

Purchase Order Terms and Conditions Goods, Works and Services

1. Definitions

In this agreement:

- 1.1 **Business Day** means a day that is not a Saturday, Sunday or public holiday in the State of South Australia.
- 1.2 **Confidential Information** means any documentation or information of a confidential nature supplied by either party to the other in connection with this agreement; but excludes any information which has been previously published or otherwise disclosed to the general public or is required to be disclosed by law.
- 1.3 **Existing Conditions** means the conditions as described in clause 9.5, being declarations and directions made pursuant to section 23 and 25 of the Emergency Act 2004 as at the date of this agreement.
- 1.4 **Force Majeure Event** means an unforeseeable and unknown event occurring after the date of this agreement beyond the reasonable control of the parties which precludes a party from performing on time an obligation under this agreement. Such circumstances include:
 - 1.4.1 acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires, and any natural disaster; and/or
 - 1.4.2 acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage, and revolution; and/or
 - 1.4.3 a pandemic is declared by a Government Agency and measures are implemented by the Government Agency to address the pandemic; and/or
 - 1.4.4 a suspension or termination of services or works is necessitated by legislative requirement or is ordered by a Government Agency;
 but does not include any event or circumstance which the Contractor/Supplier ought to have reasonably foreseen from or as a result of the Existing Conditions.
- 1.5 **Goods** means any the goods and / or materials specified in the Purchase Order and Specifications.
- 1.6 **Government Agency** means any government or any semi-government, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity including any self-regulatory organisation established under statute or any stock exchange.
- 1.7 **Intellectual Property** means all rights conferred by statute, common law, or equity in relation to patents, inventions, registered and unregistered designs, registered and unregistered trademarks, trade names, logos and get up, confidential information, copyright and moral rights and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.
- 1.8 **Purchase Order** means any Purchase Order issued by the Council.
- 1.9 **Specifications** means any specifications provided in, or in addition to, the Purchase Order.
- 1.10 **Terms and Conditions** means these Terms and Conditions.
- 1.11 **Works** means any works or services specified in the Purchase Order and Specifications together with any additional works necessary for the performance of this agreement.
- 1.12 Expressions used in the Purchase Order have the same meaning in these Terms and Conditions.

2. Interpretation

In this document, unless the context otherwise requires:

- 2.1 a reference to this **agreement** means the Purchase Order, the Specifications, and the Terms and Conditions;
- 2.2 a reference to a party includes its executors, administrators, successors and permitted assigns;
- 2.3 an agreement, representation, warranty, or indemnity in favour of two (2) or more parties (including where two (2) or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- 2.4 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;
- 2.5 a provision is not construed against a party only because that party drafted it;
- 2.6 an unenforceable provision or part of a provision may be severed, and the remainder of this agreement continues in force, unless this would materially change the intended effect of this agreement;
- 2.7 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions.

3. Application

- 3.1 These terms and conditions do not apply if a separate written contract/agreement has been executed with Council in respect of the Works/Goods being provided.
- 3.2 This agreement:
 - 3.2.1 applies to all Works/Goods supplied by the Contractor/Supplier to the Council (with the exception of those supplied in accordance with clause 3.1) and the Contractor/Supplier is deemed to have read and agreed to this agreement prior to filling any order for the Works/Goods; and
 - 3.2.2 prevails over the Contractor's/Supplier's terms and conditions of sale or any other documents provided by the Contractor/Supplier.

4. Supply

The Contractor/Supplier agrees to supply the Works/Goods and the Council agrees to purchase the Works/Goods on the terms of this agreement.

5. Delivery of Works/Goods

- 5.1 The Contractor/Supplier must deliver the Works/Goods on or before the delivery or agreed date.
- 5.2 Unless otherwise specified in this agreement, "delivery" occurs as soon as the Goods are:
 - 5.2.1 off-loaded at the delivery address specified in the Purchase Order and Specifications; and
 - 5.2.2 inspected by the Council and accepted as being in accordance with this agreement.
- 5.3 Title to and property in the Goods passes to the Council on delivery of the Goods.
- 5.4 Risk in the Goods passes on delivery of the Goods.
- 5.5 No liability to pay for any Goods arises until delivery.

