

1. AGREEMENT

- a. The following documents form the entire agreement between the parties (**Agreement**):
- the Purchase Order;
 - these Purchasing Terms and Conditions; and
 - other documents expressly referred to in the Purchase Order.
- b. If there are inconsistencies or ambiguities between documents comprising the Agreement, the Council will direct the Supplier as to the interpretation to be followed and the Supplier will not be entitled to claim as a result of that direction.
- c. The Supplier will be deemed to have accepted the terms of this Agreement (and the Agreement shall be binding) when both of the following have occurred:
- the Supplier has received the Council's written or verbal confirmation to perform the Supply; and
 - the Supplier has received a Purchase Order number from the Council,
- and the Supplier irrevocably accepts that only the documents set out in clause 1.a shall form part of the Agreement (unless there are any Variations making alterations to those documents).
- d. The parties agree that the terms and conditions of the Agreement apply notwithstanding any subsequent purchase order or any other terms and conditions issued by the Supplier regarding the Supply.
- e. Any review, comment, approval or non-approval by the Council of the Supply or documents provided by the Supplier does not relieve the Supplier of its obligations or liabilities under the Agreement.

2. WARRANTIES

- a. The Supplier represents and warrants to the Council that it has:
- carefully examined and acquired actual knowledge of the contents of information made available by the Principal;
 - made investigations and assessments of the work, risks, contingencies and circumstances involved in performing the Supply and it has reviewed all information the Principal has made available and is otherwise obtainable by reasonable enquiries, in relation to the Supply;
 - satisfied itself that the Price covers the cost of complying with all obligations under the Agreement; and
 - the necessary authority and power to enter into the Agreement and to perform the obligations under it.
- b. The Supplier warrants to the Council that the Supply will:
- match the description of the Supply ordered by the Council and comply with any specifications supplied by the Council;
 - comply with any applicable laws, regulations, licences, permits, approvals and Australian Standards;
 - be fit for the purpose(s) described in the Agreement or which the Council has otherwise made known to the Supplier, or in the absence of such expressed purpose, be fit for the purposes for which goods or services of the same kind as the Goods or Services are commonly procured.

3. GOODS

3.1 Performance

The Supplier warrants that any Goods supplied will:

- correspond with any sample the Supplier provided to, or showed to, the Council prior to or after an order is issued by the Council;
- be new, of merchantable quality and free from defects in materials and workmanship; and
- be free from all liens, charges and encumbrances of any kind and that the Supplier is able to pass good title to the Goods.

3.2 Delivery

Delivery of Goods will have occurred only when the Supplier has:

- delivered the Goods to the Site in accordance with the Agreement and (unless otherwise agreed) unloaded the Goods at the designated part of the Site;
- received a delivery receipt from the Council's Site personnel for the Goods delivered; and
- provided all installation instructions, maintenance and operating manuals, engineering data, spare parts lists and other information as reasonably required for the installation, operation and maintenance of the Goods.

The Supplier must properly pack and protect any Goods to ensure they are not damaged during delivery, unloading and storage at the Site.

3.3 Title and risk

Risk in the Goods passes to the Council upon delivery of the Goods in accordance with clause 3.2, subject to risk passing to the Supplier when the Goods are made available by the Council for the purposes of clauses 5.b.iii and 5.b.v. Unencumbered title to the Goods passes to the Council on payment or delivery (whichever occurs first).

3.4 International conventions

Neither the *Sale of Goods Act 1986* (Qld) (or similar legislation in any other jurisdictions) nor any international conventions or recognised customs in relation to rules that may otherwise apply for or in respect to the international sale of goods, have any application to any matter in connection with the Agreement.

4. SERVICES

4.1 Performance

The Supplier warrants that any Services provided will be performed with skill, care and diligence and by appropriately qualified, licenced, skilled and trained personnel.

4.2 Supply of items

Any items which the Supplier uses or supplies in connection with the Services must:

- be of merchantable quality;
- comply with any applicable Australian Standards and any other standards specified in the Agreement; and
- be fit for the purpose or purposes described in clause 2.b.iii.

