



## **POL-44**

# Dry Hire Purchase Order Terms and Conditions

Rev 1.0



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## Terms and Conditions of Dry Hire

### 1 Agreement

#### 1.1 Documents and Order of Precedence

- (a) These terms and conditions apply when CEM issues a Dry Hire Purchase Order to the Supplier upon which a Dry Hire Agreement is formed which consists of the following documents:
- (1) *the Dry Hire Purchase Order;*
  - (2) *these terms and conditions; and*
  - (3) *subject to subparagraph 1.2(b) below, any document which is expressly incorporated by CEM by reference or as an attachment to the Dry Hire Purchase Order.*
- (b) If there is any inconsistency, ambiguity or conflict between the provisions of the above documents forming the Dry Hire Agreement then, unless otherwise stated, the documents take precedence in the order detailed under clause 1.1(a) above.

#### 1.2 Other terms and conditions

- (a) The terms of the Dry Hire Agreement will apply in lieu of any terms and conditions to any general purchase order issued by CEM for the Equipment and/or Operator.
- (b) To the extent the Supplier's terms and conditions are supplied to CEM (including as printed on quotes, consignment notes or other documents), those terms and conditions will have no legal effect and will not constitute part of the Dry Hire Agreement, even if a representative of CEM signs those terms and conditions or annexes the terms and conditions to the Dry Hire Purchase Order. The inclusion of the Supplier's quote number or quote details in the Dry Hire Purchase Order is for convenience only and does not incorporate the terms of that quote into the Dry Hire Agreement.

#### 1.3 Acceptance of terms and conditions

Upon receipt of a Dry Hire Purchase Order, unless otherwise specified in the Dry Hire Agreement, the commencement of performance under the Dry Hire Agreement by the Supplier (including, without limitation, by delivery of the Equipment) will constitute its acceptance of the Dry Hire Agreement.

### 2 Hire of Equipment

#### 2.1 Hire

- (a) On and from the Commencement Date, the Supplier hires to CEM and CEM takes on hire from the Supplier, the Equipment for the Term and on the terms and conditions contained in the Dry Hire Agreement.
- (b) On and from the Commencement Date Supplier will give and CEM will take possession of the Equipment.
- (c) CEM may vary the following terms from time to time by giving reasonable prior written notice to the Supplier:
- (1) *the length of the Term;*
  - (2) *the Mobilisation Address and/or Demobilise Address; and*
  - (3) *the type or quantity of the Equipment.*
- (d) Unless expressed otherwise within the Dry Hire Purchase Order, CEM is not bound to order or pay for the Equipment for any minimum period.

#### 2.2 Delivery

- (a) Unless agreed otherwise in writing between the parties, The Supplier is responsible at its cost for the packing and transporting the Equipment safely to the Mobilisation Address by the Hire Start Date.
- (b) Unless agreed otherwise in writing between the parties, the Supplier is responsible at its cost to collect the Equipment at the expiration or earlier termination of the Term at the Demobilise Address.

#### 2.3 Supplier's mobilisation obligations

- (a) The Supplier must complete the following by the Hire Start Date and as a precondition to entitlement to the Hiring Fee:
- (1) *deliver the Equipment to the Mobilisation Address;*
  - (2) *deliver to CEM all licensing and registration documentation to be provided under clause 7.2;*
  - (3) *deliver to CEM all insurance certificates to be provided under clause 8.3(b)(1);*
  - (4) *deliver to CEM any inspection checklist to be provided to CEM under clause 10.1(a); and*
  - (5) *provide CEM (and the Operator, as applicable) with all other documentation and information, and all induction and other training as may be reasonably necessary (including, without limitation, to satisfy all Legal Requirements) for the effective and safe operation and use of the Equipment by or for the benefit of CEM.*

- (b) Without limitation as to the remedies available to CEM under the Dry Hire Agreement or at law, the Supplier will be liable to CEM for any and all Loss suffered by CEM as a result of any delay in or failure to satisfy its mobilisation obligations under clause 2.3(a) (except to the extent the delay or failure is caused by CEM or its agents, employees or contractors).

## 3 Term and Suspension

### 3.1 Term

The Term commences on the Commencement Date and ends on the earlier of the date that the Dry Hire Agreement is terminated in accordance with its terms or the Hire End Date.

### 3.2 CEM's obligations on termination

On the termination of the Dry Hire Agreement, CEM must:

- pay the Supplier any amount due and payable under the Dry Hire Agreement; and
- surrender possession of the Equipment to the Supplier at the Demobilise Address, together with any necessary duly transferred certificate of registration or other documents relating to the title, operation or use of the Equipment.

