

Terms and Conditions of Purchase

1 Definitions

Agreement means the agreement between Contractor and Council for the supply of Goods by Contractor to Council and shall be constituted in its entirety by the Purchase Order, these Terms and Conditions of Purchase together with any documents provided by Council including the terms and/or contents of any request, solicitation, sample, drawing, specification, schedule or other document agreed to be so incorporated.

Claim means any allegation, action, demand, cause of action, suit, proceeding, judgement, debt, damage, loss, cost, expense or liability howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.

Contractor means the person, firm, partnership, company or other legal entity in which the Purchase Order is issued and includes its employees, agents and subcontractors.

Council means Randwick City Council.

Defective means Goods and/or Services (or any aspect of them) which are not in accordance with the Purchase Order or which are damaged, deficient, faulty, inadequate or incomplete.

Goods mean all goods, products or materials covered by the Purchase Order.

GST Act means the New Tax System (Goods and Services Tax) Act 1999 (Cth).

Purchase Order means Council's official order to which these terms and conditions apply.

Services mean all services covered by the Purchase Order.

2 General

- (1) The Agreement shall be formed by and upon the Contractor accepting the Purchase Order from Council and the terms of the Agreement shall apply to the exclusion of any conditions of sale appearing on any document of the Contractor.
- (2) All additions and alterations to these terms and conditions must be in writing and attached as special conditions to the Purchase Order.
- (3) In the event of any inconsistency between these terms and conditions and:
 - (a) special conditions, the special conditions prevail; or
 - (b) where there is a pre-existing contract the terms of the pre-existing contract prevail.

3 Price and GST

- (1) The price set out in the Purchase Order is a fixed price and includes all costs associated with packing, insurance, delivery, duties and taxes (including GST where the Contractor is registered for GST) and any other applicable costs and charges.
- (2) Council must reimburse the Contractor for the amount of any GST payable in respect of any supply provided that the Contractor provides Council with a valid tax invoice for the supply within the meaning of the GST Act.
- (3) Council may reject without payment any invoice that is not a tax invoice or which fails to quote the Purchase Order Number.
- (4) If there is an adjustment event in relation to the supply:
 - (a) the Contractor must refund Council the amount by which the amount reimbursed pursuant to clause 3(2) exceeds the adjusted GST on the supply; or
 - (b) Council must pay the Contractor the amount which the adjusted GST on the supply exceeds the amount reimbursed pursuant to clause 3(2).
- (5) In this clause 3, the expressions "supply", "tax invoice" and "adjustment event" have the same meanings as in the GST Act.

4 Payment of Account

- (1) Council will attend to payment of a tax invoice within thirty (30) days from receiving the tax invoice. This may be varied where Council accepts a discount by the Contractor for early payment.
- (2) Without limiting Council's rights under any other provision of this Purchase Order, Council may deduct from or set off against any moneys which may be or thereafter become payable by Council to the Contractor:
 - (a) any debt due from the Contractor to Council; and
 - (b) any Claim which Council may have against the Contractor under or by virtue of any provision of this Purchase Order or otherwise at law or in equity.
- (3) Payment does not constitute an acceptance by Council that the Services and/or Goods are not Defective and will not in any way affect Council's rights under these terms and conditions.

5 Goods and Services

- (1) All Goods must be new and comply with the highest relevant commercially accepted standards.
- (2) Council may reject, within a reasonable time, Goods that are Defective. If the Goods are Defective Council may, by notice, require the Contractor to make good, collect and replace at no additional cost or refund Council any amount paid for the Defective Goods within the time specified by Council.

- (3) If the performance of the Services is Defective, Council may, by notice, require the Contractor to remedy the defect, complete the Services, or re-do the Services at no additional cost to Council within the time specified by Council.
- (4) Where Council rejects the Goods which are already installed, the Contractor shall immediately upon written direction, remove the defective Goods, replace same and make good any damage to other property occasioned in such removal to the satisfaction of and at no cost to Council.
- (5) In the event the Contractor does not satisfactorily comply with a notice issued by Council under clauses 5(2), 5(3) or 5(4) Council may have the repair, modification or replacement of Goods or resupply of the Services undertaken by a third party (or itself) and all resulting costs and expenses will be debt due to Council by the Contractor.

6 Timing and delivery

- (1) The Contractor must deliver the Goods or supply the Services within the time, and at the location, specified in the Purchase Order.
- (2) If the Goods are not delivered or the Services are not supplied within the time and/or at the location specified in the Purchase Order, Council may rescind the Purchase Order and these terms and conditions unless the delay is caused by factors outside of the reasonable control of the Contractor as determined by Council.