5. DEFECTS

- The Supplier must, at its cost, rectify any Defect while carrying out the Supply and any applicable Defects Liability Period.
- Without limiting clause 5a, the Council may direct the Supplier to, at the Supplier's cost and risk, do any one or more of the following as determined by the Council in its absolute discretion:
 - take such steps as are necessary to ensure that the Services comply with the Agreement;
 - refund to the Council any payments made by the Council in respect of the Defective Goods or Services;
 - re-take possession of any Defective Goods and refund the Price for the Defective Goods to the Council;
 - repair any Defective Goods; or
 - collect and deliver replacements of any Defective Goods.
- If any Defect is not rectified within 5 Business Days of a direction by the Council, the Council may itself or by others, rectify the Defect and the cost of remedying the Defect will become a debt due and payable to the Council from the Supplier.
- Any repaired or replaced Goods provided by the Supplier are subject to the same warranties as the original Goods, from the date of repair or replacement and the Defects Liability Period will recommence from such date.
- Any loss or damage that the Council has incurred as a result of any Defect will be a debt due and payable to the Council.

6. COMPLETION

- a. The Supplier must:
- deliver the Goods by the Completion Date; and/or
 - complete the Services by the Completion Date, and otherwise, carry out the Supply expeditiously and without delay.
- b. If the Supplier believes that anything may delay the progress of the Supply, the Supplier must notify the Council with details of the estimated extent of the delay and the cause.
- c. Subject to clauses 6d and 6e, the Supplier will only be entitled to an extension of time to the Completion Date where:
- the Supply is delayed by an act, default or omission of the Council or its personnel in the Council's capacity as a party to the Agreement which prevents the Supplier completing the Supply by the Completion Date (**Qualifying Cause**);
 - the Supply is not concurrently delayed (in whole or to the extent of any part) by a cause other than a Qualifying Cause;

- iii. within 5 Business Days after commencement of the Qualifying Cause, the Supplier gives notice to the Council setting out the Qualifying Cause, the delayed activities and the extension of time to the Completion Date claimed; and
- iv. if the delay continues beyond the extension of time claimed, the Supplier gives the Council updated notices every 5 Business Days that satisfies the requirements of clause 6ciii until the delay ends.
- d. Provided the requirements of clause 6c are satisfied, the Council will determine (acting reasonably) the period of delay caused by the Qualifying Cause and extend the Completion Date by that period.
- e. If the Supplier does not make a claim for an extension of time within the time or in the form specified in clause 6c, the Supplier is not entitled to an extension of time for that delay.
- f. The Council may (without obligation), at any time and for any reason it thinks fit, extend the Completion Date. This right is solely for the Council's benefit and may be exercised in its absolute discretion.

7. LIQUIDATED DAMAGES

- a. If the:
 - i. Purchase Order sets out any Completion Dates; and
 - ii. Supplier fails to achieve Completion by the Completion Date, the Supplier will be liable to the Council for liquidated damages at the rate in the Purchase Order (if any), for each day after the Completion Date up to and including the date that the Supply is completed as determined by the Principal (acting reasonably) or termination of the Agreement, whichever is sooner.
- b. Liquidated damages which may be payable pursuant to this clause may be provisionally deducted after the Completion Date and:
 - i. are a genuine pre-estimate of damages likely to be suffered by the Council if the Supplier does not complete the Supply by the Completion Date; and
 - ii. do not relieve the Supplier from any of its obligations or liabilities under the Agreement.
- c. If the Purchase Order does not provide for liquidated damages, or liquidated damages are found to be void or unenforceable, the Supplier indemnifies the Council for damages at common law for its failure to complete the Supply by the Completion Date.

