

Purchase order terms and conditions

[Effective September 2019]

1 Definitions

In this document, these terms have the following meanings:

Agreement	The Purchase Order and these Purchase order terms and conditions unless a Contract Number has been allocated by Council and/or a Contract Number is referenced in the Purchase Order in which case these purchase order terms and conditions do not apply and the agreement will be the Purchase Order and the terms and conditions associated with that Contract Number.
Auditors	The meaning given in clause 9.1(a) .
Authorised Subcontractor	The meaning given in clause 8.1 .
Authority	Any government or any governmental, semi governmental or local government authority, administrative or judicial body or tribunal, department, commission, public authority, agency, minister, statutory corporation or instrumentality.
Business Day	A day that is not a Saturday, Sunday or public holiday in Gympie, Queensland.
Change in Control	The Contractor ceasing to be within the Control of the person(s) who Controlled the Contractor on the Commencement Date (or where Council consents to such a change, on the date that such consent is last given).
Commencement Date	The date this Agreement is made between Council and the Contractor, as determined by the date of the Purchase Order.
Conflict of Interest	Having an interest (whether personal, financial or otherwise) which conflicts or may reasonably be perceived as conflicting with the ability of the Contractor to perform its obligations under this Agreement fairly and objectively.
Consequential Loss	Indirect loss, loss of profits, loss of revenue, loss of savings, consider the issue and done a bit of research loss of opportunity, loss of bargain, loss of use, damage to credit rating, loss of or damage to reputation, future reputation or publicity, loss in connection with claims made by third parties, remote, abnormal or unforeseeable loss, and any consequential loss or damage that is similar to the losses in this definition, whether or not such loss or damage was foreseeable or within the contemplation of Council and/or the Contractor at the time they entered into this Agreement.
Contract Administrator	The person or persons appointed by Council from time to time.
Contract Material	Any data, documents, reports, maps, goods or other material (whether in hard copy or electronic format): <ul style="list-style-type: none"> (a) created or developed by or on behalf of the Contractor (including in association or collaboration with Council or a third party); or (b) which is provided or made available (by whatever mode of delivery) by the Contractor to Council, before on or after the Commencement Date and in connection with this Agreement or the Service, including any material identified in the Service Specification.
Contract Number	Any Contract Number allocated by Council to the Contract to which the Purchase Order relates (or any other number as the Council may specify in writing to the Contractor for the purposes of the Contract)(if any).
Contractor	The entity specified in the Purchase Order.
Contractor Representative	The person appointed by the Contractor from time to time.
Corporations Act	The <i>Corporations Act 2001</i> (Cth).
Council	The Gympie Regional Council.
Council Confidential Information	Any information (including any information in Council Material) disclosed before, on or after the Commencement Date to the Contractor by Council or the representatives or Personnel of Council regardless of its form which: <ul style="list-style-type: none"> (a) is marked private or confidential; (b) is by its nature confidential (including the terms of this Agreement); or (c) the Contractor knows or ought to know is confidential, but excludes information which: <ul style="list-style-type: none"> (a) is required to be disclosed by law; (b) is or becomes public knowledge (other than as a result of a breach of confidence or information that is Personal Information); or (c) the Contractor already knew before receiving the information from Council (other than as a result of a breach of confidence or information that is Personal Information).
Council Material	Any data, documents or other material (including hard copy and electronic format) provided by Council to the Contractor in connection with this Agreement, whether provided before on or after the Commencement Date.
Delivery Point	The address for the delivery of Contract Material (or addresses if different Contract Material are to be delivered to different addresses) specified in the Service Specification.
Direction	Any lawful direction, instruction, request, permission, notice, consent, approval, refusal, nomination, specification, requirement, designation or authorisation given, whether verbally or in writing, and Direct has an equivalent meaning.

Equipment	The plant and equipment used by the Contractor to perform its obligations under this Agreement (whether or not owned by the Contractor).
Expiry Date	Means: <ul style="list-style-type: none"> (a) in respect of a supply of Goods, all of those Goods being supplied to Council in accordance with the terms of this Agreement; (b) in respect of a supply of Services, the Services being completed in accordance with the terms of this Agreement; and (c) in respect of a supply of Goods and Services, the later to occur of the events in paragraph (a) and (b) of this definition.
Goods	The goods described in the Purchase Order to be supplied by the Contractor to Council.
Insolvency Event	Any of the following: <ul style="list-style-type: none"> (a) a person is, or states that the person is, unable to pay from the person's own money all the person's debts as and when they become due and payable; (b) a person is taken or must be presumed to be insolvent or unable to pay the person's debts under any applicable legislation; (c) an application or order is made for the winding up or dissolution or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of a corporation; (d) an administrator, provisional liquidator, liquidator or person having a similar function under the laws of any relevant jurisdiction is appointed in respect of a corporation or any action is taken to appoint any such person and the action is not stayed, withdrawn or dismissed within seven days; (e) a controller is appointed in respect of any property of a corporation; (f) a corporation is deregistered under the Corporations Act or notice of its proposed deregistration is given to the corporation; (g) a distress, attachment or execution is levied or becomes enforceable against any property of a person; (h) a person enters into or takes any action to enter into an arrangement (including a scheme of arrangement or deed of company arrangement), composition or compromise with, or assignment for the benefit of, all or any class of the person's creditors or members or a moratorium involving any of them; or (i) anything analogous to or of a similar effect to anything described above under the law of any relevant jurisdiction occurs in respect of a person.
Intellectual Property Rights	All intellectual and industrial property rights and interests throughout the world, whether registered or unregistered, including trade marks, designs, patents, inventions, circuit layouts, copyright and analogous rights, confidential information, know-how and all other intellectual property rights as defined in Article 2 of the convention establishing the World Intellectual Property Organisation of 14 July 1967 as amended from time to time.
Invitation to Quote	A document or request issued by Council inviting quotations for the provision of goods and/or services.
Loss	Any loss (including Consequential Loss), claim, action, liability, damage, cost, charge, expense, outgoing, payment, diminution in value or deficiency of any kind or character which a person pays, suffers, incurs or is liable for, including: <ul style="list-style-type: none"> (a) personal injury to or death of a person; (a) interest and other amounts payable to third parties; and (b) legal (on a full indemnity basis) and other expenses incurred in connection with investigating or defending any claim or action whether or not resulting in any liability, and all amounts paid in settlement of any claim or action.
Notice of Termination	The meaning given in clause 15.3 .
Notice to Remedy	The meaning given in clause 15.1(a) .
Personal Information	Information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent or can reasonably be ascertained, from the information or opinion.
Personnel	A party's officers, employees, agents and contractors, and, in the case of the Contractor, includes officers, employees and agents of its Authorised Subcontractor(s).
Purchase Order	The document titled "Purchase Order" to which this document is attached.
Service	The service or services described in the Agreement and includes any work or services that are necessary or incidental to the supply of those services to Council and services that are necessary or desirable for Council to be able to benefit from the Service.
Service Rates	The service rates set out in the Purchase Order.
Service Specification	The Service Specification contained in the Invitation to Quote.
Term	The term of this agreement determined by clause 2.

