

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

In these terms and conditions:

- (a) **Agreement** means the agreement between Council and Supplier consisting of these terms and conditions, the PO, any applicable Specifications, and all terms, warranties and conditions implied by law except where inconsistent with these terms and conditions;
- (b) **Claim** includes any claim, demand, action or proceeding in relation to or in connection with this Agreement or any Supply;
- (c) **Council** means the Council of the City of Ryde (ABN 81 621 292 610);
- (d) **Delivery Date** means:
  - (i) in relation to Goods, the date for delivery of the Goods; and
  - (ii) in relation to Services, the date for completion of the Services, as stated in the PO (or if no date is stated in the PO, as most recently agreed by Council prior to the PO being issued);
- (e) **Goods** means the item(s) (if any) set out in the PO;
- (f) **H&S Laws** means applicable laws in respect of the health and safety of workers and workplaces and includes the *Work Health and Safety Act 2011* (NSW) and associated regulations, standards and codes of practice;
- (g) **Loss** includes any damage, liability, action, loss, charge, cost or expense (including legal expenses on a full indemnity basis and consultant's fees);
- (h) **PO** means:
  - (i) the purchase order issued by Council to Supplier, including a purchase order issued electronically to Supplier; or
  - (ii) if no purchase order has been issued by Council, the relevant correspondence issued by Council to Supplier requesting the Supplies;
- (i) **Services** means the services (if any) set out in the PO and any related services, functions or responsibilities not specifically described in the PO which are reasonably required for the proper performance of such services, including delivery and unpacking of the Goods;
- (j) **Specifications** means, in relation to any Supplies:
  - (i) Council's required functionality and performance criteria for the Supplies;
  - (ii) all representations made by Supplier for the benefit of Council in relation to the Supplies; and
  - (iii) the functional and performance specifications set out or referred to in Supplier's standard documentation for the Supplies, and the earlier paragraph prevails to the extent of conflict or inconsistency;
- (k) **Supplier** means the party to which the PO is issued by Council; and
- (l) **Supply** means the Goods to be supplied or the Services to be performed by Supplier in accordance with this Agreement.

**1.2 Interpretation**

- (a) References to:
  - (i) the singular includes the plural and the plural includes the singular;
  - (ii) a party includes the party's executors, administrators, successors and permitted assigns;
  - (iii) a thing includes the whole and each part of it separately; and
  - (iv) "including" and similar expressions are not words of limitation.

**2. PURCHASE ORDERS**

**2.1 Conditions of Purchase Orders**

These terms and conditions apply to all POs issued by Council.

**2.2 Acceptance by Supplier**

Upon Supplier's acceptance (whether in writing or by conduct, including by supplying the Supplies) of the PO, Supplier agrees to the terms and conditions of this Agreement.

**2.3 Variation**

Any variation to this Agreement, including any PO or Specifications, must be in writing and signed by the parties.

Under no circumstances will any terms or conditions of Supplier, including as contained in, or endorsed upon, any correspondence, invoices or documents issued by Supplier in connection with this Agreement or otherwise stated by Supplier in making a quotation or accepting or acknowledging a PO, be binding upon Council or deemed to form any part of this Agreement.

Where a Supply is specifically governed by another agreement which has expressly signed by Council's authorised representative, such other agreement shall apply in place of, and override, these terms and conditions.

**3. GOODS AND SERVICES**

**3.1 General**

Supplier must supply the Goods, provide the Services and carry out the whole of work required by this Agreement in a proper and workmanlike manner to the satisfaction of Council and in accordance with the terms and conditions of this Agreement.

**3.2 Delivery Date**

Supplier must supply the Goods to the shipping address stated in the PO on the Delivery Date, unless Supplier is notified otherwise in writing by Council.

Supplier must perform the Services promptly and, in any event, in accordance with any time-table which has been agreed in writing by Council for the performance of the Services, and complete performance of the same by the Delivery Date.

If it is apparent to Supplier, that the Delivery Date will not be met, then, without prejudice to Council's other rights or remedies, Supplier must immediately notify Council in writing and take all necessary corrective action that Council may direct at Supplier's cost.