8. SITE MATTERS

- a. Entry to the Site by the Supplier and its personnel is at their own risk. To the extent permitted by law, the Council will not be responsible for any loss of or damage to property or for any personal injury or death to persons while on the Site.
- b. When accessing the Site, the Supplier must comply with all policies and procedures relating to the Site.
- c. If the Supply constitutes 'building work' for the purposes of the *Queensland Building and Construction Commission Act 1991* (Qld) ('**QBCC Act**'), the Supplier must supervise and manage the performance of the Supply (including any performed by subcontractors) personally or by a competent representative and must otherwise comply with the requirements in sections 43 and 43A of the QBCC Act.
- d. The Council may direct the Supplier to have removed from the Site or any activity in respect to the Supply, any of the Supplier's personnel engaged in the Supply who, in the Council's opinion, is incompetent, guilty of misconduct or for any other reason notified to the Supplier.
- e. The Supplier must coordinate the Supply on the Site with activities of the Council, the Council's personnel and any other contractors and has no entitlement to any claim for doing so or for any impact of interference caused to the Supplier or that part of the Supply required to be performed on the Site.
- f. The Supplier must avoid disruptions or inconvenience to:
 - i. the usual and safe operations of the Site; and
 - ii. the users of the Site, except to the extent expressly permitted by the Agreement.
- g. The Supplier must take all necessary steps to:
 - i. prevent damage to property on or near the Site;
 - ii. avoid unnecessary interference with the passage of people and vehicles on or near the Site; and
 - iii. prevent nuisance and unreasonable noise and disturbance on or near the Site.

9. WORK HEALTH AND SAFETY

- a. Without limiting any other clause, the Supplier must:
 - i. carry out the Supply in a safe manner;
 - ii. comply with, and do all things necessary to enable the Council to comply with, all laws relating to WHS;
 - iii. comply with lawful directions issued by persons with control of the Site pursuant to any laws relating to WHS;
 - iv. have documented safe work practices and procedures for the Supply;
 - v. provide its personnel with personal protective equipment, inductions, information, instruction, training and supervision to ensure their health and safety;
 - vi. provide, when requested by the Council, evidence of its compliance with any laws relating to WHS; and
 - vii. immediately notify the Council of accidents involving its personnel.
- b. If urgent action is necessary to protect the Supply, property or people, and the Supplier fails to take the action, the Council may take the necessary action and costs incurred by the Council in performing those actions will be a debt due and payable to the Council from the Supplier.

10. STATUTORY DECLARATION

The Supplier agrees that:

- a. at any time, the Council may request the Supplier to provide a completed and signed statutory declaration (in a form and containing such detail as reasonably required by the Council) from a current director of the Supplier confirming that the Supplier is solvent and not subject to any event set out in clause 16.b.i; and
- b. the Supplier must provide such completed and signed statutory declaration within 3 Business Days of such a request.

11. VARIATION

- a. The Council officer stated in the Purchase Order or any replacement person nominated by the Council (**Authorised Officer**), may direct the Supplier at any time to vary, amend, increase, decrease, omit, change the timing of (including to accelerate), or change the quality, character or extent of the Supply (**Variation**). No Variation will invalidate the Agreement and the Supplier must comply with the Variation.
- b. The Council will not be in breach of the Agreement if it reduces the quantity or scope of the Supply ordered and thereafter engages a third party for that Supply.
- c. If the parties do not agree on the price or Completion Date for a Variation, where the Variation has not arisen from a default of the Supplier or for its convenience, the Council will determine a reasonable change to the Price and the Completion Date.
- d. If a Variation is requested by a representative of the Council other than the Authorised Officer, then the Supplier must obtain the written confirmation for that Variation from the Authorised Officer before complying with the Variation and in any event within 3 Business Days of any such request. Compliance with this clause 11.d is a condition precedent to any Claim, and the Council shall have no liability for any Claim, in connection with the requested Variation to the extent the Supplier has failed to comply with this clause 11.d (including without limitation any costs incurred prior to having obtained the written confirmation of the Authorised Officer).

12. INVOICING AND PAYMENT

- a. The Council will, subject to the terms of the Agreement, pay the Supplier an amount not exceeding the Price.
- b. The Supplier may only invoice the Council after completion of the Supply to the reasonable satisfaction of the Council. Invoices must include the Council's Purchase Order number, the Council's budget number (if any), the name of the Authorised Officer and a detailed description of the Supply performed, the Price payable and any other information reasonably required by the Council.
- c. Subject to clauses 12.e and 12.f, the Council will pay the amount of invoices issued by the Supplier under clause 11.c within 30 days from date of invoice, except where the Council disputes the invoice, in which case:
 - i. the Council will pay the undisputed part of the invoice (if any);

