

Lake Macquarie City Council Standard Conditions of Purchase

DEFINITIONS

"Council" means Lake Macquarie City Council ABN 81 065 027 868.

"Council Policies" means any published Council Policies and Procedures to the extent relevant to the Goods and/or Services as updated from time to time (accessible using <https://www.lakemac.com.au/Our-Council/Council-policies>).

"Council Purchase Conditions" means these Lake Macquarie City Council Standard Conditions of Purchase as updated from time to time.

"Goods" means all goods, products or materials covered by the Purchase Order.

"Law" includes all statutes, regulations, by-laws, ordinances, rules, approvals, certificates, consents, orders and other delegated legislation and any rule of common law or equity from time to time.

"Modern Slavery" has the same meaning as defined in the *Modern Slavery Act 2018 (NSW)*.

"Purchase Order" means the Council's official Order and any referenced specification stated in it to which the Council Purchase Conditions apply.

"Services" means all services or works as described in the Purchase Order.

"Seller" means the legal entity to whom the Purchase Order is issued and "Seller" includes its servants, agents and subcontractors.

1. CONTRACT AND VARIATION

- (a) Subject to clause 1(b), the acceptance by the Seller of the Purchase Order shall constitute a binding contract between the Seller and the Council consisting of the terms of the Purchase Order, the Council Purchase Conditions and any applicable Council Policies ("the Contract").
- (b) Where the Seller and the Council are parties to an existing agreement for the purchase of the goods and/or services of the type referred to in the Purchase Order, the terms and conditions of that existing agreement will take precedence over the Contract to the extent of any inconsistency or conflict.
- (c) Unless the exception in clause 1(b) applies, no other document (including any Seller quote), representation or statement shall form part of the Contract unless the Council agrees in writing.
- (d) Any variation of the Contract shall be of no effect unless in writing and signed by both the Council and the Seller.

2. PRICE AND GOODS AND SERVICES TAX ("GST")

- (a) The Price includes, as appropriate, the cost of delivery free into store to the address nominated in the Purchase Order ("the Nominated Address") and insurance costs, duties, taxes (except GST) and packing costs and any other costs and expenses associated with manufacturing, delivering and supplying the Goods and/or Services.
- (b) Unless otherwise stated expressly all prices are exclusive of GST and the Council must reimburse the Seller for any GST payable in respect of any supply made under the Contract, PROVIDED THAT the Seller must first provide the Council with a Payment Claim (as per clause 6) which is a tax invoice for the supply. The Council may reject without payment any payment claim or invoice that is not a tax invoice.

3. DELIVERY

- (a) The Seller must deliver the Goods to and/or supply the Services at the Nominated Address (unless otherwise directed in writing by the Council).
- (b) The Seller shall be deemed not to have delivered the Goods and/or supplied the Services unless it obtains a receipt or signed delivery docket from an authorised agent or employee of the Council.

4. TIME

- (a) If a time for delivery of the Goods and/ or supply of the Services is stipulated in the Purchase Order, that time (subject to clause 4(c)) shall be of the essence of the Contract. If no such time is stipulated in the Purchase Order, the Seller will deliver the Goods and/or supply the Services with due diligence, expedition and without delay.
- (b) Immediately upon the Seller becoming aware of anything which may delay the delivery of the Goods and/or the supply of the Services (regardless of whether there is a time stipulation in the Purchase Order), it must notify the Council in writing and give reasons for the possible delay (including any causal factors outside the Seller's reasonable control) and give details of what reasonable steps it has taken or proposes to take to mitigate losses arising from the delay ("Delay Notice").
- (c) Once it has considered the Delay Notice, the Council (acting reasonably and promptly) may vary the time (whether stipulated in the Purchase Order or not) by notice to the Seller but under no circumstances is the Council liable to pay the Seller any additional costs it incurs arising from the delay (unless the Council is the cause of the delay or otherwise agrees to do so).
- (d) If the Goods are not delivered and/or if the Services are not supplied by the time referred to in clause 4(a) (or by the time as varied pursuant to clause 4(c)) the Council may, without prejudice to any other rights and remedies, rescind the Contract in whole or in part or source those Goods and/or Services from a third party, in which case, the Seller will be liable to pay the Council the difference between the price the Council paid the third party and the Price the Council would have paid the Seller if it had supplied the Goods and/or Services as required under the Purchase Order.
- (e) The Council shall not be liable to the Seller in respect of any cost, expense, loss or damage whatsoever incurred or suffered by the Seller as a direct or indirect result of the rescission of the Contract or the sourcing of the Goods and/or Services from a third party pursuant to clause 4(d).

