

Shellharbour City Council

Supply of Goods and Services – Terms and Conditions

BACKGROUND

- A. The Council wishes to engage the Supplier to provide the Goods and/or Services.
- B. The Supplier has the skills, background and experience in providing the Goods and/or Services and is willing to provide the Good and/or Services to Council in accordance with these terms and conditions.
- C. These terms and conditions apply to any Purchase Order issued by Council to the Supplier.

1 Definitions

1.1 Definitions

Background IP means the Intellectual Property of a Party which was in existence prior to the commencement of this agreement or which is subsequently developed by that Party independently of and for purposes unconnected with this agreement.

Confidential Information includes any information marked as confidential and any information received or developed by the Supplier during the term of this agreement, which is not publicly available and relates to processes, equipment and techniques used by the Council in the course of the Council's business including all information, data, drawings, specifications, documentation, source or object code, designs, construction, workings, functions, features and performance notes, techniques, concepts not reduced to material form, agreements with third parties, schematics and proposals and intentions, technical data and marketing information such as Council lists, financial information and business plans.

Contract IP means Intellectual Property created by the Supplier in the course of performing its obligations under this agreement.

Council means Shellharbour City Council ABN 78 392 627 134 and includes the Council's agents and permitted assigns.

Fees means the rates which the Council must pay to the Supplier in consideration of Goods or Services as set out in the Purchaser Order or as otherwise agreed in writing between the parties.

Force Majeure Event means any occurrence or omission as a direct or indirect result of which the Party relying on it is prevented from or delayed in performing any of its obligations under this agreement and which is beyond the reasonable control of that Party and could not have been prevented or mitigated by reasonable diligence or precautionary measures, including forces of nature, natural disasters, acts of terrorism, riots, revolution, civil commotion, epidemic, industrial action and action or inaction by a government agency but does not include any act or omission of a subcontractor (except to the extent that act or omission is caused by a Force Majeure Event).

Goods means the goods to be provided by the Supplier to the Council in accordance with a Purchase Order.

GST Law means the same as in the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Intellectual Property Rights means intellectual property rights at any time protected by statute or common law, including copyright, trade marks, patents and registered designs.

Loss includes, but is not limited to, costs (including party to party legal costs and the Supplier's legal costs), expenses, lost profits, award of damages, personal injury and property damage.

Modern Slavery means conduct which would constitute:

- (a) an offence under division 270 or 271 of the Criminal Code;
- (b) an offence under either of those divisions if the conduct took place in Australia;
- (c) an offence against any other applicable Commonwealth or state legislation relating to modern slavery;
- (d) trafficking in persons, as defined in article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; or
- (e) the worst forms of child labour, as defined in article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

Parties means the Supplier and the Council, and **Party** means either one of them.

Purchase Order means a written description of the Goods or Services to be provided by the Supplier which includes an estimate of the Supplier's charges for the performance of the required work and may also include an estimate of the time frame for the delivery of the Goods or Services. Each Purchase Order is identified by a unique six-digit number.

Services means the services to be provided by the Supplier to the Council in accordance with a Purchase Order.

Supplier means the entity specified as the supplier of Goods or Services on the Purchase Order and includes the Supplier's agents, personnel and permitted assigns.

Variation means a written request provided by Council to the Supplier to vary the Purchase Order.

2 General

- (a) These terms and conditions apply to all transactions between the Council and the Supplier relating to the provision of Goods and/or Services, unless otherwise agreed between the Parties.

3 Purchaser Order

- (a) Every Purchase Order must be submitted in writing on the Council's standard Purchase Order form, unless otherwise agreed between the Parties.

- (b) The Supplier will be deemed to have accepted the Purchase Order when the Supplier provides written acceptance of the Purchase Order or when the Supplier commences providing the Goods and/or Services in accordance with the Purchase Order.

4 Variations

- (a) The Council may request that Purchase Order be varied by providing a Variation.
- (b) The Supplier must take all reasonable steps to accommodate the Variation.
- (c) If the Council requests a Variation, and the Supplier will reasonably incur further costs in association with meeting such variation, the Supplier is required to provide the Council with a quote for the further costs. Council will have a period of 7 days to accept the further costs. If Council:
 - (i) accepts the further costs, the Purchase Order is varied as set out in the Variation;
 - (ii) does not accept the further costs within this timeframe or rejects the further costs, Council will elect to either:
 - (A) continue with the Purchase Order without the Variation; or
 - (B) cancel the Purchase Order.
- (d) If the Council requests a Variation, and the Supplier reasonably requires further time to complete the Purchase Order to meet such variation, the Supplier is required to provide the Council with the extension required. Council will have a period of 7 days to accept the extension. If Council:
 - (i) accepts the extension, the Purchase Order is varied as set out in the Variation;
 - (ii) does not accept the extension within this timeframe, Council will elect to either:
 - (A) continue with the Purchase Order without the Variation; or
 - (B) cancel the Purchase Order.
- (e) In the event that Council cancels a Purchase Order in accordance with clauses 4(c)(ii)(B) or 4(d)(ii)(B), Council will only be liable to pay for the expenses incurred by the Supplier in accordance with the Purchase Order as at the date of cancellation.

