



## 1 INTERPRETATION

1.1 In these Conditions the following words will (unless the context otherwise requires) have the following meanings:

"Customer" means the person, firm or company that has requested any Work identified in the Order;

"Conditions" means the General Terms and Conditions for Specialist Personnel Services set out herein;

"Contract" means any contract for Work between the Customer and MD;

"Goods" means goods supplied by MD (as defined in MD's tender or order acknowledgement);

"IPRS" means any intellectual property rights of any nature including without limitation any and all inventions, patents, utility models, design rights, copyright, know how, trade secrets, confidential information, trademarks, service marks, trade names and goodwill;

"MD" means MAN Diesel Australia Pty Limited and its associates;

"Order" means an order placed by the Customer with MD for Work;

"Services" means services supplied by MD (as defined in MD's tender or order acknowledgement);

"Site" shall mean the place where the Services are to be performed by MD together with so much of the area surrounding the said place as MD shall actually use in connection therewith;

"Specialist Personnel" means the specialists chosen by MD to perform the Services;

"Work" means Goods and/or Services.

1.2 The headings in these Conditions are for convenience only and shall not affect their interpretation.

## 2 FORMATION

2.1 All tenders are made and Orders are accepted by MD subject to these Conditions and they shall apply to all Contracts to the exclusion of any other terms and conditions including without limit those which the Customer purports to apply under any Order. Variations to the terms of any Contract will only be effective if agreed in writing. If any such agreed variation increases the time or cost to MD of performing the Contract then the Contract price and/or programme will be adjusted accordingly.

2.2 Orders from the Customer are only binding on MD after a written order acknowledgment has been issued and only on the conditions stated in the order acknowledgment.

2.3 All information on weight, dimensions, capacity, price, technical and other data stated in catalogues, prospectuses, circulars, advertisements, illustrated matter and price lists is to be considered approximate. Such information is only binding to the extent expressly stated in the order acknowledgment or in other documents forming part of the Contract expressly referring to such information.

## 3 DELIVERY AND NON-DELIVERY AND DELAY

3.1 Unless otherwise expressly agreed in writing by MD

- delivery times accepted by MD are given in good faith but are an estimate only; and  
- delivery of the Goods is made "Ex Works" in accordance with Incoterms 2000, but the delivery price is exclusive of packing, which will be charged extra.

3.2 Performance of the Services shall be at the Site specified in MD's tender or order acknowledgement.

3.3 MD may deliver Goods in instalments and perform Services in sections in any sequence. Default by MD, howsoever caused, in respect of one or more instalments and/or sections shall not entitle the Customer to terminate the relevant Contract as a whole.

3.4 Where:

- the Customer fails or refuses to accept delivery of any Goods when they are ready for delivery in accordance with the relevant Order; or
- MD agrees (at its sole discretion) to postpone delivery of the Goods at the request of the Customer; or
- the Customer fails to provide any instructions consents or authorisations required to enable the Goods to be delivered on the due date;

the risk in the Goods shall pass immediately to the Customer, delivery of the Goods shall be deemed to have taken place and MD may store or arrange for storage of such Goods and charge the Customer for all related costs and expenses (including storage, insurance, reasonable costs and interest) and may sell such Goods after expiry of 28 days following such failure or refusal and deduct any monies payable to MD by the Customer from the sale proceeds and charge the Customer for any shortfall below the Contract price.

3.5 Upon delivery to the Customer, all Goods should be examined. MD shall not be liable for any shortages in, damage to or non-delivery of Goods unless the same is notified by the Customer to MD (together with all specific details) in writing within 10 days of the actual date of delivery. Subject to such notice being provided MD shall, if it is satisfied that any Goods have not been delivered and the cause thereof being beyond the reasonable control of MD, at its sole discretion, either arrange for delivery as soon as reasonably possible or give credit to the Customer for such Goods and this shall be the Customer's only remedy and in lieu of all other rights and remedies which might otherwise be available to the Customer. Shortages in, or non-delivery of some or part of the Goods shall not affect the Contract in respect of the other or other parts of the Goods.

