

Information Bulletin

Conditions of Sale for Goods and services

14th November 2009

1 DEFINITIONS

Unless the context otherwise requires the following words and expressions used herein shall have the meanings hereby assigned to them:

“Conditions” means these Conditions of Sale for the provision of Goods and/or Services

‘Contractor’ means Invensys Rail Pty Ltd, 78 000 102 483, including its successors and permitted assigns

‘Customer’ means the entity (which expression includes its successors or permitted assigns) which enters into the Contract with the Contractor

‘Force Majeure’ means anything beyond the reasonable control of the Party affected thereby that prevents, delays or hinders that Party from or in fulfilling its obligations under the Contract.

“Goods” means any goods requested by the Purchaser in the Order.

“Order” means the order placed by the Purchaser with the Supplier for the supply of Goods and/or Services, and includes any delivery schedule(s) attached thereto.

‘Party’ or ‘Parties’ means the Customer or the Contractor or both of them as the context requires.

‘Price’ means the total price, exclusive of GST, to be paid by the Customer

to the Contractor in accordance with the provisions of the Contract.

‘Services’ means the services to be provided by the Contractor to the Customer as specified in the Contract.

‘Time for Completion’ means the time(s) or date(s) specified in the Contract for the completion of the Services and/or delivery of the Goods (as such time(s) or date(s) may be adjusted from time to time in accordance with the provisions of the Contract).

‘Variation’ means any modification, alteration or amendment to the Services or Goods.

2 INTERPRETATION

2.1 The Conditions form part of the Contract and, except and to the extent specifically agreed otherwise by the Contractor in writing, shall apply to the exclusion of any and all other conditions of contract specified by the Customer.

2.2 References herein to Clauses mean clauses of these Conditions. Clause headings are used for ease of reference only and shall not affect the interpretation of the Clauses to which they refer.

2.3 The Contract shall be governed by and construed in accordance with Australian law and the Parties agree to submit to the jurisdiction of the Australian courts, which shall have exclusive jurisdiction if the Contractor so opts. Any claim or proceedings shall be validly served if sent to the last-known address of the Party against whom the claim is being made or the proceedings taken.

- 2.4 **Notice is hereby given that clauses 5, 8 and 9 specify exclusions from, and limitations to, the contractor's liability under or in connection with the contract.**

3 PRICE AND PAYMENT

- 3.1 The Customer shall pay to the Contractor the Price together with any GST due thereon.
- 3.2 The Customer shall pay the Price to the Contractor in accordance with the payment terms set out elsewhere in the Contract. If (and only if) payment terms are not so set out, the Customer shall pay the Price to the Contractor in the manner set out herein below.

In this Clause 3.2, "*duration*" means the number of days between the Contractor's commencement of work under the Contract and the Time for Completion. If the *duration* is 31 days or less, the Contractor shall be entitled to submit its invoice to the Customer for payment of the Price in full upon delivery of the Goods and completion of the Services. If the *duration* is more than 31 days, the Customer shall pay the Price in monthly instalments in arrears, each instalment being calculated as follows: -

The Price at Contract award (or the Contractor's estimate thereof if the Price is not a lump sum) shall be divided by the *duration* at Contract award resulting in a notional daily contract value (the "*NDCV*"). (eg. if the Price were \$100 and the *duration* 100 days, the *NDCV* would be \$1). The *NDCV* shall be multiplied by 30 to derive a notional monthly contract value (the "*NMCV*"). At or around the end of each calendar month throughout the *duration* the Contractor shall be entitled to submit an invoice to the Customer for the *NMCV* or pro-rata amount for any period less than 20 days), plus any reimbursable expenses or other amounts incurred during the preceding calendar

month which are payable under the Contract.

The *NMCV* shall be adjusted to take account of any increase or decrease in the Price and/or change to the *duration* made in accordance with the Contract. The adjustment to the *NMCV* shall be such that the Price (or the Contractor's estimate thereof if the same is not a lump sum) is recovered by the Contractor in full by the end of the *duration* (and, insofar as it is practicable to do so, in equal instalments).

The Contractor's invoices shall include GST at the applicable rate.

