



# Doing Business with Bayside Council

## STANDARD TERMS AND CONDITIONS



# 1. Definitions

**"Agreement"** means the Agreement between the Contractor and Council for the provision of Goods and/or Services and/or the execution of Works and shall be constituted in its entirety by the Purchase Order, any Terms and Conditions in the Purchase Order, these Terms and Conditions and any attachment or document provided by Council expressly in writing including specific Terms and Conditions, sample, drawing, schedule or other document agreed to be so incorporated.

**"Agreement Period"** means the time stated to complete the provisions of Goods or Services or the execution of the Works.

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

**"Contractor"** means the person, company, partnership or legal entity providing the Goods or Services or the execution of Works in which the Purchase Order is issued and includes its employees, agents and subcontractors.

**"Council"** means Bayside Council NSW.

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

**"Dispute"** means any disagreement or differences of view as to these Terms and Conditions, the terms of the Purchase Order, the terms of an invoice, the meaning given to or proper construction of any of these documents and the performance of part or all of a party's obligations pursuant to these Terms and Conditions, a Purchase Order or service of an invoice.

**"GIPA"** means the Government Information (Public Access) Act 2009.

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

**"GST"** means Goods and Services Tax.

**"Intellectual Property"** means all rights in copyright, patents, registered and unregistered trademarks, registered designs, trade secrets and all other rights of intellectual property arising under Common Law and/or Statute.

**"Notice"** means formal written communication to be given to any party under the Contract and must be in English. A Notice may be issued by hand, post or electronic transmission and will be deemed to be received:

- if by hand, on the date of delivery;
- if by prepaid post, on the second business day after posting;
- if by facsimile or email, when the sender's facsimile or email system confirms the Notice or communication has been transmitted in its entirety to the facsimile number or email address of the addressee.

**"PIIA"** means the Privacy and Personal Information Act 1998

**"Practical Completion"** means the Works complete in accordance with the Agreement.

**“Purchase Order”** means Council's official order to which these Terms and Conditions apply.

**“Services”** means the whole of Services to be performed in accordance with the Purchase Order including approved amendments and variations.

**“Site”** means the location nominated by Council where the Contractor is to perform the provision of Goods or Services or Works.

**“WHS Laws”** means the Work Health and Safety Act 2011 (NSW) (WHS Act), Work Health and Safety Regulation 2011 (NSW) (WHS Regulation).

**“Works”** means the whole of the works and services that are to be performed and completed under the Agreement, including any approved amendments and variations.

## 2. General

- 2.1 These Terms and Conditions apply to any order for Goods and/or Services and/or Works placed by Council as described in the Purchase Order to the Contractor.
- 2.2 The Agreement shall be formed by and upon the Contractor accepting the Purchase Order from Council and the Terms and Conditions of the Purchase Order shall apply to the exclusion of any conditions of sale appearing on any document of sale or appearing on any document from the Contractor.
- 2.3 By execution of these Terms and Conditions the Contractor agrees to be bound by these Terms and Conditions in the provision of any good or service by it to the Council under a Purchase Order.
- 2.4 No amendments to these Terms and Conditions will be binding on the parties unless approved in writing by an authorised Council representative.
- 2.5 Where Council has issued a Request for Quotation (RFQ) or Request for Tender (RFT) document that includes already established Conditions of Offer and Conditions of Contract then in this event, the conditions included within the Quote or Tender document will take precedence and will be referred to in the Purchase Order.

## 3. Purchase Order

- 3.1 In the absence of already established Conditions of Contract that specify the provision by the Contractor of a Good or Service to Council, there will be no Agreement between Council and any Contractor unless Council issues to that Contractor a Purchase Order for the provision by the Contractor of a Good or Service.
- 3.2 Unless there are already established Conditions of Contract in place, Council will have no liability to any Contractor or any other party pursuant to a Contract or Agreement in the absence of that Contractor being provided with a Purchase Order by Council.