### 3.3 Suspension

- CEM may suspend the Dry Hire Agreement in whole or part for any period that CEM considers will be necessary and reasonable for any reason, by notice in writing to the Supplier.
- Without limiting clause 3.4 below, if the suspension is directed for a reason other than a default of the Supplier, the Supplier will be entitled to claim payment for the Equipment being suspended but at the standby rate specified in the Dry Hire Purchase Order only (and the standard Hiring Fee will be suspended during the suspension period).
- The Supplier must recommence the supply of the Equipment suspended if and when directed by CEM.

### 3.4 No Fee During Stand Down

Unless expressly stated otherwise in the Dry Hire Agreement, CEM is not liable to pay any Hiring Fee (including any standby charges or other costs) for any period where the Equipment is stood down due to delays or other reasons beyond CEM's control including (but not limited to) inclement weather, industrial action, or events or circumstances caused or contributed to in any way by the Supplier or its employees, agents or contractors.

## 4 Hiring Fee and Payment

### 4.1 Hiring Fee

Unless otherwise specified in the Dry Hire Agreement, the Hiring Fee specified in the Dry Hire Purchase Order is:

- fixed and not subject to the rise or fall in costs;
- in Australian Dollars;
- exclusive of GST;
- inclusive of any costs associated with travel, transport, delivery, mobilisation and demobilisation with respect to the Equipment;
- inclusive of any ongoing costs for fuel, maintenance, spare parts, labour for servicing and other similar or applicable operation costs; and
- inclusive of all direct and indirect taxes, levies, duties, costs and charges, including but not limited to those related to the emission of greenhouse gases.

### 4.2 Payment

- The Supplier must issue an invoice to CEM each month for Equipment supplied under the Dry Hire Agreement up to and including the 25<sup>th</sup> day of the month. The invoice must be received no later than the last day of the month to be included in payment for that month. Invoices received after the last day of the month will be deemed to be for the following month.
- The amount claimed is to be calculated by reference to the rates or prices specified within the Dry Hire Purchase Order.
- Invoices must contain the following information:
  - the Dry Hire Purchase Order number to which the invoice relates (and the Dry Hire Purchase Order issued by CEM is the only instrument that will be recognised by CEM as authority for charging CEM for the Equipment);*
  - all necessary information required for it to constitute a valid invoice under the applicable taxation legislation and regulations;*
  - a detailed description of the amounts claimed and the goods and services provided in the month covered by the invoice; and*
  - any further verification or documentation in relation to the invoice as reasonably required by CEM to assess it.*



- (d) If CEM disputes any amount claimed by the Supplier in an invoice, it must notify the Supplier in writing within 28 days from its receipt of the relevant invoice.

*Any failure by CEM to issue the written notice with 28 days deems the invoice to be disputed in whole.*

- (e) All amounts paid to the Supplier are "on account" only and are not to be construed as CEM's acceptance of the Equipment or other goods or services provided or the amount paid.
- (f) Without prejudice to any other rights of CEM, CEM may deduct from any moneys which may be, or become, payable to the Supplier, any costs, expenses, losses or damages due to CEM from Supplier or which CEM has incurred or reasonably considers it might incur in the future as a consequence of any act or omission of the Supplier or the Supplier's employees, consultants, agents or secondary subcontractors, under or in connection with any contract between the CEM and the Supplier including, without limitation, for which the Supplier is liable under:
- (1) *clause 2.3(b) (in connection with a failure or delay in the Supplier's mobilisation obligations);*
  - (2) *clause 5.2 (in connection with the Supplier's failure to pay amounts for which it is liable under the Dry Hire Agreement); and/or*
  - (3) *clause ~~Error! Reference source not found.~~18.3(a) and ~~18.3(b)~~18.3(c) (in connection with any other Event of Default by the Supplier).*

- 4.2 As a pre-condition for payment of the Hiring Fee, the Supplier must provide to CEM all inspections, licenses, insurances, permits, registrations, certifications, approvals, operation manuals, plans and other documents and information that is necessary or desirable for CEM's proper, effective and safe use of the Equipment.

## 5 Charges Levied on Equipment

### 5.1 Supplier to Pay Charges

The Supplier must pay on demand all charges, assessments, taxes or fines levied, assessed or charged on the Equipment or in respect of the use of the Equipment by CEM during the Term, including the cost of registering the Equipment in accordance with any statute, but excluding any speeding fines and other traffic law infringement penalties incurred as a result of the acts or omissions of CEM, the Customer or their respective employees, agents or contractors.

### 5.2 CEM's Right to Make Payments

- (a) If at any time CEM considers the Supplier has failed to pay any amount for which it is liable under the Dry Hire Agreement, CEM is entitled to make such payment in its absolute discretion.
- (b) Any amounts paid by CEM under subparagraph (a) of this clause will be a debt due and payable to CEM on demand.
- (c) Nothing contained in this clause nor the exercise of its rights under this clause by CEM, constitutes any waiver of or is prejudicial to, any other rights of CEM arising or which have already arisen, under the Dry Hire Agreement.

