

# PURCHASE / WORK ORDER TERMS AND CONDITIONS

These Terms and Conditions apply to any Order issued by Mid-Coast Council (ABN 44 961 208 161) (**Council**) to a Supplier for the supply of Goods and/or Work or Services to Council and must be read in conjunction with the applicable Contract.

## 1 DEFINITIONS

In the Contract, unless the context otherwise requires:

**Acceptance** means acceptance by Council of any Good or Work or Service in accordance with clauses 7(a) and 7(b). **Accept** or **Accepted** has a corresponding meaning.

**Business Day** means any day other than a Saturday, Sunday, gazetted public holiday in Sydney, New South Wales, Australia or 27, 28, 29, 30 and 31 December.

**Conditions** means these Terms and Conditions, as reasonably updated by Council from time to time.

**Confidential Information** means information which is by its nature confidential, that a party has designated as confidential, or is capable of protection at common law or equity as confidential information, but does not include information that is or becomes public knowledge other than through a breach of the Contract, or that a party receiving the information independently knows or develops.

**Contract** means an agreement between Council and Supplier for the supply of Goods and/or Work or Services formed under and constituted by the documents referred to in clause 2(a).

**Contract Price** means the amounts for Goods and/or Work or Services as set out in the Order, excluding any GST component payable, as adjusted under these Conditions.

**Council Equipment** means any item stated in the Order to be made available by or on behalf of Council to Supplier for the purpose of Supplier performing Work or Services in accordance with the Contract. For example, Council Equipment may be provided to Supplier so that Supplier can perform Work or Services in the nature of repairs and maintenance to the Council Equipment.

**Deliver** means deliver and unload the Goods, or perform and complete the Work or Services, at the Delivery Place in accordance with clauses 3 and 6. **Delivery**, **Delivering** and **Delivered** have a corresponding meaning.

**Delivery Date** means, in relation to a:

- (a) Good, the date specified in the Order on which the Good or is to be Delivered; or
- (b) Work or Service, the date specified in the Order by which the Work or Service is to be Delivered,

as adjusted under the Contract or as otherwise agreed in writing by the parties.

**Delivery Place** in relation to a Good or Work or Service, means the location(s) for Delivery stated in the Order for that Good or Work or Service, or as otherwise agreed in writing by the parties.

**Good** means merchandise or products described in the Order and **Goods** means all of them, as varied under these Conditions or by the parties in writing.

**GST** means the tax payable on taxable supplies under the GST Law.

**GST Law** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**IPR** means any and all intellectual or industrial property rights throughout the world in relation to (without limitation) inventions, ideas, patents, applications for patents, copyright (including an author's moral rights under the *Copyright Act 1968* (Cth)), registered and unregistered designs, registered and unregistered trademarks, rights in relation to circuit layouts and circuit layout designs, rights in relation to technologies in development, trade secrets, know-how and all other intellectual property as defined in article 2 of the Convention Establishing the World Intellectual Property Organization of July 1967, whether registered or unregistered and whether or not now existing and in all cases for the duration of those rights; and any licence, consent, application or right to use or grant the use of any the foregoing rights, including all renewals and extensions.

**Order** means any purchase or work order and/or other written instruction by Council for the procurement of Goods and/or Work or Services from

Supplier.

**Supplier** means the person, body corporate or entity that sells the Goods or provides the Work or Services to Council.

**WHS Law** means the *Work Health and Safety Act 2011* (NSW), including regulations and other instruments under the Act, any Codes of Practice and consolidations, amendments, re-enactments or replacements of the Act, and any corresponding WHS law as defined in section 4 of the *Work Health and Safety Act 2011* (NSW).

**Work or Service** means the work or service described in the Order and **Work or Services** means all of them, as varied under these Conditions or by the parties in writing.

## 2 APPLICATION OF CONDITIONS AND FORMATION OF AGREEMENT

(a) Subject to clause 2(b), where Council issues an Order for the purchase of Goods and/or Work or Services from Supplier and Supplier commences to provide the Goods and/or Work or Services to Council, an agreement (**Contract**) is formed in respect of those Goods and/or Work or Services comprising:

- (i) the Order;
- (ii) subject to clause 2(c), any documents referred to in or attached to the Order;
- (iii) these Conditions; and
- (iv) any variations made in accordance with these Conditions or otherwise recorded by the parties in writing.

(b) Without limiting clause 2(c), these Conditions shall only apply to Orders for the purchase of Goods and/or Work or Services by Council from Supplier where there is no separately executed contract which applies between Supplier and Council in respect of the Goods and/or Work or Services (**Separate Contract**). Where a Separate Contract applies, that Separate Contract prevails over these Conditions and no Contract (as defined in these Conditions) will be created by these Conditions.

(c) Notwithstanding clauses 2(a)(ii) and 2(b), these Conditions shall apply to the exclusion of any terms and conditions which Supplier may purport to apply to, or which are endorsed upon any correspondence or documents issued by Supplier to Council in connection with, the Order or the Goods and/or Work or Services the subject thereof, irrespective of their date of communication to Council. Supplier may not rely on any representations by Council that are not included in the Contract.