5. ACCEPTANCE AND PASSING OF RISK AND PROPERTY

- (a) Risk in the Goods shall pass to the Council on acceptance of the Goods, which shall be deemed to be accepted by the Council on the 7th day after delivery if the Council has not advised the Seller before then that the Goods are not in conformity with the Contract.
- (b) Property in the Goods shall pass to the Council on delivery of the Goods to the Nominated Address or payment by the Council, whichever is earlier.

6. PAYMENT

- (a) The Seller shall be entitled to submit to the Council a claim for payment of the amount due to the Seller under the Contract ("Payment Claim") upon the complete delivery of the Goods and/or supply of the Services stipulated in the Contract.
- (b) The Payment Claim must be for the Price (plus any applicable GST) for the value of the Goods and/or Services supplied under the Contract.
- (c) A Payment Claim must be in the form of a tax invoice, reference the Purchase Order number and be supported by clear and accurate evidence of the amount due to the Seller and such other information as the Council shall reasonably require or as required by Law (such as a Subcontractor's Statement).
- (d) Without limiting the Council's rights under any other provision of the Contract, the Council may deduct from or set off against any moneys which may be or thereafter become payable by the Council to the Seller:
 - (i) any undisputed debt due from the Seller to the Council; and
 - (ii) any claim which the Council may have against the Seller under or by virtue of any provision of the Contract or otherwise at law or in equity.
- (e) If the Seller submits a claim for payment under the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ("SOPA"), then any Payment Certificate issued by the Council in response thereto is deemed to be a payment schedule served by the Council for the purposes of SOPA.
- (f) The Council must pay the Seller within 15 business days from a valid Payment Claim being received, unless otherwise agreed in writing or specified in a relevant Law, in which case, the payment terms of the agreement in writing or relevant Law will take precedence.
- (g) For the purposes of SOPA, the parties agree that the authorised nominating authority to whom any adjudication application may be made is the Resolution Institute ABN 69 008 651 232.
- (h) Any payment by the Council is made on account only and does not prevent Council from enforcing its rights and remedies under the Contract or otherwise at Law.

7. WARRANTY

- (a) The Seller warrants to the Council that:
 - (i) the Goods and/or Services correspond to the description in the Contract and conform to all specifications, drawings, samples and descriptions provided by the Council to the Seller;
 - (ii) the Goods and/or Services are fit and sufficient for the purpose specified by the Council or the purpose for which those Goods and/or Services are typically used for;
 - (iii) it will supply all tools, facilities, materials and other resources necessary to supply the Goods and/or perform the Services and it will ensure that all such resources are appropriate for supplying the Goods and/or performing the Services;
 - (iv) the Goods and/or Services are of the quality specified (or, if no quality is specified, the best merchantable quality);
 - (v) the Goods are new and free of all defects and will operate satisfactorily and reliably under all conditions to which those Goods and/or Services are typically subject to;
 - (vi) the Goods are free of all security interests, liens and encumbrances and the Seller has good title to them;
 - (vii) the Council is entitled to, and the Seller will transfer, the benefit of any manufacturer's warranties in respect of the Goods;
 - (viii) the Services will be performed in co-operation with other suppliers and contractors engaged by the Council where relevant and with the degree of professional skill, care, and diligence expected of a competent professional supplier experienced in carrying out the same services or services similar to the Services;
 - (ix) the supply of the Goods and/or Services by the Seller to the Council and the licence granted by the Seller pursuant to clause 11 does not infringe the intellectual property rights of any third party; and
 - (x) the Seller (and the Goods and/or Services supplied by it) shall strictly comply with all applicable Laws (including Modern Slavery and cybersecurity laws), relevant Australian Standards and Building Codes of Australia and all notices, directions, Council Policies and reasonable requirements of the Council from time to time.
- (b) All representations and warranties implied by Law relevant to the Goods and/or Services or their provision form part of the Contract and are not excluded, restricted, or modified by the application to the Contract of any provision of the *Competition and Consumer Act 2010* (Cth) or State Fair Trading Acts or their equivalents.

