



AFDS CONTRACT TERMS AND CONDITIONS

(9 April 2009)

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These terms and conditions are the terms on which AFDS is prepared to perform work on your behalf. If you agree to use the AFDS then you agree to the terms and conditions below. Words used in these terms and conditions are defined at clause 37.

1. WORKS

- 1.1 AFDS shall supply all labour, materials and plant necessary for the carrying out of the Works, including the design and installation of the piles, in accordance with the Contract Documents on the terms set out herein and in the Quotation.
- 1.2 All piles shall be designed and installed within the tolerances specified in the Quotation, if any.
- 1.3 AFDS will do all things reasonably necessary to minimise the risk of loose material falling down pile holes before or during construction.

2. WARRANTIES

- 2.1 AFDS warrants that:
 - (a) the Works will be carried out in a proper and workmanlike manner and in accordance with the Contract Documents,
 - (b) all materials supplied by AFDS will be good and suitable for the purpose for which they are used and that, unless otherwise stated in this Contract, those materials will be new, and
 - (c) it holds all licenses, if any, required to carry out the Works.

3. HEALTH AND SAFETY

In carrying out the Works, AFDS and its agents and employees shall observe all relevant Occupational Health and Safety Laws.

4. EXCLUDED ITEMS

The Client and AFDS agree that the items set out in the Quotation as Exclusions, if any, are excluded from this Contract.

5. COMMENCEMENT OF WORKS

- 5.1 AFDS shall not be required to commence the Works until the Client:
 - (a) provides evidence that it is the owner of the site or contracted builder of the works to be carried out on the Site,
 - (b) provides a copy of any Development Approval required in respect of Works, if any, and
 - (c) has paid the Deposit in accordance with clause 13.

6. ACCURACY OF CONTRACT DOCUMENTS

- 6.1 The party responsible for the preparation of a Contract Document warrants that it is accurate and correct.
- 6.2 In the event of any inconsistency between the Contract Documents, or any detail not being given, AFDS shall give notice to the Client detailing the problem. The Client must within two (2) Business Days of receiving such notice give written instructions as to how AFDS is to proceed with the Works.
- 6.3 In the event that the Client refuses or fails to give written instructions to AFDS within two (2) Business Days of a notice pursuant to Clause 6.2, the Client authorises AFDS to determine the required detail necessary to resolve the error, ambiguity or inconsistency.
- 6.4 If the required detail, as determined by the Client or AFDS necessitates a change to the scope of the Works, that work is deemed to be a Variation.
- 6.5 In relation to a document that is; supplied by, prepared under the instruction of, or prepared from sketches provided by, the Client, the Client indemnifies AFDS from all costs, expenses, losses or

damages that are incurred by AFDS relating to or as a consequence of any claim for breach of copyright arising from AFDS carrying out the Works in accordance with that document.

7. BUILDING APPROVALS

- 7.1 The Client must obtain and pay for all building approvals necessary for the Works.
- 7.2 The Client must obtain and give copies of the building approvals to AFDS promptly.
- 7.3 If the requirements of any statutory or other Authority necessitate a change to the Works AFDS must carry out the works to effect that change and that work is deemed to be a Variation.

8. SITE POSSESSION, ACCESS, SERVICES AND MATERIALS

- 8.1 The Client warrants that it has exclusive possession of the Site to carry out works including the Works.
- 8.2 The Client must provide all weather access to the Site for delivery of materials. If the Client does not provide all weather access, AFDS may carry out any work required to achieve such access and that work is deemed to be a Variation.
- 8.3 The Client must not:
 - (a) hinder AFDS's access or possession of the Site for the purposes of carrying out the Works,
 - (b) hinder the progress of the Works, or
 - (c) make inquiry of, issue directions to, or give instructions to, AFDS's workers or subcontractors. Communications must only be with AFDS's nominated person.
- 8.4 The Client may only have access to the Works at reasonable times and after giving reasonable prior notice for the purposes of inspecting the progress of the Works.
- 8.5 The Client must supply electricity and water, at its expense, for AFDS to use in carrying out the Works.
- 8.6 All materials delivered to site by AFDS and not required for the Works will remain the property of AFDS.

