



## TERMS AND CONDITIONS OF PURCHASE

**PLEASE NOTE that these terms and conditions do not apply if a contract/agreement has been executed with Council in respect to the services being provided in which case you will continue to be bound by those terms and conditions.**

### 1. Definitions

In this agreement:

1.1 **Business Day** means a day other than:

- a) a Saturday, Sunday;
- b) a day which is a Public Holiday in South Australia (within the meaning of the *Holidays Act 1910*); or
- c) a day that falls between any Christmas and the next following New Year's Day.

at the principal place of business of the party obliged to perform an obligation or receiving a notice under this agreement as applicable, and references to time are to local time at that location.

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 or 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 8.4, a summary and updates of which is detailed on the *Government of South Australia website*: <https://www.covid-19.sa.gov.au/emergency-declarations>

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:

- a) acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster; and
- b) acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution;
- c) a pandemic is declared by a Governmental Agency and measures are implemented by the Government Agency to address the pandemic; and/or
- d) a suspension or termination of services or works is necessitated by legislative requirement or is ordered by a Governmental Agency;

but does not include any event or circumstance which the Contractor ought to have reasonably foreseen from or as a result of the Existing Conditions.

1.5 **Governmental Agency** means any government or any government, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity including any self-regulatory organization established under statute or any stock exchange.

1.6 **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.

1.7 **Purchase Order** means any official Purchase Order issued by the Council.

1.8 **Terms and Conditions** mean these Terms and Conditions.

1.9 **Variation** means any change in the Works as specified in any Purchase Order, being:

- a) any increase of, decrease in, or omission from such Works;
- b) any change in the character, quality, origin or the materials from any such Works; or
- c) any supply of additional Works.

1.10 **Works** means any works and services specified in the Purchase Order together with any additional works necessary for the performance of this agreement.

1.11 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 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 by two or more parties (including where two or more

persons are included in the same defined term) binds them jointly and severally;

- 2.4 an agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- 2.5 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it.
- 2.6 a provision is not construed against a party only because that party drafted it;
- 2.7 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; and
- 2.8 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions.

### 3. Application

This agreement:

- 3.1 applies to all Goods/Works supplied by the Supplier/Contractor performed by the Supplier/Contractor to the Council and the Supplier/Contractor is deemed to have read and agreed to this agreement prior to filling any order for the Goods/Works; and
- 3.2 prevails over the Supplier/Contractor's terms and conditions of sale or any other documents provided by the Supplier/Contractor.

### 4. Supply

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

### 5. Delivery of goods (goods only)

- 5.1 The Supplier must deliver the Goods on or before the Delivery 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
  - 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. Payment

Unless otherwise specified in the Payment Terms, the Council must pay the price specified in the Purchase Order by cheque or electronic funds transfer within 30 days of the end of the month in which the invoice is issued by the Supplier/Contractor. The invoice cannot be issued until after delivery of the Goods or completion of the Works.

### 7. Service Standards (works only)

The Contractor must:

- 7.1 perform the Works in a professional and competent manner with due care, skill and diligence and within the time specified in the Purchase Order;

- 7.2 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 anything affected by the Works;
- 7.3 provide at its own cost all supervision, labour, materials plant, tools and equipment, transport and temporary works required for the performance of the Works;
- 7.4 be responsible for the care of the Works 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
- 7.5 provide, erect and maintain all barricades, fences, signs, lighting and temporary works necessary for the protection of the Works, other property and for the safety and convenience of the public.

### 8. Warranties by Supplier/Contractor

- 8.1 The Supplier/Contractor warrants that the Goods/Works will:
  - 8.1.1 be of good merchantable quality and fit for their purpose;
  - 8.1.2 be new or performed using new materials, unless otherwise notified in writing by the Supplier/Contractor;
  - 8.1.3 conform with the description and the Specifications in the Purchase Order; and
  - 8.1.4 throughout the Warranty Period, operate in accordance with the Specifications, and otherwise in accordance with the operation of similar products.
- 8.2 If any Goods/Works are found to be defective or do not comply with clause 8.1.1 to 8.1.4 and the Council notifies the Supplier/Contractor of the defect during the Warranty Period, the Supplier/Contractor must, at its own cost, promptly replace the Products and deliver it to the Council, or promptly rectify any defects in the Works within the Warranty Response Time.
- 8.3 Failing rectification by the Supplier/Contractor, the Council may rectify defects at the cost of the Supplier/Contractor.
- 8.4 The Supplier/Contractor:
  - 8.4.1 Acknowledges and agrees that it enters into this agreement with knowledge of the existing 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;
  - 8.4.2 warrants to the Council that it has entered into this agreement with full knowledge of the Existing Conditions, has not relied on any advice or statements by the Council regarding the Existing Conditions and has taken appropriate advice in respect of the Existing Conditions or chosen not to seek or receive such advice; and
  - 8.4.3 Acknowledges that the Council has relied on the Supplier/Contractor's warranties in entering into

this agreement not to seek or receive such advice;