8. SAFETY AND MODERN SLAVERY

- (a) In supplying the Goods and/or Services, the Seller must comply with all applicable Law and codes of practices relating to the environment, work health and safety and all relevant Australian Standards.
- (b) The Seller must ensure that the Goods and/or Services and the way in which they are supplied does not put the health and safety of any person or the environment at risk.
- (c) The Seller must take reasonable steps to identify, assess and address risks of Modern Slavery practices in the operations and supply chains used in the provision of the Goods and/or Services. If at any time the Seller becomes aware of Modern Slavery practices in the operations and supply chains used in the supply of the Goods and/or Services or performance of the Contract, the Seller must as soon as reasonably practicable take all reasonable action to address or remove these practices, including where relevant by addressing any practices of other entities in its supply chains.
- (d) The Seller must promptly comply with all reasonable directions given by the Council or all notices and directions given by a government or statutory authority, concerning these matters of health and safety.
- (e) The Seller is in the same way responsible for the activities of all its subcontractors and suppliers.

9. MATERIALS SUPPLIED BY COUNCIL

- (a) The Council must provide to the Seller all designs, specifications, drawings, technical information, equipment and other materials specified in the Contract to enable the Seller to produce the Goods and/or supply the Services ("the Materials").
- (b) All Materials, remain the property of the Council.
- (c) The Seller must not use the Materials for any purpose except the supply of the Goods and/or Services required by the Contract.
- (d) To the extent permitted by Law, the Council shall have no liability whatsoever to the Seller in respect of or in connection with any failure by the Council to provide any Materials.

10. DESIGN AND SPECIFICATIONS

- (a) If the Council reviews design drawings, specifications, construction drawings or workshop drawings or any other documents prepared by or on behalf of the Seller, gives any approval, direction, or instruction to the Seller or provides information to the Seller, this shall not:
 - (i) relieve or reduce the Seller's sole responsibility for the supply of the Goods and/or performance of the Services in accordance with the Contract;
 - (ii) release the Seller from its obligations under clauses 7, 8 and 12; or
 - (iii) restrict the Council's rights and remedies under the Contract or constitute acceptance by the Council that the Seller has complied with its obligations under the Contract.
- (b) To the extent permitted by Law, the Council assumes no responsibility or duty of care whatsoever to the Seller, notwithstanding any such review, approval, direction, instruction or provision of information.

11. INTELLECTUAL PROPERTY ("IP")

- (a) **IP not created predominantly for the purpose of the Contract:** subject to clause 11(b), each party licenses to the other party such IP that it owns or is permitted to license whether coming into existence before or after the date of the Contract, limited to the extent necessary to enable the other party to supply, operate or use the Goods and/or the Services as the case may be.
- (b) **IP coming into existence after the date of the Contract and created predominantly for the purpose of it:** ownership vests in and will be the property of the Council and the Council licenses such IP that it owns or is permitted to license to the Seller limited to the extent necessary for the Seller to provide or supply the Goods and/or Services.
- (c) Unless otherwise agreed by the parties, and to the extent permitted by Law, the licence granted by a party under this clause 11 is a perpetual non-exclusive, non-transferable, worldwide, royalty-free licence.
- (d) Each party warrants to the other that it is entitled to grant the IP licenses under this clause and indemnifies the other against any costs or losses in connection with any breach of IP (including any third party IP) arising from or in connection with the supply, operation or use of the Goods and/or Services as the case may be, save to the extent caused by the other party.

