

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 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 7.4.1, a summary of which is detailed in Annexure A.
- 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 Governmental 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 organisation 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 the Purchase Order on the front page of these Terms and Conditions.
- 1.8 **Terms and Conditions** means 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 for 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 ;
 - 2.8 the meaning of general words is not limited by specific examples introduced by 'including', 'for example ' or similar expressions;
- 2.9 **PRECEDENCE**
In the event of any conflict between the terms of this Agreement and a Council Contract, then the terms of the Contract shall prevail

3. APPLICATION

This agreement:

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

4. SUPPLY

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

5. PAYMENT

Unless otherwise specified in the Payment Terms, the Council must pay the price specified in the Purchase Order by electronic funds and BPAY transfer within 30 days of the end of the month in which the invoice is issued by the Contractor. The invoice cannot be issued until the Works have been completed by the Contractor.

6. SERVICE STANDARDS

The Contractor 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;
- 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 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 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
- 6.5 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.

7. WARRANTIES BY CONTRACTOR

- 7.1 The Contractor warrants that the Works will:
 - 7.1.1 be of good merchantable quality and fit for their purpose;
 - 7.1.2 be performed using new materials, unless otherwise notified in writing by the Contractor;
 - 7.1.3 conform with the description and the Specifications in the Purchase Order; and

- 7.1.4 throughout the Warranty Period, operate in accordance with the Specifications, and otherwise in accordance with the operation of similar products.
- 7.2 If any Works are found to be defective or do not comply with clause 7.1.1 to 7.1.4 and the Council notifies the Contractor of the defect during the Warranty Period, the Contractor must, at its own cost, promptly rectify any defects in the Works within the Warranty Response Time.
- 7.3 Failing rectification by the Contractor during the Warranty Response Time, the Council may rectify defects at the cost of the Contractor.
- 7.4 The Contractor:
- 7.4.1 acknowledges and agrees that it enters into this agreement with knowledge of the 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;
- 7.4.2 warrants to the Council that is 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
- 7.4.3 acknowledges that the Council has relied on the Contractor's warranties in entering into this agreement.
- 7A. VARIATIONS AND EXTENSIONS OF TIME**
- 7A.1 No unauthorised Variation and Valuation of Variations
- 7A.1.1 The Contractor must not, and is not authorised to, make any Variation of the Works except:
- 7A.1.1.1 a Variation instructed by the Council; and/or
- 7A.1.1.2 a Variation requested by the Contractor, which has been approved by the Council.
- 7A.1.2 Variations by the 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.
- 7A.2 Adjustment of price
For the purpose of any adjustment to the price for a Variation:
- 7A.2.1 if practicable, the value of the Variation must be agreed by the Contractor and the Council before the Contractor commences to execute the Variation; or
- 7A.2.2 if the value of the Variation is not agreed by the Contractor 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 must promptly and diligently supply to the Council all relevant information to the valuation.
- 7A.3 Extension of Time
- 7A.3.1 The 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 foreseeable as at the date of receipt of a Purchase Order from the Council.
- 7A.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.
- 7A.3.3 The claim must be made before or within seven days after the commencement of the delay, whether or not it is practicable to estimate the delay or its consequences.
- 7A.3.4 Subject always to clause 7A.3.5, if supply of the Works is delayed by a cause beyond the control of the Contractor, the Contractor is entitled to a fair and reasonable extension of the time for supplying the Works.
- 7A.3.5 For the avoidance of doubt, the 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 foreseeable at the date of receipt of a Purchase Order from the Council this agreement.
- 7A.3.6 The 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 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.
- 8. INSURANCE**
- 8.1 The Contractor must maintain at all times Public Liability Insurance to the value of at least \$20 million.
- 8.2 The Contractor must maintain the Contractor's Insurances for at least 6 years following completion of the Works unless otherwise specified in the Purchase Order.
- 8.3 The Contractor must provide certificates of currency in respect of the Contractor's Insurances before commencing the Works and when reasonably requested by the Council.
- 9. WORK HEALTH & SAFETY AND RETURN TO WORKSA**
If applicable
- 9.1 the Contractor must comply with the Work Health and Safety Act 2012 (SA), 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, notices and codes of practice having application to this agreement;
- 9.2 the Contractor must comply with the Return to Work Act 2014 (SA) and any regulations made under it;
- 9.3 the Contractor must comply with all reasonable directions and procedures relating to security and work health and safety as required by the Council; and
- 9.4 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.
- 10. CONTRACTOR INDEMNITIES**
The Contractor 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 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.
- 11. INTELLECTUAL PROPERTY**
- 11.1 The Contractor acknowledges Council's obligations may require Reports/Documentation to be published or provided to the public. As a minimum requirement this may be 'view only', or as otherwise required.
- 11.2 Other than any drawings or specifications provided by the Council to the Contractor, the Contractor warrants that the Works will not infringe the Intellectual Property of any third party.
- 11.3 The ownership of Intellectual Property produced as a result of this agreement vests solely in the Council immediately on its creation.
- 11.4 The Contractor is granted a royalty free non-transferrable non-exclusive licence to use any Intellectual Property: produced as a result of this agreement; or
- 11.5 relating to the drawings and specifications or the Confidential Information provided by the Council to the Contractor; solely for the purpose of completing the Works and for no other purpose.