## 9. Variations and Extensions of Time

### 9.1.1 No unauthorised Variation and Valuation of Variations

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

- 9.1.1.1.1 a Variation instructed by the Council; and
- 9.1.1.1.2 a Variation requested by the Supplier/Contractor, which has been approved by the Council.

9.1.1.2 Variations by the Supplier/Contractor arising from, or related or attributable 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.

### 9.1.2 Adjustment of Price

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

- 9.1.2.1 The Supplier/Contractor must not, and is not authorised to, make any Variation of the Works except:
- 9.1.2.2 The Supplier/Contractor must not, and is not authorised to, make any Variation of the Works except:

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

### 9.1.3 Extension of Time

9.1.3.1 The Supplier/Contractor by written notice to the Council may claim a time extension if progress of the Works 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 foreseen as at the date of receipt of a Purchase Order from the Council.

9.1.3.2 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 supplying the Works.

9.1.3.3 The claim must be made before or within seven (7) days after the commencement of the delay, whether or not it is practicable to estimate the delay or its consequences.

9.1.3.4 Subject always to clause 9.1.3.5 if supply of the Works is delayed by a cause beyond the control of the Supplier/Contractor, the Supplier/Contractor is entitled to a fair and reasonable extension of the time for supplying the Works.

9.1.3.5 For the avoidance of doubt, the Supplier/Contractor is not entitled to an extension of time for any delays or disruptions arising from the Existing Conditions which were, or ought to have been, reasonably foreseen at the date of receipt of a Purchase Order from the Council to this agreement.

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

## 10. Insurance

10.1 The Supplier/Contractor must maintain at all times their insurances for at least the cover specified in the Purchase Order.

10.2 The Supplier/Contractor must maintain their Insurances for at least 12 months following delivery of the Products (6 years following completion of Works) unless otherwise specified in the Purchase Order.

10.3 The Supplier/Contractor must provide certificates of currency in respect of the Supplier/Contractor's Insurances when reasonably requested by the Council.

## 11. Work Health & Safety & Return to Work SA (WORKS ONLY)

If applicable:

11.1 the Contractor must comply with the *Work Health and 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 regulations, notices and codes of practice having application to this agreement;

11.2 the Contractor must comply with the *Return to Work 2014 (SA)* and any regulations made under it;

11.3 the Contractor must comply with all reasonable directions and procedures relating to security and work health and safety as required by the Council; and

11.4 the Contractor must immediately notify the Council of any incident or accident arising from the performance of this agreement, including any incident or accident involving the public.

## 12. Indemnities

The Supplier/Contractor must indemnify 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 Supplier/Contractor'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.

## 13. Intellectual Property

13.1 Other than any drawings or specifications provided by the Council to the Supplier/Contractor, the Supplier/Contractor warrants that the Works will not infringe the Intellectual Property of any third party.

13.2 The ownership of Intellectual Property produced as a result of this agreement vests solely in the Council immediately on its creation.

13.3 The Supplier/Contractor is granted a royalty free non-transferrable non-exclusive licence to use any Intellectual Property:

13.3.1 produced as a result of this agreement; or

13.3.2 relating to the drawings and specifications or the Confidential Information provided by the Council to the Supplier/Contractor;

Solely for the purpose of completing the Works and for no other purpose.

