attorney appointed under this subclause may exercise the powers conferred by this subclause even if the attorney has a conflict of interest or duty, or derives a benefit from the exercise of the power.
- (i) Each Guarantor must pay HWS's costs and expenses of enforcing this guarantee and indemnity, including legal costs on an indemnity basis, enforcement costs, search fees, registration fees and any other debt recovery costs.
- (j) A Guarantor may revoke this guarantee for future credit by giving written notice to HWS. Revocation does not affect liability for any Guaranteed Money owing, or arising from Works commenced, before HWS receives that notice.
- (k) In this clause:
 - (i) **Guaranteed Money** means all amounts now or in the future owing by the Customer to HWS under or in connection with these Terms, including invoices, interest, enforcement costs, recovery costs and damages.
 - (ii) **Guarantor** means each person who gives, or is taken under these Terms to give, the guarantee and indemnity in this clause 24.