(d) There may be additional terms and conditions specified by Council in an Order for the purchase of Goods and/or Work or Services. In such circumstances, the terms of the Order will prevail if there is any inconsistency between the terms of the Order and these Conditions.

(e) Supplier's provision of any Goods and/or Work or Services constitutes Supplier's acceptance, and its agreement to be bound by, the Contract, including these Conditions.

## 3 OBLIGATIONS

(a) Supplier must:

- (i) deliver the Goods and/or Work or Services using due care, diligence, best practices and professional skill;
- (ii) ensure the Goods and/or Work or Services meet any requirements and specifications specified in the Contract;
- (iii) ensure the Goods and/or Work or Services are fit for the purposes for which goods, work or services of a similar nature to the Goods or Work or Services are commonly supplied and for any other purposes notified by Council;
- (iv) ensure that the Goods and/or Work or Services supplied, if software or data, do not contain any harmful code (such as viruses or other malicious code);
- (v) in providing any Work or Services:
  - (A) ensure that it is suitably qualified and experienced in the performance of Work or Services similar to the Work or Services; and
  - (B) provide the Work or Services in accordance with any requirements specified in the Order;
- (vi) do and perform all such other acts, matters and things as may be necessary or convenient to give effect to the intentions of the parties as expressed in the Contract;
- (vii) maintain at Supplier's own expense all equipment and supplies necessary to enable Supplier to discharge Supplier's responsibilities under the Contract;
- (viii) in Delivering the Goods and/or Work or Services, comply with:

(A) Council's reasonable directions, instructions, procedures and policies, whether such procedures and policies are specifically drawn to the attention of Supplier or as might reasonably be inferred from the circumstances, including Council's Statement of Business Ethics Policy available for download at the Council website (as updated, amended or replaced from time to time); and

(B) all applicable laws and recognised industry standards (including laws relating to the environment and, where the Goods are being delivered by road, all laws relating to fatigue management, speed and mass, dimension and load restraint compliance requirements (generally referred to as "Chain of Responsibility" laws or "Heavy Vehicle National" laws));

(ix) as soon as practicable after becoming aware of any matter or circumstances which may adversely affect the Delivery of the Goods and/or Work or Services, give written notice to Council detailing the matter or circumstances and its anticipated effect on the Goods and/or Work or Services;

(x) obtain, maintain and comply with all licenses, authorisations, approvals and consents necessary to perform its obligations under the Contract;

(xi) not sell or otherwise part with possession, custody or control of, nor encumber with any registered or unregistered charge, lien, mortgage, security (including a security interest under the *Personal Property Securities Act 2009* (Cth)):

(A) the Goods upon title passing to Council in accordance with the Contract; or

(B) Council Equipment at any time except in accordance with the prior written consent of Council;

(xii) carry out all tests necessary to ensure the Goods and/or Work or Services (as applicable) comply with the requirements of the Contract;

(xiii) if required by Council, demonstrate its capability to comply with AS/NZS ISO 9001:2015 or ISO 9001:2015 Quality Management Systems, or obtain third party certification for its quality management system and provide evidence of that certification in writing to Council;

(xiv) only use Council Equipment:

(A) for the sole purpose of performing the Work or Services;

(B) in accordance with any directions of Council; and

(C) in the manner in which and for the purpose that it was designed;

(xv) take all reasonable care of Council Equipment in its possession, custody or control;

(xvi) keep all Council Equipment in its possession, custody or control secure and in good order and condition;

(xvii) return any Council Equipment in its possession, custody or control to Council on the earliest of:

(A) Delivery of all Work or Services the subject of the Order;

(B) termination of the Contract in accordance with its terms; and

(C) within 7 days of a request by Council (or any later time agreed by Council); and

(xviii) not alter any Goods, any Council Equipment or Work or Services in any way, unless otherwise approved by Council.

(b) Subject to clause 16, if Supplier engages any person to perform any part of the Delivery of the Goods and/or Work or Services, Supplier:

(i) must ensure such person is competent, experienced, appropriately accredited, qualified, licensed and trained; and

(ii) agrees it is vicariously liable for the acts and omissions of that person.

#### 4 CONTRACT PRICE

(a) The Contract Price is firm (unless a variation is directed in writing under clause 10 or the parties mutually agree a variation in writing) and includes the cost of any packaging, marking, handling, freight and delivery, insurance and any other costs and charges,

including costs associated with the return of goods wrongly supplied or defective Goods and any customs or import duties, taxes and any other imposts associated with the Goods and/or Work or Services.

(b) The price at which the Goods and/or Work or Services are provided by Supplier to Council does not (unless otherwise stated or agreed in writing) include GST, which must be added to the Contract Price and will be paid by Council.

