

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.
- 1.7. **Supplier** 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 supplied by the Supplier to the Council and the Supplier 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 Supplier's terms and conditions of sale or any other documents supplied by the Supplier.

4. Supply

The Supplier 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)

- 5.1. The Supplier must supply 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.

6. Payment

- 6.1. The Supplier must provide an invoice (in a PDF electronic file) to the Council (via email address accounts@mountgambier.sa.gov.au) on the completion of supply of the goods or services specifying the relevant purchase order number.
- 6.2. The Council shall pay, by electronic funds transfer, the price to the Supplier by the last business day of the calendar month following the month in which the invoice is dated provided that the goods are supplied and the services are provided in the manner set out in the contract documents.

7. Service Standards (Works Only)

The Supplier 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 Supplier 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 Supplier

- 8.1. The Supplier warrants that the Product will:
 - 8.1.1. consist of materials/products that are of good merchantable quality and fit for their purpose;
 - 8.1.2. consist of new materials, 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 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 Supplier of the defect during the Warranty Period, the Supplier 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 Supplier, the Council may rectify defects at the cost of the Supplier.

9. Variations

- 9.1. General
No Variation invalidates this agreement.
- 9.2. No unauthorised Variation
The Supplier 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 Supplier, which has been approved by the Council.
- 9.3. Execute Variations
The Supplier must supply 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 Supplier.
- 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 Supplier and the Council before the Supplier commences to execute the Variation; or
 - 9.5.2. 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; and
 - 9.5.3. if the Council gives the Supplier a written instruction that a matter is so urgent that the Supplier should proceed with the Variation before it is valued, the Supplier may proceed with the Variation and the Council and the Supplier will then jointly negotiate a reasonable value for the Variation.

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.

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 Supplier, the Supplier 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 Supplier 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 Supplier is entitled to a time extension only if the Supplier 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 Supplier in respect of each request and must give written notice of every such determination to the Supplier, 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 Supplier.
- 10.5. No costs or damages
The Supplier accepts the risk of all costs, losses and expenses incurred because of a delay in the provision of the Product. 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.

11. Insurance

- 11.1. The Supplier must maintain all insurances reasonably required by the Council.
- 11.2. The Supplier must provide certificates of currency in respect of the Supplier's insurances to the Council upon request.

12. Work Health & Safety and Return to Work SA

If applicable:

- 12.1. the Supplier 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 Supplier must comply with the *Return to Work Act 2014* (SA) and any regulations made under it;
- 12.3. the Supplier 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 Supplier 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 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.

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
 - 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 Supplier (**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 any unpaid invoice already issued to the Council; and
 - 14.4.2. Within twenty (20) Business Days of the Termination Date the Supplier 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 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 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 Supplier if the Supplier:
 - 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 do 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,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 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.
- 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 Supplier 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 Supplier's obligations under this agreement.

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

20.4. Assignment (**Works Only**)

The Supplier 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 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 or any other legislation, as regards this agreement.

20.10. ICAC

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, as regards this agreement.

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 Supplier under this Agreement until the Supplier 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).

20.13. Set Off

The Council is entitled to deduct from amounts otherwise payable to the Supplier by the Council any amount due from the Supplier to the Council pursuant to the terms and conditions of the contract.