

PURCHASE ORDER

TERMS AND CONDITIONS

1. DEFINED TERMS

In this Agreement:

'**Agreement**' means this agreement between the Purchaser and the Supplier.

'**Delivery Address**' means the delivery address specified in the Details.

'**Delivery Date**' means the date specified in the Details.

'**Delivery Instructions**' means the delivery instructions specified in the Details.

'**Fee**' means the fee specified in the Details, as reduced in accordance with this Agreement.

'**Goods**' means the goods specified in the Details and Schedule 1.

'**GST**' means the Goods and Services Tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* as amended.

'**Legislative Requirement**' means:

- (a) Acts, ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and New South Wales;
 - (b) codes, standards, certificates, licences, consents, permits, approvals and requirements of organisations, including the requirements of any authority, and the requirements of any approvals;
 - (c) the Purchaser's code of conduct, statement of business ethics, and any NSW government supplier guidelines, standards and codes; and
 - (c) fees and charges payable in connection with the foregoing,
- as amended, replaced or updated from time to time.

'**PPSA**' means the *Personal Property Securities Act 2009* (Cth).

'**PPS Law**' means:

- (a) the PPSA and any regulation made at any time under the PPSA, including the PPS Regulations (each as amended from time to time); and
- (b) any amendment made at any time to any other legislation as a consequence of a law or regulation referred to in paragraph (a).

'**PPS Regulations**' means the *Personal Property Securities Regulations 2010* (Cth).

'**Proportionate Liability Act**' means the *Civil Liability Act 2002* (NSW).

'**Purchaser**' means Penrith City Council.

'**Security Interest**' means any 'security interest' as defined in the PPS Law.

'Supplier' means the party named as such in the Details.

2. SUPPLIER'S OBLIGATIONS

The Supplier must:

- (a) deliver the Goods in accordance with the requirements of this Agreement;
- (b) not interfere with, delay or damage the work of the Purchaser (if any), or any other contractors working at the Delivery Address;
- (c) comply with any directions given by the Purchaser (including in respect of safety); and
- (d) keep the existence of this Agreement confidential, and not disclose the existence, or the terms and conditions, of this Agreement, without prior consent, in writing, from the Purchaser.

3. PURCHASER'S OBLIGATIONS

The Purchaser must pay to the Supplier the Fee in accordance with this Agreement.

4. CONFORMITY OF GOODS

- 4.1 The Supplier must deliver Goods that are of the quantity, quality and description detailed in this Agreement.
- 4.2 The Supplier warrants that:
 - (a) the Goods are fit for the purposes for which the Goods are intended to be used by the Purchaser;
 - (b) the Goods comply with any samples, specifications, drawings or other descriptions provided to the Purchaser;
 - (c) the Goods are of good quality, free from all defects (including defects in design, material and workmanship) and are new; and
 - (d) the Purchaser will receive good and clear title to the Goods.
- 4.3 The Supplier shall provide, and shall procure from its manufacturers and subcontractors (at its cost), warranties and guarantees in respect of the Goods on terms reasonably required by the Purchaser for the benefit of the Purchaser or any other person nominated in writing by the Purchaser.
- 4.4 All Goods provided by the Supplier must comply with the provisions of all applicable workplace health and safety legislation, environmental, and any other applicable Legislative Requirements that may apply to the Goods.
- 4.5 Without limiting clause 4.4, the Supplier must ensure that hazardous Goods have prominent and suitable warnings on all containers, packages and documents containing the Goods, and these warnings must comply with all Legislative Requirements and as otherwise reasonably required by the Purchaser.
- 4.6 In respect of any Goods supplied under this Agreement which are not in accordance with the requirements of this Agreement, are defective in any way or are damaged due to the Supplier's failure to properly package the Goods or the Supplier's mishandling of the Goods (as determined by the Purchaser), the Purchaser may (at its sole discretion):
 - (a) require the Supplier to make good that damage or rectify the defect within a timeframe specified by the Purchaser. If the Supplier fails to do so within the specified timeframe, the Purchaser may itself, or by engaging a third party, make good or rectify and recover its costs from the Supplier;

