

Terms and Conditions of Purchase

*PLEASE NOTE that these terms and conditions **do not** apply if a contract/agreement has been executed with the Council in relation to the goods/works/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 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 of the parties to the other in connection with this agreement and includes all scientific, technical, manufacturing, performance, sales, financial, commercial, contractual or marketing information possessed by each party, but specifically excludes any documentation or information which has been previously published or otherwise disclosed to the general public or is required to be disclosed by Law.
- 1.3. **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.
- 1.4. **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.
- 1.5. **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.
- 1.6. **Product** means the goods, works, or services the subject of the Purchase Order.

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- 1.7. **Provider** means the contractor, consultant or supplier engaged by the Council to supply and deliver goods, undertake works or provide services as specified in the Purchase Order.
- 1.8. **Purchase Order** means the purchase order issued by the Council that these Terms and Conditions are attached to.
- 1.9. **Terms and Conditions** mean these Terms and Conditions.
- 1.10. **Variation** means any change in the Product specified in the Purchase Order, including:
- a) any increase of, decrease in, or omission from such Product.
 - b) any changes in the character, specifications, quality, scope, origin and/or the materials for any such Product or
 - c) any additional supply of such Product.
- 1.11. **Warranty Period** means the warrant period specified in the Purchase Order.
- 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 and the Terms and Conditions.
- 2.2. a reference to a party includes its executors, administrators, successors and permitted assigns.
- 2.3. words importing persons shall include individuals, partnerships, bodies corporate or unincorporated and
- 2.4. a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it.

3. Application

This agreement:

- 3.1. applies to the Product provided by the Provider to the Council and the Provider is deemed to have read and agreed to the Purchase Order and Terms and Conditions prior to filling any order for the Product and
- 3.2. prevails over the Provider's terms and conditions of sale or any other documents provided by the Provider.

4. Supply

The Provider agrees to supply the Product and the Council agrees to purchase the Product on the terms of this agreement

5. Delivery of Goods (*Goods Only*)

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- 5.1. The Provider must provide the Product on or before the date/s specified in the Purchase Order.
- 5.2. Unless otherwise specified in this Agreement, “delivery” occurs as soon as the Product is:
 - 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 Product passes to the Council on delivery of the Product.
- 5.4. Risk in the Product passes on delivery of the Product
No liability to pay for the Product arises until delivery.

6. Payment

Unless otherwise specified in the Purchase Order, the Council must pay the price specified in the Purchase Order by cheque or electronic funds transfer within thirty (30) days from the end of the month in which the Council receives a correctly rendered tax invoice from the Provider. The invoice cannot be issued until after the Product has been provided.

7. Service Standards (*Works Only*)

The Provider must:

- 7.1. deliver the Product in a professional and competent manner with due care, skill and diligence and within the timeframe 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 provision of the Product and with all requirements, notices or orders in respect of anything affected by the provision of the Product.
- 7.3. provide at its own cost all supervision, labour, materials plant, tools and equipment, transport and temporary works required for the provision of the Product.
- 7.4. be responsible for the care, storage and protection of unfixed items, items provided to the Provider by the Council, and items brought onto the relevant site by any sub-contractors and
- 7.5. provide, erect and maintain all barricades, guards, fences, signs, lighting and temporary roadways and footpaths necessary for the protection of the Product, other property and for the safety and convenience of the public in accordance with accepted Standards or Codes of Practice and shall remove them when no longer required.

8. Warranties by Provider

- 8.1. The Provider warrants that the Product will:
 - 8.1.1. consist of materials/products that are of good merchantable quality and fit for their purpose.

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- 8.1.2. consist of new materials, unless otherwise notified in writing by the Provider.
- 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 any specifications set out in the Purchase Order, and otherwise in accordance with the operation of similar products.

- 8.2. If the Product is found to be defective or does not comply with clauses 8.1.1 to 8.1.4 and the Council notifies the Provider of the defect during the Warranty Period, the Provider must, at its own cost, promptly replace the Product and deliver it to the Council, or promptly rectify any defects in the Product.
- 8.3. Failing rectification by the Provider, the Council may rectify defects at the cost of the Provider.

9. Variations

9.1. General

No Variation invalidates this agreement.

9.2. No unauthorised Variation

The Provider must not, and is not authorised to, make any Variation of the Product except:

- 9.2.1 a Variation instructed by the Council and/or
- 9.2.2 a Variation requested by the Provider, which has been approved by the Council.

9.3. Execute Variations

The Provider must provide any Variation instructed by the Council.

9.4. Variations in Writing

All Variations must be documented in writing and must be signed by a representative of both the Council and the Provider.

9.5. Adjustment of Price

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

- 9.5.1. if practicable, the value of a Variation must be agreed by the Provider and the Council before the Provider commences to execute the Variation or
- 9.5.2. if the value of the Variation is not agreed by the Provider and the Council, the value must be determined by the Council by application of rates accepted by the Council and
- 9.5.3. if the Council gives the Provider a written instruction that a matter is so urgent that the Provider should proceed with the Variation before it is

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valued, the Provider may proceed with the Variation and the Council and the Provider will then jointly negotiate a reasonable value for the Variation.

