



TERMS AND CONDITIONS OF CONTRACT

This document contains the Terms and Conditions of Contract referred to in the Purchase Order provided by Council. The Contractor acknowledges they have read and understood the Terms and Conditions of Contract set out in this document and accepts them as legally binding, on the acceptance of the Purchase Order.

1. Contract

- a. These terms and conditions together with any specifications provided by Council in connection with the supply of the goods, services, Materials (“the Specification”) and including Works and the Purchase Order shall constitute the contract documents and the entire terms of the agreement.
- b. Where the Contractor provides the Council with an invoice or document containing conditions, the Contractor's conditions do not have any effect or operation.
- c. If there are any inconsistencies between the Purchase Order and this Contract, the terms of this Contract prevail.

2. Definitions

In this Contract, unless something else is clearly indicated:

Contract means these Terms and Conditions of Contract for supply of goods, services, Materials and Works together with the Purchase Order

Contractor means the Contractor named in the Purchase Order and includes its employees and agents

Council means the City of Holdfast Bay and its employees and agents

Defects Liability Period means 52 calendar weeks commencing on completion of any Works under this Contract

GST has the same meaning it does in section 195-1 of *A New Tax System (Goods and Services Tax) Act 1999*

Force Majeure Event means an unforeseeable and unknown event occurring after entering into this Contract, beyond the reasonable control of the Council or Contractor, which precludes a party from performing on time an obligation under this Contract. 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 any existing conditions.

Legislative Requirements means the requirements of all Acts of Parliament of the Commonwealth or of the State of South Australia, all ordinances, rules, regulations, by-laws, proclamations and orders made or issued under any such Acts and all codes of practice, directions, orders and requirements of any governmental agency empowered to issue the same under any such Acts

Liabilities means all liabilities, damages, remedies, losses, penalties, fines, costs, expenses (including reasonable legal fees and expenses), demands, claims and proceedings of any nature

Materials means the goods or Materials supplied to the Council by the Contractor

Purchase Order means the purchase order completed by the Council requesting the supply of the services or Materials by the Contractor

Price means the amount payable by the Council to the Contractor for the supply of the goods or services specified in the Purchase Order

Works means any works and services specified in the Purchase Order together with any additional works necessary for the performance of this Contract.

Unless otherwise provided all references to sums of money shall be in terms of Australian currency, all documents and communications shall be in the English language and all references to measurements quantities, dimensions and units shall be in terms of the Commonwealth legal units.

3. Formal Contracts Take Precedence

Where a Purchase Order is issued by the Council pursuant to an existing contract between the Council and the Contractor, the terms and conditions of that contract shall govern the rights and obligations of the parties with respect to the Purchase Order. In any other case, this Contract will govern the legal relationship between the Council and the Contractor insofar as it applies to the subject matter of the Purchase Order.

4. The General Scope of Contract

This Contract requires the Contractor to:

- a. Supply Materials of description, nature, specification, quantities and size and at the Price specified in the Purchase Order.
- b. Supply services of description, nature, specification and in the manner requested by Council. Services must be provided at such time and place as described in the Purchase Order or in the Request for Quote documents, and be provided by qualified and experienced personnel with due care and skill. Services must be provided at the price set out in the Purchase Order.
- c. The supply of Materials or services must comply with all applicable Legislative Requirements and The Contractor must supply appropriate facilities, Materials, equipment and protective clothing (if applicable) necessary to complete the Contract.

5. Quantity

The quantity of the Materials delivered or services provided shall not differ from that specified in the Purchase Order unless the change in quantity is ordered by the Council in a written form specifically referring to the amendment of the quantity.

6. Sub-Contractors

The Contractor shall not engage sub-contractors to perform any of its obligations under this Contract without prior written approval of the Council, such approval the Council may refuse in its absolute discretion.