1.1 Construction

Unless expressed to the contrary, in this Agreement:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) a reference to time is to the time in Gympie, Queensland;
- (d) "month" means a calendar month;
- (e) "week" means a seven day period from Monday to Sunday (inclusive);
- (f) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (g) "includes" means includes without limitation (and "including" shall have an equivalent meaning);
- (h) if a word or phrase is not defined, it has the meaning given to it in the Service Specification;
- (i) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it; and
- (j) a reference to:
 - (i) a person includes a natural person, body corporate, partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
 - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
 - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation; and
 - (v) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes fax transmissions; and
- (k) Clause, schedule and annexure references in this Agreement are references to clauses, schedules and annexures of this Agreement, unless stated otherwise.

1.2 Headings

Headings do not affect the interpretation of this Agreement.

2 Term

This Agreement commences on the Commencement Date and, unless terminated earlier in accordance with the terms of this Agreement, ends on the Expiry Date.

3 Exclusivity of appointment

3.1 Appointment of Contractor

The appointment of the Contractor by Council to supply Services under this Agreement is non-exclusive.

Council does not make any representation or give any warranty that it will exclusively source or order the Service (or services in the nature of the Service) from the Contractor.

Council is free to appoint any third party to supply Council with the Service, or services in the nature of the Service, without the consent of the Contractor.

4 Service

4.1 Supply of services

- (a) The Contractor must supply:
 - (i) the Service;
 - (ii) the Goods;
 - (iii) the Contract Material; and
 - (iv) such other documents and material necessary for the supply or use of the Service,to Council on the terms of this Agreement.
- (b) The Contractor acknowledges and agrees that Council has no obligation to order any number, volume or value of Services from the Contractor and does not make any representation or give any warranty that it will order any number, volume or value of Services from the Contractor.

4.2 Service requirements

The Contractor must perform the Service:

- (a) in accordance with the terms of this Agreement;
- (b) on and from the Service Commencement Date (unless otherwise required by the terms of this Agreement);
- (c) with due care and skill and in a professional, punctual and diligent manner;
- (d) with minimum noise, nuisance and disturbance;
- (e) taking into consideration environmental objectives, including reduction of environmental impacts; and
- (f) to best industry standards applicable in Australia at the time the Service is performed.

4.3 Capacity warranties

The Contractor represents and warrants to Council that:

- (a) it has capacity to unconditionally execute, deliver and comply with its obligations under this Agreement;
- (b) it has taken all necessary action to authorise the unconditional execution and delivery of, and the compliance with its obligations under, this Agreement;
- (c) this Agreement constitutes its valid and legally binding obligations and is enforceable against it by Council in accordance with its terms; and
- (d) its unconditional execution and delivery of, and compliance with its obligations under this Agreement, do not contravene:
 - (i) any law to which it or any of its property is subject or any order or directive from a government body binding on it or any of its property; or
 - (ii) its constituent documents, any agreement or instrument to which it is a party or any obligation to any other person.

4.4 Service warranties

The Contractor represents and warrants that:

- (a) each of the matters promised, represented or warranted by the Contractor in its Invitation to Quote are repeated in this Agreement (except to the extent that the terms of this Agreement are inconsistent with those matters, in which case the terms of this Agreement shall prevail to the extent of inconsistency);
- (b) the responses given by the Contractor in its Invitation to Quote are true, accurate, complete and not misleading or deceptive;

- (c) the Contractor has and will have the skills, expertise, resources and personnel necessary to perform the Service to best industry standards applicable in Australia;
- (d) the Contractor has not relied upon any representations, warranties or guarantees of Council in deciding to enter into this Agreement;
- (e) the Contractor has fully informed itself of all matters relevant to this Agreement and its decision to enter into this Agreement;
- (f) the Service provided by the Contractor and the Contract Material do not and will not infringe the Intellectual Property Rights of any third party;
- (g) the Contractor has obtained (or will obtain in advance of providing any part of the Service) all consents, approvals, licences, permissions and authorisations necessary to perform all aspects of the Service;
- (h) the Contractor will cooperate with and act reasonably towards Council in connection with the performance of the Service at all times;
- (i) it will not represent or allow it to be represented as the Council or as an employee of the Council; and
- (j) it has not contravened any provisions of the Competition and Consumer Act 2010 (Cth) in connection with its entry into this Agreement.

4.5 No warranties by Council as to approvals

Council gives no warranty and makes no representation that the Contractor will be able to secure (or secure within any period of time) any consents, approvals, licences, permissions or authorisations necessary to perform the Service under this Agreement (including any licences, permissions or approvals that Council may be responsible for, or in control of, granting).

4.6 No exclusion of consumer guarantees

Nothing in this clause excludes, restricts or modifies the application of any provision of the Australian Consumer Law or any other statute relevant to the supply of goods under this Agreement which by law cannot be excluded, restricted or modified.

4.7 No representations by Council

The Contractor acknowledges and agrees that no representations were made or warranties given to it by Council or any other person in relation to this Agreement.