## 4. Price and GST

- 4.1 In consideration for the provision of Goods and/or Services and/or Works, Council agrees to pay the Contractor the price specified in the Purchase Order.
- 4.2 The price set out in the Purchase Order is a fixed price and includes all costs associated with packing, insurance, freight, delivery, duties and taxes (including GST where the Contractor is registered for GST) and any other applicable costs and charges. The Contractor warrants and

agrees that the price payable and specified in the Purchase Order is the GST inclusive price unless otherwise agreed in the Purchase Order.

- 4.3** Council may reject without payment any invoice that is not a tax invoice, or which fails to quote the Purchase Order Number.

## 5. Payment of Account

- 5.1** Subject to subclauses 5.2, Council agrees to pay the Contractor the payment specified in a tax invoice within thirty (30) days from receiving and acceptance of the tax invoice.

- 5.2** Exceptions to clause 5.1 are:

- a) Where Council has issued a Request for Quotation (RFQ) or Request for Tender (RFT) document that includes already established payment schedules in agreed Conditions of Contract. In this event, the payment conditions included within the Quote or Tender document will take precedence and will be referred to in the Purchase Order.
- b) Specific payment schedules governed by Legislation.
- c) Agreed in writing in the Purchase Order.
- d) Where Council withholds any disputed portion of the amount until the dispute is resolved.
- e) Where the Goods are not delivered and/or the Services are not supplied and/or Works not executed within the agreed time and/or location specified in the Purchase Order and Council rescinds the Purchase Order unless Council determines that the delay is caused by factors outside of the reasonable control of the Contractor.
- f) Subject to subclause 6.8, where the Council deems the performance of the Services and/ or the Goods and/or the Works provided are defective or incomplete.
- g) Where the Council deems the contractor in default pursuant to Clause 13 or the Agreement is terminated in accordance with Clause 20.

- 5.3** Invoices issued for payment must be a properly constituted invoice under the law and regulations and include as a minimum:

- a) the name and address of the Contractor;
- b) invoice number;
- c) date of invoice;
- d) the correct ABN;
- e) the Purchase Order number issued by Council;
- f) description of Goods or Services provided, or Works executed;
- g) volume and unit cost of Goods.

- 5.4** Council's preferred method of payment is electronic funds transfer (EFT).

- 5.5** The contractor is to ensure all details are up to date to ensure prompt payment.

## 6. Provision of Goods, Services and Works

- 6.1** The Contractor must use all reasonable efforts to inform itself of the requirements of the Agreement and must regularly consult Council's authorised officer during the provision of the Goods or Services or Works required.

- 6.2** The Contractor must obtain all approvals, authorities, licenses, permits, rights, titles, interests and property necessary to provide the Goods and/or perform the Services and/or execute the Works unless otherwise agreed in writing by Council.

- 6.3** The Contactor must ensure all Goods supplied, all Services provided and/or Works executed complies with the requirements of all applicable legislation codes and statutory authorities' requirements, and all relevant Australian Standards applicable and any agreed design and performance criteria for the Goods and/or Service.
- 6.4** The Contractor must deliver the Goods, supply the Services or execute the Works within the time, and at the location, specified in the Purchase Order or at the written direction of an authorised Council representative.
- 6.5** If it becomes evident to the Contractor that the delivery of Goods and/or the provision of the service and/or execution of Works will be delayed, the Contractor will promptly notify Council.
- 6.6** All deliveries must be accompanied by a delivery docket or invoice on delivery that includes as a minimum:
- a) Docket or invoice number
  - b) Delivery date
  - c) Delivery Location
  - d) Council's Purchase Order number
  - e) Quantity of goods supplied
  - f) Name and signature of person delivering the Goods
  - g) Name and signature of person receiving the Goods.
- 6.7** Council by notice in writing, at its absolute discretion, may require the Contractor to remedy any defect including collect and replace, complete the Services or Works, or re-do the Services or Works at no additional cost to Council within the time specified by Council, or may require a refund of any amount paid for the defective Goods and/or Services and/or Works within the time specified by Council.
- 6.8** Where Council rejects the Goods which are already installed, the Contractor shall immediately upon written direction, remove the defective Goods, replace same and make good any damage to other property occasioned in such removal to the satisfaction of and at no cost to Council.
- 6.9** In the event the Contractor does not satisfactorily comply with a notice issued under clause 6.7, Council may repair, modify or replace Goods or resupply Services or remedy the Works which will be undertaken by third party (or itself) and all resulting costs and expenses will be debt due to Council by the Contractor.