7. Delivery of Materials

- a. Delivery of Materials shall be made to such locations at such times as shall be nominated by the Council.
- b. Upon delivery, the Materials shall be accompanied by a delivery document with the Council's order number specified.
- c. A separate invoice shall be emailed to the Council's Accounts Payable department accountspayable@holdfast.sa.gov.au which shall state clearly the contents of the delivery and the purchase order number.
- d. The price shall be inclusive of all freight insurance and other charges in connected to forwarding the Materials to Council.

- e. All elements of the Materials delivered by the Contractor shall be at the risk of the Contractor. No liability to pay for Materials shall arise until that element of the Materials are approved by the Council and delivery is accepted in writing or by countersignature.
- f. Upon return of any such element of the Materials which is not acceptable to the Council, the Contractor shall reimburse the Council for:
 - i. Any amounts paid by the Council on account of the Price of the returned elements of the Materials; and
 - ii. Any costs incurred by the Council in connection with the delivery or return of the relevant element of the returned Materials.

8. Invoicing and Payment

- a. The Council shall pay the Price to the Contractor within 30 days of receipt of a Tax Invoice. The invoice must quote the Australian Business Number, identify the amount of GST (if registered for GST) and identify the Purchase Order number.
- b. Payment will be made on the condition that the Materials are supplied and the Services are provided in the manner set out in the Contract Documents.

9. Acceptance of Materials

The Council shall only be obliged to accept delivery of such Materials as comply with this Contract and if the delivery of the Materials shall not comply with all of the same in any respect then the Contractor shall, if so required by the Council remove all such rejected elements of the Materials and replace the same with a delivery of the Materials acceptable to the Council. All freight, insurance and other charges whatsoever in connection with the return of that element of the Materials wrongly supplied and the delivery of a further supply of the Materials shall be paid and borne by the Contractor.

10. Testing

- a. The Council may require, as a condition of delivery or any element of the Materials, the Contractor to supply a sample of the relevant Materials for testing and approval by the Council. In the event that such a sample is produced, delivery of the Materials must be to the same size and nature and quality consistent with that of the approved sample.
- b. The Council may monitor the Contractors performance of the services If the Council is dissatisfied with the Contractors performance, the Council may:
 - i. Request that the Contractor at its cost provide the services to the satisfaction of Council;
 - ii. Procure the services from a third party and set off the cost of procuring the services from the third party and the cost of monitoring the Contractors performance of the services pursuant to this Contract.

11. Set off

The Council is entitled to deduct from amounts otherwise payable to the Contractor by the Council any amount due from the Contractor to the Council pursuant to the terms of this Contract.

12. Property in the Materials

When any part of the entire payment for any element of the Materials is made by the Council the entire title of the property shall pass without exclusion or limitation but subject to the Council's right to subsequent rejections in the event that the relevant element of the Materials is discovered to not comply with the terms of this Contract.

13. Variation

Any variations to the Purchase Order must be in writing and signed by both the Council and the Contractor.

14. Warranty

- a. The Contractor warrants that it has full power to enter into this Contract and perform its obligations under the Contract.
- b. The Contractor warrants in addition to any warranty or guarantee implied by law, that all of the Materials delivered to the Council:
 - i. Will conform to the relevant description of the same contained in this Contract;
 - ii. Shall be of good merchantable quality and for the known purpose for which it is sold;
 - iii. Are new (unless otherwise specified);
 - iv. Are free from all liens and encumbrances and the Contractor has a good marketable title thereto;
 - v. shall be delivered by the due delivery date specified on the Purchase Order.
- c. The Contractor warrants that:
 - i. In the supply of services it will not do any act, matter or thing prejudicial to the goodwill, commercial reputation or public image of the Council;
 - ii. It will supply the services with all due care and skill in accordance with any legal requirements;
 - iii. In the supply of any Materials or services it will not infringe any intellectual property rights.

15. Indemnity

The Contractor indemnifies and will keep indemnified the Council with respect to any Liabilities of any kind whatsoever resulting from or connected with the Contractors supply of services or Materials to the Council, including those arising out of or in connection with the breach of this Contract by the Contractor, or any act or omission of the Contractor, its employees, contractors or agents.