6. Service Standards

The Contractor/Supplier must:

- 6.1 perform the Works in a professional and competent manner with due care, skill, and diligence and within the time specified in the Purchase Order and Specifications;
- 6.2 comply fully and promptly at its own cost with all laws, applicable standards, codes of practice, by-laws, orders, and regulations at present or in the future relating to the performance of the Works and with all requirements, notices or orders in respect of

Purchase Order Terms and Conditions Goods, Works and Services

anything affected by the Works;

6.3 provide at its own cost all supervision, labour, materials, plant, tools and equipment, transport and temporary works required for the performance of the Works;

6.4 be responsible for the care of the site from the date of commencement until completion, including the care, storage and protection of unfixed items and items provided by the Council (if any); and

6.5 provide, erect, and maintain all barricades, fences, signs, lighting, and temporary works necessary for the protection of the site, other property and for the safety and convenience of the public.

7. Variations and Extensions of Time

7.1 No unauthorised Variations and Valuation of Variation

7.1.1 The Contractor/Supplier must not, and is not authorised to, make any Variation of the Works/Goods except:

7.1.1.1 A Variation instructed by the Council; and/or

7.1.1.2 A Variation requested by the Contractor/Supplier, which has been approved by the Council.

7.1.2 Variations by the Contractor/Supplier arising from or related or attributed to the Existing Conditions which were, or ought to have been, reasonably foreseen as at the date of receipt of a Purchase Order from the Council are not permitted.

7.2 Adjustment of Price

For the purposes of any adjustment to the price for a Variation:

7.2.1 If practicable, the value of the Variation must be agreed by the Contractor/Supplier and the Council before the Contractor/Supplier commences to execute the Variation; or

7.2.2 If the value of the Variation is not agreed by the Contractor/Supplier and the Council, the value must be determined by the Council by application of rates accepted by the Council.

A Variation must be valued as soon as practicable, and the Contractor/Supplier must promptly and diligently supply to the Council all relevant information to the valuation.

7.3 Extension of time

7.3.1 The Contractor/Supplier by written notice to the Council may claim a time extension if progress of the Works/delivery of the Goods is delayed or will be delayed by an event arising from, or related or attributable to the Existing Conditions, but which were not, and could not have been, reasonably foreseeable as at the date of receipt of the Purchase Order from the Council.

7.3.2 The claim must state with reasonable particularity the cause of delay, and an estimate (if practicable) of the extent or likely extent of the delay in delivering/supplying the Works/Goods.

7.3.3 The claim must be made before or within seven days after commencement of the delay, whether or not it is practicable to estimate the delay or its consequences.

7.3.4 Subject always to clause 7.3.5, if delivery/supply of the Works/Goods is delayed by a cause beyond the control of the Contractor/Supplier, the Contractor/Supplier is entitled to a fair and reasonable extension of the time for delivering/supplying the Works/Goods.

7.3.5 For the avoidance of doubt, the

Contractor/Supplier is not entitled to an extension of time for any delays or disruptions arising from the Existing Condition which were, or ought to have been, reasonably foreseeable at the date of receipt of a Purchase Order from the Council.

7.3.6 The Supplier/Contractor accepts the risk of all costs, losses and expenses incurred because of a delay in delivery, progress, or completion of the Works/Goods (including a delay caused by a Variation directed by Council). The Contractor's/Supplier's sole remedy for such a delay is an extension of time approved by the Council under this clause 7. No costs or damages are payable by the Council in respect of such a delay.

8. Payment

Unless otherwise specified in the Payment Terms, the Council must pay the price specified in the Purchase Order by electronic funds transfer within thirty (30) days of receipt of the invoice issued by the Contractor/Supplier, subject to:

8.1 The price being in accordance with the Purchase Order;

8.2 All Works/Goods being received and accepted by the Council as satisfying the Purchase Order and Specifications; and

8.3 Invoices quoting the Purchase Order number and having adequate detail of the works;

Otherwise, payment may be delayed until the requirements above are satisfied.