3.6 If the contractual delivery time for the Work or part of the Work is delayed and this delay was caused by negligence or intention of MD and if the Customer has suffered a loss caused by such delay, the Customer shall be entitled to liquidated damages for delay. Such liquidated damages for delay shall amount to 0.5% of the Contract price of the delayed part of the Work concerned per each full week of delay considering a grace period of 2 (two) weeks. The liquidated damages for delay will be limited to a maximum of 5% (five per cent) of the Contract price of the delayed part of the Work.

3.7 Liquidated damages shall be Customer's sole and exclusive measure of damages and remedy against MD with respect to the failure to achieve the contractual delivery time for the Work.

## 4 TITLE

Unless MD has been paid in full in advance, the Work will be considered as having been made with MD retaining the ownership until full payment has been effected by the Customer

under all contracts between MD and the Customer. If the Customer does not pay when due, MD is entitled to take back the Goods without a court judgment in accordance with the applicable law.

## 5 PRICE AND BINDING PERIOD OF QUOTATIONS AND TENDERS

5.1 Unless otherwise agreed, quotations and tenders lapse after 30 days from their date.

5.2 Unless fixed prices have been agreed in writing by MD, all sales are made at the prices valid at the date of MD's tender or the date of MD's order acknowledgement (as the case may be).

5.3 MD shall neither be entitled nor obliged to implement changes in the scope of supply, before the Parties have reached an agreement regarding the corresponding adjustment of the Contract price and the delivery time.

5.4 Unless otherwise agreed in writing by MD prices set out in any of MD's price lists, tenders or order acknowledgement are Ex Works (Incoterms 2000) and exclusive of any taxes, duties, fees, charges or similar and any costs of carriage, package and insurance which shall be payable in addition to the price.

5.5 Unless otherwise agreed by MD in writing, sums payable by the Customer to MD shall fall due and be effected by the Customer net cash not later than 30 days after the date of the invoice. If any sum payable under the Contract is not paid when due then without prejudice to MD's other rights under these Conditions, such sum shall bear interest from the due date until payment is made in full, both before and after any judgment, at 6% per annum over the Cash Rate Target of the Reserve Bank of Australia in force on the due date of payment.

5.6 MD shall be entitled, upon request, to an advance payment of 50 % of the Contract price, unless another percentage rate will be agreed upon between the Parties. This advance payment shall be effected by the Customer to MD's account, or, according to the MD's choice for services to be rendered outside Germany, by delivery of an irrevocable letter of credit to be established by the Customer in the Federal Republic of Germany, and confirmed by a German first class bank acceptable to MD, at least 21 days prior to the departure of the Specialist Personnel.

5.7 The set-off with counter-claims by the Customer shall only be allowed with undisputed claims or in accordance with an appropriate court judgement.

## 6 PROVISION OF SERVICES

6.1 Unless otherwise expressly agreed in writing, Services rendered by MD shall be charged on a time basis in accordance with MD's general rates for personnel valid at the date of the provision of the Services. Such rates are exclusive of board, lodging and transportation and such other facilities as are to be provided by the Customer free of charge. All travelling expenses and costs of carriage of luggage, instruments and tools incurred by the Specialist Personnel shall be borne by the Customer. Unless otherwise agreed MD's execution of Services is subject to manual assistance being rendered by the Customer either through engine room staff or other persons made available by the Customer.

6.2 The taking-over of the Works by the Customer shall be deemed to have taken place at the latest, when the Customer has received MD's notice that the Work has been completed, provided that the Work is as required for taking-over according to the Contract. Minor deficiencies which do not affect the efficiency of the Work shall not prevent taking-over. The period, referred to in Condition 7.1 shall start to run at the latest when the Work is ready for taking-over in accordance with this Condition 6.2.

6.3 MD shall be responsible for the adherence to legal or other regulations applicable at the Site only as far as the Customer has sufficiently informed MD of such regulations in advance.

6.4 The daily working time shall be arranged by the Customer and the Specialist Personnel at the Site, and the actual working time shall be certified on work sheets by the Customer.

6.5 MD will present monthly accounts based on the work sheets. The final accounts shall be submitted to the Customer within a reasonable period after the completion of the Works.