4.8 Packaging

Packaging, labelling and transportation of all Goods supplied and in particular poisons, drugs, chemicals, flammables, gases, volatiles, corrosives, explosives and goods of a dangerous nature, must comply with the applicable laws, and must be accompanied by relevant material safety data sheets.

All packaging must protect the products despatched by whatever likely means of transport may be employed by the Contractor.

Council will not accept, or accept liability for, Goods received damaged and all deliveries are received subject to subsequent inspection by Council.

4.9 Spatial data

- (a) This clause 4.9 only applies if the Services cannot be performed without digital spatial data.
- (b) Any digital spatial data supplied under this Agreement will be supplied on a GDA-based co-ordinate mapping datum.
- (c) Where the Agreement requires Council to supply digital spatial data to the Contractor, the Contractor must execute a data licence agreement covering the terms and conditions of the data supply.
- (d) Where the Agreement is a 'once-off' project, the Contractor must sign a standard data licence agreement.
- (e) Where a Preferred Supplier or is subject to a standing arrangement:
 - (i) the Contractor must have a valid and current standing agreement for the supply of Council data, and undertake to sign an appropriate attachment covering data supplied as part of the current project or contract;
 - (ii) the Contractor must adhere to all terms and conditions set out in the Standard Agreement or Standing Agreement including Attachments; and
 - (iii) if changes or additions to a Standard Agreement or Standing Agreement are deemed necessary, additions or amendments may be made by mutual agreement, using an appropriate Deed of Variation.

5 Passing of title and risk

5.1 Title

Title in the Contract Material passes to Council on delivery of the Contract Material or payment of the Service Rates for the Service relating to those Contract Materials, whichever is the earlier to occur.

5.2 Risk

Risk in the Contract Material passes from the Contractor to Council on delivery of the Contract Material to the Delivery Point (or such other address directed by Council).

6 Payments

6.1 Service Rates

Subject to the Contractor complying with the terms of this Agreement, Council must pay the Contractor for performance in accordance with the Service Rates applicable at the time the Service is performed.

Subject to the provision of an invoice in accordance with clause 6.3 and the Contractor complying with the terms of this Agreement, Council will pay invoices of the Contractor within 30 days of the date of the invoice.

6.2 No other payments

Except as provided in this Agreement, the amounts payable under this clause 6 are the only fees, expenses or amounts payable by Council in connection with the performance of the Contractor's obligations under this Agreement.

Any services performed by the Contractor which are not required to be performed under this Agreement are performed at the cost and risk of the Contractor and the Contractor must not, without Council's prior written approval, make any claim against Council for payment, compensation or restitution for the performance of those services.

Except as expressly provided in this Agreement, the Contractor is responsible for and must pay all amounts, expenses, fees, charges and costs incurred by the Contractor in the performance of its obligations under this Agreement.

The Contractor must not, without the prior written consent of Council, accept any payment for the performance of the Service from any person other than Council.

6.3 Invoicing

- (a) The Contractor must submit invoices to the Council on a monthly basis in such format and by such means as shall be advised by Council from time to time, unless otherwise specified in the Agreement.

- (b) The invoice must:
- (i) be submitted as a single PDF file by email to creditors@gympie.qld.gov.au. If it is not possible to submit the invoice by email, it can be mailed to PO Box 155, Gympie Qld 4570;
 - (ii) identify the Services the subject of the invoice;
 - (iii) specify the title of the Agreement;
 - (iv) include Council's:
 - (A) name and address; and
 - (B) purchase order number;
 - (v) specify the Contract Number allocated to the Agreement by the Council (or any other number as the Council may specify in writing to the Contractor for the purposes of the Contract)(if any);
 - (vi) where Services are charged on a time basis, be supported by records of time spent by individual persons on the Services, verified by the Council;
 - (vii) specify details of the Purchase Order;
 - (viii) specify details of the Service Rates requested by the Council;
 - (ix) provide sufficient detail to enable the Council to assess progress against targets (if any) set out in the Purchase Order or the Specification;
 - (x) specify the Australian Business Number of the Contractor;
 - (xi) specify the name of the Contractor and display the address for payment of the Contractor;
 - (xii) specify the date of supply of the Services identified in the invoice;
 - (xiii) specify the Contractor's own unique invoice number and invoice issue date;
 - (xiv) specify the Service Rates payable by the Council and particulars of any GST payable in respect of the Service Rates;
 - (xv) identify if the invoice has already been paid by credit card;
 - (xvi) include the words "tax invoice" (if applicable); and
 - (xvii) otherwise comply with the requirements of a tax invoice for the purposes of the GST Act.
- (c) Upon receipt of an invoice, the Council may require the Contractor to provide additional information to assist the Council to determine whether or not an amount is payable.
- (d) For a schedule of rates contract, payment will be based on the actual number of items supplied and delivered extended at the tendered rates for the various sizes.
- (e) An exception shall apply for payments relating to the Building Industry Fairness (Security of Payment) Act 2017 (Qld).
- (f) Failure to:
- (i) provide an invoice under this **clause 6.3**; or
 - (ii) quote the Council Order number on delivery,
- will result in delays in payment for delivery and may result in a failure to pay.

6.4 Unsatisfactory performance

Council is not liable to pay any amounts to the Contractor in respect of any part of the Service which is not performed, or which Council reasonably determines has not been performed, in accordance with this Agreement.

6.5 Correction of errors

- (a) Despite Council's payment of an amount claimed under an invoice, Council may, at any time, correct an error (including an underpayment or overpayment) discovered in any previous invoice.
- (b) In correcting the error, Council may:
- (i) add the amount of any underpayment to; or
 - (ii) deduct the amount of any overpayment (which will be a debt due and owing to Council) from,
- any amounts due or becoming due to the Contractor under this Agreement to the extent necessary to correct the error.
- (c) The Contractor must pay the amount of any overpayment (which will be a debt due and owing) to Council upon demand by Council.

6.6 Set off

- (a) Council may deduct from any amounts due or becoming due to the Contractor under this Agreement any amounts owed by the Contractor to Council under this Agreement or otherwise (including any overpayment by Council to the Contractor).

