

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 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;
 - e) but does not include any event or circumstance which the Supplier ought to have reasonably foreseen from or as a result of the Existing Conditions.
 - f) 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.
- 1.5 **Intellectual Property** means all rights conferred by statute, common law or equity in relation to patents, inventions, registered and unregistered designs, registered and unregistered trade marks, 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 **Purchase Order** means the Purchase Order on the front page of these Terms and Conditions.
- 1.7 **Terms and Conditions** means these Terms and Conditions. 1.5 Expressions used in the Purchase Order have the same meaning in these Terms and Conditions.
- 1.8 **Variation** means any change in the Goods as specified any Purchase Order, being:
 - a) any increase of, or decrease in, the Goods;
 - b) any change in the character, quality or origin of any such Goods; or
 - c) any supply of additional Goods.
- 1.9 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;

3. 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

4. APPLICATION

This agreement:

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

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

6. DELIVERY OF GOODS

- 6.1 The Supplier must deliver the Goods and Services on or before the Delivery Date.
- 6.2 Unless otherwise specified in this agreement, "delivery" occurs as soon as the Goods are:
 - 6.2.1 off-loaded at the delivery address specified in the Purchase Order; and
 - 6.2.2 inspected by the Council and accepted as being in accordance with this agreement.
- 6.3 Title to and property in the Goods passes to the Council on delivery of the Goods.
- 6.4 Risk in the Goods passes on delivery of the Goods.
- 6.5 No liability to pay for any Goods or Services arises until delivery.

7. PAYMENT

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

8. WARRANTIES BY SUPPLIER

- 8.1 The Supplier warrants that the Goods and Services will:
 - 8.1.1 be of good merchantable quality and fit for their purpose;
 - 8.1.2 be new, unless otherwise notified in writing by the Supplier;
 - 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 are found to be defective or do not comply with clause 7.1.1 to 7.1.4 and the Council notifies the Supplier of the defect during the Warranty Period, the Supplier must, at its own cost, promptly replace the Products and deliver it to the Council.
- 8.3 Failing rectification by the Supplier, the Council may rectify defects at the cost of the Supplier.
- 8.4 The Supplier:

- 8.4.1 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;
- 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's warranties in entering into this agreement.

7A. VARIATIONS AND EXTENSIONS OF TIME

- 7A.1 No unauthorised Variation & Valuation of Variations
- 7A.1.1 The Supplier must not, and is not authorised to, make any Variation of the Goods except:
- 7A.1.1.1 a Variation instructed by the Council; and/or
- 7A.1.1.2 a Variation requested by the Supplier, which has been approved by the Council.
- 7A.1.2 Variations by the Supplier 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
- 7A.2.1 For the purpose of any adjustment to the price for a Variation:
- 7A.2.1.1 if practicable, the value of the Variation must be agreed by the Supplier and the Council before the Supplier commences to execute the Variation; or
- 7A.2.1.2 if the value of the Variation is not agreed by the Supplier and the Council, the value must be determined by the Council by application of rates accepted by the Council.
- 7A.2.2 A Variation must be valued as soon as practicable, and the Supplier must promptly and diligently supply to the Council all relevant information to the valuation.
- 7A.3 Extension of Time
- 7A.3.1 The Supplier by written notice to the Council may claim a time extension if 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 foreseen 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 delivering the Goods.
- 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 delivery of the Goods is delayed by a cause beyond the control of the Supplier, the Supplier is entitled to a fair and reasonable extension of the time for delivering the Goods.

- 7A.3.5 For the avoidance of doubt, the Supplier 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.
- 7A.3.6 The Supplier accepts the risk of all costs, losses and expenses incurred because of a delay in delivery of the Goods (including a delay caused by a Variation directed by the Council). The Supplier'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.

9. INSURANCE

- 9.1 The Supplier must maintain at all times Public and Products Liability Insurance for a value of at least \$20 million.
- 9.2 The Supplier must maintain the Supplier's Insurances for at least 12 months following delivery of the Products unless otherwise specified in the Purchase Order.
- 9.3 The Supplier must provide certificates of currency in respect of the Supplier's Insurances when reasonably requested by the Council.
- 9.4 The Supplier must comply with the Work Health and Safety Act 2012 and all associated regulations, including those adopted by the Council.

10. SUPPLIER INDEMNITIES

The Supplier 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'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:
- 11.5 produced as a result of this agreement; or
- 11.6 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:
- 12.2 neither party is liable for such delay or failure; and
- 12.3 all obligations of a party under this agreement are suspended until the Force Majeure Event ceases to apply.
- 12.4 A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this agreement must:
- 12.5 notify the other party as soon as possible giving:
- 12.6 reasonably full particulars of the Force Majeure Event;
- 12.7 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
- 12.8 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
- 12.9 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;

- 12.10 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;
- 12.11 notify the other party when the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and
- 12.12 notify the other party when resumption of performance occurs.
- 12.13 If a delay or failure under this clause exceeds 60 days, the Council may immediately terminate this agreement by written notice to the Supplier (Termination Date).
- 12.14 In the event of the Council terminating this agreement pursuant to clause 10.3:
- 12.15 the Council remains liable to pay the Supplier any unpaid invoice already issued by the Supplier; and
- 12.16 within twenty (20) Business Days of the Termination Date the Supplier must give the Council a final invoice;
- 12.17 for Goods supplied up to and including the Termination Date and not the subject of a prior invoice; and
- 12.18 for reasonable and substantiated direct costs or expenses (net of GST input tax credits) the Supplier incurred as the result of the Council terminating the agreement under clause 10.3 and not reasonably able of being put to alternate use.
- 12.19 The Council will not otherwise be liable to the Supplier for any cost, loss, expense or damage incurred by the Supplier in connection with the exercise by the Council of its rights under clause 10.3 including, without limitation, any claim relating to loss of anticipated profits or unsupplied Goods.

13. TERMINATION

- 13.1 The Council may immediately terminate this agreement by giving notice to the Supplier if the Supplier:
 - 13.1.1 ceases to carry on business or becomes otherwise unable to perform its obligations under this agreement; 10.1.2 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;
 - 13.1.2 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. AUDIT

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

15. DISPUTES

All disputes or differences between the Council and the 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.

16. RELATIONSHIP

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

17. MISCELLANEOUS

- 17.1 Special conditions
 - 17.1.1 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.

17.2 Alteration

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

17.3 Assignment

- 17.3.1 The Supplier must not assign this agreement or any right under it without the prior written consent of the Council.
- 17.3.2 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.

17.4 Entire agreement

- 17.4.1 This agreement:
 - 17.4.1.1 constitutes the entire agreement between the parties about its subject matter;
 - 17.4.1.2 supersedes any prior understanding, agreement, condition, warranty, indemnity or representation about its subject matter.

17.5 Waiver

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

17.6 Exercise of power

- 17.6.1 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.
- 17.6.2 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.

17.7 Survival

- 17.7.1 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.

17.8 Governing law

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

17.9 Ombudsman

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

17.10 ICAC

- 17.10.1 The Supplier acknowledges and agrees that by entering into this agreement with the Council the Supplier 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.

18. GST

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

19. NOTICES

- 19.1 A notice, demand, consent, approval or communication under this agreement (Notice) must be:

- 19.1.1 in writing, in English and signed by a person authorised by the sender; and
- 19.1.2 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.
- 19.2 A Notice is deemed to be received:
 - 19.2.1 if sent by prepaid post, two business days after posting;
 - 19.2.2 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;
 - 19.2.3 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.