6.6 In the event of illness during employment of the Specialist Personnel, payment of the hourly rates shall be continued for the time during which the Specialist Personnel has to remain in the country where the Site is located owing to illness. During hospitalisation in the country where the Site is located the hourly rates shall be reduced to such special rates mentioned in MD's general rates for personnel valid at the date of the provision of the Services. If it is necessary for the incapacitated Specialist Personnel to return home, the travelling costs including allowance and hourly rates for the travelling time shall be borne by the Customer.

6.7 For Services rendered abroad, any costs arising in connection with illness or accidents, e.g. costs of medical treatment, hospital care or similar treatment, and medicine, shall be borne by the Customer.

## 7 WARRANTY

7.1 MD warrants for a period of 6 months from the date the Goods were delivered or the Services rendered, that such Goods and/or Services are free from substantial defects in materials or manufacture and that such Services were carried out with reasonable skill and care.

7.2 All conditions, warranties or other terms whether express or implied, statutory or otherwise, inconsistent with Condition 7.1, are hereby expressly excluded to the fullest extent permitted by law.

7.3 The warranty given in Condition 7.1 will not apply:

- where the defect complained of arises from any drawing, design, specification or intellectual property right supplied by the Customer or arises from normal wear and tear, wilful damage, the Customer's negligence, abnormal working conditions, or misuse or alteration or repair of the Goods without MD's approval or arises from any failure to follow MD's advice (whether oral or in writing or whether relating without limit to the fabrication, operation, use or maintenance of the Goods);
- if MD or its agent is not given a reasonable opportunity to safely inspect the Work;
- if the total price for the Goods or Services has not been paid by the due date for payment;
- if the damage was caused by the Customer's personnel;
- if the Goods supplied by MD are mounted in a MD engine for which the Customer has also used unoriginal parts (i.e. parts which have not been supplied through MD