**3.3 Inspection of Goods prior to delivery**

Prior to delivery, Council may enter Supplier's premises to make such inspections and tests as may be deemed necessary by Council to ensure that the Goods comply with the terms and conditions of this Agreement and Supplier must give all necessary assistance with such inspections and tests.

**3.4 Risk**

Supplier bears the risk of Goods up to the time of delivery of the Goods to Council.

**3.5 Passing of ownership**

Ownership of the Goods passes to Council upon the earlier of delivery of the Goods to Council and payment, without prejudice to any rights of rejection that Council may have.

**3.6 Warranties**

- (a) Supplier represents, warrants and undertakes to Council in relation to the Goods that:
  - (i) the Goods will comply with the Specifications, all applicable laws, regulations and industry standards and be free from defects;
  - (ii) it has the right to sell the Goods and upon delivery to Council, the Goods will be free from any charge, lien or other encumbrance;
  - (iii) where the Goods are supplied by reference to a sample or description, the Goods will correspond with the sample and description, in terms of quality and all other respects;
  - (iv) the Goods will be new and of merchantable quality; and
  - (v) the Goods will be fit for the purposes for which they are to be used by Council and Supplier has informed itself of those purposes.
- (b) Supplier represents, warrants and undertakes to Council in relation to the Services that:
  - (i) the Services will comply with the Specifications and all applicable laws, regulations and industry standards;
  - (ii) when performing the Services, it will use parts, material and other goods which are new, of good and merchantable quality and fit for their intended purpose, and which meet or exceed current industry standards;
  - (iii) it has informed itself of the nature of the Services and the materials necessary for the performance of the Services; and
  - (iv) it has thoroughly inspected the site at which the Services are to be performed.
- (c) Supplier represents, warrants and undertakes to Council that:
  - (i) it and its personnel will at all times be suitably qualified and experienced, and will exercise due skill, care and diligence;

- (ii) it has obtained and will maintain all necessary consents, licences, permits and authorisations (other than those which Council is expressly required to obtain under this Agreement);
- (iii) it will comply with all applicable laws, regulations and standards;
- (iv) it will comply with Council's Statement of Business Ethics (as available at ryde.nsw.gov.au) and any other policies of Council notified to it from time to time;
- (v) it has entered into this Agreement without relying on any representation by Council or any other person; and
- (vi) it will make its own enquiries to confirm the accuracy of any information or documents supplied by Council, and acknowledges and agrees that it will not rely on any such information or documents.

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**4. SUPPLY NOT IN ACCORDANCE WITH AGREEMENT**

**4.1 Notice of Claim/Defect**

At any time within twelve (12) months of the Delivery Date, Council may give written notice to Supplier of any Defect in the Goods and/or Services. If requested by Council, Supplier must promptly repair or replace the relevant Defective Goods or re-perform the relevant Defective Services at Supplier's cost.

**4.2 Council may withhold payment**

In the event of any Claim by Council against Supplier, Council may withhold payment of any amount owing by Council to Supplier on any account whatsoever, whether under this Agreement or any other agreement, until such Claim is resolved.

Supplier may not make a set-off against Council for any reason whatsoever.

**4.3 Costs of return of Goods**

If the Goods are not in accordance with this Agreement (including if Goods contain a Defect) and the Council subsequently returns the Goods to Supplier at Council's expense, Supplier must refund or reimburse any Losses incurred by Council.

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**5. PRICE**

**5.1 Price in Purchase Order**

The price payable for the Supply is the price set out in the PO.

**5.2 Costs included in price**

Unless otherwise stated, the price:

- (a) is inclusive of GST and all other taxes, duties, levies and fees; and
- (b) includes all of Supplier's costs and expenses, including relating to packaging, loading, delivery, testing, certification, travel or subsistence.

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**6. INVOICE AND PAYMENT**

Supplier must not issue an invoice for a Supply until such Supply has been successfully provided to Council. Subject to the performance by Supplier of its obligations under this Agreement, Council will pay all correct and valid tax invoices in accordance with any payment terms set out in the PO (or if nothing is specified in the PO, within thirty (30) days of the date of receipt of an invoice). Invoices must be valid tax invoices, quote Council's PO number and attach all necessary or requested substantiating documentation.