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

10. Extension of Time

10.1. Extension

10.1.1. If the provision of the Product is delayed by a cause beyond the control of the Provider, the Provider may, subject to clause 10.1.2, request a fair and reasonable extension of the time for the provision of the Product.

10.1.2. Any request by the Provider for an extension must be in writing and made within seven days after the commencement of the delay and must state with particularity the cause of the delay and include an estimate (if practicable) of the extent or likely extent of the delay in providing the Product.

10.2. Conditions precedent

The Provider is entitled to a time extension only if the Provider took reasonable steps to minimise the delay.

10.3. Council's determination

The Council must determine what (if any) fair and reasonable extension of time should be allowed to the Provider in respect of each request and must give written notice of every such determination to the Provider, and the date and time for the provision of the Product must be extended accordingly.

10.4. Documentation

All extensions of time must be in writing and must be signed by a representative of both the Council and the Provider.

10.5. No costs or damages

The Provider accepts the risk of all costs, losses and expenses incurred because of a delay in the provision of the Product. The Provider'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.

11. Insurance

11.1. The Provider must maintain all insurances reasonably required by the Council.

11.2. The Provider must provide certificates of currency in respect of the Provider's insurances to the Council upon request.

12. Work Health & Safety and Return to Work SA

If applicable:

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- 12.1. the Provider 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;
- 12.2. the Provider must comply with the *Return to Work Act 2014* (SA) and any regulations made under it.
- 12.3. the Provider must comply with all reasonable directions and procedures relating to security and work health and safety as required by the Council and
- 12.4. the Provider 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.

13. Indemnities

The Provider 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 Provider'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. 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 terminates or abates to an extent which permits resumption of performance and

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14.2.5. Notify the other party when resumption of performance occurs.

14.3. If a delay or failure under this clause exceeds sixty (60) days, the Council may immediately terminate this agreement by written notice to the Provider (**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 Provider any unpaid invoice already issued to the Council and

14.4.2. Within twenty (20) Business Days of the Termination Date the Provider must give the Council a final progress claim for money owing up to and including the Termination Date and not the subject of a prior progress claim.

14.5. The Council will not otherwise be liable to the Provider for any cost, loss, expense, or damage incurred by the Provider 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 (if relevant).

15. Termination

15.1. The Council may immediately terminate this agreement by giving notice to the Provider if the Provider:

15.1.1. becomes an externally administered body corporate or an insolvent under administration.

15.1.2. ceases to carry on business or becomes otherwise unable to perform its obligations under this agreement or

15.1.3. 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.

15.2. 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 of and in the matter contemplated by this agreement, and agrees that it will:

16.1.1. keep confidential.

16.1.2. take reasonable steps to ensure that the party's officers and employees to not disclose to a third party.

16.1.3. maintain proper and secure custody of. and

16.1.4. not use or reproduce in any form,

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any Confidential Information belonging to the other party. Any departure from a party's obligations pursuant to this clause may only be with the written consent of the other party or as required by law or the terms of this agreement.

16.2. The Provider 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.

16.3. Subject to clause 16, for the purposes of the FOI Act, the terms specified confidential in the Purchase Order are confidential.

17. Audit

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

18. Disputes

All disputes or differences between the Council and the Provider must be referred to an arbitrator, agreed by the parties or in the absence of agreement appointed by the Chairperson for the time being of the South Australian Chapter of the Institute of Arbitrators and Mediators 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 Provider must not assign this agreement or any right under it without the prior written consent of the Council.

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

20.4. Assignment (*Works Only*)

The Provider must not assign this agreement or any right or obligation under it without the prior written consent of the Council, which may be granted or withheld in the Council's absolute discretion.

20.5. Waiver

A waiver of a provision of or right under this agreement must be in writing signed by the party giving the waiver and is effective only to the extent set out in the written waiver.

20.6. Exercise of power

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.

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

This agreement is governed by the law in South Australia.

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

20.9. Ombudsman

The Provider acknowledges that the *Ombudsman Act 1972* (SA) empowers the Ombudsman to investigate matters in the public interest. The Provider must ensure compliance with all obligations arising under that or any other legislation, as regards this agreement.

20.10. ICAC

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

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20.11. GST

20.11.1. The total amounts payable under the Purchase Order are exclusive of GST, if applicable.

20.11.2. Notwithstanding any other provision of this agreement, the Council need not make any payment for a taxable supply made by the Provider under this Agreement until the Provider has given the Council a tax invoice in respect of that taxable supply.

20.12. Notices

20.12.1. A notice, demand, consent, approval, or communication under this agreement **(Notice)** must be:

- a) in writing, in English and signed by a person authorised by the sender and
- b) hand delivered or sent by pre-paid 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.

20.12.2. A Notice is deemed to be received:

- a) if sent by prepaid post, two (2) Business Days after posting (or seven (7) Business Days after posting if posting to or from a place outside Australia) or
- b) if sent by electronic communication, at the time deemed to be the time of receipt under the *Electronic Transactions Act 2000* (SA).