## **7. Council's Obligations**

- 7.1** The Council will as soon as reasonably practicable, or as specified by the Agreement:
- a) Make available to the Contractor any additional instructions, information, documents, specification, plans, drawing and other particularly relevant to the work;
  - b) Answer queries in writing made by the Contractor, relating to Council's requirements with the Purchase Order; and
  - c) Review and determine amendments and variations within a reasonable time frame and notify the Contractor in writing.

## 8. General Warranties to Goods, Services and Works

- 8.1** The Contractor agrees to assign, novate or transfer to Council, as may be necessary, any manufacturer's warranty in support of the operation of Goods or Services provided by a Contractor pursuant to a Purchase Order.
- 8.2** In obtaining or procuring a good for the purposes of satisfying a Purchase Order a Contractor must obtain a manufacturer's warranty that:
- a) Is for the longest duration commercially offered by that manufacturer; and/or
  - b) Covers to the fullest extent possible all aspects of the performance and operation of the good so that the manufacturer must repair or replace at no cost to Council the good or some part or component of the good.
- 8.3** The Contractor warrants that any good provided by it to Council shall be free from any claim or any assertion of a proprietary right by any third party and that title or ownership to that good passes immediately to Council upon delivery of the good irrespective as to whether the Contractor has rendered an invoice or any moneys remain due and owing pursuant to an invoice previously rendered for the provision of that good.
- 8.4** The Contractor warrants that the Contractor and its personnel will have all the necessary experience, skill, knowledge and competence to perform the Services and/or Works, and the Services and/or Works will be performed in accordance with good industry practice.
- 8.5** The Contractor warrants and represents that the Contractor has (and will ensure that its subcontractors have): the necessary resources in place to comply with the WHS laws; and taken all necessary measures to assess and eliminate or control risks arising from hazards associated with this Agreement.

## 9. Title, Acceptance and Risk

- 9.1** Title and risk in the Goods will transfer to Council upon acceptance of the Goods by Council. Acceptance by Council will be deemed to have occurred if within 14 days of deliver Council has not advised the Contractor that the Goods are defective or nonconforming.
- 9.2** The Contractor expressly waives any and all liens of any kind or nature to which the Contractor may otherwise be entitled, whether statutory or otherwise, and the Contractor agrees to indemnify and forever hold harmless Council against any claims from any third parties against the Contractor affecting directly or indirectly the Goods.

## 10. Intellectual Property

- 10.1** The Contractor hereby as beneficial owner irrevocably assigns to Council ownership of Intellectual Property rights including without limitation all copyright, rights to inventions (whether patentable or not) all industrial designs (whether able to be registered or not) and all other Intellectual Property rights as are not already vested in Council in all materials (whether completed or not or in the course of preparation) produced in connection with or pursuant to this Agreement. If requested by Council to do so, the Contractor will deliver all such materials to Council within the time specified by Council in its request.
- 10.2** The Contractor warrants that it will not breach any intellectual property rights of any Third Party.

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

**10.4** The Contractor warrants that the rights granted under this Agreement and its conduct of and incidental to the performance of any work or undertaking as a result of the issue to it by Council of a Purchase Order do not and will not infringe any patents or other intellectual or industrial property of third parties. The Contractor indemnifies Council from and against all claims, demands, actions, proceedings, costs, expenses and liabilities for any infringement or alleged infringement.

## 11. Inspection, Tests and Source Quality Assurance

**11.1** Council is entitled to inspect and test all Goods supplied. Where Goods fail such inspections, Council is entitled to reject the Goods and the Supplier remove the Goods within a reasonable timeframe at its expense.

**11.2** If the supplier fails to remove the rejected Goods within a reasonable timeframe, Council may return the Goods at the Suppliers expense.