5 Invoicing and payment

- (a) In consideration of the provision of Goods and/or Services in accordance with this agreement, the Council will pay the Supplier the Fees.
- (b) The parties agree that the Fees will be inclusive of any GST that may be charged by the Supplier to the Council.
- (c) The Supplier must provide the Council with a tax invoice in accordance with the GST Law within 28 days of the date of the Purchase Order. Payment must be made by the Council to the Supplier in accordance with within the agreed terms of payment with the Supplier.

- (d) The invoice referred to in clause 5(c) must include the Purchase Order number and the Supplier's ABN.
- (e) The Supplier will not charge, and the Council will not be liable, for any expenses, charges, costs, fees except the Fees as agreed between the parties.
- (f) Except to the extent otherwise provided in this agreement, payment of an invoice is not:
 - (i) evidence or an admission that the Supplier has complied with its obligations under this agreement;
 - (ii) an admission of liability by the Council; or
 - (iii) acceptance of approval of the Supplier's performance.

6 Insurance

- (a) The Supplier will take out and maintain the following:
 - (i) worker's compensation insurance as prescribed by law for the Supplier's personnel;
 - (ii) public liability insurance for a minimum \$20,000,000 for any one occurrence; professional indemnity insurance for a minimum of \$2,000,000, where applicable;
 - (iii) any insurances specified with the Purchase Order; and
 - (iv) and any other insurances reasonably requested by Council.
- (b) The Supplier must maintain the above insurances for at least twelve (12) months following completion of the Goods and/or Services.
- (c) At the request of the Council, the Supplier will supply a copy of the certificates of currency in respect of the insurances and the insurance policies to the Council.
- (d) At the request of the Council, the Supplier shall register with the Council's nominated contractor compliance provider.

7 Title and risk

- (a) Risk in the Goods and/or Services passes to the Council when the Goods and/or Services:
 - (i) are off-loaded at the delivery address specified in the Purchase Order or otherwise delivered to Council; and
 - (ii) inspected by the Council and accepted as being in accordance with this agreement.
- (b) Title to and property in the Goods and/or Services passes to the Council on delivery of the Goods and/or Services.
- (c) Council is not liable to pay for any Goods and/or Services until completion of delivery.

8 No employment relationship, partnership, agency etc.

- (a) Nothing in this agreement constitutes the relationship of employer and employee between the Parties.
- (b) This agreement will not constitute or imply any partnership, joint venture, agency, fiduciary relationship or other relationship between the Parties.
- (c) Neither Party will have, nor represent that it has, any authority to make any commitments on the other Party's behalf.

9 Disclosure and ownership of Intellectual Property

- (a) The Parties agree that, other than as expressly provided in this clause, nothing in this agreement transfers or grants to any party any right, title or interest in or to any Intellectual Property in any Background IP.
- (b) The Supplier grants to the Council a worldwide, royalty free, perpetual, irrevocable, transferable, non-exclusive licence to use and develop the Supplier's Background IP to the extent necessary for the Council to exercise its rights and fulfil its obligations under this agreement, including to the right to use, develop and obtain the full benefit of the Goods and/or Services. The Council may sub-license its rights under this clause 9(b) to any contractor, agent or third party service provider of the Council.
- (c) The Supplier agrees to indemnify the Council fully against all liabilities, costs and expenses which the Council may incur if the Contract IP or Background IP infringes the rights of a third party.
- (d) The obligations accepted by the Supplier under this clause 9 survive termination or expiry of this agreement.

10 Confidentiality

- (a) The Supplier must keep the Council's Confidential Information confidential and not deal with it in any way that might prejudice its confidentiality.
- (b) The Supplier's obligations with regard to the Confidential Information will continue for so long as the Confidential Information is maintained on a confidential basis by the Council.
- (c) At the termination of this agreement, or when earlier directed by the Council:
 - (i) the Supplier must return all Confidential Information to the Council, including all copies of the Confidential Information or any extracts or summaries of the Confidential Information that the Supplier makes and any software that the Supplier creates based on the Confidential Information; and
 - (ii) the Supplier must erase and destroy any copies of any software containing or comprising the Confidential Information in the Supplier's possession or under the Supplier's control or that may have been loaded onto a computer possessed or controlled by the Supplier.
- (d) The Confidential Information does not include information which is generally available in the public domain otherwise than as a result of a breach of clause 10(a) by the Supplier.