- (b) reject all or part of the Goods, in which case the risk in the rejected Goods will remain with the Supplier and the Purchaser will not be liable to pay for the rejected Goods for so long as they are rejected; or
 - (c) accept the Goods, and the Fee shall be reduced by a reasonable amount to take account of the non-compliance, defect or damage, as determined by the Purchaser.
- 4.7 The Purchaser shall be entitled in such circumstances to recover from the Supplier any financial loss incurred by the Purchaser either directly or indirectly arising from such occurrence.
- 4.8 The Supplier is taken to have read and, to agrees to, comply with any local government codes, standards and guidelines applicable to the Goods.

5. DELIVERY

- 5.1 The Supplier must deliver the Goods to the Delivery Address in accordance with any Delivery Instructions, or as otherwise directed by the Purchaser from time to time.
- 5.2 The Supplier must deliver the Goods on the Delivery Date. Time is of the essence.
- 5.3 The Purchaser may alter the Delivery Date at any time before the Delivery Date (but not to a date earlier than the Delivery Date) by way of written notice to the Supplier.
- 5.4 The Supplier must provide to the Purchaser, on the Delivery Date, all drawings, operating and maintenance manuals and technical data associated with the Goods.
- 5.5 The Supplier must ensure that the Goods are contained and packaged safely and securely and protected against damage to ensure their safety during transport, storage and delivery.

6. TITLE

- 6.1 Title to the Goods passes to the Purchaser on the earlier of the date and time of:
- (a) payment for those Goods; and
 - (b) subject to clause 4.6, delivery of those Goods to the Purchaser.
- 6.2 The Supplier warrants that the Goods are free from all charges, liens and encumbrances.

7. PAYMENT

- 7.1 Subject to the Supplier's compliance with this Agreement (including delivery of the Goods on the Delivery Date), the Purchaser will pay the Fee within [x] days from the later of:
- (a) the end of the month during which a tax invoice is received from the Supplier for the delivery of the Goods; and
 - (b) the end of the month during which the Delivery Date falls.
- 7.2 The Supplier is not entitled to interest on unpaid monies, or for any other costs associated with recovery from the Purchaser for unpaid monies.
- 7.3 The Purchaser may deduct from moneys due or to become due to the Supplier any amount necessary to satisfy any debt due or any other claim the Purchaser may have against the Supplier whether under this Agreement or otherwise.

8. INTELLECTUAL PROPERTY

- 8.1 The Supplier warrants that the Goods do not infringe or contribute to any infringement of any patent, registered design, copyright or moral right.
- 8.2 The intellectual property in all materials provided by the Purchaser to the Supplier including, but not limited to, drawings, specifications, designs, manuals and/or tenders remains with the Purchaser, and the Supplier must promptly return all such material to the Purchaser, if requested by the Purchaser.
- 8.3 The Supplier grants to the Purchaser a royalty-free, irrevocable, worldwide, perpetual and transferable licence, which may be sublicensed by the Purchaser in its sole discretion, to use any reports, designs, drawings, calculations, models, disks, tapes, other electronic data, written information and other documents created in respect of the Goods.
- 8.4 The Supplier indemnifies the Purchaser against any and all liability, loss, damages and expenses arising out of any claim in respect of infringement or alleged infringement, of any patent, trade mark or design, copyright or any other form of intellectual or industrial property whether in Australia or overseas, relating to the Goods.