#### 5 PAYMENT

(a) Council will pay Supplier the Contract Price (or the relevant part thereof) for Goods and/or Work or Services the subject of the Order only if:

(i) those Goods and/or Work or Services have been Delivered in accordance with any sequence stipulated in the Order;

(ii) Council has Accepted those Goods and/or Work or Services; and

(iii) Supplier has submitted an invoice in the form of a valid tax invoice in accordance with the GST Law and which attaches:

(A) sufficiently detailed information and documentary evidence to enable Council to verify its accuracy;

(B) (if applicable) a written subcontractor's statement evidencing payment of any subcontractors and workers, and payment of workers compensation insurance premiums and payroll tax relating to such persons, in a form which complies with the requirements of Schedule 2 Part 5 of the *Payroll Tax Act 2007* (NSW), section 175B(7) of the *Workers Compensation Act 1987* (NSW) and section 127(5) of the *Industrial Relations Act 1996* (NSW); and

(C) any other information as may reasonably be requested or advised by Council.

(b) Within 10 Business Days after receipt of an invoice submitted by Supplier in accordance with clause 5(a), Council will assess the invoice and, if it disagrees with the amount stated, issue a written payment schedule to Supplier certifying the amount it deems payable and specifying the reasons for the difference.

(c) Without limiting Council's rights under any law, within 30 Business Days after receipt of an invoice submitted by Supplier in accordance with clause 5(a), Council will:

(i) if a payment schedule has been issued by Council in accordance with clause 5(b) in respect of the invoice, pay Supplier the amount certified as payable in the payment schedule (if any); or

(ii) if no payment schedule has been issued by Council in accordance with clause 5(b) in respect of the invoice, pay the amount stated in the invoice.

(d) Notwithstanding any other clause, Council may reduce or set-off against the Contract Price or any other amount payable by Council to Supplier from time to time, whether under the Contract or otherwise, any charge, credit, rebate or other amount which should be reimbursed to or is otherwise payable to Council by Supplier.

(e) Without limiting clause 5(d), Council may withhold any payment due to Supplier under the Contract if a third party providing work or services in connection with the Contract serves Council with a payment withholding request pursuant to Division 2A of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Request**), but only to the extent of the amount stated in the Request.

(f) Any payment made by Council under or in connection with the Contract is not an:

(i) approval by Council of Supplier's performance of or compliance with the Contract or any law; nor

(ii) admission of liability.

(g) Unless otherwise agreed by Council, payment under clause 5(c) will be made by electronic funds transfer to a bank account nominated by Supplier.

#### 6 DELIVERY

(a) Supplier, at its expense, must Deliver each Good and/or Work or Service (as applicable):

(i) in accordance with the relevant Delivery Date (time is of the essence) or, if no such date is stated, within a reasonable

time having regard to the Good and/or Work or Service to be Delivered;

- (ii) to or at the relevant Delivery Place(s), and in the relevant sequence (if applicable);
- (iii) in the relevant quantity; and
- (iv) between the hours (or otherwise between such other hours as may be reasonably determined by Council and notified as such to Supplier),

specified in the Order or any other document comprising the Contract, and in accordance with any reasonable directions given by Council.

- (b) Unless otherwise agreed by Council, Supplier shall arrange for any Goods to be suitably packed and Delivered Free Into Store (FIS) at the Delivery Place.
- (c) Supplier must:
  - (i) on Delivery, provide to Council (by assignment or otherwise) all unexpired third party warranties provided with respect to the Goods and/or Work or Services; and
  - (ii) not take any action that will void or impair any third party warranty unless authorised by Council in writing.
- (d) Supplier acknowledges and agrees that an Order may require Goods and/or Work or Services to be Delivered:
  - (i) at or to multiple Delivery Places; and
  - (ii) in a specified sequence.
- (e) Where required, Council will provide Supplier access to the Delivery Place(s) to enable Supplier to comply with its obligations under the Contract.
- (f) In accessing a Delivery Place to which access has been granted under clause 6(e), Supplier must:
  - (i) act in accordance with the reasonable directions, instructions and workplace policies of Council;
  - (ii) attend any inductions relating to work health and safety as may be relevant to the Delivery Place;
  - (iii) at all times, minimise nuisance, inconvenience and interference with the conduct of Council's business and any of its other contractors at, or any other persons having a right of access to, or any area in the vicinity of, the Delivery Place; and
  - (iv) co-ordinate the Delivery of the Goods and/or Work or Services with the work of Council or any of its other contractors at, or any other persons having a right of access to, the Delivery Place.
- (g) In Delivering the Goods and/or Work or Services, Supplier must not pollute, contaminate or otherwise damage the environment.
- (h) Supplier acknowledges that where the Delivery of the Goods and/or Work or Services may affect the environment (whether built or natural), it will comply with applicable environmental legislation, including the *Environmental Planning & Assessment Act 1979* (NSW) and the *Protection of the Environment Operations Act 1997* (NSW), and observe the principles of ecologically sustainable development (if applicable).
  - (i) Supplier accepts each Delivery Place in its current state and condition and is responsible for and assumes the risk of any cost, expense, loss, liability, damage or delay it suffers or incurs arising out of or connected with the physical conditions of any Delivery Place (and its surroundings) and any other premises where any Work or Services are to be performed.