7 Contractor's Personnel and Key Personnel

7.1 Sufficient number

The Contractor must engage and provide a sufficient number of Personnel to promptly and efficiently perform the Contractor's obligations under this Agreement.

7.2 Skills, training and experience

The Contractor represents and warrants that the Personnel engaged in performing the Contractor's obligations under this Agreement possesses and will possess the necessary skills, training and experience required to perform the Service in accordance with this Agreement.

7.3 Personnel security checks

If required by Council, the Contractor must:

- (a) ensure that each of its Personnel are security-cleared to a standard acceptable to by Council and, if any of its Personnel fail to reach that security standard, then the Contractor must not engage that person in the performance of the Service;
- (b) ensure that its Personnel are properly supervised either by the Contractor or a responsible supervisor so that its Personnel conduct themselves in good and proper manner at all times; and
- (c) where keys are supplied to the Contractor by Council for the purpose of allowing the Contractor entry upon Council owned land or a Council owned facility, ensure that it and its Personnel take all necessary precautions to secure those keys and to prevent the copying or duplication by any person of those keys without the prior written approval of Council.

8 Subcontracting

8.1 Subcontracting only to Authorised Subcontractors

The Contractor must not subcontract the whole or any part of its obligations under this Agreement except where Council has approved the Contractor's use of a particular subcontractor in writing (**Authorised Subcontractor**).

If Directed by Council, the Contractor must attend and cause any Authorised Subcontractor specified by Council to attend meetings notified by Council to the Contractor.

8.2 Provision of information

The Contractor must provide Council with any information that Council reasonably requires for

the purpose of deciding whether to give its approval under **clause 8.1** (including evidence satisfactory to Council that the subcontractor is and will be capable of performing the relevant obligations of the Contractor under this Agreement).

8.3 Contractor remains liable

The subcontracting of any of the obligations of the Contractor under this Agreement does not relieve the Contractor of any liability or obligation under this Agreement or at law in respect of the performance or purported performance of this Agreement. The Contractor is liable for the acts and omissions of any Authorised Subcontractors (and their officers, employees, agents and contractors) as if they were the acts or omissions of the Contractor.

8.4 Removal of subcontractor

- (a) If Directed by Council, the Contractor must remove any subcontractor (including any Authorised Subcontractor) engaged by the Contractor to perform part or all of the Service.
- (b) If the Contractor is Directed by Council under **clause 8.4(a)**, the Contractor must ensure that:
 - (i) the subcontractor ceases performance of any part of the Service; and
 - (ii) any keys provided under **clause 7.3(c)** are returned by the subcontractor to the Contractor,

within the timeframe specified in the Direction given by Council, or if no timeframe specified, within no later than 48 hours from the date of the Direction.

9 Auditing

9.1 Audit

- (a) The Contractor must, upon no less than three Business Days prior notice by Council, permit and provide persons nominated by Council (**Auditors**), supervised access to the Contractor's premises, books, records, documents, computer systems, Equipment, facilities and other property during normal business hours (or at such other times agreed between the parties) to verify compliance by the Contractor with its obligations under this Agreement and its likely capacity to continue to comply with its obligations in the future.
- (b) The Contractor must, and must ensure its Personnel, provide any reasonable assistance requested by the Auditors in respect of the audit conducted under this **clause 9.1**.
- (c) The Auditors may make copies of books, records, documents and other materials related to the Service, and the Contractor must provide the Auditors with necessary facilities to enable them to do so.
- (d) If an audit under this **clause 9.1** discloses any non-compliance by the Contractor with its obligations under this Agreement, the Contractor must, if requested by Council, pay any costs (including internal costs) reasonably incurred by Council in conducting the audit.

10 Performance management

- (a) During the performance of the Contract, the Contractor must, as reasonably required by the Council, liaise with and report to the Council, as well as attend meetings and briefings with Council Officers.

11 Directions

11.1 Directions

- (a) The Contractor must (and must ensure that its Personnel) strictly comply with any Directions given by Council or Contract Administrator (or any Personnel of Council nominated by Contract Administrator from time to time) in connection with the Service:
 - (i) within the time specified in the Direction; or
 - (ii) if no time for compliance is stipulated in the Direction, as soon as practicable after the Direction is given.
- (b) Notwithstanding **clause 12**, Contract Administrator and Council's Chief Executive Officer (or any person acting in either of those positions from time to time) may give Directions to the Contractor or the Contractor's Personnel.
- (c) A Direction by Council or the Contract Administrator is not a Variation.
- (d) A Direction is given at the time it is communicated to the Contractor. A verbal communication is deemed to be given contemporaneously with the occurrence of the verbal communication (including if the verbal communication is received by an automated answering service of the Contractor). Directions given by facsimile, post or email are deemed to be communicated in accordance with **clause 12**.

11.2 Queries

If the Contractor, acting reasonably, considers that a Direction is:

- (a) not able to be complied with; or
 - (b) not able to be complied with within the time required,
- the Contractor Representative must immediately notify the Contract Administrator.

11.3 Compliance with directions

Any Direction given by Council must be complied with by the Contractor.

12 Notices

12.1 General

Except as otherwise expressly provided in this Agreement, a notice, demand, certification, process or other communication (communication) relating to this Agreement must be in writing in English and may be given by an agent of the sender.

12.2 How to give a communication

Except as otherwise expressly provided in this Agreement and subject to **clause 12.6**, a communication must be given by being:

- (a) personally delivered;
- (b) left at the party's current address for notices;
- (c) sent to the party's current address for notices by pre-paid ordinary mail or, if the address is outside Australia, by pre-paid airmail;
- (d) sent by fax to the party's nominated fax number for notices;
- (e) sent by email to the party's nominated email address; or
- (f) delivered, sent or transmitted in any other manner approved in writing by Council from time to time.

12.3 Particulars for delivery of notices

The particulars for delivery of notices are initially the particulars set out in the Purchase Order. A party may change its particulars for delivery of notices (or particular types of notices) by notice to the other party.