12. GUARANTEE AND DEFECTS

- (a) The Seller guarantees the Goods and/or Services against any omissions or defects or other failures arising from faulty design, materials or workmanship, or any other such defects which render them unsuitable for the Council's specified requirements or the requirements such Goods and/or Services are typically used for ("Defects"), which occur at any time from the date of acceptance of the Goods and/or completion of the Services until the date 12 months after the date the Goods and/or Services are first put into use.
- (b) If the Seller is in breach of clause 12(a) the Seller must, at the option of the Council (acting reasonably):
 - (i) refund the Price provided the Council returns the Goods to the Seller;
 - (ii) repair, modify or replace at the Seller's expense and within the time reasonably requested by the Council, any of the Goods and/or Services that have Defects; and
 - (iii) supply again Services which in the reasonable opinion of the Council have Defects or are not supplied in accordance with the Contract; and
 - (iv) the Seller shall be liable for any resulting direct costs and expenses reasonably incurred by the Council or the Seller.
- (c) In the event that the Seller fails to comply with clauses 12(b)(ii) or 12(b)(iii), the Council may, at its option (acting reasonably), have the repair, modification or replacement of the Goods and/or resupply of the Services referred to in clause 12(b) undertaken by a third party or undertake the repair, modification, replacement or resupply itself, and all resulting direct costs and expenses shall be a debt due and payable by the Seller to the Council.

- (d) The Seller's obligations survive termination and expiry of the Contract and the Seller's compliance with this clause 12 does not prevent the Council from exercising its other rights and remedies under the Contract or at Law. All warranties given by the Seller are given separately and in addition to (and not instead of) the obligations of the Seller under the Contract, including this clause 12.

13. INSURANCE AND INDEMNITY

- (a) The Seller must, until acceptance of the Goods by the Council and/or completion of the performance of the Services, at its own cost, insure the Goods and any Materials provided by the Council to the Seller pursuant to clause 12 for any loss of or damage to the Goods and Materials.
- (b) The Seller must have and maintain a public and products liability insurance policy for at least \$20 million for any one occurrence.
- (c) The Seller must, at its own cost, obtain and maintain adequate insurance for all Goods and/or Services (and any personnel providing the Services) as required by Law and the Contract and sufficient to insure its obligations under the Contract.
- (d) To the extent permitted by Law, and subject to clauses 13(e), (f), (g) and (h), the Seller shall indemnify and keep indemnified the Council from and against all actions, claims, costs, expenses and damages suffered or incurred by the Council arising out of or in respect of:
- (i) loss of or damage to property of any kind of the Council, or damage of any kind suffered by the Council, or
 - (ii) personal injury or death or loss of or damage to any property,
- to the extent arising out of any act or omission or breach of Contract or breach of Law by the Seller in respect of the supply of the Goods and/or the Services.
- (e) The Seller's liability to indemnify the Council under this clause 13 will be reduced proportionately to the extent that:
- (i) a wrongful or negligent act or omission of the Council or its employees, agents or other contractors contributed to the claim or loss or damage; or
 - (ii) the Council fails to act reasonably to mitigate the liability, loss, damage, cost or expense.
- (f) The Seller's liability to the Council, under, arising out of or any way in connection with the Contract or the Goods and/or Services, whether in contract, tort (including negligence) or otherwise, in respect of one event or series of connected events is limited to two (2) times the total Price paid or payable by the Council for the Goods and/or Services under the Contract ("Limit of Liability").
- (g) Neither party shall be liable to the other for any consequential damages, including but not limited to, loss of profits, loss of use, incidental, indirect, exemplary, punitive, penal, multiple or other special damages incurred by the other party or for which either party may be liable to any third party.
- (h) However, this Limit of Liability does not apply to or limit or exclude in any way, any liability of the Seller:
- (i) arising out of or caused by:
 - (A) personal injury or death;
 - (B) loss of or any damage to any third party property;
 - (C) infringement of IP rights;
 - (D) breach of confidentiality or privacy;
 - (E) fraudulent, malicious or criminal conduct; or
 - (F) any intentional conduct, breach, act or omission by the Seller done or omitted to be done after having had regard to, or with conscious or reckless indifference to, the foreseeable harmful consequences arising from the conduct, breach, act or omission;
 - (ii) any amount recovered under an insurance policy required to be effected and maintained by the Seller under the Contract up to the limits required by the Contract;
 - (iii) any amount which would have been recovered under an insurance policy required to be effected and maintained by the Seller under the Contract but for:
 - (A) the Seller failing to take out and maintain those required insurances;
 - (B) the Seller vitiating or prejudicing any insurance policy;
 - (C) the Seller failing to make a claim under an insurance policy; or
 - (D) the Seller's Limit of Liability; or
 - (iv) to the extent the liability is one that the Seller, by Law, is not able to contract out of or limit; and
 - (v) any liability of the Seller in respect of the matters referred to in this clause 13(h)(i) – (iv) (inclusive) must not be taken into account in determining whether the Seller's Limit of Liability has been reached.
- (i) The parties agree that, to the extent permitted by Law, the operation of Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to all and any rights, obligations, and liabilities under the Contract whether such rights, obligations, or liabilities are sought to be enforced as a breach of contract or a claim in tort (including negligence) or otherwise at law or in equity.