The Customer shall pay the Contractor's invoices within 30 days of the Customer's receipt thereof.

For the avoidance of any doubt, any overpayment or underpayment of the Price resulting from the operation of this Clause 3.2 shall be corrected in the final invoice due under the Contract.

- 3.3 Without prejudice to any other right or remedy of the Contractor, if the Customer fails to make any payment in accordance with the Contract, the amount unpaid shall accrue interest, from the date upon which it should have been paid until the date of actual payment, at the rate of four percent above the base rate from time to time of the ANZ Bank Ltd. Such interest shall accrue from day to day.
- 3.4 If, by reason of any change or amendment to, or introduction of any statute, regulation, bye-law or similar instrument or code of practice, the cost to the Contractor of performing its obligations under the Contract shall be increased, then the Contractor's fair and reasonable estimate of the amount of such increase shall be added to the Price.

4 TIME FOR COMPLETION

The Time for Completion shall be adjusted if and as reasonable to take account of Force Majeure, any default of the Customer or others for whom the Customer is responsible, and/or as otherwise provided in the Contract. If the Contractor fails to deliver the Goods and/or complete the Services by the Time for Completion, the Contractor shall in full satisfaction and discharge of its liability for such failure, pay to the Customer liquidated damages calculated at a weekly rate of 1% of the part of the Price attributed to the Goods and/or Services in delay up to a maximum amount equal to 5% thereof.

5 DELIVERY OF GOODS

Unless the Contract expressly provides otherwise:

- a) the Goods shall be packed and delivered by the Contractor to the address specified in the Contract at its own risk and expense and by a method of transport chosen by the Contractor;
- b) risk in the Goods shall pass from the Contractor to the Customer upon delivery thereof; and
- c) property in the Goods shall pass from the Contractor to the Customer upon the Customer paying the Price in full. Any Goods lost or damaged in transit must be reported to the Contractor by the Customer in writing during the working day following that upon which the Goods are delivered. Failure to do so shall result in the Goods being deemed to have been at the Customer's risk whilst in transit.

6 VARIATIONS

- 6.1 At any time during the performance of the Contract (excluding the warranty period referred to in Clause 8) the Customer may by written notice instruct the Contractor to give effect to a Variation in so far as it

is reasonably practicable for the Contractor to do so.

- 6.2 The Time for Completion shall be adjusted to such extent as is reasonable in all the circumstances to take account of any Variations.
- 6.3 The Price shall be adjusted to take account of Variations by: (i) the Contractor submitting to the Customer a priced quotation therefore which the Customer accepts; or (ii) if one or both Parties do not wish to proceed in accordance with (i), then by measurement and valuation at the rates and prices set out in the Contract for similar work; or (iii) if there are no such rates and prices, then by measurement and valuation at reasonable rates and prices.
- 6.4 Notwithstanding any other provision of this Clause 6, the Contractor shall not be obliged to carry out any Variation if the combined net effect thereof when taken with all other Variations would be to increase or decrease the Price (as mutually agreed at the time of formation of the Contract or, if not so agreed, estimated by the Contractor to have applied at such time,) by more than twenty-five percent.

7 WARRANTY

The Contractor warrants that:

- a) the Goods shall be free from defects in design, materials and workmanship; and
- b) the Services shall be provided using all reasonable skill and care. Should a defect appear in the Goods during the period of 12 months from delivery of the Goods and/or completion of the Services then the Contractor's standard Terms of Warranty (set out in Appendix 1 hereto) shall apply. This warranty is in place of and excludes all other warranties and legal liability in relation to the quality, fitness for purpose or performance of the Goods and Services, whether statutory, express, implied, oral or written.

8 LIMITATION OF LIABILITY

8.1 Subject to Clause 8.2 below but notwithstanding any other provision of the Contract whether express or implied:

- a) The Contractor shall in no event have any liability to the Customer under or in connection with the Contract for any loss of profit, loss of revenue, loss of use (including without limitation loss of use of or delay/disruption to the railway infrastructure) or loss of business or contract, nor for any economic, financial, consequential or indirect loss or damage, howsoever caused, whether suffered by the Customer or any third party claiming against the Customer; and
- b) The Contractor's total liability to the Customer howsoever arising under or in connection with the Contract shall be limited to an aggregate sum equivalent to 25% of the Price.