#### 14. Force Majeure

- 14.1 If a Force Majeure Event causes delay or failure by a party to perform its obligations under this agreement:
- 14.1.1 neither party is liable for such delay or failure; and
- 14.1.2 all obligations of a party under this agreement are suspended until the Force Majeure Event ceases to apply.
- 14.2 A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this agreement must:
- 14.2.1 notify the other party as soon as possible giving:
- 14.2.1.1 reasonably full particulars of the Force Majeure Event;
- 14.2.1.2 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
- 14.2.1.3 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
- 14.2.2 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;
- 14.2.3 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;
- 14.2.4 Notify the other party when the Force Majeure Event terminations or abates to an extent which permits resumption of performance; and
- 14.2.5 Notify the other party when resumption of performance occurs.
- 14.3 If a delay or failure under this clause exceeds 60 days, the Council may immediately terminate this agreement by written notice to the Supplier/Contractor (**Termination Date**).
- 14.4 In the event of the Council terminating this agreement pursuant to clause 14.3:
- 14.4.1 The Council remains liable to pay the Supplier/Contractor any unpaid invoice already issued to the Council;
- 14.4.2 Within twenty (20) Business Days of the Termination Date the Supplier/Contractor must give the Council an invoice:
- 14.4.2.1 For Works completed up to and including the Termination Date; and
- 14.4.2.2 for reasonable and substantiated direct costs or expenses (net of GST input tax credits) the Supplier/Contractor incurred as the result of the Council terminating the agreement under clause 14.3 and not reasonable able of being put to alternate use.
- 14.4.3 The Council will not otherwise be liable to the Supplier/Contractor for any cost, loss, expense or damage incurred by the Supplier/Contractor in

connection with the exercise by the Council of its rights under clause 14.3 including, without limitation, any claim relating to loss of anticipated profits or unperformed Works.

#### 15. Termination

- 15.1 The Council may immediately terminate this agreement by giving notice to the Supplier/Contractor if the Supplier/Contractor:
- 15.1.1 ceases to carry on business or becomes otherwise unable to perform its obligations under this agreement;
- 15.1.2 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;
- 15.1.3 becomes an externally-administered body corporate or an insolvent under administration or becomes insolvent (each within the meaning of the *Corporations Act 2001*).
- 15.2 Termination of this agreement under this clause does not affect any accrued rights or remedies of either party.

#### 16. Confidential Information and Freedom of information

- 16.1 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:-
- 16.1.1 keep confidential; and
- 16.1.2 not use or reproduce in any form,
- any Confidential Information belonging to the other party. A party may depart from its obligations under this clause only with the written consent of the other party or as required by law or the terms of this agreement.
- 16.2 The Supplier/Contractor consents to any disclosures made as a result of the Council complying with its obligations under the *Freedom of Information Act 1991* (SA), subject to any legally required consultation.
- 16.3 Subject to clause 16.1, for the purposes of the FOI Act, the terms specified confidential in the Purchase Order are confidential (ie confidential sections).
- 16.4 Unauthorised disclosure of the confidential sections and their subject matter is a breach of this agreement.

#### 17. Audit

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

#### 18. Disputes

All disputes or differences between the Council and the Supplier/Contractor 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.

#### 19. Relationship

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

## 20. Miscellaneous

### 20.1 Special conditions

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

### 20.2 Alteration

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

### 20.3 Assignment (Goods Only)

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

19.3.1 in any application for such consent, the Supplier must provide all information required by the Council, including evidence that the proposed assignee is capable of providing the Goods.

### Assignment (Works Only)

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

### 20.4 Entire agreement

This agreement:

- 20.4.1 constitutes the entire agreement between the parties about its subject matter;
- 20.4.2 supersedes any prior understanding, agreement, condition, warranty, indemnity or representation about its subject matter.

### 20.5 Waiver

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

- 20.5.1 must be in writing signed by the party giving the waiver;
- 20.5.2 is effective only to the extent set out in the written waive

### 20.6 Exercise of power

- 20.6.1 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.
- 20.6.2 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.

### 20.7 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.

### 20.8 Governing law

- 20.8.1 This agreement is governed by the law in South Australia.
- 20.8.2 The parties irrevocably submit to the exclusive jurisdiction of the courts in South Australia.

### 20.9 Ombudsman

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

## 20.10 ICAC

The Supplier/Contractor acknowledges and agrees that by entering into this agreement with the Council the Supplier/Contractor will be considered to be a 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, as regards this agreement.

## 21. GST

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

## 22. Notices

- 22.1 A notice, demand, consent, approval or communication under this agreement (**Notice**) must be:
  - 22.1.1 in writing, in English and signed by a person authorised by the sender; and
  - 22.1.2 hand delivered or sent by pre-paid post or facsimile or electronic communication to the recipient's address or facsimile number specified in the Purchase Order, as varied by any Notice given by the recipient to the sender.
- 22.2 A Notice is deemed to be received:
  - 22.2.1 if sent by prepaid post, two business days after posting;
  - 22.2.2 if sent by facsimile, at the time and on the day shown in the sender's transmission report, if it shows that the entire Notice was sent to the recipient's facsimile number last Notified by the recipient to the sender;
  - 22.2.3 if sent by electronic communication, at the time deemed to be the time of receipt under the *Electronic Transactions Act 2000* (SA).