## 6 Use of Equipment

### 6.1 Use by Customers

The Supplier acknowledges and agrees that CEM may hire the Equipment to Customers and/or use the Equipment to provide services to Customers. The Supplier must comply with any reasonable requirements of such Customers provided such requirements do not conflict with the terms and conditions of the Dry Hire Agreement.

### 6.2 Storage of Equipment

CEM must ensure that the Equipment is properly and adequately stored and secured at the Premises.

### 6.3 Proper and Suitable Manner

CEM must ensure the Equipment is used and operated in a proper and suitable manner.

### 6.4 Trained and Competent Persons

CEM must ensure only persons who are properly trained and competent in the operation and use of the Equipment are permitted to use or operate the Equipment.

### 6.5 Manufacturer's Recommendations

CEM must ensure the reasonable instructions and recommendations of:

- (a) the Supplier; and
  - (b) the manufacturer or supplier of the Equipment,
- are adhered to in the use, operation, maintenance, storage, care and repair of the Equipment by CEM and any applicable Customer.

### 6.6 No Danger

CEM must not do, omit, or permit anything to be done or omitted that will endanger the safety or condition of the Equipment or the Supplier's title to the Equipment.

## 7 Supplier Obligations and Warranties

### 7.1 Supply of Equipment

The Supplier must supply the Equipment in accordance with the Dry Hire Agreement and all reasonable instructions given by CEM.

### 7.2 Licencing and Registration

The Supplier must maintain at its cost for the duration of the Term, all applicable licenses, insurances, permits, registrations, certifications, approvals and the like for the proper use and operation of the Equipment, and must provide a copy of all such documents to CEM prior to the Hire Start Date and as the same are obtained or renewed throughout the Term.

### 7.3 Condition and Warranties

The Supplier warrants that all Equipment supplied and the Supplier's performance of the Dry Hire Agreement will be, in addition to any other warranty implied at law:

- (a) identical to any example or sample provided by the Supplier to CEM;
- (b) of merchantable quality and fit for their intended purpose;
- (c) free from any defects and in good and safe working condition;
- (d) regularly cleaned, serviced and maintained at the Supplier's cost (except as otherwise expressly provided in the Dry Hire Agreement);
- (e) stored in a safe and secure location at all times during the Term (except when under CEM control);
- (f) compliant with any applicable legislation, regulations and site/project specific requirements; and
- (g) in accordance with any specification provided by CEM to the Supplier, or if no specification is provided, in accordance with any relevant and current Australian Standard published by SAI Global Limited.

### 7.4 Replacement

The Supplier must remove and replace any Equipment within 5 days of CEM's request where CEM reasonably considers that such Equipment does not conform to the requirements set out in clause 7.3 above.

### 7.5 Inspection Testing and Maintenance

- (a) The Supplier must provide any and all relevant documentation reasonably requested by CEM to evidence the Supplier's conformance and satisfaction of the warranties provided under clause 7.3.
- (b) CEM may inspect and test any Equipment at the Supplier's premises or onsite at any time prior to the Commencement Date or during the Term. The Supplier must do everything reasonably necessary to enable CEM to inspect and test the Equipment.

### 7.6 Environmental Protection

*The Supplier shall comply with all Legal Requirements and the requirements of CEM for the protection of the environment and to ensure it does not pollute, contaminate or otherwise damage the environment in supplying the Equipment. The Supplier shall make good any pollution, contamination or damage to the environment and shall indemnify CEM against any Loss arising out of the Supplier's failure to comply with this clause.*

## 8 Insurances

### 8.1 Insuring Party to Effect Insurances

The Insuring Party must maintain with insurers registered under the *Insurance Act 1973* (Cth), in the names of CEM and the Supplier, for their respective rights and interests, all of the following insurances at all times during the Term:

#### (a) General Insurance

Insurance of the Equipment for the value stated in the Dry Hire Purchase Order or, if no value is specified, their full replacement value, against:

- (1) *damage or destruction caused by accident;*
- (2) *any insurable risk commonly insured against in regard to equipment of a similar nature to the Equipment; and*
- (3) *such other insurable risks as CEM may reasonably stipulate.*

#### (b) Motor Vehicle Insurance

If any of the Equipment includes a motor vehicle, then insurance for its full replacement value against:

- (1) *damage or destruction caused by accident;*



- (2) any insurable risk commonly insured against with regard to equipment of a similar nature to the Equipment; and
- (3) such other insurable risks as CEM may reasonably stipulate.

## 8.2 The Supplier's Insurance

The Supplier must maintain with insurers registered under the Insurance Act, in the names of CEM and the Supplier, for their respective rights and interests, all the following insurances at all times during the Term:

### (a) Public Liability

Public liability insurance relating to the Equipment for an indemnity (including injury, death and damage to the property of any person) of not less than \$20 million or such other amount as CEM may from time to time reasonably stipulate for any one event.