**11.3** To meet Quality Assurance requirements, Council may perform quality audits as defined in ANZ/ISO 8402 of quality systems, production processes and/or undertake product inspections as defined in AS1199 before acceptance of Goods.

**11.4** The Contractor will provide authorised Council representatives with full and free access to its premises and work areas and all reasonable facilities and assistance (at no additional cost) for the purposes of this clause.

## 12. Assignment and Sub-contracting

**12.1** This Agreement binds and ensures the benefit of the parties, their respective successors (including in the case of natural persons, their legal personal representatives) and permitted assigns.

**12.2** Except as expressly provided in the Purchase Order, the Contractor may not assign or sub contract any of its obligations under the Purchase Order without the prior written consent of Council.

**12.3** Approval to assign or subcontract does not relieve the Contractor remains liable for the carrying out and completion of its obligations under the Purchase Order or impose any liability upon Council to an assignee or a subcontractor.

## 13. Indemnity

**13.1** The Contractor indemnifies Council against all losses it directly or indirectly sustains or incurs as a result of:

- a) Any negligent, unlawful or wilful act or omission of the Contractor, Contractor personnel or Contractor's subcontractors;
- b) Any infringement or claimed infringement of the intellectual property rights or moral rights of a third party arising out of Council's receipt or use of the Goods and / or Services and/or Works;

- c) Death or personal injury of any person to the extent caused by the Contractor;
- d) Property damage to the extent caused by the Contractor; or
- e) Any breach by the Supplier of clause 10.

## 14. Insurance

- 14.1** The Contractor must have and maintain for the duration of the Agreement the following insurances unless otherwise agreed by Council in writing:
- a) Workers Compensation insurance in accordance with the Workers' Compensation Act 1987 (NSW)
  - b) Public Liability Insurance for a minimum amount of \$20 million for each occurrence
  - c) Professional indemnity insurance for an amount appropriate with the level of risk and agreed upon by Council.
  - d) Product Liability Insurance for a minimum amount of \$10 million for each occurrence
  - e) Transit (all risk) insurance covering transit, loading and unloading of Goods for not less than full replacement value
  - f) Any insurances as specified by Council in writing.
- 14.2** The Contractor must ensure that any sub-contractor engaged by it is insured to a level commensurate with the insurance obligations of the Contractor under the Agreement.
- 14.3** If requested by Council, the Contractor must provide Council with a copy of the above insurance policies and the certificate of currency.

## 15. Risk Management and Work Health and Safety

- 15.1** The Contractor must comply with the Protection of the Environment Operations Act 1997 (NSW) and other relevant environmental legislation, and the WHS laws to mitigate and manage risk to health and safety of its employees, contractors or other personnel, including members of the public and to protect the built and natural environment.
- 15.2** The Contractor must ensure the health and safety of all people the Contractor's activities may affect under this Agreement, in compliance with the WHS laws stated in sub clause 15.1
- 15.3** The Contractor must undertake its own identification and analysis of all WHS risks associated with the performance of the Purchase Order.
- 15.4** Any excavation work must only be carried out subsequent to undertaking appropriate *Dial before You Dig* inquiries and any excavation where Services are identified with appropriate supervision and guidance by the relevant utility authority.

## 16. Miscellaneous Provisions

- 16.1** The law in force in the State of New South Wales governs these Terms and Conditions. The parties submit to the exclusive jurisdiction of the courts of New South Wales.
- 16.2** If any term or provision of these Terms and Conditions is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision will

be severed and the remainder of the provisions of these Terms and Conditions will continue and have full force and effect.

- 16.3** A failure by Council to enforce a provision of the Purchase Order will not be construed as in any way affecting the enforceability in any other instance or the enforceability of the Purchaser Order as a whole.
- 16.4** If a clause or part of a clause can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way. Contractor shall at all times comply with the requirements of all applicable statutes, regulations or standards in the supply of the Goods pursuant to the Agreement.
- 16.5** Where there is more than one Contractor then the liability of each shall be joint and several.
- 16.6** The rights and remedies provided in the Agreement will not affect any other rights or remedies available to Council.