12.4 Communications

Subject to **clause 12.5**, a communication is given if posted within Australia to an Australian address, three Business Days after posting.

Subject to **clause 12.5**, a communication is given if sent by fax when the sender's fax machine produces a report that the fax was sent in full to the addressee.

That report is conclusive evidence that the addressee received the fax in full at the time indicated on that report.

Subject to **clause 12.5**, a communication is given if it sent by email when the email becomes capable of being retrieved by the addressee at the email address of the addressee.

If Council approves an additional manner (which may include the giving of communications verbally) for the giving of communications, or particular types of communications, under **clause 12.2(f)**, Council may specify when a communication given in that manner is taken to be given for the purpose of this Agreement.

12.5 After hours communications

Other than a request by Council for the Contractor to provide Service, if a communication is given:

- (a) after 5.00 pm in the place of receipt; or
- (b) on a day which is a Saturday, Sunday or public holiday in the place of receipt,

it is taken as having been given at 9.00 am on the next day which is not a Saturday, Sunday or official public holiday in that place.

12.6 Directions in relation to communications

Council may Direct the Contractor to give communications, or particular types of communications, in a particular manner and/or form.

13 Liability and indemnity

13.1 Limitation of liability

- (a) The total liability of Council for any loss or damage, howsoever caused, suffered or incurred by the Contractor in connection with:
 - (i) the performance of the Service by the Contractor;
 - (ii) breach of any term of this Agreement by Council (including any breach of warranty); or
 - (iii) the negligence of Council or any of its Personnel,is limited to the total amount of Service Rate paid by Council to the Contractor in the three months prior to the first event that gave rise to the loss or damage occurring.
- (b) Council excludes all liability for any Consequential Loss, howsoever caused, (including by the negligence of Council) that is suffered or incurred by the Contractor or its Personnel in connection with the provision of the Service or this Agreement.

13.2 Indemnity

- (a) The Contractor indemnifies Council and Council's Personnel from and against all Loss arising directly or indirectly from one or more (and any combination of) of the following:
 - (i) breach of this Agreement by the Contractor or its Personnel;
 - (ii) any act or omission (including negligence, unlawful conduct or wilful misconduct) of the Contractor or its Personnel;
 - (iii) contravention of law by the Contractor or its Personnel; and
 - (iv) injury or death to any person and any loss or damage to property, real or personal, caused or contributed to by any act or omission of the Contractor or its Personnel, except to the extent that an act or omission of Council or its Personnel caused to the injury, death, loss or damage.
- (b) For the purpose of obtaining the benefit of the indemnity granted under **clause 13.2(a)**, Council has informed each of its Personnel of the promise of indemnification made by the Contractor under **clause 13.2(a)** and hereby communicates acceptance of that promise for and on behalf of each of its Personnel to the Contractor.
- (c) It is not necessary for Council to suffer or incur expense or make a payment before enforcing or making any claim under an indemnity conferred by this Agreement.

13.3 Set-off

Without limiting **clause 6.6**, Council may deduct any amount owed by the Contractor to Council under this **clause 13** from any amount Council owes or that Council will owe to the Contractor under this Agreement or otherwise.

14 Insurance

14.1 Workers' compensation insurance

The Contractor must itself, and must ensure that any Authorised Subcontractors, effect workers' compensation policies of insurance as required by law in respect of all of their respective employees.

14.2 Public Liability Insurance

- (a) The Contractor must, at all times during the term of this Agreement, be the holder of a current public liability policy of insurance (**Public Liability Insurance**) in the name of the Contractor providing coverage for an amount of at least \$20 million per occurrence.
- (b) The Public Liability Insurance must:
 - (i) be effected with an insurer authorised to carry on non-life insurance business in Australia under the *Insurance Act 1973* (Cth) approved by Council;
 - (ii) cover claims in respect of:
 - (A) damage to, loss or destruction of, or loss of use of, real or personal property; and
 - (B) injury to, or disease or death of, persons;
 - (iii) cover any liability of the Contractor to Council under **clause 13.1** in respect of third party claims; and
 - (iv) not be subject to an excess or deductibles of greater than \$50,000.00 without Council's prior written consent.

14.3 Motor Vehicle Insurance

- (a) The Contractor must, and must ensure that each Authorised Subcontractors, at all times during the term of this Agreement, effect and maintain (or cause to be effected or maintained) comprehensive motor vehicle insurance (**Motor Vehicle Insurance**) with a cover equivalent to the value of all vehicles to be used in the performance of the Contractor's obligations under this Agreement and providing for a coverage of at least \$20 million in respect of third party property damage.
- (b) The Motor Vehicle Insurance must be effected with an insurer authorised to carry on non-life insurance business in Australia under the *Insurance Act 1973* (Cth).

14.4 Professional Indemnity Insurance

- (a) The Contractor must, and must ensure that each Authorised Subcontractors (unless Council has otherwise given its written consent), at all times during the term of this Agreement, and for a period of at least one year following the expiry or termination of this Agreement, effect and maintain (or cause to be effected and maintained)

professional indemnity insurance (**Professional Indemnity Insurance**) providing for coverage of at least \$5 million in respect of any professional indemnity claims.

- (b) The Professional Indemnity Insurance must be effected with an insurer authorised to carry on non-life insurance in Australia under the *Insurance Act 1973* (Cth).

14.5 Other insurance

The Contractor must, at all times during the term of this Agreement, effect and maintain any other insurances which are commonly effected by reasonably prudent contractors in the position of the Contractor, Council Directs the Contractor to effect and maintain, and any special insurance specified in the Service Specification.

14.6 Evidence of insurance

Not less than ten Business Days before the Service Commencement Date, the Contractor must produce to Council certificates of currency and any other evidence required by Council, showing that the insurances referred to in **clauses 14.1, 14.2, 14.3 and 14.4(b)** have been taken out and are current.

The exercise of a power by Council under **clause 14.6** will not prevent Council terminating the Agreement under **clause 15.3** in respect of that or any subsequent breach of this **clause 14**.