Unless otherwise stated, all invoices must be issued in and all payments will be made in Australian Dollars.

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**7. GENERAL SUPPLIER OBLIGATIONS**

**7.1 Documents**

Supplier must ensure that all necessary documentation and certification information relating to the Supplies is provided to Council and acknowledges and a Supply will not be considered complete until all necessary documents and certificates have been received by Council in correct, valid and good order.

Any document or other property (tangible or intangible) provided by Council to Supplier remains (as between Council and Supplier) the property of Council and must be returned immediately to Council upon request.

**7.2 Confidentiality and publicity**

Supplier must treat all information received or obtained by Supplier in connection with this Agreement relating to the operations, staff, customers, business and/or affairs of Council as confidential, and must keep the same strictly confidential and not disclose it to any person, other than to Supplier's officers and employees and professional advisers on a strict "need-to-know" basis or as may be required by applicable law, without the prior written consent of Council.

Supplier must not disclose, including in its advertising, referral or publicity material, the existence of this Agreement or the terms of its relationship with Council or use Council's name, brand or trade marks for publicity or reference purposes without the prior written consent of Council.

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**8. INDEMNITY**

**8.1 Supplier indemnities**

Supplier is liable for and indemnifies and holds harmless Council and its officers, agents and employees from and against any Losses sustained, incurred or suffered by any of them as a result of:

- (a) any defect in a Supply or any part of a Supply, including the replacement of any defective Supply;
- (b) any Claim that the receipt, possession or use of the Goods or Services infringes the intellectual property right or other rights of any person;
- (c) any personal injury, death, disease or illness (including mental illness) of any person or loss of, or damage to, or loss of use of, any property of any person to the extent caused by Supplier; and
- (d) any breach of this Agreement by Supplier.

**8.2 No consequential loss**

Council will not under any circumstances be liable to Supplier for any loss of profit or for any loss of an indirect, special or consequential nature whatsoever.

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**9. INSURANCE REQUIRED BY SUPPLIER**

Unless otherwise specified in the PO, Supplier must hold the insurances that a prudent supplier of the Goods and Services would hold, including:

- (a) comprehensive public and product liability insurance of \$20 million; and
- (b) workers compensation insurance as required by law.

If requested by Council, Supplier must provide copies of certificates of currency for all insurance policies.

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**10. INTELLECTUAL PROPERTY**

Supplier acknowledges that Council owns the intellectual property rights in any design, drawing, specification or document (**Works**) provided to or produced for Council pursuant to this Agreement, other than to the extent the Works were developed independently of the Council (**Existing Material**).

Supplier hereby absolutely assigns and transfers (and will procure that its personnel, affiliates, sub-contractors and suppliers assign and transfer) to Council with full title guarantee all existing and future intellectual property rights throughout the entire world in the Works (excluding Existing Material), including all statutory and common law rights attaching thereto.

Supplier hereby grants to Council a worldwide, non-exclusive, perpetual, royalty-free, transferable and sub-licensable licence to use, copy and modify any and all intellectual property rights in Existing Material for any purpose whatsoever.

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**11. DEFAULT AND TERMINATION**

**11.1 Termination**

Council may terminate this Agreement or reduce the scope of the Supplies with immediate effect by providing written notice to Supplier if:

- (a) Supplier is in breach of this Agreement and such breach is, in Council's opinion, incapable of being remedied;
  - (b) Supplier is in breach of this Agreement and such breach is capable of being remedied, but Supplier fails to remedy the breach within seven (7) days of its receipt of a notice requiring it to do so;
  - (c) Supplier or Supplier's personnel commit fraud or wilful misconduct or act or omit to act in a manner calculated or likely to bring Council into disrepute; or
  - (d) Supplier is subject to an insolvency event,
- (each an **Event of Default**).