## 17. Suspension of Council's obligations

- 17.1** The obligations of the Council will be suspended during the time and to the extent that the Council is prevented from or delayed in complying with its obligations by force majeure. Force majeure means a circumstance beyond the reasonable control of Council and which occurs without the fault or negligence of Council. If, after a reasonable period of time, the force majeure event makes it impossible for Council to perform its obligations under the contract, Council is at its election is able to terminate the contract.

## 18. Dispute resolution

- 18.1** The Parties agree to resolve any disagreements or differences between them in relation to the Agreement by using all reasonable endeavours acting in good faith to resolve the dispute by joint discussions.
- 18.2** Any party who seeks to allege a Dispute must set out in writing addressed to a nominated representative of the other party:
- the nature of the dispute alleged;
  - the relevant clause or right alleged to have been infringed or breached;
  - the consequence of the infringement or breach as alleged;
  - The remedies sought (**Dispute notice**).
- 18.3** Within 14 days of the receipt of a Dispute notice pursuant to clause 19.2, representatives of the respective parties are to meet on a without prejudice basis to discuss the Dispute and the potential resolution of it (**Settlement meeting**).
- 18.4** Within a further 7 days, , if the dispute is not settled, the other party must in writing respond directly to the matters alleged and raise any further relevant matter it contends as being material to the dispute as alleged (**Dispute reply**).
- 18.5** If the dispute is not settled within 14 Days of the Settlement Meeting, or if no Settlement Meeting, within 28 days of the issue of the Dispute Notice, the parties must submit a dispute to mediation administered by the Australian Commercial Disputes Centre Ltd (ACDC) or the Institute of Arbitrators and Mediators Australia (IAMA) or failing Agreement to ACDC.

- 18.6** The mediator will be an independent person agreed between the parties or failing Agreement, a mediator will be appointed by the President of the body determined under subclause 19.5
- 18.7** Any mediation meetings and proceedings under Clause 18.3 and 18.6 must be held in Sydney, NSW.
- 18.8** The dispute should not be subject to proceedings before a court until it has followed the procedures outlined in subclause 18.1 to 18.7 and the parties have not agreed a resolution within 30 days of the appointment of a mediator, unless a party seeks injunctive or other interlocutory relief.

## 19 Termination by Convenience

- 19.1** Council may terminate the whole or part of the Purchase Order at any time, by Notice to the Supplier.
- 19.2** Council shall pay the Supplier the fees and expenses reasonably incurred by the Supplier in carrying out the requirements of the Purchase Order to the date of termination unless otherwise stated in the Purchase Order
- 19.3** Council will not be liable for payment to the Supplier for any compensation relating to loss of profit, revenue, goodwill or business opportunities, damage to reputation or for any indirect or consequential loss or for any other reason in relation to termination.
- 19.4** Council will not be liable to pay for any Services performed after the termination date as specified in the Notice.

## 20 Termination for Default

- 20.1** The Council may by notice terminate the Agreement with immediate effect if the Contractor:
- fails to deliver the Goods and/or perform the Services and/or execute the Works within the period specified by Council;
  - has neglected or omitted to carry out any instructions of Council in accordance with the Purchase Order;
  - has intimated that it is unwilling or unable to complete the supply of Goods, and/or perform the Services and/or execute the Works by the agreed date;
  - has committed an act of bankruptcy or becomes bankrupt, or becomes insolvent or Council reasonably considers that the Supplier is or likely to become insolvent or has a receiver, liquidator, administrator or other controller of property appointed;
  - breaches the Council's Statement of Business Ethics and/or Code of Conduct as it applies to the Contractor's obligations and/or noncompliance to GIPA or PPIPA provisions;
  - breaches of any term of the Agreement which in the Council's opinion is not capable of remedy; or
  - breaches of any term of the Agreement which is capable of remedy but fails to remedy the breach within 14 days after receiving notice to do so.
- 20.2** If the Agreement is terminated under this clause, the Contractor shall not be entitled to claim any amounts by way of damage or other payments including claim for any supplies, materials, specifications, Goods, Services or Works with a wholly or partly manufactured or yet to be delivered but in the possession of the Contractor as at the time of termination.
- 20.3** Termination under this clause may be taken by the Council without prejudice to any other rights or remedies the Council may have hereunder, terminate this Agreement, forfeit any

retention, take possession of any premises, materials, tools and appliances and finish the work by whatever means it may deem expedient.