- ii. if the resolution of the dispute determines that the Council is to pay an amount to the Supplier, the Council will pay that amount upon resolution of that dispute.
- d. The Council will respond to any 'payment claim' for the purposes of the SOPA, within the maximum time permitted for issuing a 'payment schedule' under SOPA.
- e. The Council may reduce any payment due to the Supplier under the Agreement by any amount for which the Supplier is or may be liable to the Council. This does not limit the Council's right to recover those amounts in other ways.
- f. The Supplier must ensure all Claims for payment arising out of or in connection with the Agreement are issued by the Supplier to the Council within 12 months after the date upon which the Supply is completed (**12 Month Period**). Compliance with this clause 12.f is a condition precedent to any Claim, and the Council shall have no liability for any Claim to the extent it is made after the 12 Month Period.

13. GST

- a. Capitalised terms in this clause 12 have the meanings given to them in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- b. The consideration for a Supply made under or in connection with the Agreement does not include GST. If a Supply made under or in connection with the Agreement is a Taxable Supply, then at or before the time the consideration for the Supply is payable:
 - i. the Recipient must pay the Supplier an amount equal to the GST for the Supply (in addition to the consideration otherwise payable under the Agreement for that Supply); and
 - ii. the Supplier must give the Recipient a Tax Invoice for the Supply.
- c. If either party has the right under the Agreement to be reimbursed or indemnified by another party for a cost incurred in connection with the Agreement, that reimbursement or indemnity excludes any GST component of that cost for which an Input Tax Credit may be claimed by the party being reimbursed or indemnified.

14. INDEMNITY

The Supplier indemnifies the Council from any claims, actions, proceedings, costs, expenses, losses and damages (including legal fees on an indemnity basis) incurred in connection with:

- a. any loss of or damage to real or personal property caused by the Supplier or its personnel;
- b. personal injury or death caused by the Supplier or its personnel;
- c. a breach of any third party intellectual property rights;
- d. a breach of any laws in connection with the Agreement by the Supplier or its personnel; and
- e. a breach of the Agreement by the Supplier or its personnel.

15. INSURANCE

The Supplier must effect and maintain at its own cost:

- a. public liability insurance for an amount no less than \$20 million (except where a lesser amount is agreed with the Council);
- b. workers' compensation insurance as required by law;
- c. third party comprehensive motor vehicle insurance; and
- d. if design Services are ordered by the Council, or the Supplier is designing Goods for the Council, professional indemnity insurance with a limit of liability of not less than \$5 million (except where a lesser amount is agreed with the Council) that is to be maintained until six years after the Completion Date.

The Supplier must provide the Council with evidence of such insurances whenever requested by the Council.

16. TERMINATION

- a. The Council may terminate the Agreement for any reason in the Council's absolute discretion on 7 days' written notice to the Supplier.
- b. The Council may terminate the Agreement immediately if:
 - i. the Supplier becomes insolvent, commits an act of bankruptcy, enters into administration, appoints a liquidator, receiver, manager or controller, makes a statement or conducts itself in a manner from which it may reasonably be deduced that it is insolvent, stops or suspends (or threatens to stop or suspend) payment of all or a class of its debts, or anything analogous to these events; or
 - ii. the Supplier fails to remedy a breach of the Agreement within 7 days of being directed in writing to do so by the Council.

- c. If the Council exercises its rights under clause 16.a, the Supplier will only be entitled to its reasonable direct costs incurred up to the date of termination (capped at the Price) provided that the Council receives unencumbered title to any Goods that are paid for in accordance with this clause 16.c. The Supplier will not be entitled to any loss of profit or other compensation.
- d. If the Council exercises its rights under clause 16.b, the Supplier will not be entitled to any claim against, or compensation from, the Council.
- e. If the Council terminates, or purports to terminate, the Agreement and it is subsequently held to be invalid, void or otherwise unenforceable then the Council will be deemed to have terminated for convenience under clause 16.a as at the same date and time as the original notice of termination. The Supplier's sole entitlement will be a payment (if any) under clause 16.c and the Supplier waives any claim it has, or would have had, but for this clause, arising out of or in connection with any termination, or purported termination, by the Council under the Agreement or otherwise at law being subsequently held to be invalid, void or otherwise unenforceable.