## 7 ACCEPTANCE OR REJECTION OF GOODS AND/OR WORK OR SERVICES

- (a) Within 28 days after Delivery of a Good or Work or Service, Council will either:
  - (i) accept the Good or Work or Service; or
  - (ii) provide a written notice to Supplier stating that the Good or Work or Service is rejected and specifying the cause(s) for any rejection.
- (b) If Council does not provide a notice of rejection of a Good or Work or Service pursuant to clause 7(a)(ii), the Good or Work or Service will be deemed to be accepted by Council upon the expiry of the period for giving a notice of rejection.
- (c) If Council provides a notice of rejection of a Good or Work or Service pursuant to clause 7(a)(ii), Supplier must, within 5 days, remedy the cause(s) for that rejection, which may require rectification, replacement or re-performance of a Good or Work or

Service (as applicable), at no cost to Council such that it fully complies with the Contract.

- (d) If, in accordance with clause 7(c), Supplier fails to remedy the cause(s) for the rejection to the satisfaction of Council within the time period specified in clause 7(c), Council may do all things Council deems reasonably necessary to remedy the cause(s) for the rejection at Supplier's cost (such cost being a debt due and immediately payable by Supplier to Council on demand), which may include the cost of:
  - (i) Council re-performing or engaging a third party to re-perform the rejected Work or Service; or
  - (ii) repairing the Good, or returning the Good and purchasing a suitable replacement.
- (e) Signed delivery dockets are not evidence that a Good has been Accepted or rejected by Council.
- (f) The rights and remedies of Council pursuant to this clause 7 are in addition to any other rights and remedies of Council at law or in equity.
- (g) Neither Acceptance of a Good or Work or Service, nor any payment made under the Contract, will be construed as:
  - (i) in any way limiting Supplier's responsibility to provide all Goods or Work or Services in accordance with the requirements of the Contract;
  - (ii) an acknowledgement by Council that Supplier has complied with its obligations under the Contract; or
  - (iii) a waiver by Council of any right under the Contract or any cause of action arising out of any act or omission of Supplier.
- (h) Supplier is not entitled to payment for any Good or Work or Service rejected in accordance with clause 7(a)(ii) unless such Good or Work or Service has been subsequently Accepted in accordance with this clause 7. The price of any Good or Work or Service not Accepted by Council will be deducted from the Contract Price and, if the relevant portion of the Contract Price has been pre-paid by Council, will be a debt due and immediately payable by Supplier to Council.

## 8 TITLE AND RISK IN THE GOODS

- (a) Council retains ownership of and title in Council Equipment at all times and nothing in the Contract confers on Supplier any property right of any kind in any Council Equipment.
- (b) Risk of any loss or damage to Council Equipment will pass:
  - (i) from Council to Supplier when Supplier takes possession, custody or control of the Council Equipment; and
  - (ii) from Supplier back to Council on the later of Delivery or Acceptance of the applicable Work or Service(s) in accordance with the Contract.
- (c) Risk of any loss or damage to a Good will pass from Supplier to Council on the later of Delivery or Acceptance of the Good in accordance with the Contract.
- (d) Subject to clause 8(e), ownership of, and unencumbered title in, a Good or any part thereof will vest in Council upon the earlier of Acceptance of or payment for a Good.
- (e) Where payment for a Good occurs before Acceptance and the Good is subsequently rejected under clause 7, title in the rejected Good will re-vest in Supplier from the time of rejection until the Good is Accepted by Council.

## 9 WORK HEALTH AND SAFETY

Supplier must:

- (a) undertake its own identification and analysis of work health and safety risks associated with all Goods and/or Work or Services;
- (b) take all necessary measures to assess and eliminate or control risks arising from any hazards associated with the Goods and/or Work or Services;
- (c) ensure that the Goods and/or Work or Services conducted by or on its behalf comply with WHS Law;
- (d) Deliver the Goods and/or Work or Services in a manner that does not cause Council to breach any of its obligations under WHS Law;
- (e) cooperate and do all things necessary to assist, and refrain from doing anything that may impede Council or any of its or any of its employees, servants, officers or agents discharging their relevant obligations under WHS Law;
- (f) where required by WHS Law or upon Council's request, promptly provide to Council any information or documentation relating to work health, safety and rehabilitation matters, including:

- (i) a written report summarising Supplier's compliance with WHS Law and information regarding Supplier's work health and safety system and the work health and safety system(s) of any subcontractor(s); and
  - (ii) any 'safe work method statements' under the *Work Health and Safety Regulation 2017 (NSW)* prepared in connection with any Work or Services; and
- (g) co-operate fully with, and promptly notify Council of any investigation by, any government agency, Parliamentary inquiry, board of inquiry or coronial inquiry with respect to a 'notifiable incident' under section 35 of the *Work Health and Safety Act 2011 (NSW)*.

## 10 VARIATIONS TO GOODS AND/OR WORK OR SERVICES

Council may by written notice to Supplier:

- (a) increase or decrease the quantity of or omit any of the Goods and/or Work or Services;
- (b) change the specification of any of the Goods and/or Work or Services; or
- (c) vary the requirements of any of the Goods and/or Work or Services,

and Supplier must comply with such direction unless it is unfeasible or unreasonable for Supplier to comply. If such direction causes Supplier to incur more or less cost than it would have otherwise incurred, Council will, acting reasonably, assess the difference and the Contract Price will be adjusted accordingly. If the direction will affect Supplier's requirement to meet a Delivery Date, Council will amend that Delivery Date acting reasonably and after consultation with Supplier.