9. INDEMNITY

- 9.1 The Supplier indemnifies the Purchaser, its officers, employees, agents and contractors (in this clause, referred to as 'those indemnified') against all cost, loss, expense or damage including legal costs and expenses on solicitor/own client basis, and liabilities incurred or suffered by those indemnified, caused directly or indirectly, or in connection with any:
 - (a) breach of any warranty or representation given by the Supplier in relation to the Goods;
 - (b) breach of any term of this Agreement;
 - (c) in respect of damage to property of the Purchaser or third parties or injury or death of third party in connection with this Agreement or the Goods;
 - (d) liability under the *Competition and Consumer Act 2010* (Cth), the *Sale of Goods Act 1923* (NSW) and *Fair Trading Act 1987* (NSW) in connection with this Agreement or the Goods;
 - (e) defect or fault or alleged defect or fault in the Goods; and
 - (f) act or omission of the Supplier, its officers, employees, agents, or subcontractors,which arises from any claim, suit, demand, action, or proceeding by any person. The Supplier's indemnity to the Purchaser under this clause shall be reduced proportionately to the extent that any wilful, unlawful, or negligent act or omission of the Purchaser, its officers, employees, agents or contractors contributed to the loss or liability.
- 9.2 Without limiting clause 9.1, the Supplier is liable for any direct, indirect or consequential losses or expenses suffered by the Purchaser or any third party arising out of or in connection with this Agreement or the use of the Goods, howsoever caused, including, but not limited to loss of turnover, profits, business or goodwill or any liability to any other party.

10. INSURANCE

- 10.1 Before commencing performance of this Agreement and for the duration of this Agreement, the Supplier shall effect and maintain the following insurances:

- (a) insurance cover for the Goods for their full replacement value against loss or damage, including loss or damage in transit to the Delivery Address and unloading at the Delivery Address;
 - (b) workers compensation insurance, in accordance with the requirements of, and for an amount of not less than the maximum amount specified in, the relevant statutory regime in State or Territory mentioned in the Details; and
 - (c) public and product liability insurance for the amount specified in the Details covering:
 - (i) the respective rights and interests, and liabilities to third parties, of the parties from time to time, whenever performing obligations under the Agreement;
 - (ii) the parties' respective liability to each other for loss or damage to property (other than property required to be insured by clause 10.1(a)) and the death of or injury to any person (other than liability which the law requires to be covered under a workers compensation insurance policy).
- 10.2 Whenever requested by the Purchaser, the Supplier shall provide satisfactory evidence that all insurances required to be effected by the Supplier under this Agreement have been effected and maintained. If, after being requested by the Purchaser, the Supplier fails to produce evidence of insurance as required by this clause, the Purchaser may effect and maintain the insurance and pay the premiums, in which case the amount paid shall be a debt due from the Supplier to the Purchaser.

11. TERMINATION

- 11.1 Without prejudice to any right the Purchaser may have to indemnity or damages, or to rescission, and to the extent permitted by law, for breach of this Agreement, the Purchaser may terminate this Agreement by written notice to the Supplier at any time at its absolute discretion. Supplier notice in writing, including termination for the Supplier's breach of this Agreement.
- 11.2 If this Agreement is terminated under this clause, the Purchaser will be liable only for payment for Goods delivered in accordance with this Agreement before termination, and shall not be liable for any other cost, loss, damage or expenses to the Supplier arising out of the termination of this Agreement.
- 11.3 If for any reason the Supplier validly terminates this Agreement as a result of the breach or repudiation of this Agreement by the Purchaser, this Agreement will be deemed to have been terminated by the Purchaser under this clause.

12. PPSA

The Supplier agrees that the terms of this Agreement may constitute one or more Security Interests for the purpose of the PPSA and that:

- (a) to perfect any such Security Interest the Purchaser may register a financing statement(s) on the Personal Property Securities Register;
- (b) the Supplier shall have no rights under sections 95, 118, 121(4), 125, 130, 132, 135 142 and 143 of the PPSA;
- (c) the application of Part 4.3 (other than sections 123, 124, 126, 128, 129(1), 133, 134(1) and 136) of the PPSA is contracted out of if that Part would apply by virtue of section 116(2) of the PPSA;

- (d) the Supplier waives its right to receive notice of a verification statement under section 157 of the PPSA; and
- (e) the Supplier must, promptly on request by the Purchaser, provide any such information and execute and deliver any such documents as the Purchaser may reasonably require to protect the Security Interests granted to the Purchaser by the Supplier under or in relation to this Agreement.

13. CIVIL LIABILITY ACT

13.1 To the maximum extent permitted by law:

- (a) the parties agree that the Proportionate Liability Act will not have any application to this Agreement, or any of the obligations of the Supplier under this Agreement or at law;
- (b) the Supplier's agreement of sole responsibility and the indemnities contained in this Agreement shall apply despite the provisions of the Proportionate Liability Act; and
- (c) the parties agree that their rights, obligations and liabilities will be those which would exist if the Proportionate Liability Act did not apply.