9. Warranties / Defect Liability Period

9.1 The Contractor/Supplier warrants that the Works/Goods will:

9.1.1 be of good merchantable quality and fit for their purpose;

9.1.2 be performed/manufactured using new materials, unless otherwise notified in writing by the Contractor/Supplier ;

9.1.3 conform with the description in the Purchase Order and Specifications; and

9.1.4 throughout the warranty period, operate in accordance with the Specifications, and otherwise in accordance with the operation of similar products.

9.2 The defect liability period / warranty period will the 12-month period following completion of the Works / supply of the Goods, unless otherwise agreed by the Council in writing.

9.3 If any Works/Goods that are found to be defective or do not comply with clause 9.1.1 to 9.1.4 and the Council notifies the Contractor/Supplier of the defect during the defect liability period / warrant period, the Contractor/Supplier must, at its own cost, promptly rectify any defects in the Works/Goods within 7 days, or any other timeframe as deemed appropriate by Council.

9.4 Failing rectification by the Contractor/Supplier within 7 days, or any other timeframe as deemed appropriate by Council, the Council may rectify defects at the cost of the Contractor/Supplier.

9.5 The Contractor/Supplier:

9.5.1 acknowledges and agrees that it enters into this agreement with knowledge of the

Purchase Order Terms and Conditions Goods, Works and Services

existence and impact of the COVID-19 pandemic in the State of South Australia, Australia, and the world as at the date of this agreement (Existing Conditions) and has had regard to those Existing Conditions in entering into this agreement.

- 9.5.2 warrants to the Council that it enters into this agreement with full knowledge of the Existing Conditions, has not relied on any advice or statement by the Council regarding the Existing Conditions and has taken appropriate advice in respect of the Existing Condition or chosen not to seek or receive such advice; and
- 9.5.3 acknowledges that the Council has relied on the Contractor's/Supplier's warranties in entering into this agreement.

10. Insurance

- 10.1 The Contractor/Supplier must maintain at all times during the application of this agreement the Contractor's/Supplier's insurances, including:
- 10.1.1 Public liability insurance for a minimum sum of twenty million dollars (\$20,000,000);
- 10.1.2 Any other insurances as specified the Purchase Order and Specifications or otherwise in writing by the Council.
- 10.2 The Contractor/Supplier must maintain the Contractor's/Supplier's insurances for at least twelve (12) months following completion of the Works/ delivery of the Goods.
- 10.3 The Contractor/Supplier must provide certificates of currency in respect of the Contractor's/Supplier's Insurances before commencing the Works and when reasonably requested by the Council.

11. Work Health & Safety

- 11.1 The Contractor/Supplier must comply with the *Work Health & Safety Act 2012*, any regulations made under it and any associated policies adopted by the Council and must ensure that its employees and contractors comply with all laws, regulations, policies, notices, and codes of practice having application to this agreement.
- 11.2 The Contractor/Supplier must comply with the *Return to Work Act 2014* and any regulations made under it.
- 11.3 The Contractor/Supplier must comply with all reasonable directions and procedures relating to security and work, health and safety as required by the Council.
- 11.4 The Contractor/Supplier must immediately notify the Council of any incident or accidents arising from the performance of this agreement, including any incident or accident involving the public.

12. Environment

The Contractor must demonstrate due regard for the impact the Works may have on the environment and, where necessary, must implement appropriate environment control measures.

13. Contractor/Supplier Indemnities

The Contractor/Supplier indemnifies the Council against all actions, proceedings, claims, demands, charges, penalties, expenses, and all other liabilities arising from or in relation to the performance or non-performance of any of the Contractor's/Supplier's obligations under this agreement. This indemnity is reduced by the extent to which the Council contributes to the event giving rise to the claim for the indemnity.