12. FORCE MAJEURE

- 12.1 If a Force Majeure Event causes delay or failure by a party to perform its obligations under this agreement:
 - 12.1.1 neither party is liable for such delay or failure; and
 - 12.1.2 all obligations of a party under this agreement are suspended until the Force Majeure Event ceases to apply.
- 12.2 A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this agreement must:
 - 12.2.1 notify the other party as soon as possible giving:
 - 12.2.1.1 reasonably full particulars of the Force Majeure Event;
 - 12.2.1.2 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
 - 12.2.1.3 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
 - 12.2.2 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;
 - 12.2.3 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;
 - 12.2.4 notify the other party when the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and
 - 12.2.5 notify the other party when resumption of performance occurs.
- 12.3 If a delay or failure under this clause exceeds 60 days, the Council may immediately terminate this agreement by written notice to the Contractor (Termination Date).
- 12.4 In the event of the Council terminating this agreement pursuant to clause 12.3:
 - 12.4.1 the Council remains liable to pay the Contractor any unpaid invoice already issued to the Council;
 - 12.4.2 within twenty (20) Business Days of the Termination Date the Contractor must give the Council an invoice:
 - 12.4.2.1 for Works completed up to and including the Termination Date; and
 - 12.4.2.2 for reasonable and substantiated direct costs or expenses (net of GST input tax credits) the Contractor incurred as the result of the Council terminating the agreement under clause 12.3 and not reasonably able of being put to alternate use.
 - 12.4.3 The Council will not otherwise be liable to the Contractor for any cost, loss, expense or damage incurred by the Contractor in connection with the exercise by the Council of its rights under clause 12.3 including, without limitation, any claim relating to loss of anticipated profits or unperformed Works.

13. TERMINATION

- 13.1 The Council may immediately terminate this agreement by giving notice to the other party if the Contractor:
 - 13.1.1 ceases to carry on business or becomes otherwise unable to perform its obligations under this agreement;
 - 13.1.2 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;
 - 13.1.3 becomes an externally-administered body corporate or an insolvent under administration or

becomes insolvent (each within the meaning of the Corporations Act 2001).

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

14. CONFIDENTIAL INFORMATION AND FREEDOM OF INFORMATION

- 14.1 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:
 - 14.1.1 keep confidential; and
 - 14.1.2 not use or reproduce in any form;
- 14.2 The 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.
- 14.3 Subject to clause 14.1, for the purposes of the FOI Act, the terms specified confidential in the Purchase Order are confidential (confidential sections).
- 14.4 Unauthorised disclosure of the confidential sections and their subject matter is a breach of this agreement.

15. AUDIT OF WORKS

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

16. DISPUTES

All disputes or differences between the Council and the 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.

17. RELATIONSHIP

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

18. MISCELLANEOUS

- 18.1 Special conditions
 - 18.1.1 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.
- 18.2 Alteration
 - 18.2.1 This agreement may be altered only in writing signed by each party.
- 18.3 Assignment
 - 18.3.1 The Contractor must not assign this agreement or any right under it without the prior written consent of the Council.
- 18.4 Entire Agreement

This agreement:

 - 18.4.1 constitutes the entire agreement between the parties about its subject matter; and
 - 18.4.2 supersedes any prior understanding, agreement, condition, warranty, indemnity or representation about its subject matter.
- 18.5 Waiver

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

 - 18.5.1 must be in writing signed by the party giving the waiver;
 - 18.5.2 is effective only to the extent set out in the written waiver.
- 18.6 Exercise of power
 - 18.6.1 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.
 - 18.6.2 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.
- 18.7 Survival
 - 18.7.1 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.
- 18.8 Governing law

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

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

18.9 Ombudsman

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

18.10 ICAC

18.10.1 The Contractor acknowledges and agrees that by entering into this agreement with the Council the 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.

19. WORK COVER

If applicable:

- a. the Contractor must comply with the Work Health and Safety Act 2012 and all associated regulations, including those 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;
- b. the Contractor must comply with all reasonable directions and procedures relating to security and occupational health, safety and welfare as required by the Council; and
- c. 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.

20. GST

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

21. NOTICES

- 21.1 A notice, demand, consent, approval or communication under this agreement (**Notice**) must be:
 - 21.1.1 in writing, in English and signed by a person authorised by the sender; and
 - 21.1.2 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.
- 21.2 A Notice is deemed to be received:
 - 21.2.1 if sent by prepaid post, two Business Days after posting;
 - 21.2.2 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;
 - 21.2.3 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.

Annexure A Existing Conditions

By way of example, the directions applicable as at 9 April 2020 made pursuant to section 25 of the Emergency Act 2004 are as follows:

Emergency Management (Non-essential Business and Other Activities No 2) (COVID-19) Direction 2020 was made under section 25 of the Emergency Management Act 2004 on 30 March 2020 and operates from 31 March 2020;

Emergency Management (Cross-border Travel No 2) (COVID-19) Direction 2020 was made under section 25 of the Emergency Management Act 2004 on 28 March 2020 and operates from 29 March 2020;

Emergency Management (Appropriate Surgery During COVID-19 Pandemic No 3) Direction 2020 was made under section 25 of the Emergency Management Act 2004 on 2 April 2020 and operates from 3 April 2020;

Emergency Management (Gatherings) (COVID-19) Direction 2020 was made under section 25 of the Emergency Management Act 2004 on 27 March 2020 and operates from 28 March 2020;

Emergency Management (COVID-19) (Isolation Following Diagnosis or Close Contact) Direction 2020 was made under section 25 of the Emergency Management Act 2004 on 27 March 2020 and operates from 28 March 2020;

Emergency Management (Continuation of Overseas Travel Self-Quarantine) (COVID-19) Direction 2020 was made under section 25 of the Emergency Management Act 2004 on 27 March 2020 and operates from 28 March 2020;

Emergency Management (Prohibition of Point of Care Serology Tests) (COVID-19) Direction 2020 was made under section 25 of the Emergency Management Act 2004 on 2 April 2020 and operates from 2 April 2020; and

Emergency Management (Residential Aged Care Facilities) (COVID-19) Direction 2020 was made under section 25 of the Emergency Management Act 2004 on 27 March 2020 and operates from 28 March 2020