### (b) Products Liability

If the Supplier is the manufacturer of the Equipment, products liability insurance in amount and form reasonably acceptable to CEM.

## 8.3 The Supplier's Obligations

In respect of those insurances the Supplier must maintain (including those with respect to which the Supplier is the Insuring Party),

(a) the policies must, unless prohibited by law:

- (1) insure CEM and its personnel for their respective rights and interests arising out of or in connection to the Dry Hire Agreement;
- (2) include a cross liability clause, noting that each of the parties comprising the insured will be considered as a separate entity, and the insurance applies as if a separate policy has been issued to each such party;
- (3) waive all express or implied rights of subrogation against CEM and its personnel arising out of or in connection to the Dry Hire Agreement; and
- (4) include a clause that provides a breach of a condition or term of insurance by one insured will not adversely affect the cover provided, and

(b) the Supplier must:

- (1) deposit certificates of currency with CEM prior to the Commencement Date;
- (2) pay each premium before the due date and, when asked by CEM, produce receipts for the payments; and
- (3) given written notice to CEM immediately if an event occurs which may give rise to a claim under any of the insurances or which could adversely affect any of them if any insurance is cancelled.

## 8.4 Restrictions on Activities

Unless the other consents in writing, neither party will:

- (a) do or allow anything to be done which adversely affects any insurance maintained by the other party in connection with the Equipment or which may increase the premium on that insurance; or
- (b) settle or compromise any claim under any policy of insurance relating to the Equipment.

## 9 Indemnity and liability

### 9.1 By Supplier

The Supplier indemnifies and keeps indemnified CEM and the Customer and their respective directors, officers, agents, employees and contractors (collectively, the **Indemnified Parties**) from and against any and all Loss suffered by the Indemnified Parties in connection with the Dry Hire Agreement (including, without limitation, arising in connection with any Event of Default of the Supplier). The Supplier's liability to indemnify the Indemnified Parties under this clause is reduced proportionally to the extent that a breach of contract or negligence of CEM or an Indemnified Party contributed to the injury, death, loss or damage.

### 9.2 Consequential Loss

- (a) Subject to paragraph (b) below, neither party is liable to the other party for any loss of use, profit, revenue, business interruption, loss of reputation or opportunities or any other indirect or consequential loss suffered by that party arising out of or in connection with the Dry Hire Agreement.
- (b) The exclusion of liability under paragraph (a) will not apply with respect to any loss in relation to:
  - (1) injury to or death of any person in connection with this Dry Hire Agreement; or
  - (2) in the case of the Supplier, any wilful misconduct, wilful default or gross negligence of the Supplier or its personnel.



## 10 Inspection and Repair

### 10.1 Inspections and Maintenance

The Supplier will:

- (a) complete, certify and return to CEM an inspection checklist in CEM's designated format prior to any item of Equipment being used at the Premises and at any other time required by CEM; and
- (b) complete to CEM's reasonable satisfaction, all safety inspections, servicing, maintenance and repairs in accordance with manufacturer's requirements and good industry practice as necessary for the safe, responsible and efficient use, operation and maintenance of the Equipment by or for CEM.

### 10.2 Supplier to Make Repairs

- (a) The Supplier must commence any necessary maintenance and repairs to the Equipment within 2 days after the earlier of the same becoming due (with respect to routine maintenance), or CEM notifying the Supplier of the need for such maintenance or repairs, and carry out the service or maintenance works in a diligent and expeditious manner at the Premises. All service and repair works (including Minor Repairs and Major Repairs) will be performed by the Supplier at the Supplier's cost unless:
  - (1) *otherwise expressly indicated on the Dry Hire Purchase Order; or*
  - (2) *the associated damage was caused by the misuse of the Equipment or a negligent act or omission by CEM, any Customer or their respective agents, employees or contractors.*
- (b) The applicable Hiring Fee will be suspended for any period during which the Equipment is inoperable due to any servicing or repair works unless clause 10.2(a)(2) applies (in which case the standby rate only is to apply).
- (c) The Supplier must as soon as practicable at the Supplier's cost, provide a replacement for any Equipment which will be inoperable for more than 5 days (or less days if requested by CEM because of project requirements) due to any servicing or repair works.

### 10.3 Replacement Parts

The Supplier will supply all necessary replacement parts at the request of CEM as necessary to maintain the Equipment in good working condition.

### 10.4 CEM's Right to Perform

At CEM's option, or if the Supplier fails to promptly, diligently and expeditiously carry out any of its obligations under the Dry Hire Agreement, CEM may (by itself or through a third party), but need not, carry out an obligation of the Supplier under the Dry Hire Agreement including (but not limited to) conducting repairs or maintenance. Except to the extent clause 10.2(a)(1) or 10.2(a)(2) applies, the Supplier shall promptly reimburse CEM for all costs and expenses incurred by CEM in carrying out such obligation of the Supplier.