## 11 WARRANTIES

Without limiting any warranty implied by statute or at law that Council has the benefit of, including statutory warranties under the Australian Consumer Law, Supplier warrants that:

- (a) the Goods:
  - (i) are new and unused (unless otherwise specified in the Order or any other document comprising the Contract), free from deficiencies in design, manufacture and workmanship; and
  - (ii) match the model number or brand specified in the Order and/or any documents attached to the Order or, if no such model number or brand is specified, match any demonstration model or sample provided to Council;
- (b) the Goods and/or Work or Services are fit for the purposes for which goods, work or services of a similar nature to the Goods or Work and/or Services are commonly supplied and for any other purposes notified by Council;
- (c) the Goods or Work or Services are in accordance with all applicable laws and recognised industry standards and will comply with all the requirements of the Contract;
- (d) the Goods are free of any registered or unregistered charge, lien, mortgage, security (including a security interest under the *Personal Property Securities Act 2009 (Cth)* or other encumbrance at the time title to the Goods passes to Council (except for any security interest in favour of Council);
- (e) it has obtained all licences, authorisations, approvals and consents required for entering into and giving effect to the Contract;
- (f) to the best of its knowledge, as at the time of executing the Contract, it does not have a conflict of interest, and no conflict of interest is likely to arise in the performance of the Contract. Supplier must immediately notify Council if it becomes aware of the existence or possibility of a conflict of interest;
- (g) no litigation, arbitration, criminal or administrative proceedings are current, pending or (to its knowledge) threatened which if adversely determined would have a material adverse effect on its ability to perform its obligations under the Contract; and
- (h) it has entered into the Contract based on its own investigations and information and has not relied on any information provided or representation made by Council or any of Council's employees, servants, officers or agents.

## 12 INDEMNITY

- (a) Supplier bears the risk of and must indemnify and keep indemnified Council and its employees, servants, officers and agents (each an **Indemnified Party**) from and against any loss, damage, cost, expense or other liability incurred or suffered by any Indemnified Party, and/or any claim made against any Indemnified Party, including in respect of:

- (i) personal injury, illness or death;
  - (ii) loss of or damage to any property;
  - (iii) a breach of any law, licence, authorisation or consent; or
  - (iv) infringement or alleged infringement of any person's IPRs, arising out of or in connection with:
  - (v) Supplier's (or any of its employees', agents' or subcontractors') unlawful, negligent, reckless or deliberate acts or omissions in providing the Goods or performing the Work or Services or the Contract; or
  - (vi) Supplier's breach of the Contract,
- except that this indemnity is reduced proportionally to the extent a negligent act or omission of Council, or any of its employees, servants, officers or agents, caused or contributed to the loss, damage, cost, expense, other liability or claim.

## 13 INSURANCE

- (a) Supplier must procure and maintain all insurances a prudent supplier providing goods, work or services similar to the Goods and/or Work or Services would procure and maintain, including:
  - (i) transit insurance for the full cost of the replacement value of the Goods and/or any Council Equipment in the possession, custody or control of Supplier;
  - (ii) public and product liability insurance to cover the parties for their liability to third parties, and Supplier's liability to Council, for loss or damage to property or injury or death to any person arising out of or in connection with the supply of the Goods and/or Work or Services (including loss or damage to Council Equipment) for the insured amount of not less than \$20,000,000 per occurrence;
  - (iii) as applicable:
    - (A) workers compensation insurance covering the death of or injury to any persons employed by Supplier as required by the *Workers Compensation Act 1987 (NSW)*; or
    - (B) personal accident and illness insurance providing weekly benefits of at least 75% of weekly income, death and capital benefits of at least \$250,000 and for a minimum benefit period of 104 weeks;
  - (iv) if motor vehicles are used in providing the Goods and/or Work or Services, compulsory third party (CTP) and comprehensive motor vehicle insurance (which includes cover for damage and theft);
  - (v) if watercraft is used in performing any Work or Services:
    - (A) marine hull and machinery insurance, including collision liability, on all watercraft so used, with a limit of cover not less than the market value of the watercraft; and
    - (B) protection and indemnity insurance including coverage for injuries or death of masters, mates and crews. Such insurance must provide cover to an amount of not less than \$10,000,000 for each and every claim; and
  - (vi) if the Work or Services involve the provision of professional advice, professional indemnity insurance for the insured amount of not less than \$10,000,000 for any one claim and in the aggregate and which is maintained for a period of 7 years following the completion or earlier termination of the Contract.
- (b) The insurances required by this clause 13 must be with a reputable insurer, preferably being an insurer that is the holder of a current licence issued by the Australian Prudential Regulation Authority and which has a financial rating of no less than A- from Standard & Poors (Australia) Pty Limited.
- (c) At Council's request, Supplier must provide satisfactory evidence of the insurances procured and maintained in accordance with this clause 13, including policy terms, product disclosure statements and/or certificates of currency (no more than 20 days old).