- or through a MD licensee), in which case MD does not assume any liability for any damage which may arise.
- 7.4 The obligations of MD under the Contract are limited such that in the event of a breach by MD of the warranty in Condition 7.1 or any defect in any Goods or Services MD shall only be obliged (and shall have no further liability in contract, negligence or otherwise for any defect in quality of the Goods and/or Services) at its option either to:
- credit the price (if already paid) attributable to the faulty Goods or Services; or
  - repair, rectify or replace the faulty Goods or Services
- provided that such Goods are returned to MD in their delivered state at the Customer's expense if so requested by MD within 12 months from the date of their delivery. MD shall especially not be responsible for offloading of cargo and/or any precondition works necessary to repair and/or rectify the defect. Condition 7.4 shall be the Customer's only remedy and in lieu of any other rights and remedies which might otherwise be available to the Customer. Any replacement Goods will be warranted on the terms set out in this Condition 7.
- 8 FORCE MAJEURE**
- 8.1 In case of Act of God, labour disputes, civil commotion, governmental or official actions, war, acts of terror or any other event which was unforeseeable or outside the reasonable control of the Party affected, the Parties shall be temporarily relieved from their obligations during the period of time such events continue and to the extent their liabilities are affected. The afore-stated shall also be applicable to MD if a sub-supplier of MD is affected by such event and/or in case the Party concerned is already in default.
- 8.2 The Parties are committed to give each other the necessary information which may reasonably be expected without delay, and to adjust their obligations in good faith to the changed circumstances.
- 9 INTELLECTUAL PROPERTY RIGHTS AND CONFIDENTIALITY**
- 9.1 The Customer shall not, under any circumstances acquire any right in or to any of the IPRs (including, without limitation, copyright) subsisting in, resulting from or relating to Work, or any plans, descriptions, blue-prints, designs, technical information, software, documents, drawings and/or specifications relating thereto either (a) supplied by or on behalf of MD to the Customer in connection with Work, or (b) resulting from the Work, unless otherwise expressly agreed by MD in writing. If the Customer shall in any way acquire any such rights then the Customer shall immediately inform MD and shall forthwith take such steps as may be required by MD to assign such rights or vest such title in MD.
- 9.2 MD shall have the right to apply any trademarks, trade names and/or service marks to the Goods. The Customer acknowledges that no rights are granted to the Customer by the use by the Customer of such trademarks, trade names and/or service marks. The Customer shall not deface, remove or obliterate any trademarks, trade names or logos applied by MD on or in relation to the Goods.
- 9.3 The Customer shall keep confidential and not use, without the prior written consent of MD, all or any information including without limit, those supplied by MD to the Customer or disclosed to or obtained by the Customer pursuant to or as a result of the Contract, and shall not divulge the same to any third party except to the extent that any such information is or becomes public through no fault of the Customer, or disclosure of the same is required by law or by any other governmental or other regulatory body.
- 9.4 In the event that MD bases the production of the Goods on its own specifications, MD shall under the exclusion of any further liability warrant that such Goods do not interfere with IPRs published in USA and/or by the European Patent Office. This shall not apply, if MD has manufactured the Goods in accordance with drawings, models or other equivalent descriptions or information provided by the Customer. As far as MD is not liable pursuant to this Conditions 9.4, the Customer shall release MD from all third-party claims. In case an infringement of such third parties' IPRs appears to emerge, the Parties will enter into negotiations with due consideration of such situation and jointly agree on the consequences.
- 10 LIMITATION OF LIABILITY**
- 10.1 Nothing in these Conditions shall exclude or limit the liability of MD for death or personal injury or damage to other property than the Goods, caused by MD's negligence or fraudulent misrepresentation.
- 10.2 A liability for compensation does, in general, only exist in case MD was at fault when causing the damage.
- 10.3 MD shall not be liable to the Customer in contract, tort, law or otherwise howsoever and whatever the cause thereof, (i) for any loss of profit, hire, business contracts, revenues or anticipated savings, financial or economic loss, loss of opportunity or (ii) for damage to the Customer's reputation or goodwill, or (iii) for any loss resulting from any claim made by any third party, or (iv) for any special, indirect or consequential loss or damage of any nature whatsoever and none of these shall be included in any direct damage claim.
- 10.4 Without prejudice to Conditions 3.6, 10.1 and 10.3 MD's total liability for each Order in contract, tort, law or otherwise shall be limited to the value of that Order.
- 11 STATUTE OF LIMITATIONS**
- The statute of limitations applicable to any other claims of each Party against the other besides warranty claims, to which Conditions 7.1 above shall apply, shall be 24 months after delivery of the Goods to the Buyer.
- 12 TERMINATION**
- 12.1 If the Customer fails to make any payment when due or to perform any of its other obligations on time, MD shall be entitled to suspend its performance of the Contract until the failure is remedied; and regardless of whether MD elects to suspend performance:
- the time for performance of the Contract by MD shall be automatically extended accordingly; and
  - any cost (including financial costs and storage, demurrage or other charges) thereby incurred by MD shall be paid by the Customer.
- 12.2 Without prejudice to any of its other rights MD may immediately terminate the Contract if any of the following occurs or is likely to occur:
- suspension under Condition 11.1 continues for more than 120 days;
  - the Customer is in breach of any of its obligations under the Contract which, if capable of remedy, the Customer has not remedied within 30 days of receiving written notice from MD; or