15 Default by Contractor

15.1 Notice to Remedy

- (a) Without limiting any other rights of Council under this Agreement or at common law, if for any reason the Contractor fails to perform any obligation under this Agreement which is capable of remedy, Council may give notice to the Contractor requiring the Contractor to remedy the default (**Notice to Remedy**).
- (b) Notice to Remedy must specify that it is a notice issued under that clause.
- (c) The Contractor must remedy the default in accordance with a Notice to Remedy:
 - (i) in the manner (if any) specified in the notice;
 - (ii) within the time (if any) specified in the notice (which must be a reasonable time); or
 - (iii) if no time is specified in the notice, within ten Business Days of the date of receipt of the notice.
- (d) If the Contractor fails to remedy a default in accordance with a Notice to Remedy, without prejudice to any other rights of Council under this Agreement or at law, Council may, at its option do any or all of the following:
 - (i) refer the matter to dispute resolution;
 - (ii) suspend any or all payments to the Contractor under this Agreement for the period during which the default remains unremedied;
 - (iii) remedy the default itself or arrange for the default to be remedied by a third party; or
 - (iv) terminate this Agreement under **clause 15.3**.
- (e) Any expenses or internal costs (including monitoring, administration and management costs) incurred by Council in remedying a default under **clause 15.1(d)(iii)**:
 - (i) must be paid by the Contractor to Council within ten Business Days of receipt of an invoice from Council; or
 - (ii) may be deducted by Council from any money that Council owes or will owe to the Contractor under this Agreement, at Council's election.

15.2 Suspension of payments

A suspension of payments under **clause 15.1(d)(ii)**:

- (a) extends the time by which Council is required to pay any amount that is or becomes due and payable to the Contractor under **clause 6** during the period of the suspension:
 - (i) if the amount was due and payable prior to the suspension, by the period of the suspension; or
 - (ii) if the amount becomes due and payable during the suspension, by the period of the suspension occurring after the amount first became due and payable; and
- (b) does not in any way affect the obligations of the Contractor under this Agreement.

15.3 Termination

Notwithstanding any other terms of this Agreement, Council may immediately terminate this Agreement by written notice to the Contractor (Notice of Termination) if:

- (a) the Contractor defaults in carrying out any obligation under this Agreement where the default is not capable of remedy;
- (b) in the case of a default by the Contractor of any obligation under this Agreement which is capable of remedy, the Contractor does not remedy that default in accordance with a Notice to Remedy;
- (c) the Contractor does not perform any of the Service when required under this Agreement for:
 - (i) a period of two or more consecutive days;
 - (ii) on two or more days during any month; or
- (d) on two or more consecutive occasions of supply;
- (e) the suspension of an obligation of the Contractor due to force majeure continues for more than two weeks;
- (f) the Contractor fails to take out and maintain any of the policies of insurance required by **clause 14**;
- (g) any representation made, warranty given or statutory guarantee by the Contractor:
 - (i) prior to the formation of this Agreement;
 - (ii) during the Term of this Agreement; or
 - (iii) in connection with its Invitation to Quote,
 - (iv) that is incorrect, false or misleading;
- (h) any misrepresentation or false representation is made by the Contractor to Council prior to this Agreement being executed or during its Term;
- (i) any information given by the Contractor to Council in connection with this Agreement is false or misleading;
- (j) the Contractor, the Contractor Representative or a director or officer of the Contractor involved in the performance of the Contractor's obligations under this Agreement is convicted of or prosecuted for, any offence involving fraud or dishonesty;
- (k) an Insolvency Event occurs in relation to the Contractor or an Authorised Subcontractor;

- (l) the Contractor ceases or threatens to cease to carry on its business or a substantial part of its business;
- (m) an investigation is instituted under the Corporations Act, the Competition and Consumer Act 2010 (Cth) or other legislation into the Contractor's affairs or an inspector is appointed to investigate its affairs; or
- (n) a Change in Control of the Contractor occurs without the prior written consent of Council.

15.4 Consequences of termination

In the event that Council terminates this Agreement (for any reason), Council will make payments to the Contractor only in respect of performance of the Service by the Contractor in accordance with the terms of this Agreement up to the date of termination.

15.5 No prejudice as to right to damages

Nothing in this clause 15 in any way prejudices Council's right to claim and recover damages for any breach of this Agreement by the Contractor.

15.6 Survival

Clauses 4, 6.5, 6.6 13, 19.2, 20 and any clauses which survive expiry or termination by implication remain in full force and effect and survive the expiry or termination of the agreement evidenced by this document.

Clause 9.1 survives expiry or termination of this Agreement for a period of seven years.

16 Variations

16.1 Variations to the Agreement

- (a) The Council may request, in writing, the Contractor to vary the Agreement in nature, scope or timing, provided that no variation will be such that if it had been included in the original Invitation to Quote, more or different offers would have been received.
- (b) The Agreement may be varied in response to circumstances or information not known at the time of entering into the Agreement.
- (c) Where the Council requests a variation to the Agreement, the parties must negotiate in good faith a variation to the prices/rates.
- (d) The Contractor must not commence work on the variations unless directed to the contrary by the Council.

16.2 Variation to prices/rates

- (a) Unless otherwise specified, all pricing will be firm and not subject to rise and fall.
- (b) There will be no variation in price in respect to any variation in rates of wages, price of materials or other factors, occurring after the time fixed for the completion of the Agreement or any extension of time under the Agreement approved by the Council.
- (c) Contractors shall advise the Council of reductions in Agreement prices due to reductions in duty or currency exchange rate and price factor fluctuations. Failure to do so may result in cancellation of a standing offer/preferred supplier arrangement.

17 GST

17.1 Definitions

In this clause 16 and clause 6:

- (a) words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law; and
- (b) **GST Law** has the same meaning given to that expression in the *A New Tax System (Goods and Service Tax) Act 1999* (Cth).
- (c) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member.

17.2 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.

17.3 Payment of GST

If GST is payable in respect of any supply made by a supplier under this Agreement, the recipient will pay to the supplier an amount equal to the GST payable on the supply. The recipient will pay the amount referred to in this clause 17.3 in addition to and at the same time that the consideration for the supply is to be provided under this Agreement.