17. INFORMATION AND INTELLECTUAL PROPERTY

- a. The Supplier must not disclose to any person, or use for any purpose other than carrying out the Supply, the contents of the Agreement and any other document or information obtained by the Supplier in the course of or in connection with carrying out the Supply (**Confidential Information**):
 - i. without the prior written consent of the Council; or
 - ii. unless required by law.
- b. The Supplier must immediately notify the Council if the Supplier becomes aware of any unauthorised disclosure or use of the Confidential Information and return any Confidential Information (including copies) on the written request of the Council.

The Supplier agrees:

- c. unless the Council expressly agrees otherwise, any information (whether documented or otherwise) supplied or made available to the Supplier by or on behalf of the Council:
 - i. is provided only for the Supplier's convenience; and
 - ii. has not been and will not be relied upon by the Supplier for any purpose (including entering into or performing its obligations under the Agreement);
- d. the Council does not warrant, guarantee or assume responsibility in respect of such information (including its accuracy, completeness or adequacy for the purposes of the Agreement); and
- e. the Council will not be liable to the Supplier in contract, tort, equity, under statute or otherwise arising from or in connection with the supplied information (including its inaccuracy or adequacy), the provision of the supplied information or the non-provision of any other information by the Council.
- f. The Supplier grants the Council a transferable, irrevocable, royalty free licence, including the right to sub-licence, to use any material provided to the Council in connection with the Agreement for use and enjoyment of the Supply, including (without limitation) any modification, repair or alteration of any Goods.
- g. The Supplier warrants that the Supply will not infringe any intellectual property rights in Australia or any other country.

18. PERSONAL PROPERTY SECURITIES ACT

- a. If the Council determines that the Agreement (or a transaction in connection with it) is or contains a Security Interest (as defined in the Personal Property Securities Act 2009 (Cth) (**PPSA**); the Supplier agrees to do anything the Council may reasonably require for the purposes of enabling the Council to:
 - i. ensure that the Security Interest is enforceable, perfected and ranks ahead of other Security Interests;
 - ii. apply for, and obtain, any registration or providing any notification in accordance with the PPSA; or
 - iii. exercise any right in connection with the Security Interest or the property the subject of the Security Interest.
- b. Except as expressly agreed in writing, the Supplier:
 - i. acknowledges that neither the Agreement nor a transaction in connection with it is intended to provide a Security Interest in favour of the Supplier; and
 - ii. agrees that it will not register any Security Interest and will remove any registration in connection with the Agreement.

- iii. must promptly notify the Council if it knows that a third party has or claims a Security Interest on a product of the Supply supplied or to be supplied by the Supplier to the Council, owned by the Council or in which the Council has an interest;
- iv. must give the Council information reasonably required by the Council in relation to any such Security Interest or claim; and
- v. must, on request by the Council, use best endeavours to ensure that the third party discharges any such Security Interest and removes any registration in respect of any such Security

19. QUALITY ASSURANCE

Without limiting its other obligations under the Agreement, the Supplier must carry out the Supply in accordance with a quality assurance system which establishes the qualities and performance of the Supply including quality manuals, plans, management structures and other critical issues relating to quality assurance.

20. PRIVACY

If the Supplier collects or has access to Personal Information (as defined in the *Information Privacy Act 2009* (Qld) (**IPA**)) in carrying out the Supply, the Supplier must:

- a. comply with all applicable policies, procedures and directions of the Council and laws relating to privacy and the processing of Personal Information, including without limitation the IPA and the *Privacy Act 1988* (Cth);
- b. ensure that its personnel do not access, use or disclose Personal Information other than in connection with carrying out the Supply;
- c. ensure that its personnel who have access to Personal Information comply with obligations the same as those imposed on the Supplier under this clause; and
- d. notify the Council on becoming aware of a breach of this clause.

21. DISPUTE

- a. If a dispute between the parties arises from or in connection with the Agreement (**Dispute**), neither party may commence court proceedings concerning the Dispute unless it has complied with this clause or the party seeks urgent injunctive or declaratory relief.
- b. A party claiming a Dispute must notify the other party of the Dispute and specify the claim (**Dispute Notice**). A party served with a Notice of Dispute may give written response to the Notice of Dispute within 28 days of the receipt of the Dispute Notice (**Response**).
- c. Within 42 days of service of a Dispute Notice, or within 14 days of the receipt of a Response, whichever is the earlier, the parties must confer to attempt to resolve the Dispute. Each party must be represented by a person having authority to agree to a resolution of the Dispute.
- d. If the Dispute is not resolved under clause 21c within 30 days, either party may commence litigation.
- e. Each party must continue to perform its obligations under the Agreement despite the existence of a Dispute.