## 14 INTELLECTUAL PROPERTY

- (a) Supplier:
  - (i) warrants that it has all IPRs necessary to provide the Goods to Council and perform any Work or Services;

- (ii) grants (or will procure for) Council an irrevocable, non-exclusive, perpetual and royalty-free licence (including a right of sub-licence) to use all IPR necessary for Council (and any of its successors) to have the full benefit of the Goods and/or Work or Services for any purpose, but excluding any commercial exploitation of such IPR;
- (iii) warrants that:
  - (A) the provision of any Goods and/or Work or Services; and
  - (B) Council's use of the Goods and/or any document or other deliverable produced or generated in the provision of any Work or Services;
 will not infringe any person's IPR;
- (iv) agrees that it has no right, title or interest (including any IPR) in, and must not use, any documentation, data, drawings, specifications or any other records or documentation provided to Supplier by Council under or in connection with the Contract (**Council Documents**), otherwise than in accordance with clause 14(b);
- (v) without limiting any other sub-clause of this clause 14 or clause 8(a), agrees that the provision of any Council Equipment to Supplier under the Contract does not create in favour of or confer on Supplier any right, title or interest in any IPR associated with the Council Equipment; and
- (vi) other than strictly in accordance with the Contract, must not, whether directly or indirectly, modify, vary, improve, adapt, copy, create works derived from, analyse, remove components from, decompile, reverse engineer, or attempt to derive source code, techniques, algorithms or processes from, any Council Documents, Council Equipment or part thereof, or permit or encourage any other person to do so.
- (b) Council grants Supplier a non-transferable, royalty-free and non-exclusive licence to use the Council Documents for the sole purpose of performing its obligations under the Contract. The licence granted to Supplier by Council in this clause 14(b) will terminate upon the earlier of completion of Supplier's obligations under the Contract and termination of the Contract for whatever reason.
- (c) In this clause 14, the words "use" or "using" includes reproducing, making adaptations of, modifying, or incorporating into other work.

## 15 CONFIDENTIALITY AND PRIVACY

- (a) Each party must ensure that Confidential Information provided by the other party is not disclosed, except to the extent the disclosure is:
  - (i) authorised by the prior written approval of the other party;
  - (ii) required by law (including the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) and the *Local Government Act 1993* (NSW), due to statutory or portfolio duties, or for public accountability reasons, including disclosure to the councillors of Council where required to support a transparent and accountable process or following a request by Parliament or Parliamentary Committee;
  - (iii) to a professional adviser, insurer, financier or auditor of a party to the extent necessary for the purposes of the Contract;
  - (iv) necessary for the conduct of any legal proceedings relating to the Contract; or
  - (v) necessary for a party to fulfil its obligations under the Contract.
- (b) Supplier must, at its expense and within the time requested by Council, provide Council with access to and copies of (if required by Council) such information requested by Council in Supplier's possession relating to the Contract for the purposes of Council's compliance with the GIPA Act, including information supplied by or on behalf of Council to Supplier.
- (c) To the extent Supplier acquires Personal Information in connection with the Contract, Supplier must:
  - (i) strictly comply with all applicable laws relating to privacy (including the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information*

*Privacy Act 2002* (NSW) as though those Acts applied to Supplier);

- (ii) take all necessary measures to ensure such Personal Information is protected against any loss or unauthorised access, use, modification or disclosure; and
- (iii) immediately notify Council if it has reasonable grounds to believe that there has been a breach of the *Privacy and Personal Information Protection Act 1998* (NSW) or the *Health Records and Information Privacy Act 2002* (NSW) in connection with the Contract.
- (d) Any Personal Information collected by Council from Supplier in connection with the Contract will be used in relation to the Contract and managed and stored in accordance with Council's Privacy Management Plan available at: <https://www.midcoast.nsw.gov.au/Council/Privacy>.
- (e) For the purposes of clauses 15(c) and 15(d), the term "Personal Information" has the meaning given in the *Privacy and Personal Information Protection Act 1998* (NSW).

## 16 SUBCONTRACTING & ASSIGNMENT

- (a) Supplier must not:
  - (i) assign the benefit of or novate the Contract; nor
  - (ii) subcontract any part of the Delivery of any of the Goods or Work or Services,
 without the prior written approval of Council, which shall not be unreasonably withheld.
- (b) If any approval to subcontract is given by Council under clause 16(a), Supplier must ensure that its subcontractors effect and maintain equivalent insurances to those required under the Contract (as applicable).
- (c) An approval given by Council under clause 16(a) permitting Supplier to subcontract any part of the Delivery of any of the Goods or Work or Services does not relieve Supplier from its obligations and liabilities pursuant to the Contract, and Supplier will be liable for the acts and omissions of its subcontractors.