8.2 The provisions of Clause 8.1 a) shall not affect the Contractor's liability for the payment of liquidated damages pursuant to Clause 4.

The Contractor's liability for loss of or damage to property (excluding the Goods) caused by its negligence shall be limited to ten million dollars.

For the avoidance of any doubt, nothing in these Conditions shall exclude or limit (or is intended to exclude or limit) the Contractor's liability for:

- a) personal injury or death caused by its negligence; or
- b) any other matter if and to the extent that excluding or limiting liability in relation thereto is not permissible at law.

8.3 The exclusions or limitations of the Contractor's liability set out in this Clause 9 or elsewhere in the Contract shall apply regardless of whether such liability arises in contract, tort (including without limitation negligence), breach of statutory duty or otherwise at law and shall apply

equally to the employees and agents of the Contractor.

9 INTELLECTUAL PROPERTY RIGHTS

Any and all intellectual property rights (including without limitation copyright, patents and design rights) generated by the Contractor in the performance of the Contract, or subsisting in or relating to the Goods and Services shall, subject to the rights of third parties, vest in the Contractor. In addition, the Contractor's Standard Software License terms set out in Appendix 2 shall apply to any software supplied by the Contractor under the Contract.

10 CONFIDENTIALITY

10.1 In this Clause 10, '*confidential information*' means information disclosed to or obtained by one Party (the '*receiving party*') directly or indirectly by or from the other Party (the '*disclosing party*') which is identified by the *disclosing party* as being confidential or which if not so identified should nevertheless have reasonably been recognised by the *receiving party* as being confidential, provided that *confidential information* shall not include information which:

- a) is in the public domain otherwise than as a result of a breach of this Clause 10 by the *receiving party*; or
- b) the *receiving party* can show was in its possession or known to it without obligation of confidentiality prior to the same being disclosed by or obtained from the *disclosing party* under or in connection with the Contract; or
- c) is rightfully acquired from a third party without such third party placing an obligation of confidentiality on the *receiving party*; or
- d) is furnished by the *disclosing party* to a third party without restriction on disclosure being placed on such third party.

10.2 The *receiving party* shall not without the prior written consent of the *disclosing party* use, publish or disclose to any person confidential information otherwise than for the purposes of performing the Contract or exercising its rights thereunder, or as may be required by law.

against or enters into an arrangement or composition with its creditors or, being a company, goes into liquidation whether voluntary or otherwise (except for the purpose of solvent amalgamation or reconstruction), or a receiver or manager on behalf of a creditor is appointed in respect of such other Party.

11 SUSPENSION

If in the Contractor's bona fide opinion the Customer has failed to make payment when due or to perform on time any of its other obligations under the Contract:

- a) the Contractor shall be entitled to suspend its performance of the Contract until such failure is remedied;
- b) the Time for Completion shall be extended to such extent as is reasonable to take account of such suspension;
- c) any cost incurred by the Contractor as a result of or in connection with such suspension shall be reimbursed to the Contractor by the Customer; and
- d) the Contractor shall be entitled to terminate the Contract if the performance thereof is suspended for an aggregate period in excess of 60 days, such termination being treated as termination by the Contractor pursuant to Clause 12 a)

12 TERMINATION

Without prejudice to any other rights or remedies it may have at law, either Party shall be entitled to terminate the Contract forthwith by serving written notice to the other to such effect if:

- a) the other Party commits a serious breach of its obligations under the Contract and fails to remedy the same within a reasonable period of time from receipt of written notice to do so; or
- b) a receiving order is made against the other Party, or such other Party is unable to pay its debts as they fall due, or seeks the protection of the Court

13 RIGHTS OF THIRD PARTIES

Except as expressly stated otherwise in Clause 8.3, no person other than the Contractor and the Contractor or their respective successors in title and/or permitted assignees and/or any person expressly made a party to the Contract by novation, shall have any rights to enforce any term of the Contract, whether or not such term expressly or impliedly purports to confer benefit upon such person.