## 11 Alterations

CEM must not make any material alteration or addition to any part of the Equipment without the prior written consent of the Supplier which will not be unreasonably withheld.

## 12 Statutory Requirements

If the use of the Equipment is permissible only with the registration, consent, license or authority under any statute:

- (a) unless CEM has given written notice to the Supplier that it has obtained the same, the Supplier must obtain and keep current for the Term all registrations, consents, licenses or authorities that pertain to the Equipment; and
- (b) CEM must ensure that all persons who operate the Equipment obtain and keep current all registrations, consents, licenses or authorities that pertain to the operator of the Equipment.

## 13 Property Rights and Security Interests

### 13.1 PPSA

- (a) If one party (Secured Party) determines that the Dry Hire Agreement (or a transaction in connection with it) is or contains a Security Interest, the other party (Grantor) agrees to promptly do anything (such as obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) which is reasonably requested by the Secured Party and which is reasonably necessary for the purposes of:
  - (1) *ensuring that the Security Interest is enforceable, perfected (including, where possible, by "control" (as defined in the PPSA) in addition to registration) and otherwise effective; or*
  - (2) *enabling the Secured Party to apply for any registration, or give any notification, in connection with the Security Interest so that the Security Interest has the priority required by the Secured Party; or*





- (3) *enabling the Secured Party to exercise rights in connection with the Security Interest, but only to the extent of the Security Interest created.*
- (b) The Grantor agrees:
  - (1) *to provide at least 10 business days' notice of any change to its name, or any other information which might affect the details recorded in any Financing Statement registered by the Secured Party;*
  - (2) *not to change its place of business to a jurisdiction outside of Australia.*
  - (3) *everything that a party is required to do under this clause is at that party's expense, and neither party will be responsible for any costs or expenses incurred or payable by the other party in relation to registering, maintaining or releasing any Security Interest, Financing Statement or Financing Change Statement or giving any notice in relation to a Security Interest.*
- (c) The parties agree that to the extent they may be excluded by law:
  - (1) *sections 142 and 143 of the PPSA are excluded and the Secured Party need not comply with the following provisions of the PPSA: sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4) and any other provision of the PPSA notified to the Grantor by the Secured Party after the date of the Dry Hire Agreement; and*
  - (2) *neither the Secured Party nor any receiver need give any notice required under any provision of the PPSA (except section 135).*
- (d) This clause applies despite any other clause in the Dry Hire Agreement.
- (e) Capitalised terms used by not defined in this clause have the meanings given such terms in the PPSA.

## 14 Termination

- (a) CEM may terminate the Dry Hire Agreement by giving 2 Business Days' notice in writing to the Supplier at any time.
- (b) If the termination of the Dry Hire Agreement is for a reason other than the Supplier's default, the Supplier will be entitled, as its sole and exclusive recourse, to the Hiring Fee for the period during which the Equipment was supplied in accordance with the Dry Hire Agreement up to the date of termination.
- (c) If the termination of the Dry Hire Agreement is due to a default by the Supplier, the Supplier will not be entitled to further payments until the parties' rights have been determined.

## 15 Entry by Supplier

CEM must permit the Supplier to access the Equipment and for that purpose enter the Premises on the condition that the Supplier uses all reasonable endeavours not to cause any undue inconvenience to CEM:

### 15.1 General

- (a) during CEM's regular business hours on the Supplier giving to CEM not less than 10 Business Days' notice; or
  - (b) on demand in the case of emergency,
- for the purposes mentioned in this clause;

### 15.2 Comply with Authorities

to comply with any requirement, notification or order of an Authority having jurisdiction or authority over or in respect of the Equipment for which the Supplier is liable under the Dry Hire Agreement; or

### 15.3 Maintenance, Modifications or Extensions

to carry out maintenance, repair, renovation or replacement to the Equipment.

## 16 Report to Supplier

CEM will report to the Supplier, any:

- (a) damage to or defect in the Equipment;
- (b) accident in which the Equipment are involved causing property damage to the Equipment or any other thing or injury to any person,

promptly after becoming aware of such damage, defect or accident.

## 17 Compliance with Law

Without limiting the Supplier's obligations and liabilities under the Dry Hire Agreement, CEM must comply with all applicable requirements of any Authority and all laws from time to time in force relating to the use of the Equipment.

## 18 Default

### 18.1 Events of Default

An Event of Default occurs if:

- (a) any undisputed amount to be paid under the Dry Hire Agreement remains unpaid for 10 Business Days after receipt of written notice that it is past due;
- (b) the Supplier does not comply with its obligations under clauses 2.2, 2.3(a), 7.4, or 10.2 above within the applicable time period stated;
- (c) either party does not comply with any of its other obligations under the Dry Hire Agreement within 20 Business Days from the date the other party has given written notice to the defaulting party of that failure to comply (or such longer period as may be reasonable in the circumstances); or
- (d) an Insolvency Event occurs in respect of either party.