22. OTHER

- a. The Supplier must at its own expense obtain all requisite permits, approvals and licences and comply with all laws and regulations in connection with the Agreement.
- b. The Supplier must keep the Council fully informed in respect to the Supplier's performance of the Agreement and provide to the Council, as requested by the Council, progress reports.
- c. The Supplier must at its own cost supply all labour, tools, equipment and materials necessary for the Supply.
- d. The parties' relationship is one of principal and independent contractor, not employer and employee, principal and agent or partnership.
- e. The Supplier must comply with all reasonable directions of the Council.
- f. The Agreement may not be amended, altered, supplemented or cancelled without the prior written consent of the Council.
- g. Where the Supplier comprises more than one entity, each will be jointly, severally and vicariously liable for the full performance of the Supplier's obligations under the Agreement.
- h. The Supplier must not assign or subcontract its rights or obligation under the Agreement without the prior written consent of the Council (and will be vicariously liable for the acts or omission of such subcontractors)

- i. A right under the Agreement may only be waived in writing signed by the party granting the waiver, and is effective only to the extent specifically set out in that waiver.
- j. Where any provision of the Agreement is void, illegal or unenforceable, it may be severed without affecting the enforceability of the other provisions in the Agreement.
- k. The parties agree that the laws in force in the State of Queensland apply to the Agreement and both submit to the exclusive jurisdiction of the Queensland courts.
- l. If any day on or by which a person must do something under the Agreement is not a Business Day, then the person must do it on or by the next Business Day.
- m. No provision of the Agreement is to be constructed against the interests of the Council because the Council prepared the Agreement.

23. GIFTS & BENEFITS

- a. It is the Council's policy to discourage the receipt or giving of gifts, directly or indirectly by suppliers to employees who do business or are seeking to do business with the Council.
- b. Council employees may not accept gifts from persons or entities who deal with the Council in cases where the gift is being made in order to influence the Council employee's actions where the acceptance of gifts could create the appearance of conflict of interest or impropriety.
- c. Council's Gifts & Benefits Policy can be found here: <https://www.southburnett.qld.gov.au/laws-forms-policies/policies>

24. DEFINITIONS

In the Agreement,

Business Day means a day which is not:

- a. Saturday or Sunday; or
- b. a public holiday, bank holiday or special holiday in the place in which the Site is located.

Claim means any claim, notice, demand, debt, account, lien, liability, action, proceedings or suit under, arising out of, or in any way in connection with the Agreement, the Supply or either party's conduct under the Agreement before or after it came into force, whether at law (including breach of contract) or in equity (including restitution), by statute or in tort (including negligence).

Completion Date means:

- a. for Goods, the date or dates nominated by the Council for the delivery of the Goods in accordance with clause 3.2a; and/or
- b. for Services, the date or dates nominated by the Council for the completion of the Services.

Council means South Burnett Regional Council ABN 89 972 463 352.

Defects Liability Period means the period stated in the Purchase Order (if any) which commences on the date the Supplier completes the Supply (as determined by the Council acting reasonably).

Defect or Defective means any part of the Goods and/or Services which does not comply strictly with the requirements of the Agreement or is otherwise unsatisfactory to the Council.

Goods means goods ordered by the Council as part of the Supply.

Price means the price or prices agreed between the Council and the Supplier for the Supply.

Services means services ordered by the Council as part of the Supply.

Site means:

- a. for Goods, the location for delivery of the Goods in accordance with clause 3.2, as agreed between the parties; and
- b. for Services, the location where the Services are to be performed, as agreed between the Council and the Supplier.

SOPA means the *Building Industry Fairness (Security of Payment) Act 2017* (Qld).

Supplier means the party stated in the Purchase Order who is responsible for carrying out and completing the Supply.

Supply means the supply of Services, if any, and Goods, if any.

WHS means workplace health and safety.