9. PRODUCT DATA

- 9.1 Where any products are referred to in the Contract Documents, if requested, AFDS will:
 - (a) obtain from the relevant manufacturer, certification, technical specifications, recommendations for installation, type test or factory test data and warranty information relating to the products intended purpose and required performance for the Works, and
 - (b) arrange for a representative of the relevant manufacturer to visit the Site during construction of the Works to certify in writing that the Works have been carried out in accordance with the manufacturer's requirements.

10. AFDS SUBMISSIONS

- 10.1 If requested, AFDS will submit:
 - (a) Manufacturer's data: published product data, including technical specifications, recommendations for installation and type test or factory test data,
 - (b) Product warranties: The manufacturer's written statement certifying that the product complies with the specification and is suitable for the intended use,
 - (c) Construction Program: program showing proposed pile installation schedule, and

- (d) Details of the proposed piling methods, equipment and sequence.

11. CONTRACT PRICE

- 11.1 The Client shall pay the Contract Price and other money that becomes payable under this Contract in the manner and at the times stated in this Contract.

12. GST

- 12.1 The Contract Price and all other monies payable by the Client pursuant to this Contract are exclusive of GST unless otherwise stated.
- 12.2 If AFDS incurs a liability to pay GST in connection with a supply to the Client pursuant to this Contract, the consideration that the Client must pay to AFDS for the supply is increased by an amount equal to the GST liability that AFDS incurs in making the supply and the amount of the GST liability is payable at the same time and in the same manner as the consideration in respect of the supply is payable.
- 12.3 AFDS shall provide the Client with a tax invoice for any GST included in any payment made pursuant to this Contract.

13. DEPOSIT

- 13.1 The Client must pay to AFDS a deposit equal to 10% of the Contract Price plus GST at least seven (7) before the Works are due to commence.

14. VARIATIONS

- 14.1 A Variation occurs if:
- this Contract deems a Variation, or
 - the Client and AFDS agree in writing to a Variation, including agreement as to the price of the Variation.
- 14.2 Subject to clause 14.4, AFDS will notify the Client in writing as soon as reasonably possible after it becomes aware that a Variation exists and may not carry out any work the subject of the Variation unless the Client has approved the Variation in writing.
- 14.3 Without limitation, AFDS shall be entitled to a Variation for any work carried out or costs incurred due to a request by the Client pursuant to clause 9.1, 10.1, 15.1, 19.1 or 20.2.
- 14.4 If there is insufficient time to calculate the price of a Variation, or this Contract deems a Variation, the cost of the Variation will be based on AFDS's standard hourly rate, per meter rate (piercing) or square meter rate (sheet piling) as the case may be.
- 14.5 Variations will be invoiced separately to Progress Claims in relation to the Contract Price. AFDS may issue a Payment Claim in relation to a Variation on any date that it is entitled to issue a Progress Claim.
- 14.6 The price of a Variation is due and payable at the next Progress Payment after it is carried out unless a different time is agreed.
- 14.7 Notwithstanding any other clause herein, AFDS is under no obligation to carry out any Variation requested by the Client.

15. SETTING OUT

- 15.1 If requested, AFDS will:
- engage a licensed surveyor to peg the position of each pile and to establish a grid of recovery pegs to enable the setting out to be checked, and
 - following completion, submit a Surveyor's Certificate to the Client certifying that the piles are set out in accordance with the Contract Documents.
- 15.2 AFDS will notify the Client promptly if for any reason it considers that:
- the piles cannot be installed at the locations shown in the Contract Documents, or
 - the piles could not be guaranteed to meet the requirements of relevant specifications, if any, if they piles are installed at the locations shown in the Contract Documents.

16. SITE CONDITIONS & REPORTING

- 16.1 AFDS shall be entitled to a Variation:
- where the ground conditions at the Site is found to be different to that described in the Geotechnical Investigation Report referred to in the Quotation, if any,
 - where no Geotechnical Investigation Report is referred to in the Quotation, the ground conditions at the Site is affected by such things as, but not limited to:
 - the existence of rock,
 - ground subsidence,
 - underground cavities,
 - underground water,
 - surface water, or
 - any other unknown ground condition, or
 - where AFDS encounters any unexpected subsurface obstruction.
- 16.2 AFDS will notify the Client promptly if it encounters:
- ground conditions that would entitle AFDS to a Variation pursuant to clause 16.1,
 - ground conditions that would adversely affect the design of the piles or founding depth for the piles in a material way, or
 - subsurface obstructions and will include a proposal(s) for methods of overcoming the obstruction.