14. Intellectual Properties

- 14.1 Other than any drawings or Specifications provided by the Council to the Contractor/Supplier, the Contractor/Supplier warrants that the Works/Goods will not infringe the Intellectual Property of any third party.
- 14.2 The ownership of Intellectual Property produced as a result of this agreement vests solely in the Council immediately on its creation.
- 14.3 The Contractor/Supplier is granted a royalty free non-transferrable non-exclusive licence to use any Intellectual Property:
- 14.3.1 produced as a result of this agreement; or
- 14.3.2 relating to the drawings and Specifications or the Confidential Information provided by the Council to the Contractor/Supplier;
- solely for the purpose of completing the Works or supply of the Goods and for no other purpose.

15. Force Majeure

- 15.1 If a Force Majeure Event causes delay or failure by a party to perform its obligations under this agreement:
- 15.1.1 Neither party is liable for such delay or failure; and
- 15.1.2 All obligations of a party under this agreement are suspended until the Force Majeure ceases to apply.
- 15.2A party which is, by reason of a Force Majeure, unable to perform any obligation or condition required by this agreement must:
- 15.2.1 Notify the other party as soon as possible giving:
- 15.2.1.1 Reasonably fully particulars of the Force Majeure Event;
- 15.2.1.2 the date of commencement of the Force Majeure Event and an estimate of the time required to enable it to resume full performance of its obligations; and
- 15.2.1.3 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
- 15.2.2 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;
- 15.2.3 resume performance as soon as possible after termination of the Force Majeure Event or after the Force Majeure Event abates to an extent which permits resumption of performance;
- 15.2.4 notify the other party where the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and
- 15.2.5 notify the other party when resumption of performance occurs.
- 15.3If a delay or failure under this clause 15 exceeds 60 days, the Council may immediately terminate this agreement by written notice to the Contractor/Supplier (**Termination Date**).
- 15.4In the event of the Council terminating this agreement pursuant to clause 15.3:
- 15.4.1 the Council remains liable to pay the Contractor/Supplier any unpaid invoice already issued by the Council;
- 15.4.2 within twenty (20) Business Days of the Termination Date the Contractor/Supplier must give the Council an invoice:
- 15.4.2.1 for Works completed/Goods supplied up to and including the Termination Date; and

Purchase Order Terms and Conditions Goods, Works and Services

15.4.2.2 for reasonable and substantiated direct costs or expenses (net of GST input tax credits) the Contractor/Supplier incurred as a result of the Council terminating the agreement under clause 15.3 and not reasonably able of being put to alternate use.

15.4.3 The Council will not otherwise be liable to the Contractor/Supplier for any cost, loss, expense, or damage incurred by the Contractor/Supplier in connection with the exercise by the Council of its rights under clause 15.3 including, without limitation, any claim relating to loss of anticipated profits or unsupplied Goods / unperformed Works.

16. Termination

16.1 The Council may immediately terminate this agreement by giving notice to the other party if the Contractor/Supplier:

16.1.1 ceases to carry on business or becomes otherwise unable to perform its obligations under this agreement;

16.1.2 breaches a material provision of this agreement and fails to remedy the breach within a specified reasonable time after receiving notice requiring it to do so;

16.1.3 becomes an externally administered body corporate or an insolvent under administration or becomes insolvent (each within the meaning of the *Corporations Act 2001*).

16.2 Termination of this agreement under this clause 16 does not affect any accrued rights or remedies of either party.

17. Confidential Information and Freedom of Information

17.1 Each party agrees that it will not use any Confidential Information of the other party or allow any Confidential Information of the other party to be used for any purpose, except for the purposes contemplated by this agreement, and agrees that it will:

17.1.1 keep confidential; and

17.1.2 not use or reproduce in any form;

17.2 any Confidential Information belonging to the other party. A party may depart from its obligations under this clause 17 only with the written consent of the other party or as required by law or the terms of this agreement. The Contractor/Supplier consents to any disclosures made as a result of the Council complying with its obligations under the *Freedom of Information Act 1991* (SA) (FOI Act), subject to any legally required consultation.