- 20.4** Council shall not be liable to pay Contractor any further payments until work or Services are completed. If the unpaid balance of the purchase price shall exceed the expense of finishing the work, then such excess shall be paid forthwith by Supplier and/or deducted as the case may be to Supplier's account.

## 21 No waiver

- 21.1** The Council's failure to insist that the Supplier perform an obligation under the Purchase Order or Agreement is not a waiver of the Council's right to insist that the Contractor perform, or to claim damages for breach of, that obligation, or to insist that the Contractor perform any other obligation.

## 22 Code of Conduct

- 22.1** The Contractor is bound by Council's:

- a) Statement of Business Ethics
- b) Council's Code of Conduct Policy

Documents can be downloaded from Council's website: [www.bayside.nsw.gov.au](http://www.bayside.nsw.gov.au)

- 22.2** Council strictly applies 'A Thank You Is Enough' principle and does not accept incentives, benefits or gifts.

## 23 Compliance with GIPA Act and PPIPA

- 23.1** The Contractor must, within 7 days of receiving a written request by the Council, provide the Council with immediate access to the following information contained in records held by the Contractor:

- a) information that relates directly to the performance of the Services provided to the Council by the Contractor pursuant to the Agreement;
- b) information collected by the Contractor from members of the public to whom it provides, or offers to provide, the Services pursuant to the Agreement; and
- c) information received by the Contractor from the Council to enable it to provide the Services pursuant to the Agreement.

- 23.2** For the purposes of sub-clause 23.1, information does not include:

- a) information that discloses or would tend to disclose the Contractor's financing arrangements, financial modelling, cost structure or profit margin;
- b) information that the Contractor is prohibited from disclosing to the Council by provision made by or under any Act, whether of any State or Territory, or of the Commonwealth; or
- c) Information that, if disclosed to the Council, could reasonably be expected to place the Contractor at a substantial commercial disadvantage in relation to the Council, whether at present or in the future.

- 23.3** The Contractor will provide copies of any of the information in sub-clause 23.1, as requested by the Council, at the Contractor's own expense.

- 23.4** Any failure by the Contractor to comply with any request pursuant to sub-clause 23.1 or 23.3 will be considered a breach of an essential term and will allow the Agency to terminate the Contract by providing notice in writing of its intention to do so with the termination to take

effect 7 days after receipt of the notice. Once the Contractor receives the notice, if it fails to remedy the breach within the 7-day period to the satisfaction of the Council, then the termination will take effect 7 days after receipt of the notice.

**23.5** The Contractor must comply with, carry out and discharge the obligations contained in the information privacy principles set out in section 8 to 19 of PPIA as it were the Council carrying out and discharging those obligations. The Contractor must notify the Council as soon as possible upon it becoming aware of a breach of these obligations.

## 24 Compliance with Modern Slavery Act 2018

**24.1** The Act requires NSW government bodies, councils and state-owned corporations to take reasonable steps to ensure the goods and services they buy are not the product of modern slavery, and to report on how they do this.

**24.2** For the purposes of sub-clause 24.1, the Contractor must disclose:

- 24.2.1 the organisation's structure, its business and its supply chains;
- 24.2.2 its due diligence process in relation to modern slavery;
- 24.2.3 parts of the business and supply chains where risks exist, and steps taken to manage those risks; and
- 24.2.4 training about modern slavery to its employees.

**24.3** The Council may by notice terminate the Agreement with immediate effect if:

- 24.3.1 the Contractor or any of its sub-contractors are discovered to be non-compliant with the provisions of the Modern Slavery Act 2018 on modern slavery and human trafficking;
- 24.3.2 the Contractor or any of its sub-contractors are discovered to fail to pay the award wages to their employees.