## 17 TERMINATION

### 17.1 TERMINATION FOR CAUSE

- (a) Council may terminate the Contract if:
  - (i) Supplier:
    - (A) does not Deliver a Good or Work or Service by the relevant Delivery Date or to the relevant Delivery Place; or
    - (B) notifies Council that it will be unable to Deliver a Good or Work or Service by the relevant Delivery Date or to the relevant Delivery Place;
  - (ii) Council does not Accept a Good or Work or Service and Supplier fails to remedy the cause(s) for the rejection to the satisfaction of Council within the time period specified in clause 7(c);
  - (iii) Supplier experiences a material adverse change in its circumstances, its legal structure or its identity which in the reasonable opinion of Council will adversely impact Supplier's ability to perform its obligations under the Contract;
  - (iv) Supplier becomes insolvent;
  - (v) Supplier breaches the Contract and the breach is not capable of remedy; or
  - (vi) Supplier does not remedy a breach of the Contract which is capable of remedy within the period specified by Council in a notice of default issued by Council to Supplier.
- (b) If the Contract is terminated by Council in accordance with clause 17.1(a), Council is liable only for payments due and payable under clause 4 for Goods and/or Work or Services Accepted up until the date of termination, and Council may seek damages from Supplier in connection with the termination.

### 17.2 TERMINATION FOR CONVENIENCE

- (a) In addition to any other rights or remedies it has under the Contract, Council may at any time terminate the Contract for convenience by notifying Supplier in writing. Supplier's only remedy for such termination will be payment for any sums due and payable by Council to Supplier for any Goods and/or Work or Services Accepted in accordance with the Contract up until the date of termination. Supplier will not be

entitled to payment of any other costs, expenses or damages in connection with the termination under this clause 17.2(a), including for any loss of profit or anticipated profit on any part of the Contract.

- (b) If Council issues a notice under clause 17.2(a), Supplier must stop work in accordance with the notice, comply with any directions given by Council and mitigate all loss, costs, and expenses in connection with the termination.

### 17.3 TERMINATION FOR IMPOSSIBLE PERFORMANCE

If Supplier's obligations under the Contract become impossible to perform as a result of any government imposed restriction, government declaration of war, act of god or pandemic, then the parties may mutually agree to terminate the Contract and, subject to clause 17.4(b), neither party may seek damages from one another in connection with the mutual termination of the Contract under this clause 17.3.

### 17.4 CONSEQUENCES OF TERMINATION

- (a) On the expiry or termination of the Contract for whatever reason, without limiting any other rights or remedies Council may have, Supplier must:
- (i) immediately cease Delivering the Goods and/or Work or Services; and
  - (ii) within 7 days, at Council's election, return to Council or destroy (or in the case of machine readable records, erase) all property, Council Equipment, Council Documents and other materials provided by Council to Supplier, including any Confidential Information.
- (b) On termination of the Contract for whatever reason, any portion of the Contract Price pre-paid by Council for Goods unsupplied and/or Work or Services unperformed will be a debt due and immediately payable by Supplier to Council.
- (c) Without limiting clauses 17.1(b), 17.2 and 17.4(b), termination of the Contract for whatever reason will not affect any rights or remedies accrued by either party, whether under the Contract or at law, prior to the date of termination.

### 18 SUSPENSION OF WORK OR SERVICES

Council may instruct Supplier to suspend, and after a suspension has been instructed recommence, the Delivery of all or any part of any Work or Service, and Council will not be liable upon any claim (whether for damages, costs or otherwise) in respect of any such suspension other than a reasonable extension to the Delivery Date.

### 19 MODERN SLAVERY

- (a) Supplier warrants that:
- (i) it will not supply any Goods and/or Work or Services it knows (or ought to know through the making of reasonable inquiries) are the product of; and
  - (ii) it does not use any labour practices involving, Modern Slavery.
- (b) If Supplier is a 'reporting entity' for the purposes of any state or federal Modern Slavery legislation, including the *Modern Slavery Act 2018* (Cth), it must provide Council with a copy of any report it is required to prepare under that legislation at Council's request.
- (c) For the purposes of this clause 19, "**Modern Slavery**" has the meaning given in section 4 of the *Modern Slavery Act 2018* (Cth), and includes any form of slavery, servitude, debt bondage, deceptive recruitment practices, or forced labour to exploit children or other persons.

### 20 NO EXCLUSIVITY

Entering into the Contract with Council does not:

- (a) give Supplier the right to be the sole deliverer or supplier of any Goods and/or Work or Services to Council;
- (b) oblige Council to acquire any particular quantity of any goods, work or services from Supplier; or
- (c) prevent Council from obtaining goods, work or services that are the same as, or similar to, the Goods or Work or Services from other suppliers.

### 21 PUBLICITY

Supplier must not use Council's name in any publication, press statement, press conference or other form of publicity or media without first obtaining the written consent of Council (which may be withheld in Council's sole discretion).

### 22 ANTI-CORRUPTION

- (a) In this clause 22, "**Public Official**" includes any person representing or employed by a government department or enterprise
- (b) Supplier must always comply with all laws, rules, regulations and other legally binding measures imposed in the State of New South Wales relating to bribery, corruption, money laundering, fraud or similar activities and not offer, promise or give (either directly or indirectly) any financial or other advantage, payment, gift, promise or transfer of anything of value:
- (i) to any person with the intention of inducing that person to breach a position of trust or duty of good faith or impartiality; or
  - (ii) to any Public Official intending to influence that official with the aim that either party should benefit as a result.