- (e) The Supplier agrees that the Council may require it to sign a confidentiality agreement in a form that the Council approves, acting reasonably.
- (f) The Supplier agrees to indemnify the Council fully against all liabilities, costs and expenses which the Council may incur as a result of any breach of this clause by the Supplier.
- (g) The Supplier acknowledges that damages may be an inadequate remedy for breach of this clause 10 and that the Council may obtain injunctive relief against the Supplier for any breach of this clause 10.
- (h) The obligations accepted by the Supplier under this clause 10 survive termination or expiry of this agreement.

11 Warranties, liability and indemnities

- (a) The Supplier warrants, represents and undertakes that:
 - (i) it will provide the Goods and/or Services by the date or dates agreed by the Parties;
 - (ii) it will provide the Goods and/or Services with all due skill and diligence and in a good and workmanlike manner, and in accordance with this agreement and the best practice within the industry of the Supplier (**Best Practice**);
 - (iii) the Supplier's personnel will have the necessary skills, professional qualifications and experience to provide the Goods and/or Services in accordance with this agreement and Best Practice;
 - (iv) it has full capacity and authority to provide the Goods and/or Services and enter into this agreement;
 - (v) it complies with all relevant requirements under the Fair Trading Act 1987 (NSW) and the Competition and Consumer Act 2010 (Cth);
 - (vi) any provide the Goods and/or Services provided to Council by the Supplier are fit for purpose, unencumbered and free from defects in material and workmanship and are of merchantable quality;
 - (vii) the provide the Goods and/or Services comply with all applicable Australian standards and legislation;
 - (viii) the provide the Goods and/or Services do not infringe any patent, registered design, trademark or name, copyright or other protected right; and
 - (ix) it has obtained all necessary and required licences, consents and permits to provide the Goods and/or Services.
- (b) The Supplier covenants that the Supplier will be solely responsible for the payment to the Supplier's personnel, including all employees and agents, of all amounts due by way of salary, superannuation, annual leave, long service leave and any other benefits to which they are entitled as the Supplier's personnel and to otherwise comply with legislation applicable to the Supplier's Personnel.

- (c) Throughout the continuance of this agreement the Supplier must:
- (i) comply at the Supplier's own cost and expense with all acts, ordinances, rules, regulations, other delegated legislation, codes and the requirements of any Commonwealth, state and local government departments, bodies, and public authorities or other authority so far as the same may affect or apply to the Supplier or to the Goods and/or Services; and
 - (ii) indemnify the Council from and against all actions, costs, charges, claims and demands in respect of the agreement.
- (d) The Supplier is to be responsible for and will release and indemnify the Council against liability for all loss, damage or injury to any person or property caused by the Supplier, or the Supplier's personnel, including all employees or agents of the Supplier, in the course of providing the Good and/or Services, including in relation to the performance or non-performance of the Supplier's obligations under this agreement.
- (e) The obligations accepted by the Supplier under this clause 11 survive termination or expiry of this agreement.

12 Work, health and safety

- (a) The Council is committed to providing a healthy, safe and clean workplace for its employees, contractors and visitors. The Council's goal is to foster and sustain a positive safety culture. The Council's commitment is implemented through its work health and safety (WHS) policy and underpinned by a set of WHS and operational procedures throughout the Council.
- (b) The Supplier is required to comply with all relevant work, health, safety and welfare standards and regulations determined by the Council or as prescribed by legislation.
- (c) The Supplier must immediately notify the Council of any incident or accidents arising from the performance of this agreement, including any incident or accident involving the public.

13 Modern Slavery

In performing its obligations under the agreement, the Supplier will and must ensure that it:

- (a) comply with all applicable laws, statutes, regulations in force from time to time relating to Modern Slavery; and
- (b) take reasonable steps to ensure that there are no Modern Slavery practices in the Supplier's supply chains or in any part of their business.

14 Termination

- (a) Either Party may terminate this agreement by notice in writing to the other if the Party notified fails to observe any term of this agreement and fails to rectify this breach, to the satisfaction of the notifying Party, following the expiration of 7 days' notice of the breach being given in writing by the notifying Party to the other Party.
- (b) The Council may, at any time reject the Goods and/or Services if the Council believes on reasonable grounds that the Goods and/or Services do not comply with the warranties specified in clause 11 above or do not meet the Purchase Order (as varied, if applicable).