16. Legal Relationship

The Contractor will at all times remain an independent contractor of the Council and at no time is to be construed as an employee of the Council.

17. Jurisdiction

The laws in force in the state of South Australia shall apply to this Contract and the parties shall submit to the jurisdiction.

18. Assignment

The Contractor shall not without the prior written approval of the Council, assign the Contract or assign, mortgage, charge, encumber any of the moneys payable under this Contract.

19. Part Acceptance of Order

Where the Council has accepted an element of the Materials that constitute part of a "Materials Request" the Council shall pay the Contractor that part of the purchase attribute to that element of the Materials accepted.

20. No Waiver

No failure or delay on the part of a party to exercise any right or remedy hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any such right or remedy preclude any other further exercise therefore or exercise of any right or remedy.

21. Special Conditions

Any special conditions that the Council shall incorporate on the Purchase Order shall be incorporated into this Contract and in the event of any inconsistency with the terms of this Contract the special conditions prevail.

22. Time of the Essence

Time shall be of the essence as regard to any date or period under this Contract.

23. Work Health and Safety and Return to Work SA

- a. The Contractor must comply with the *Work Health and Safety Act 2012 (SA)*, any regulations made under it and the Council's Work Health and Safety Policy, including the implementation of safety requirements and a safe system of work.
- b. The Contractor must comply with the *Return to Work Act 2014 (SA)* and any regulations made under it.
- c. Prior to the commencement of any work the engaged contractor must ensure that the appropriate steps are taken by those who control and do the work, to identify all reasonably foreseeable hazards associated with or incidental to the contracted work and worksite.
- d. Assessment of risk must be made of an identified hazard, and, on the basis of that risk assessment, control measures must be put in place to eliminate or minimise any risk. A record of the outcome of that process is to be made to Council upon request.
- e. The Contractor must comply with all reasonable directions and procedures relating to security and work health and safety as required by the Council.
- f. the Contractor must immediately notify the Council of any incident or accident arising from the performance of this Contract, including any incident or accident involving the public.

24. ICAC

The Contractor acknowledges and agrees that by entering into this Contract 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.

25. Force Majeure Events

- a. If a Force Majeure Event causes delay or failure by a party to perform its obligations under this Contract:
 - (i) neither party is liable for such delay or failure; and
 - (ii) all obligations of a party under this Contract are suspended until the Force Majeure Event ceases to apply.
- b. A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this Contract must:
 - (i) notify the other party as soon as possible giving:
 - reasonably full particulars of the Force Majeure Event;
 - 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
 - where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
 - (ii) use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;
 - (iii) 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;
 - (iv) notify the other party when the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and
 - (v) the other party when resumption of performance occurs.
- c. If a delay or failure under this clause exceeds 60 days, the Council may immediately terminate this Contract by written notice to the Contractor (Termination Date).
- d. In the event of the Council terminating this Contract pursuant to clause 25c:
 - (i) the Council remains liable to pay the Contractor any unpaid invoice already issued to the Council;
 - (ii) within twenty (20) business days of the Termination Date the Contractor must give the Council an invoice for Works completed up to and including the Termination Date; and

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 and not reasonably able of being put to alternate use.

- e. 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 25c including, without limitation, any claim relating to loss of anticipated profits or unperformed Works.

26. Insurances

The Contractor must maintain at all times Public Liability Insurance in the amount of \$20,000,000 and if relevant for the supply of services Professional Indemnity Insurance in the amount of \$5,000,000. The Contractor must provide Certificates of Currency in respect of the Contractor's insurances when requested by the Council.

27. Defects Liability Period

- a. If Works are found to be defective and the Council notifies the Contractor of the defect within 52 calendar weeks from the completion of Works, the Contractor must, at its own cost promptly rectify any defects in the Works within a reasonable time determined by Council.
- b. Failing rectification by the Contractor, the Council may rectify the defects at the cost of the Contractor.