17.4 Tax invoices

The Contractor must deliver a tax invoice or an adjustment note to Council before the Contractor is entitled to payment of an amount under clause 17.3. Council may withhold payment of the amount until the Contractor provides a tax invoice or an adjustment note, as appropriate.

17.5 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a supplier under this Agreement, the amount payable by the recipient under clause 17.3 will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires.

17.6 Reimbursements

Where a party is required under this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled; and
- (b) if the payment or reimbursement is subject to GST, an amount equal to that GST.

18 Conflict of Interest and commissions

18.1 Conflict of Interest

The Contractor represents and warrants that, as at the Commencement Date (other than Conflicts of Interest declared by the Contractor and accepted in writing by Council), neither the Contractor nor any of its officers, employees, agents or subcontractors have, or are likely to have a Conflict of Interest in the performance of the Contractor's obligations under this Agreement.

If a Conflict of Interest or risk of Conflict of Interest arises during the Term, the Contractor must immediately give notice of the Conflict of Interest, or the risk of it, to Council.

18.2 Commissions and incentives

The Contractor must not, and must ensure that its officers, employees, agents and subcontractors do not, give or offer anything to Council or any officer or employee of Council, or to a parent, spouse, child or associate of an officer or employee of Council, including any commission, inducement, gift or reward, which could in any way tend or be perceived as attempting to influence Council's actions in relation to this Agreement.

19 Intellectual Property Rights

19.1 Ownership

- (a) All Intellectual Property Rights in Council Material vest in Council and nothing in this Agreement transfers or assigns any of those Intellectual Property Rights to the Contractor.
- (b) The Contractor assigns all Intellectual Property Rights in the Contract Material to Council. To the extent necessary to give effect to this clause 19.1 and to record the interest of Council in the Intellectual Property Rights, the Contractor must execute or

procure the execution of any document specified by Council.

- (c) The Contractor represents and warrants that it has the right and authority to grant the assignment under clause 19.1(b).

19.2 Licence

- (a) Council grants a non-exclusive, royalty-free licence to the Contractor to use Council Material solely for the purposes of performing the Service.
- (b) The licence in clause 19.2(a) does not include the right to sublicense, except to Authorised Subcontractors and only to the extent necessary for the Authorised Contractor to perform those obligations of the Contractor subcontracted to the Authorised Subcontractor.

20 Confidential Information and Privacy

20.1 Confidentiality

- (a) The Contractor must not, without the prior written consent of Council disclose or give to any third party any Council Confidential Information, except:
 - (i) as required by law or the stock exchange listing rules (if any) applicable to the Contractor; or
 - (ii) as necessary to obtain professional or financial advice or assistance from a third party (provided such third party is under an obligation to keep the relevant information confidential and secure).
- (b) If the Contractor is required to make a disclosure under clause 20.1(a)(i), the Contractor must:
 - (i) to the extent possible, notify Council immediately upon becoming aware that it may be required to disclose any of Council Confidential Information;
 - (ii) consult with and follow any reasonable directions from Council to minimise the disclosure; and
 - (iii) if the disclosure cannot be avoided:
 - (A) only disclose Council Confidential Information to the extent necessary to comply with the law or stock exchange listing rules, except that the parties agree that they will not disclose information of the kind described by section 275(1) of the PPSA except as required by any other law or regulation; and
 - (B) use best endeavours to ensure that any Council Confidential Information disclosed is kept confidential by the recipient.
 - (c) If Council advises the Contractor of the terms of any confidentiality undertakings given by Council to another person in respect of any information or materials provided by Council to the Contractor, then the Contractor must also comply with those undertakings in respect of that information or those materials.

20.2 Return of Confidential Information

- (a) Subject to clause 20.2(b), the Contractor must within 10 Business Days of:
 - (i) a request by Council; or
 - (ii) the expiry or termination this Agreement,
 - (iii) return all copies and extracts of Council Confidential Information whether on paper, in an electronic information storage or retrieval system, in any other storage and retrieval system or medium.
- (b) The Contractor may retain one copy of the information or material in its control to the solely extent necessary to comply with applicable laws and quality assurance protocols. For clarity, the obligations of confidentiality under this clause continue to apply to such information.
- (c) The return of any of Council Confidential Information does not relieve the Contractor from any of its obligations under this Agreement.

20.3 Privacy

- (a) The Contractor acknowledges that it is a "bound contracted Contractor" for the purposes of the *Information Privacy Act 2009* (Qld).
- (b) The Contractor must:
 - (i) in relation to the discharge of its obligations under this Agreement, comply with parts 1 and 3 of Chapter 2 of the *Information Privacy Act 2009* (Qld) as if the Contractor was Council;
 - (ii) ensure that Personal Information is protected against loss and against unauthorised access, use, modification, disclosure or other misuse;
 - (iii) not use Personal Information other than for the purpose of performing its obligations under this Agreement, unless required or authorised by law;
 - (iv) not disclose Personal Information without the prior written consent of Council, unless required or authorised by law;
 - (v) not transfer any Personal Information outside of Australia without the prior written consent of Council;
 - (vi) ensure that access to Personal Information is restricted to those of its employees and officers who require access in order to perform their duties under this Agreement;
 - (vii) ensure that its Personnel comply with the same obligations imposed on the Contractor under this clause;
 - (viii) fully cooperate with Council to enable Council to respond to applications for access to, or amendment of, a document containing a person's Personal Information and to privacy complaints;
 - (ix) immediately notify Council if the Contractor becomes aware that a disclosure of Personal Information is or may be required or authorised by law;
 - (x) comply with such other privacy and security measures as Council reasonably advises the Contractor in writing from time to time; and
 - (xi) upon request by Council, promptly return any Personal Information to Council upon expiry or termination of this Agreement.