- (c) If the Council rejects the Goods and/or Services or any part of the Goods or Services, the Supplier must comply with any reasonable requirement of the Council to:
 - (i) Collect the defective Goods and replace them at the Supplier's expense; or
 - (ii) Refund the Council any amount paid for the defective Goods and/or Services,whichever is agreed upon between the parties.
- (d) Despite anything in this agreement to the contrary, the Council may terminate this agreement at any time by notice in writing to the Supplier, if the Supplier is guilty of any dishonesty, serious misconduct or serious neglect of duty, in or in connection with the provision of the Goods and/or Services.
- (e) The Council may terminate this agreement at any time for convenience by providing at least 28 days' written notice to the Supplier, in which case, the parties agree that the Council is not responsible any fees, expenses or reimbursements incurred by the Supplier in respect of the Purchase Order.
- (f) If the Council terminates this agreement for convenience on less than 28 days' notice, Council is only responsible for any fees, expenses or reimbursements incurred by the Supplier in respect of the Purchase Order as at the date of termination.

15 General

15.1 Force Majeure

- (a) Neither Party will have any liability under or be deemed to be in breach of this agreement for any delays or failures in performance of this agreement which result from a Force Majeure Event. The Party affected by such circumstances must promptly notify the other Party in writing when such circumstances cause a delay or failure in performance and when they cease to do so. If such circumstances continue for a continuous period of more than 6 months, either Party may terminate this agreement by written notice to the other Party.
- (b) During any period in which the Supplier is not performing obligations because of a claimed Force Majeure Event, the Council may (but need not) make alternative arrangements for the performance, whether by another person or otherwise, of any obligation which the Supplier is not performing without incurring any liability to the Supplier.
- (c) If a Force Majeure Event causes the Supplier to allocate limited resources between or among its other Councils, the Supplier must not place the Council lower in priority to any other similarly affected Council of the Supplier.

15.2 Amendments

This agreement may only be amended in writing signed by duly authorised representatives of the Parties.

15.3 Assignment

- (a) Neither Party may assign, delegate, subcontract, mortgage, charge or otherwise transfer any or all of its rights and obligations under this agreement without the prior written agreement of the other Party.

- (b) A Party may assign and transfer all its rights and obligations under this agreement to any person to which it transfers all of its business, provided that the assignee undertakes in writing to the other Party to be bound by the obligations of the assignor under this agreement.

15.4 Waiver

- (a) No failure or delay by the Council in exercising any right, power or privilege under this agreement will impair the same or operate as a waiver of the same. No single or partial exercise of any right, power or privilege precludes any further exercise of the same or the exercise of any other right, power or privilege.
- (b) The rights and remedies provided in this agreement are cumulative and not exclusive of any rights and remedies provided by law.

15.5 Conflict of Interest

The Supplier warrants that to the best of its knowledge no Conflict of Interest exists or is likely to arise in the performance of its obligations under this agreement. The Supplier must not, during the course of this agreement, engage in any activity likely to compromise its ability to perform its obligations under this agreement fairly and independently. The Supplier must immediately disclose to the Council any activity which constitutes or may constitute a Conflict of Interest.

15.6 Further assurance

Each Party to this agreement will at the request and expense of the other, execute and do any deeds and other things reasonably necessary to carry out the provisions of this agreement or to make it easier to enforce.

15.7 Notices

A notice or other communication connected with this agreement has no legal effect unless it is in writing. In addition to any other method of service provided by law, the notice may be sent by pre-paid post to the address of the addressee as set out in this agreement, or sent by email to the email address of the addressee.

15.8 Severance

If any provision of this agreement is prohibited by law or judged by a court to be unlawful, void or unenforceable, the provision will, to the extent required, be severed from this agreement and rendered ineffective as far as possible without modifying the remaining provisions of this agreement. This severance will not in any way affect any other circumstances of or the validity or enforcement of this agreement.

15.9 Entire agreement

- (a) This agreement contains the whole agreement between the Parties in respect of the subject matter of this agreement and supersedes and replaces any prior written or oral agreements, representations or understandings between them relating to such subject matter.
- (b) This agreement must be read in conjunction with any contract specified in an individual Purchase Order. If there is any inconsistency between these conditions and the contract, the contract terms will prevail.

- (c) The Parties confirm that they have not entered into this agreement on the basis of any representation that is not expressly incorporated into this agreement.

15.10 Law and jurisdiction

- (a) This agreement takes effect, is governed by, and will be construed in accordance with the laws from time to time in force in New South Wales, Australia.
- (b) The Parties submit to the non-exclusive jurisdiction of the courts of New South Wales, Australia.