17.3 Subject to clause 17.1, for the purposes of the FOI Act, the terms specified confidential in the Purchase Order and Specifications are confidential (**confidential sections**).

17.4 Unauthorised disclosure of the confidential sections and their subject matter is a breach of this agreement.

18. Audit

The Contractor/Supplier must keep the Council fully and regularly informed as to all matters relating to the Works/Goods and must provide to the Council any information reasonably requested by the Council for the purposes of monitoring the performance of the

Contractor's/Supplier's obligations under this agreement.

19. Disputes

All disputes or differences between the Council and the Contractor/Supplier must be referred to an arbitrator, agreed by the parties or in the absence of agreement appointed by the President of the Local Government Association of South Australia.

20. Relationship

This agreement does not create a relationship of employment, agency, or partnership between the parties.

21. Miscellaneous

21.1 Special Conditions

If there is an inconsistency between a special condition set out in the Purchase Order or Specifications and the rest of this agreement, the special condition governs to the extent of the inconsistency.

21.2 Alteration

This agreement may be altered only in writing signed by each party.

21.3 Assignment and Subcontracting

The Contractor/Supplier must not assign or subcontract this agreement or any right under it without the prior written consent of the Council.

21.4 Entire Agreement

This agreement:

21.4.1 constitutes the entire agreement between the parties about its subject matter; and

21.4.2 supersedes any prior understanding, agreement, condition, warranty, indemnity, or representation about its subject matter.

21.5 Waiver

A waiver of a provision of or right under this agreement:

21.5.1 must be in writing signed by the party giving the waiver;

21.5.2 is effective only to the extent set out in the written waiver.

21.6 Exercise of power

21.6.1 The failure, delay, relaxation, or indulgence by a party in exercising a power or right under this agreement is not a waiver of that power or right.

21.6.2 An exercise of a power or right under this agreement does not preclude a further exercise of it or the exercise of another right or power.

21.7 Survival

Each indemnity, obligation of confidence and other term capable of taking effect after the expiration or termination of this agreement, remains in force after the expiration or termination of this agreement.

21.8 Governing Law

21.8.1 This agreement is governed by the law in South Australia.

21.8.2 The parties irrevocably submit to the exclusive jurisdiction of the courts in South Australia.

21.9 Ombudsman

The Contractor/Supplier acknowledges that the *Ombudsman Act 1972* (SA) empowers the Ombudsman to investigate matters in the public interest. The Contractor/Supplier must ensure compliance with all obligations arising under that Act and all other applicable laws.

21.10 ICAC

The Contractor/Supplier acknowledges and agrees that by

entering into this agreement with the Council the Contractor/Supplier will be considered to be public officer for the purposes of the *Independent Commissioner Against Corruption Act, 2012 (SA) (ICAC Act)* and is obliged to comply with the *ICAC Act* and the Directions and Guidelines issued pursuant to the *ICAC Act*.

22. GST

- 22.1 The total amounts payable under this agreement are inclusive of GST, if applicable.
- 22.2 Notwithstanding any other provision of this agreement, the Council need not make any payment for a taxable supply made by the Contractor/Supplier under this agreement until the Contractor/Supplier has given the Council a tax invoice in respect of that taxable supply.

23. Notices

- 23.1 A notice, demand, consent, approval, or communication under this agreement (**Notice**) must be:
 - 23.1.1 in writing, in English and signed by a person authorised by the sender; and
 - 23.1.2 hand delivered or sent by prepaid post or electronic communication to the recipient's address specified in the Purchase Order, as varied by any Notice given by the recipient to the sender.
- 23.2 A Notice is deemed to be received:
 - 23.2.1 if sent by prepaid post, two (2) business days after posting;
 - 23.2.2 if sent by electronic communication, at the time deemed to be the time of receipt under the *Electronic Transactions Act 1999 (Cth)* if the notice was being given under a law of the Commonwealth of Australia.