17. RECORDS

- 17.1 For sheet piling and piercing works AFDS will keep records of:
- length of pile – the length from the underside of the pile cap or foundation beam to the toe of the pile, and
 - ground level – the level of the surrounding ground at the time when the pile was installed.
- 17.2 The Client must sign an equipment log which will be supplied by AFDS for approval daily.

18. INSPECTIONS

- 18.1 For sheet piling and piercing works, where the Client notifies AFDS in writing that the Works are to be inspected by an engineer or other representative of the Client at any stage(s), AFDS shall give prior notice to the Client to allow a reasonable opportunity for the inspection(s) including at the following stages, where relevant:
- setting out of pile locations,
 - piles and piling materials after delivery to Site but prior to installation,
 - upon completion of installation of piling,
 - following preparation of pile heads,
 - following completion of pile load testing, and
 - in respect of concrete piles:
 - after assembly but before installation of reinforcement cages,
 - before placing reinforcements for excavated shafts, casings and sockets,
 - before concreting excavated shafts, casings and sockets, and
 - following completion of concreting of piles.
- 18.2 If the Client requests that any part of the Works be carried out ahead of any agreed construction program for the purpose of an inspection AFDS shall be entitled to a Variation for any additional costs resulting from the performance of the request.

19. TESTING

- 19.1 If requested, AFDS will:
- (a) arrange for pile loads to be tested at recommended intervals, and
 - (b) forward the results of all pile load testing to the Client promptly.
- 19.2 Where any pile load test fails AFDS will not carry out any further part of the Works without the Client's instruction.

20. ADJOINING PROPERTIES

- 20.1 If any damage is caused to any property adjoining the Site during the course of the Works AFDS will:
- (a) cease piling operations,
 - (b) give prompt notice of the damage to the Client, and
 - (c) arrange a joint inspection with the Client and the owners and occupants of the adjoining property:
 - (i) before recommencing the piling works, and
 - (ii) following completion of the piling works.
- 20.2 If requested, AFDS will make and keep detailed records of relevant conditions existing within the adjoining properties (including structural defects and damage of defacement) at the time of initial inspection.

21. ACKNOWLEDGEMENT OF POSSIBLE DELAYS

- 21.1 The Client acknowledges that completion of the Works may be suspended by AFDS pursuant to Clause 29 or delayed by any cause beyond the control of AFDS including:
- (a) any engineering or architectural design changes;
 - (b) where circumstances exist which entitle AFDS to a Variation pursuant to clause 16,
 - (c) where any pile load test fails,
 - (d) if damage is caused to any property adjoining the Site or any existing culvert,
 - (e) a Variation or a request by the Client for a Variation,
 - (f) an act of God, fire, explosion, earthquake or civil commotion,
 - (g) any weather condition that, in the reasonable opinion of AFDS, prevents work from being carried out in the usual manner,
 - (h) an industrial dispute,
 - (i) anything done or not done by the Client,
 - (j) delays in getting any approvals,
 - (k) the delay in the supply of materials,
 - (l) the period known as "Building Industry Shutdown" being a five (5) week period commencing on or about 22 December in each year,
 - (m) the Contract Documents not being fully completed or made available to AFDS by the date of this Agreement.

- 21.2 Where the costs of the Works has increased due to any delay beyond the control of AFDS, AFDS is entitled to a reasonable increase in the Contract Price.

22. PROGRESS CLAIMS

- 22.1 AFDS may issue a Progress Claim in respect of work carried out by AFDS to the relevant date in accordance with this contract on or after:
- (a) the 1st and 15th days of each month, and
 - (b) when in AFDS's opinion the Works have reached the stage of Practical Completion.
- 22.2 The Client must pay the Contract Price progressively as claimed by AFDS within seven (7) days of service of a Progress Claim on the Client, unless otherwise agreed in writing.
- 22.3 AFDS may serve a Progress Claim on the Client by any method that it is entitled to give notice under this Contract.