### 18.2 Supplier's rights Upon Default by CEM

If an Event of Default on the part of CEM occurs, the Supplier may re-take possession of the Equipment and upon re-taking possession, the Dry Hire Agreement will immediately terminate.

### 18.3 CEM's rights upon Default by the Supplier

- (a) If an Event of Default on the part of the Supplier occurs, without limiting the remedies available to CEM under the Dry Hire Agreement or at law, CEM may, as determined by CEM in its absolute discretion:
  - (1) *immediately terminate the Dry Hire Agreement by written notice to the Supplier; or*
  - (2) *do any one or more of the following:*
    - (A) *take all such actions (itself or by use of third parties) as may be necessary to cure the Event of Default;*
    - (B) *repair any Equipment not meeting the requirements of the Dry Hire Agreement; and/or*
    - (C) *purchase or hire equivalent equipment to replace any Equipment not meeting the requirements of the Dry Hire Agreement.*
- (b) All costs incurred by CEM in exercising its rights under clause 18.3(a)(b) above will be moneys due and payable by the Supplier to CEM and accordingly will be deducted from the amount which would otherwise have been paid to the Supplier pursuant to the Dry Hire Agreement had no Event of Default on the part of the Supplier occurred.
- (c) If the Supplier is indebted to CEM, the Principal may retain the Equipment until the debt is satisfied. If after reasonable notice, the Supplier fails to pay the debt, CEM may sell the Equipment and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the Supplier.

## 19 Confidentiality

- (a) The Supplier must not, without CEM's written consent, disclose any information or document in relation to the Dry Hire Agreement or CEM's or any Customer's businesses.
- (b) The restriction in this clause does not apply to disclosure of documents or information as part of legal proceedings or to officers, employees, agents on a need-to-know basis for the purposes of supplying the Equipment, provided that the Supplier has obtained an enforceable undertaking from those parties on similar terms to this clause.
- (c) A breach of this provision by the Supplier's officers, employees, agents, contractors or subcontractors is a breach of the provision by the Supplier.
- (d) Without limiting any other provision of the Dry Hire Agreement, the provisions of this clause will survive termination and continue for a period of 10 years from termination of the Dry Hire Agreement or the expiration of the Term (whichever is earlier).

## 20 Notices

### 20.1 Form and Address

Any notice or other communication including, but not limited to, any request, demand, consent or approval, to or by a party to the Dry Hire Agreement:

- (a) must be in legible writing and in English addressed as shown below:
  - (1) *if to CEM, to the address for CEM identified in the Dry Hire Purchase Order; and*
  - (2) *if to the Supplier, to the address for Supplier identified in the Dry Hire Purchase Order,*or as specified by notice from one party to the other from time to time;
- (b) is regarded as being given by the sender and received by the addressee:
  - (1) *if by delivery in person, when delivered to the addressee; or*
  - (2) *if by post, 3 Business Days from and including the date of postage.*

but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time) it is regarded as received at 9.00 am on the following Business Day; and

- (c) can be relied upon by the addressee and the addressee is not liable to any other person for any consequences of that reliance if the addressee believes it to be genuine, correct and authorised by the sender.

## 21 Miscellaneous

### 21.1 Entire Agreement

The Dry Hire Agreement states all the express terms of the Dry Hire Agreement between the parties in respect of its subject matter. It supersedes all prior representations, discussions, negotiations, understandings and agreements in respect of its subject matter (including any terms and conditions provided by the Supplier whether included in a quote or elsewhere). The Dry Hire Agreement may only be amended in a writing signed by CEM and the Supplier.

### 21.2 Governing Law and Jurisdiction

The Dry Hire Agreement is governed by the law in force in Western Australia and each party irrevocably submits to the non-exclusive jurisdiction of courts exercising jurisdiction in Western Australia.

### 21.3 No Waiver

No party to the Dry Hire Agreement may rely on the words or conduct of any other party (including any delay in exercising a right) as a waiver of any right unless the waiver is in writing and signed by the party granting the waiver. For the purposes of this clause, waiver includes an election between rights and remedies, and conduct which might otherwise give rise to an estoppel.

### 21.4 Counterparts

The Dry Hire Agreement may be executed in any number of counterparts and all counterparts, taken together, constitute one instrument. A party may execute the Dry Hire Agreement by signing any counterpart.

### 21.5 Survival

Clauses 1, 3.2, 7, 9, 13, 18.3, 19, 21 and 24 survive the termination or expiry of the Dry Hire Agreement.

### 21.6 Approvals and Consents

Each approval or consent must be in writing and be given to the happening of the event for which the approval or consent is required.