7 Title, Acceptance and Risk

- (1) Title to the Goods will transfer to Council upon acceptance of the Goods by Council. Acceptance by Council will be deemed to have occurred if within 14 days of delivery Council has not advised the Contractor that the Goods are nonconforming. The risk of any loss or damage to the Goods remains with the Contractor until acceptance by Council.
- (2) Contractor expressly waives any and all liens of any kind or nature to which the Contractor may otherwise be entitled, whether statutory or otherwise, and the Contractor agrees to indemnify and forever hold harmless Council against any claims from any third parties against the Contractor affecting directly or indirectly the Goods.

8 Inspection and Source Quality Assurance

To meet Quality Assurance requirements, Council may perform quality audits as defined in ANZ/ISO 8402 of quality systems, production processes and/or undertake product inspections as defined in AS1199 before acceptance of Goods. The Contractor will provide authorised Council representatives with full and free access to its premises and work areas and all reasonable facilities and assistance (at no additional cost) for the purposes of this clause 8.

9 Assignment and Sub-contracting

The Contractor must obtain the prior written consent from Council to assign or subcontract the Purchase Order and these terms and conditions or any part thereof. Approval to assign or subcontract does not relieve the Contractor from any of its obligations under the Purchase Order or impose any liability upon Council to an assignee or a subcontractor.

10 Termination

- (1) By notice in writing, Council may terminate the Purchase Order and these terms and conditions in whole or in part if the Contractor:
 - (a) has not remedied a breach within the time specified in a notice provided by Council;
 - (b) becomes bankrupt or insolvent; or
 - (c) is unable to complete the contract for the provision of Goods and/or Services.
- (2) The Contractor is liable to Council for any loss suffered by Council as a result of termination or breach.
- (3) Council is not liable to the Contractor for any loss suffered by the Contractor as a result of termination due to this clause 10.

11 Dispute Resolution

- (1) Any dispute between Council and the Contractor arising out of or in any way connected with this Purchase Order which is not resolved by the parties within 14 days after service of written notice of the dispute (stating that it is given under this clause 11) by either party on the other party must be referred for decision to an arbitrator.
- (2) If Council and the Contractor are unable to agree on the appointment of an arbitrator within 30 days after service of the written notice of the dispute, either party may request the President for the time being of the Resolution Institute to appoint an arbitrator. The arbitration is to be conducted in accordance with the Rules for the Conduct of Commercial Arbitrations of the Resolution Institute.

12 Notice

All notices, requests, variations, and other communications by both parties are to be in writing and delivered promptly to the appropriate addresses named in the Purchase Order.

13 Warranties

- (1) The Contractor warrants to Council that the Goods and/or Services:

- (a) comply with the description in the Purchase Order and conform with all specifications, drawings, samples or other descriptions furnished by Council to the Contractor;
 - (b) are fit for the purpose for which they are intended;
 - (c) are of the highest quality and free from any defects in design, manufacturing, materials and workmanship;
 - (d) comply with all applicable Australian Standards and legislation; and
 - (e) are free of all liens, securities and encumbrances.
- (2) All warranties, conditions, promises, undertakings, covenants and other provisions implied by law relating to the Goods and/or Services or their supply and delivery form part of these terms and conditions and do not exclude, restrict or modify the application of any provision of the Australian Consumer Law.
- (3) The Contractor will ensure that any warranty offered by a manufacturer of Goods is enforceable by Council.

14 Indemnity

Contractor indemnifies Council against any loss, damage, liability or claim, whether arising under contract, at common law, in equity or under any statute, which Council suffers or incurs arising out of a breach of this Agreement by the Contractor.

15 Default

If the Contractor:

- (1) is in default of any provisions of this Agreement and such default is not rectified within 14 days of receipt of notice from Council to rectify such default; or
- (2) is adjudged bankrupt, its assets liquidated or if it shall make a general assignment for the benefit of its creditors; or
- (3) has a receiver, liquidator, administrator or other controller of property appointed to Supplier on account of its solvency or ability to pay its debts as they fall due;

then, Council may, without prejudice to any other rights or remedies it may have hereunder, terminate this Agreement, forfeit any retention, take possession of any premises, materials, tools and appliances and finish the work by whatever means it may deem expedient. Council shall not be liable to pay Contractor any further payments until work or services are completed. If the unpaid balance of the purchase price shall exceed the expense of finishing the work then such excess shall be paid forthwith by Supplier and/or deducted as the case may be to Supplier's account.