- 22.4 The Client may only provide AFDS with a Payment Schedule in relation to Progress Claim within five (5) Business Days of the date of service of the Progress Claim, unless otherwise agreed in writing.
- 22.5 If the Client fails to pay any Progress Claim when due, the Client must pay interest on the amount of such Progress Claim at the rate of 15% per annum calculated from the due date for payment of the relevant Progress Claim up to and including the day that the Progress Claim is paid and compounding on the first day of each calendar month.

23. WORKING HOURS

- 23.1 The Contract Price has been agreed on the basis of AFDS performing the Works during the following times:
- (a) 7:00am to 3:30pm weekdays, and
 - (b) 7:00am to 1:00pm Saturdays.
- 23.2 Where no construction program was provided to AFDS prior to the date of the Quotation, AFDS will be entitled to a Variation if the Works are required to be carried out outside the above working hours to comply with any subsequent construction program.

24. SHEET PILING RENTAL & SACRIFICIAL RATES

- 24.1 Where the Works include the supply of sheet piling, if the Quotation says that the Contract Price includes a period of rental for sheet piling AFDS will supply the sheet piling for the period stated in the Quotation.
- 24.2 Subject to clause 24.1, in addition to the Contract Price the Client shall pay to AFDS:
- (a) rent for the sheet piling supplied by AFDS at the Rental Rate, and
 - (b) compensation for any damage resulting to the sheet metal at the Sacrificial Rate.
- 24.3 AFDS will invoice the Client for any money payable pursuant to this clause separately to Progress Claims in relation to the Contract Price. AFDS may issue a Payment Claim in relation to a money payable pursuant to this clause on any date that it is entitled to issue a Progress Claim.

25. STAND DOWN TIME

- 25.1 AFDS shall be entitled to payment from the Client at the Standby Rates specified in the Quotation for any Stand Down Time.
- 25.2 Charges for Stand Down Time will be invoiced separately to Progress Claims in relation to the Contract Price. AFDS may issue a Payment Claim in relation to Stand Down Time charges on any date that it is entitled to issue a Progress Claim.

26. INSURANCES

- 26.1 AFDS must take out prior to commencing, and maintain until completion of the Works, insurance against:
- (a) Public Liability for an amount of not less than \$20,000,000.00,
 - (b) Machinery insurance – industrial special plan, and
 - (c) All other losses in respect of which AFDS is required to maintain insurances by law.
- 26.2 AFDS must comply with all obligations under Workers Compensation Legislation.
- 26.3 AFDS must, when asked by the Client, produce evidence of the existence and currency of any of the above insurance policies.

27. PRACTICAL COMPLETION

- 27.1 AFDS will give notice to the Client of Practical Completion of the Works within five (5) Business Days of Practical Completion. A Progress Claim claiming the total Contract Price or the unclaimed balance of the Contract Price shall be deemed to be notice of Practical Completion of the Works.
- 27.2 If the Client disagrees that the Works have reached the stage of Practical Completion the Client must notify AFDS in writing within five (5) Business Days of the notice of Practical Completion stating the reasons why the Works are not practically complete. AFDS shall as soon as practicable after receipt of such notice:

- (a) complete those things as may be necessary to bring the Works to the stage of Practical Completion and give the Client a further notice of Practical Completion, or
 - (b) reject the Client's notice and/or initiate dispute resolution procedures.
- 27.3 If the Client fails to give a notice pursuant to Clause 27.2, the Client is deemed to have acknowledged that the Works have reached the stage of Practical Completion.
- 27.4 AFDS is not required to obtain any Certificate of Occupancy or Construction Certificate relating to the Works.

28. SUBCONTRACTING AND ASSIGNMENT

- 28.1 AFDS may subcontract the whole or any part of the Works but remains responsible for all of the Works.
- 28.2 Neither party may assign this Contract without the prior written consent of the other party.

29. SUSPENSION

- 29.1 If the Client is in breach of this Contract AFDS may suspend the carrying out of the Works.
- 29.2 AFDS must give to the Client written notice of the suspension and details of the breach.
- 29.3 AFDS must recommence the carrying out of the Works within a reasonable time after the Client remedies the breach and gives AFDS written notice of that fact.