### 21.7 Remedies Cumulative

The rights, powers and remedies provided in the Dry Hire Agreement are cumulative with, and not exclusive of, the rights, powers or remedies provided by law independently of the Dry Hire Agreement.

### 21.8 Severance

If any provision in the Dry Hire Agreement or the application of that provision to any person or circumstance is or becomes invalid or unenforceable, then the remaining provisions of the Dry Hire Agreement are not affected and are valid and enforceable.

### 21.9 Relationship of the Parties

- (a) The Supplier is an independent contractor under the Dry Hire Agreement and is not to be taken to be an employee, agent, representative, joint venture partner or partner of CEM.
- (b) If the Supplier consists of two or more person/entities then they shall be bound jointly and severally by the Supply Agreement.
- (c) The Supply Agreement does not evidence nor create an exclusive relationship between CEM and the Supplier for the supply of any goods or services.

### 21.10 Resolution of Disputes

- (a) If a dispute arises out of or in connection to the Dry Hire Agreement, the parties shall, within 10 days of a written notice detailing the dispute being issued by either party, hold a meeting in an attempt to negotiate in good faith to resolve the dispute.
- (b) Should the parties be unable to resolve the dispute within 28 days of the written notice under this clause being issued, either party may refer the dispute to arbitration or litigation.
- (c) The Master Builders Association of WA (or, if no longer in existence, its successor organisation) shall appoint a suitably qualified arbitrator should the dispute be referred to arbitration and an adjudicator for the purposes of the *Construction Contracts Act 2004 (WA)*.
- (d) If a dispute is referred to arbitration, the arbitration is to be conducted in accordance with the rules determined by the appointed arbitrator.

### 21.11 CEM as trustee

CEM is entitled to recover from the Supplier any amounts due to an Indemnified Party under the Dry Hire Agreement on behalf of that party, and will hold any amount recovered, and the benefit of the indemnity to which that party is entitled, as trustee for and on behalf of that party.

## 22 Goods and services tax

### 22.1 Definitions

In this clause:

- (a) GST means goods and services tax or similar value added tax levied or imposed in Australia pursuant to the GST law or otherwise on a supply;
- (b) GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- (c) GST law has the same meaning as in the GST Act;
- (d) Tax Invoice includes any document or record treated by the Commissioner of Taxation as a tax invoice or as a document entitling a recipient to an input tax credit; and
- (e) Words used in this clause which have a defined meaning in the GST law have the same meaning as in the GST law unless the context otherwise indicates.

### 22.2 GST

- (a) The consideration for any supply under or in connection with the Dry Hire Agreement does not include GST.
- (b) To the extent that any supply made under or in connection with the Dry Hire Agreement is a taxable supply, the consideration for that supply is increased by an amount determined by the Supplier, not exceeding the amount of that consideration (or its market value) multiplied by the rate at which GST is imposed in respect of the supply.
- (c) The Supplier must issue a Tax Invoice to CEM no later than 7 days following payment of the GST inclusive consideration determined under this clause.

## 23 Holding Over

In any case where CEM continues in possession of the Equipment or any of them after the expiration or sooner termination of the Term, CEM will continue in possession of the Equipment as a hirer on a periodic basis and CEM must continue to pay the Hiring Fee in full and continue to observe and perform all of CEM's covenants agreements and obligations under the Dry Hire Agreement.

## 24 Definitions and interpretation

### 24.1 Definitions

In the Dry Hire Agreement:

**Authority** means any government or any governmental, semi-governmental, fiscal or judicial body, department, commission, authority, tribunal, government minister, agency or entity.

**Business Day** means a day on which trading banks are open for general banking business in Perth, not being a Saturday, Sunday or a public holiday in Perth.

**Commencement Date** means the later of (a) the hire start date specified in the Dry Hire Purchase Order, and (b) the date the Equipment has been accepted by CEM at the Mobilisation Address.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Customer** means any third party customers of CEM.

**Demobilise Address** means the demobilise address specified in the Dry Hire Purchase Order.

**Dry Hire Agreement** means the agreement between CEM and the Supplier as defined at clause 1.1 of these terms and conditions.

**Dry Hire Purchase Order** means the applicable Purchase Order – Dry Hire bearing an order number issued by CEM to the Supplier which forms part of the Dry Hire Agreement.

**Equipment** means the Equipment specified in the Dry Hire Purchase Order.

**Event of Default** means any of the events specified in clause 18.1.

**Hire End Date** is the date specified in the Dry Hire Purchase Order.

**Hire Start Date** is the date specified in the Dry Hire Purchase Order.

**Hiring Fee** means the Hiring Fee for the Equipment specified in and calculated in accordance with the Dry Hire Purchase Order.