16 Intellectual property

Contractor warrants that it is the owner of or, where appropriate, is the registered user of, any patents, trademarks, copyright, data or trade secrets connected directly or indirectly to the Goods and the Contractor agrees to indemnify and forever hold harmless Council against any actions arising from any breach of this warranty.

17 Insurance

- (1) The Contractor must, until acceptance of Goods by Council, at its own cost insure the Goods provided by the Contractor against any loss or damage to the Goods.
- (2) The Contractor must take out and maintain:
 - (a) Transit (all risk) insurance covering transit, loading and unloading of Goods for not less than full replacement value;
 - (b) Workers Compensation Insurance Policy in respect of its employees; and
 - (c) Public Liability Insurance for at least \$20,000,000.00 covering Council and the Contractor against all claims of loss or injury arising from the delivery of the Goods or the performance of the Services by the Contractor, its subcontractors, employees or agents.
- (3) If requested by Council, the Contractor must provide Council with a copy of the above insurance policies and the certificate of currency.

18 Risk Management and Work Health and Safety

- (1) The Contractor must comply with all relevant obligations with regard to the Work Health and Safety Act 2011 and its regulations to manage risk to health and safety of its employees, contractors or other personnel, including members of the public.
- (2) The Contractor must comply with all local environmental controls to protect the built and natural environment, including compliance with the Protection of the Environment Operations Act 1997 applicable to the Goods and/or Services.

19 Miscellaneous provisions

- (1) The law in force in the State of New South Wales governs these terms and conditions. The parties submit to the exclusive jurisdiction of the courts of New South Wales.
- (2) If any term or provision of these terms and conditions is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision will be severed and the remainder of the provisions of these terms and conditions will continue and have full force and effect.
- (3) A failure by Council to enforce a provision of the Purchase Order will not be construed as in any way affecting the enforceability in any other instance or the enforceability of the Purchaser Order as a whole.

- (4) The fact that Council fails to do, or delays in doing, something it is entitled to do under the Agreement, does not amount to a waiver of its right to do it.
- (5) If a clause or part of a clause can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from these Terms and Conditions of Purchase, but the rest of the Agreement is not affected.
- (6) Council shall not be liable for any failure to fulfil or any delay in fulfilling any obligation arising from the Agreement if the failure or delay has been caused directly or indirectly by any act of God, war or other civil commotion, strikes, lockouts, stoppages and restraints of labour, breakdown of machinery, inability to obtain raw materials or fuel, fire or explosion, any government action or any other cause beyond the reasonable control of Council and not a consequence of Council's negligence.
- (7) Contractor shall at all times comply with the requirements of all applicable statutes, regulations or standards in the supply of the Goods pursuant to this Agreement.
- (8) Where there is more than one Contractor then the liability of each shall be joint and several.
- (9) The rights and remedies provided in the Agreement will not affect any other rights or remedies available to Council.
- (10) The Contractor acknowledges that Council may be required to publish information concerning the Agreement in accordance with the Government Information (Public Access) Act 2009 NSW ("GIPA Act") under any similar or replacement legislation to the GIPA Act or by the Auditor-General or Parliament.

General Delivery Instructions

- Delivery Dockets to show:**
- Quantity, description and name of material.
 - Council Purchase Order Number.
 - Delivery Docket Number and date (separate number for each delivery).

Open/Flat-Top Truck Deliveries: To be covered in order to avoid loss or damage during transport unless otherwise specified in the Contract.

- Bagged Deliveries:**
- Each bag to be marked with:
 - (1) Name of material.
 - (2) Net weight per bag in kilos.
 - An agreed fixed quantity per pallet and standard palleting pattern on every delivery.

- Drummed Deliveries:**
- Side of each drum to be marked with:
 - (1) Name of material.
 - (2) Name of supplier.
 - (3) Drum deposit and value if applicable.
 - Side or top of drum to be marked with net weight (or net volume) and if possible tare and gross weight per drum in kilos.

Pallets: - Pallet weight not to exceed 1,200kg per pallet.

Hazardous Materials: - To be clearly identified. If insufficient warning is shown, goods may be rejected. (All hazardous materials are to be supplied with Material Safety Data Sheets).

Safety: - All goods supplied must comply with the relevant Australian Standards and have WorkCover NSW Approvals where applicable. All goods must be supplied with safety instructions and Material Safety Data Sheets with respect to any chemical product.