30. DISPUTE RESOLUTION

- 30.1 If a dispute arises then a party may give written notice to the other party setting out the matter in dispute.
- 30.2 AFDS and the Client must meet within ten (10) Business Days of the giving of a notice pursuant to Clause 30.1 to attempt to resolve the dispute or to agree on methods of doing so.
- 30.3 If the dispute is resolved the parties must write down the resolution and sign it.
- 30.4 The parties agree that anything done or said in the negotiations can not be revealed in any other proceedings.
- 30.5 Nothing in this clause affects the rights of the parties pursuant to *The Building and Construction Industry Security of Payments Act 1999*.

31. TERMINATION OF CONTRACT

- 31.1 If a party is in default of this Contract the other party may give the party in breach a written notice stating:
- (a) details of the breach, and
 - (b) that, if the breach is not remedied within ten (10) Business Days, the party is entitled to terminate this Contract.
- 31.2 If the breach is not remedied by the party in breach within ten (10) Business Days of notice of default being given, the party giving the notice of default may end this Contract by giving a further written notice to that effect.
- 31.3 If AFDS ends this Contract pursuant to this clause then, at the election of AFDS, the Client must pay as a debt due and payable either:
- (a) the greater of the costs of or the market value of the Works to the date of termination (including the costs of any materials on the Site or already ordered from suppliers) and the costs of quitting the Site less any amount already paid by the Client, or
 - (b) Damages.
- 31.4 A party is in default of this Contract if it:
- (a) is in substantial breach of this Contract,
 - (b) becomes insolvent, bankrupt or makes an assignment of that party's estate for the benefit of creditors,
 - (c) makes an arrangement or composition with creditors, or
 - (d) being a company goes into liquidation.

32. GUARANTEE

- 32.1 In consideration for AFDS entering into this Contract at the request of the Guarantor, the Guarantor guarantees to AFDS the performance by the Client of all of the Client's obligations under this Contract including any variation.
- 32.2 If the Client does not pay any money due under this Contract the Guarantor must pay that money to AFDS on demand without deduction, set-off or counterclaim even if AFDS has not tried to recover payment from the Client.
- 32.3 Even if AFDS gives the Client extra time to comply with an obligation under this Contract or does not insist on strict compliance with the terms of this Contract the Guarantor's obligations will not be affected.
- 32.4 Where a payment made by the Client or the Guarantor to AFDS is set aside by law, the parties are restored to their respective positions prior to the payment being made and are entitled to exercise all rights which they had under this Contract.
- 32.5 If there is more than one Guarantor:
- (a) this guarantee shall be binding on each of them jointly and severally, and
 - (b) the release by AFDS of any Guarantor from this guarantee does not affect the liability of any other Guarantor.
- 32.6 The Guarantor's liability under this clause is unlimited.
- 32.7 This guarantee is a continuing guarantee.

33. LIMITATION OF LIABILITY

- 33.1 AFDS's liability to the Client (and any party claiming through the Client against AFDS) for any claim for loss or damage (including legal expenses), whether arising in contract, tort or otherwise, in connection with this Contract shall be as follows:
- (a) where the liability relates to the supply of goods, AFDS's liability shall be limited to the lesser of the cost of:
 - (i) replacement of the goods or the supply of equivalent goods,
 - (ii) repair of the goods,
 - (iii) payment of the costs of replacing the goods or acquiring equivalent goods, or
 - (iv) payment of the costs of having the goods repaired, or
 - (b) where the liability relates to the supply of services, AFDS's liability shall be limited to the lesser of the costs of:
 - (i) supplying the services again, or
 - (ii) payment of the costs of having the services supplied again.

- 33.2 AFDS shall not be liable for any indirect, special or consequential loss or damage of any nature whatsoever resulting from or caused in any way by the carrying out of the Works.

34. DEBT COLLECTION AND OTHER COSTS

- 34.1 The Client must pay to AFDS any debt collection costs, including legal fees and costs associated with recovery or attempted recovery, of any money payable under this Contract.
- 34.2 If, after this Contract is entered into, a statutory or other Authority introduces or increases:
- (a) any tax, charge, levy or other regulation, or
 - (b) any requirement that affects the Works,
- that causes any increase in the costs of the Works then the Contract Price shall be adjusted accordingly.
- 34.3 Upon completion of the Works the Client must indemnify AFDS for any increases in the base costs of its equipment, labour or other expenses due to:
- (a) the Client delaying commencement of the Works, or
 - (b) completion of the Works being delayed otherwise than as a result of the default of AFDS.