**11.2 Recovery of Council's costs**

If Supplier is subject to an Event of Default or Council terminates this Agreement under clause 11.1, Council may engage others to, or itself, carry out any part or the whole of the remaining Supply. Council may determine the reasonable cost so incurred by Council and any other Losses sustained by Council as a consequence, and the same will constitute a debt due and owing by Supplier to Council.

**11.3 Termination for convenience**

Council may for convenience and without cause immediately cancel a PO and terminate this Agreement or reduce the scope of the Supplies at any time by written notice to Supplier.

**11.4 Return of confidential information and property**

On termination or expiration of this Agreement (in whole or in part), Supplier must promptly return to Council (or, destroy, if required by Council):

- (a) all relevant deliverables arising out of the Supplies, whether complete or partially complete;
  - (b) all confidential information (including copies, summaries and excerpts);
  - (c) all relevant software, hardware, books, documents, papers, materials, equipment, customer lists, technical information, data and reports; and
  - (d) any other relevant property,
- (in whatever form, including in electronic format) of or belonging to Council which are in its possession or control.

- (c) ensure that risk assessments are conducted for risks to health and safety to its personnel and to any other person in respect of the performance of Supplier's obligations under this Agreement;
- (d) ensure that control measures are in place to eliminate, prevent and/or minimise any risks to health and safety to the extent reasonably practicable;
- (e) consult, cooperate and coordinate activities with all other persons who have a health and safety duty in connection with this Agreement to the extent reasonably practicable;
- (f) develop, implement and maintain a health and safety system describing how Supplier will comply with H&S Laws. This system must include appropriate health and safety management and site safety plans, hazard and risk assessments and risk controls; and
- (g) immediately give Council written notice of any accident, incident notifiable under H&S Laws, injury or property damage which occurs under or in connection with this Agreement.

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**12. DISPUTE RESOLUTION**

If Supplier believes that dispute has arisen under or in connection with this Agreement, Supplier must issue a notice in writing to the Manager Procurement or the Manager Corporate Governance of Council, outlining details of the dispute. Despite the existence of a dispute, Supplier must continue to perform its obligations under this Agreement.

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**13. GENERAL**

**13.1 Assignment**

Supplier must not sub-contract, assign, novate, transfer or otherwise dispose of or any or all of its rights and/or obligations under this Agreement without the prior written consent of Council.

Supplier is liable for the acts and omissions of its personnel and its affiliates, sub-contractors and suppliers, and each of their personnel, as if such acts and omissions were those of Supplier itself.

**13.2 Entire understanding**

This Agreement constitutes the entire agreement between the parties in respect of its subject matter.

**13.3 Costs**

Subject to any express provision in this Agreement to the contrary, each party must pay its own costs of and incidental to the negotiation, preparation, execution and carrying into effect of this Agreement.

**13.4 Jurisdiction**

This Agreement is governed by, and must be construed in accordance with, the laws of New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of that State.

**13.5 Rights cumulative**

The rights, powers, privileges and remedies provided under any provision of this Agreement are cumulative and are not exclusive of any rights, powers, privileges or remedies provided under any other provision of this Agreement or by applicable law or otherwise.

**13.6 No waiver**

No waiver of any right under these terms and conditions will be of any force or effect unless such waiver is in writing, signed by the party making the waiver and is expressly stated to be a waiver. Either party's waiver or failure to enforce any rights under these terms and conditions will not in any way affect or limit that party's right thereafter to enforce strict compliance with the terms and conditions.

**13.7 Civil Liabilities Act excluded**

The parties agree that to the extent permitted by law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to all and any rights, obligations and liabilities arising out of or in connection with this Agreement.

**13.8 Time of the essence**

Time is of the essence of Supplier's performance of this Agreement.

**13.9 Health and Safety**

Without limiting Supplier's obligations under this Agreement, Supplier must, in providing the Supplies or otherwise in complying with its obligations under this Agreement:

- (a) maintain any necessary or appropriate health and safety qualifications and certifications and provide Council evidence of such qualifications and certifications on request by Council;
- (b) identify all reasonably foreseeable hazards that could give rise to a risk to health and safety and immediately notify Council in writing of such hazards;