  - the Customer is wound up or becomes insolvent or has a receiver or administrative receiver appointed or any equivalent or analogous event occurs in any other jurisdiction or the Customer ceases or threatens to cease to carry on business or otherwise is unable to pay its debts when they fall due.
- 12.3 Upon termination, howsoever arising, MD shall be entitled forthwith to suspend any further work under the Contract without any liability to the Customer. Without prejudice to MD's other remedies under the Contract, within 14 days of such a notice of termination, howsoever arising, the Customer shall pay to MD:
- the outstanding balance of the Contract price of the Work which has been delivered or performed, and
  - the costs incurred or committed by MD up to the date of notice of termination in performing such work which is not yet completed plus a reasonable margin to be agreed between the Parties which shall not be less than 15% of the Contract price, and
  - the costs reasonably incurred by MD as a result of the termination.
- 12.4 Termination, expiry or completion of the Contract or any part of it, shall not affect or prejudice the provisions of Conditions 9, 10, 12, 13 and 14.
- 13 BUYER'S OBLIGATIONS**
- 13.1 The Customer shall provide the Specialist Personnel with assistance in obtaining official entry, exit or working permits required in the country where the Services are to be carried out and ensure that they have free access to the Site.
- 13.2 The Customer shall provide the Specialist Personnel with unobstructed and safe access to the Site to enable them to perform the Work in accordance with the Contract.
- 13.3 The Customer shall be responsible for ensuring the health and safety of the Specialist Personnel whilst on the Site. The Customer shall take appropriate measures to protect the Specialist Personnel from risks associated with lone working, working in confined spaces and with substances hazardous to health. When MD is to carry out the Work on the Site, the Customer shall make available and bear the costs of an adequate number of fitters, local transport, lifting gear, towing, dockage, supply of electricity and similar supplies.
- 13.4 MD may, at its sole discretion, refuse to perform the Services in conditions or surroundings that it considers may be prejudicial to the health and/or safety of its Specialist Personnel and/ or where the Customer is in breach of this Conditions 12 and MD shall not be liable under the Contract for any delay in or failure of delivery in such event.
- 13.5 The Customer shall assume all responsibility for all acts or omissions of the Customer's personnel and MD shall have no liability with respect thereto.
- 13.6 The Customer shall provide all tools, test equipment and test facilities unless specifically stated otherwise in the Contract. Where MD does supply tools, the Customer shall give all necessary assistance with the customs formalities required for the import and re-export of MD's tools and equipment free of all customs and taxes.
- 13.7 The Customer shall to the best of its ability assist MD in obtaining all necessary information concerning such local laws and regulations as are applicable to MD's performance of the Services.
- 13.8 The Customer shall specify a firm delivery address for the ordered Goods at least within 3 weeks after receipt of MD's written confirmation of the date of readiness for dispatch. In case Customer fails to do so, MD is entitled to sell the Goods selected for delivery to the Customer to a third party and to set forth a new delivery time to be forwarded to the Customer for information. In such case the Customer is not entitled to claim liquidated damages according to Condition 3.6.
- 13.9 On MD's request the Customer shall undertake to arrange suitable accommodation for the Specialist Personnel and to assist in procuring food for the Specialist Personnel. The provision of board and lodging for the Specialist Personnel shall be at the Customer's expense.
- 13.10 If suitable accommodation cannot be obtained in the neighbourhood of the Site, the time for travelling between the lodgings and the Site will be charged as working time whenever the distance is greater than 3 km. In the event of the Specialist Personnel using public transport, the costs incurred thereby shall be borne by the Customer. The same shall apply to the transportation of equipment and other utilities necessary to perform the Services.
- 14 GENERAL**
- 14.1 MD and the Customer shall only be entitled to assign or sub-contract any of its rights or the obligations under the Contract with the prior written consent of the other Party.
- 14.2 If any term, clause, condition or part of these Conditions is found by any court, tribunal, administrative body or authority of competent jurisdiction to be illegal, invalid or unenforceable then that provision shall, to the extent required, be severed from these Conditions and shall be ineffective without, as far as is possible, modifying any other provision or part of these Conditions and this shall not affect any other provisions of the Contract which shall remain in full force and effect. The Parties are committed to replace the invalid provision by another - with respect to the commercial effect - equivalent provision, in so far as this is possible.
- 14.3 The Contract and these Conditions shall be construed in accordance with and governed in all aspects by the laws of New South Wales, Australia, however, excluding the rules of conflicts of law. The Convention of the United Nations of 11.4.1980 on Contracts for the International Sale of Goods shall apply, even if the preconditions of its Art. 1 (1) are not fulfilled.
- 14.4 All disputes arising out of or in connection with the Contract and these Conditions, including any question regarding their existence, validity or termination, shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris (ICC), by three arbitrators, appointed under such rules. The arbitration proceedings shall take place in Sydney, Australia. The procedural law of this place shall apply where the Rules are silent.
- Each Party shall nominate one arbitrator for confirmation by the competent authority under said rules. Both arbitrators shall agree on the third arbitrator within 30 days. Should the two arbitrators fail, within the above time-limit, to reach agreement on the third arbitrator, he shall be appointed by the ICC. The language to be used in the arbitration proceeding shall be English.