35. NOTICES

35.1 A notice is deemed to be have given or serviced if the notice is:

- (a) delivered by hand to the other party,
- (b) posted by ordinary prepaid mail to the other party's address stated in the Quotation on the second Business Day following the date of posting, or
- (c) sent by facsimile transmission to the parties' facsimile number stated in the Quotation upon receiving confirmation of delivery of the transmission,
- (d) sent by email to the parties' email address stated in the Quotation upon receiving confirmation of delivery of the email without error, or
- (e) where the Client has nominated a Superintendent or other representative, if the notice is served on the Superintendent or representative, as the case may be, in any of the methods described above.

36. MISCELLANEOUS

36.1 This Contract may be entered into by any number of counterparts all of which taken together shall constitute one instrument.

36.2 This Contract shall be governed by and constructed pursuant to the laws of New South Wales and the parties agree to submit to the jurisdiction of the Courts of New South Wales in connection with any dispute relating to this Contract.

36.3 If a provision of this Contract would, but for this clause, be unenforceable:

- (a) the provision must be read down to the extent necessary to avoid that result, or
- (b) if the provision cannot be read down to that extent it must be severed without altering the validity and enforceability of the remainder of the Contract.

36.4 Except as otherwise provided elsewhere in this Contract, none of the terms in this Contract may be varied, waived, discharged or released, except with the prior written consent of both parties.

37. DEFINITIONS

In this Contract:

- (a) "AFDS" means A.F.D.S. - Australian Foundation Drilling & Shoring Pty Limited ACN 124 729 951, it's successors and assigns;
- (b) "Authority" means the Local Government, State or Federal Government, or any Government agency that has power to affect the Works;
- (c) "Business Day" means any day other than Saturdays, Sundays or public holidays;
- (d) "Client" means the party named as the Client in the Quotation and includes the Client's nominated Superintendent, if any, agents, employees and invitees;
- (e) "Contract" means the Agreement between the Client and the AFDS arising from the Client's acceptance of the Quotation and set out in the Contract Documents;
- (f) "Contract Documents" means these terms and conditions, any special conditions, the Quotation, the Plans (or measurements) and the Specifications;
- (g) "Contract Price" means the amount stated as the price in the Quotation;
- (h) "Exclusions" means the exclusions described in the Quotation;
- (i) "Guarantor" means the person or persons who have signed this Contract as guarantor and includes their executors, administrators, successors and assigns;
- (j) "GST" has the same meaning as given to it in the A New Tax System (Goods and Services Tax) Act 1999.

- (k) "Payment Schedule" means a Payment Schedule as defined in *The Building and Construction Industry Security of Payment Act 1999*;
- (l) "Practical Completion" means when the Works are complete except for minor omissions and defects that do not prevent the Works from being reasonably capable of being used for their usual purpose;
- (m) "Progress Claim" means both a tax invoice as defined in the *A New Tax System (Goods and Services Tax) Act 1999* and a Payment Claim as defined in *The Building and Construction Industry Security of Payment Act 1999*;
- (n) "Quotation" means the estimate provided by AFDS and accepted by the Client in respect of the Works;
- (o) "Rental Rate" means the rate(s) for sheet piling rental specified in the Quotation, if any;
- (p) "Sacrificial Rate" means the rate(s) for damage to sheet piling specified in the Quotation, if any;
- (q) "Site" means the address at which the Works are to be carried out as specified in the Quotation;
- (r) "Stand Down Time" means any time that equipment and/or employees or contractors used by AFDS are not able to be used to perform the Works as a result of any:
 - (i) Variation,
 - (ii) requirement or direction of the Client,
 - (iii) valid suspension of works pursuant to clause 28, or
 - (iv) other delay beyond AFDS's control,
 and during which time AFDS would have otherwise used the equipment and/or labour to perform the Works;
- (s) "Variation" means to vary the Works by:
 - (i) carrying out additional work,
 - (ii) omitting any part of the Works,
 - (iii) changing the scope of the Works.
- (t) "Works" means the works described in the Quotation as shown in the Contract Documents and including variations but excluding the Exclusions.