13.2 If, despite the previous clause, the Proportionate Liability Act does apply, then:

- (a) the Supplier acknowledges and agrees that, for the purposes of the Proportionate Liability Act, the Supplier is entirely and solely responsible for any failure to take reasonable care on the part of any of its subcontractors, employees or agents; and
- (b) the Supplier undertakes to the Purchaser, as a separate and independent absolute obligation not subject to any duty to take reasonable skill and care:
 - (i) which is defective or incomplete or which is not in conformance with the requirements of this Agreement; and
 - (ii) which would otherwise be a breach of the Supplier's obligations under this Agreement; or
 - (iii) to compensate the Purchaser for any cost, loss or expense incurred by the Purchaser as a result of having such work rectified or completed.

14. GENERAL

14.1 The Supplier must not sub-contract or assign this Agreement to any other party without consent in writing from the Purchaser.

14.2 The Supplier is liable for the acts, defaults and omissions of all of its employees, agents or subcontractors as if they were done by the Supplier.

14.3 Waiver by the Purchaser of any specific default or defaults by the Supplier will not constitute a waiver by the Purchaser of its rights arising out of any further default by the Supplier.

14.4 If any term or condition is unenforceable it shall be read down so as to be enforceable or, if it cannot be read down, the term or condition shall be severed from this Agreement without affecting the enforceability of the remaining terms and conditions of this Agreement.

14.5 This Agreement constitutes the entire understanding between the Purchaser and the Supplier in relation to the subject matter of this Agreement and supersedes any other agreement or arrangement between the parties in respect of the supply.

- 14.6 A notice (and other documents) shall be deemed to have been given if addressed or delivered by hand, mail or email to the relevant address in the Details or last communicated in writing to the person giving the notice. A notice (and other documents) shall be deemed to have been received:
- (a) in the case of hand delivery, upon written acknowledgment of receipt by an officer or other duly authorised employee, agent or representative of the receiving party;
 - (b) in the case of posting, 3 business days after dispatch; or
 - (c) in the case of email, once sent, unless the sender receives notice that the email transmission has been unsuccessful or could not be delivered, or the sender receives an out of office notice indicating that the recipient is unavailable.
- 14.7 Any email sent on a day which is not a business day will be deemed not to have been received until the next business day.
- 14.8 This Agreement is to be governed by and construed in accordance with the law of the New South Wales.
- 14.9 The parties submit to the jurisdiction of the courts of New South Wales and the courts of appeal from them.
- 14.10 This Agreement may be executed in counterparts. All executed counterparts constitute one document.

15. GST

- 15.1 Words or expressions used in this clause 15 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) have the same meaning in this clause
- 15.2 Any consideration payable or to be provided for a supply made under or in connection with this Agreement, unless specifically described in this Agreement as 'GST inclusive', does not include any amount on account of GST. If GST is payable on any supply made under or in connection with this Agreement (not being a supply the consideration for which is specifically described in this Agreement as 'GST inclusive'), the recipient of the supply must pay to the supplier, an additional amount equal to the GST payable on the supply (GST Amount). The GST Amount is payable at the same time as the GST exclusive consideration is paid or provided, subject to the supplier issuing the recipient with a tax invoice for the supply to which the payment relates.
- 15.3 If the Supplier does not provide a tax invoice for a taxable supply either at the time that the supply is made or before the Purchaser makes payment for the supply, the Purchaser is deemed, at the time the supply is made, to have requested the Supplier to provide a tax invoice to the Purchaser in respect of that taxable supply and the Supplier must promptly (and in any event within 3 business days after the taxable supply has been made) provide the Purchaser with a tax invoice in relation to that supply.
- 15.4 If a payment is calculated by reference to or as a specified percentage of another amount or revenue stream, that payment shall be calculated by reference to or as a specified percentage of the amount or revenue stream exclusive of GST.
- 15.5 If a payment to a party under this Agreement is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party is entitled for that loss, cost or expense.