### 23 RESOLUTION OF DISPUTES

- (a) Any dispute which arises out of or in connection with the Contract must be the subject of at least four (4) weeks of bona fide negotiations at the appropriate authority level to attempt resolution or agree a method for resolution before either party commences legal proceedings. All aspects of the negotiations must be kept confidential, except the fact of their occurrence, and all communications between the parties during the negotiations are without prejudice.
- (b) Nothing in this clause 23 will prejudice the right of a party to seek urgent injunctive or declaratory relief from a court in respect of a dispute.
- (c) Notwithstanding the existence of a dispute, the parties must continue to perform their obligations under the Contract.

### 24 RECORDS AND AUDIT

- (a) Supplier must keep and maintain financial, operational and other relevant records to enable its compliance with the Contract to be verified, including information relating to the Goods and/or Work or Services and any other records required by law (**Records**).
- (b) The Records must be maintained in an accessible and secure form for a period of at least 7 years from the date of their creation, or longer if required by law.
- (c) Council or a representative may conduct audits relevant to the Goods and/or Work or Services with reasonable notice.

### 25 PERSONAL PROPERTY SECURITIES ACT 2009 (CTH)

Supplier acknowledges and agrees that the Contract:

- (a) constitutes a 'Security Agreement' for the purposes of the *Personal Property Securities Act 2009* (Cth) (**PPSA**); and
- (b) creates a 'Security Interest' (as that term is defined in the PPSA) of Council in the Goods and all things intended for or produced in connection with the performance of the Work or Services.

### 26 GENERAL

- (a) The Contract records the entire agreement between the parties and supersedes all previous negotiations, understandings, representations and arrangements, in relation to its subject matter.
- (b) The parties agree that the Contract constitutes a valid and legally binding obligation and it is enforceable in accordance with its terms except to the extent of discretions of courts regarding the availability of equitable remedies and laws affecting creditor's rights generally.
- (c) Unless Supplier has a specific entitlement to payment for a particular direction under the Contract, Supplier must comply with a direction of Council at Supplier's cost.
- (d) Supplier must ensure its employees, servants, officers and agents comply with Supplier's obligations under the Contract as if they are party to it.
- (e) If Supplier comprises two (2) or more persons, the obligations and liabilities of Supplier under the Contract binds those persons jointly and severally.
- (f) Nothing in the Contract will be construed or interpreted as creating or constituting a relationship of employer and employee or principal and agent, or that of partners, joint venturers or any other fiduciary relationship, between the parties. The relationship between the parties is one of principal and independent contractor.
- (g) Unless expressly stated otherwise, no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.

- (h) A right or remedy created by the Contract cannot be waived except in writing signed by the party entitled to that right.
- (i) Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (j) If any part of the Contract is or becomes illegal, invalid or unenforceable, the legality, validity or enforceability of the remainder of the Contract shall not be affected and shall be read as if that part had been severed.
- (k) No provision of the Contract or a right conferred by it can be varied except in writing signed by both parties.
- (l) To the extent permitted by law, Part 4 of the *Civil Liability Act 2002* (NSW) (and any equivalent statutory provision in any other state or territory) is excluded in relation to all and any rights, obligations or liabilities of either party under the Contract whether such rights, obligations or liabilities are sought to be enforced in contract, tort or otherwise.
- (m) The rights and remedies under the Contract are in addition to, and do not limit, any other rights of Council at law or in equity.
- (n) In the Contract:
  - (i) the words “including”, “includes” and “include” will be read as if followed by the words “without limitation”;
  - (ii) headings are for convenience only and do not affect the interpretation of the Contract; and
  - (iii) a reference to:
    - (A) a clause is a reference to a clause of the Conditions;
    - (B) legislation or a legislative provision includes any statutory modification, amendment or substitution of that legislation or legislative provision and any subordinate legislation issued under that legislation or legislative provision;
    - (C) a document is to that document as varied, novated, ratified or replaced from time to time; and
    - (D) “\$” or dollars is to Australian currency (AUD);
- (o) A provision of the Contract must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Contract or the inclusion of that provision in the Contract.
- (p) The Contract is governed by the laws of the State of New South Wales and the parties submit to the exclusive jurisdiction of the courts of that State and any courts competent to hear appeals from those courts.
- (q) The Contract will not in any way unlawfully restrict or otherwise unlawfully affect the unfettered discretion of Council to exercise any of its rights, functions or powers pursuant to any law, and no compensation shall be payable by Council to Supplier for any loss or damages suffered by Supplier arising from the valid exercise by Council of any such right, function or power.
- (r) Without limiting any other provision of the Contract relating to survival, any provision of the Contract which implies or contemplates performance or observance subsequent to any termination, expiration or completion of the Contract, and the representations, warranties, covenants and indemnities of or by the parties contained in the Contract, will survive the termination (howsoever arising), expiry or completion of the Contract and continue in full force and effect.