**Insolvency Event** means the happening of any of the following events in relation to either party:

- (a) an application is made to a court for it to be wound up or for the appointment of a provisional liquidator where such application is not withdrawn within 30 days;
- (b) the appointment of a liquidator, provisional liquidator, official manager or administrator, receiver or receiver and manager of any of its assets, or a controller of any of its assets where such appointment is not withdrawn within 30 days;
- (c) it is wound up or dissolved;
- (d) it is, or is to be regarded as being under section 461(1) or section 585 of the Corporations Act unable to pay its debts; or



(e) it becomes an insolvent under administration as defined in section 9 of the Corporations Act.

**Legal Requirement** means any requirement of any Authority and/or arising out of any law, regulation, ordinance, statutory, regulation, licence or approval, including, without limitation:

- (a) any requirement to obtain any licence or approval; and
- (b) the payment of any applicable taxes, fees or charges.

**Loss** means, subject to clause 9.2, any loss, claim, action, liability, damage, cost, charge, expense, diminution in value or deficiency of any kind or character that any party pays, suffers or incurs or is liable for including:

- (a) all interest and other amounts payable to third parties; and
- (b) all legal (on a full indemnity basis) and other expenses incurred in connection with investigating or defending any claim or action, whether or not resulting in any liability and all amounts paid in settlement of claim or action.

**Major Repairs** are repairs other than the Minor Repairs and include but shall not be limited to repairing or replacing the following components of the Equipment:

- (c) engine;
- (d) torque converter and pumps;
- (e) transmission and pumps;
- (f) differentials and planetaries including brakes;
- (g) chassis and frame;
- (h) hydraulic pumps and cylinders;
- (i) starter motors, air-conditioning compressor, alternators and emergency steering motors;
- (j) suspension;
- (k) steering components;
- (l) electrical harnesses;
- (m) hydraulic motors and drive boxes; and
- (n) equalizer bars.

**Minor Repairs** include but are not be limited to performing minor repair services such as fixing minor leaks and repairing or replacing the following types of plant and equipment:

- (o) drive belts;
- (p) items covered by the manufacturer's or supplier's service and maintenance instructions and recommendations including filters and breathers;
- (q) any adjustments and applications mechanisms;
- (r) flashing lights and mounting bases;
- (s) minor electrical components including switches, fuses, circuit breakers, warning lights and globes;
- (t) air conditioner hoses, switches and service items; and
- (u) grease lines and fittings.

**Mobilisation Address** means the mobilisation address specified in the Dry Hire Purchase Order.

**Permitted Use** means the Permitted Use specified in the Dry Hire Purchase Order and any other use or purposes for which the Equipment was designed.

**PPSA** means the Personal Properties Securities Act 2009 (Cth).

**Premises** means the location at which the Equipment is being stored or utilised.

**Term** means the term for which the Equipment is let by the Supplier to CEM as specified in clause 3.1.

## 24.2 Interpretation

In these terms and conditions, headings and boldings are for convenience only and do not affect the interpretation of these terms and conditions and, unless the context otherwise requires:

- (a) words importing the singular include the plural and vice versa;
- (b) words importing a gender include any gender;
- (c) other parts of speech and grammatical forms of a word or phrase defined in these terms and conditions have a corresponding meaning;
- (d) the word person includes a firm, company, partnership, joint venture, association, corporation or other body corporate or an Authority;
- (e) a reference to any thing (including, but not limited to, any right) includes a part of that thing but nothing in this clause implies that performance of part of an obligation constitutes performance of the obligation;
- (f) references to parts, clauses, schedules and parties are reference to parts, clauses and schedules of, and parties to, the Dry Hire Agreement;
- (g) a reference to a statute, regulation, proclamation, ordinance or by-law includes every statute, regulation, proclamation, ordinance or by-law varying, consolidating or replacing it, and a reference to a statute includes every regulation,



proclamation, ordinance or by-law issued under that statute;

- (h) a reference to an agreement includes an undertaking, deed, agreement, guarantee or legally enforceable arrangement or understanding, whether or not in writing;
- (i) a reference to a document includes an agreement in writing, or a certificate, notice, instrument or other document of any kind and includes every permitted amendment, variation or supplement to, or replacement or novation of, that document;
- (j) a reference to a party to the Dry Hire Agreement or to another document referred to in the Dry Hire Agreement includes that party's successors and permitted assigns;
- (k) an obligation, representation or warranty in favour of 2 or more persons is for the benefit of them jointly and severally;
- (l) where the words including or includes are used, they are to be taken to be followed, where the context allows, by the words but not limited to;
- (m) in the interpretation of the Dry Hire Agreement, no rules of construction apply to the disadvantage of a party because that party was responsible for the drafting of the Dry Hire Agreement or of a part of the Dry Hire Agreement; and
- (n) where a day on or by which a thing is required to be done is not a Business Day, that thing is to be done on or by the succeeding Business Day.