20.4 Contractor's subcontracts with Authorised Subcontractors

The Contractor must ensure that each subcontract between the Contractor and an Authorised Subcontractor contains provisions under which, in the event that the Authorised Subcontractor will in any way deal with Personal Information under the subcontract, the Authorised Subcontractor acknowledges and agrees that it is a bound contracted Contractor for the purposes of the *Information Privacy Act 2009* (Qld) and agrees to be bound by this clause 20 as if it were the Contractor.

20.5 Deed of privacy

Upon request by Council, the Contractor must obtain from its officers, employees and subcontractors a deed of privacy in a form acceptable to Council.

20.6 Notice of breach

The Contractor must immediately notify Council upon becoming aware of a breach of this clause 20.

21 General

21.1 Council may act

Council may, either itself or by a third party, perform an obligation which the Contractor was obliged to perform but which it failed to perform. The costs, expenses, damages and any Loss suffered or incurred by Council in performing such an obligation is a debt due from the Contractor to Council.

21.2 Compliance with laws

The Contractor must, and must ensure that its Personnel, comply with any laws which are in any way applicable to the performance of the Contractor's obligations under this Agreement.

For clarity, if there is a change in law which materially affects the performance of the Service, Council may request the Contractor to vary the Agreement under clause 16.

21.3 Cooperation

The Contractor must cooperate and coordinate with Council's other contractors.

21.4 No fettering of Council's powers

Nothing in this Agreement fetters or restricts the power or discretion of Council in relation to any of its powers or obligations under any law.

21.5 Use of Council's logo

The Contractor must not use any trade mark logo of Council (including Council Logo) without the prior written approval of Council or as expressly permitted by or licensed under this Agreement.

21.6 Duty

The Contractor is liable for and must pay all duty (including any fine or penalty except where it arises from default by Council) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it.

If Council pays any duty (including any fine or penalty) on or relating to this Agreement, any document executed under it or any dutiable transaction evidenced or effected by it, the Contractor must pay that amount to Council on demand.

21.7 Time of essence

Unless expressly stated otherwise, time is of the essence of the Contractor's obligations under this Agreement.

21.8 Legal costs

Except as expressly stated otherwise in this Agreement, each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Agreement.

21.9 Amendment

Subject to clause 16, this Agreement may only be varied or replaced by a document executed by the parties.

21.10 Waiver and exercise of rights

A single or partial exercise or waiver by a party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.

A party is not liable for any loss, cost or expense of the other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

21.11 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a party under this Agreement are cumulative and are in addition to any other rights of that party.

21.12 Approval and consent

Unless expressly provided otherwise (and solely to the extent expressed otherwise), any right of Council to approve, consent or make any other election, decision or determination under this Agreement may be exercised by Council in its absolute discretion, without giving reasons and without reference to or consultation with the Contractor. If Council gives any approval or consent or makes any election, decision or determination under this Agreement, it may do so on whatever conditions it specifies and the Contractor must comply with those conditions as if they were obligations of the Contractor expressed in this Agreement.

Any approval or consent given by Council in relation to any matter under this Agreement does not relieve the Contractor from its obligations to comply with applicable law.

Unless a time stipulation is expressly stated in this Agreement, any right, power or privilege of Council or of Contract Administrator under this Agreement may be exercised at any time and from time to time during the Term (and after the Term for those rights, powers and privileges that expressly or by implication survive termination or expiry of this Agreement).

21.13 Further steps

Each party must promptly do whatever any other party reasonably requires of it to give effect to this Agreement and to perform its obligations under it.

21.14 Governing law and jurisdiction

This Agreement is governed by and is to be construed in accordance with the laws applicable in Queensland.

Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Queensland and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

21.15 Assignment

- (a) The Contractor must not assign or deal with any right under this Agreement without the prior written consent of Council.
- (b) A Change in Control of the Contractor is taken to be an assignment of the Contractor's rights under this Agreement for the purposes of this clause 21.15(a).
- (c) The Contractor consents and agrees to Council, by notice to the Contractor, assigning or novating part or all of its rights and/or obligations (as applicable) under this Agreement to any third party on terms specified by Council.
- (d) Any purported dealing in breach of clause 21.15(a) is void.

21.16 No merger

Each representation and covenant under this Agreement continues in full force and effect until such representation, covenant or obligation is satisfied or completed.

21.17 Liability

An obligation of two or more persons binds them separately and together.

21.18 Counterparts

This Agreement may consist of a number of counterparts those counterparts, taken together, constitute one document.

21.19 Entire agreement

- (a) This Agreement constitutes the entire agreement between the parties as to its subject matter and supersedes all prior agreements, arrangements, memorandum of understandings, representations, warranties, promises, statements, negotiations and letters in respect of its subject matter.

- (b) The Contractor relies entirely on its own independent appraisal and assessment of all relevant matters and (other than warranties expressly given by Council in this Agreement) does not rely on any information, warranties, representations or misrepresentations made or given by Council or its agents prior to the formation of or in connection with this Agreement.

- (c) No oral explanation or information provided by a party to the other:

- (i) affects the meaning or interpretation of this Agreement; or
- (ii) constitutes any collateral agreement, warranty or understanding between the parties.

- (d) The Contractor must not provide or require any Personnel of Council to sign any terms or conditions in connection with the supply of the Services or any goods related to the Services.

21.20 Relationship of parties

This Agreement is not intended to create a partnership, joint venture or agency relationship between the parties.

21.21 Media releases

The Contractor must not issue any advertisement, information, publication, document or article for publication concerning the Agreement or any activities undertaken in performance of the Agreement in any media without the prior written approval of Council. The Contractor must refer to Council any media enquiries concerning the Agreement and its performance.

21.22 Severability

- (a) Subject to clause 21.22(b), if a provision of this Agreement is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this Agreement.
- (b) Clause 21.22(a) does not apply if severing the provision:
 - (i) materially alters the:
 - (A) scope and nature of this Agreement; or
 - (B) the relative commercial or financial positions of the parties; or
 - (C) would be contrary to public policy.

21.23 Waiver and exercise of rights

A single or partial exercise or waiver by a party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.

A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

21.24 Health and Safety

The contractor shall ensure that they comply with all application Health and Safety requirements, and site specific requirements.