14. CONFIDENTIALITY, PRIVACY, PUBLICITY AND GOVERNMENT INFORMATION (PUBLIC ACCESS) ACT 2009 (NSW) ("GIPA")

- (a) The Seller must: keep confidential the terms of the Contract and the Materials and shall only disclose them as required by Law (or with the written consent of the Council) and to those of its employees, servants or agents necessary to enable the Seller to perform the Contract;
- (b) A party must in relation to the Contract:
- (i) not disclose to a third party the other party's confidential information without the other party's prior written consent;
 - (ii) take all precautions necessary to maintain security, secrecy and confidentiality and prevent disclosure of the other party's confidential information;
 - (iii) not issue any press release or otherwise publish any statement or information concerning the subject matter of the Contract without the prior written consent of the other party; and
 - (iv) comply with all privacy Laws.
- (c) The Seller must ensure that in supplying the Goods and/or Services that it does not do anything, or omit to do anything, that damages or has the potential to, damage the reputation of and/or standing of the Council.
- (d) The Seller acknowledges and agrees that, notwithstanding any other provisions of the Contract, the Contract and its contents may be subject to disclosure by the Council pursuant to GIPA.
- (e) To the extent that section 121 of GIPA is relevant to the Goods and/or Services, the Seller agrees to provide the Council with immediate access to the following:
- (i) information that relates directly to the supply of the Goods and/or performance of the Services by the Seller;
 - (ii) information collected by the Seller from members of the public to whom it provides or offers to provide, the Goods and/or Services; and
 - (iii) information received by the Seller from the Council to enable it to provide the Goods and/or Services.
- (f) Where the prior written consent of a party is required under this clause such consent must not be unreasonably withheld.

15. TERM, BREACH, TERMINATION AND SUSPENSION

- (a) The Contract continues until the Goods have been supplied and/or the Services have been completed unless it is terminated earlier in accordance with the Contract.
- (b) A party may terminate the Contract in whole or in part by written notice to the other party:
- (i) if the other party is in breach of a material term of the Contract and fails to remedy the breach within 14 days of the receipt by it of a notice in writing from the party not in breach specifying the breach and requiring the party in breach to remedy it; or
 - (ii) to the extent permitted by Law, if the other party becomes bankrupt or makes an assignment of his or her estate for the benefit of his or her creditors or makes a composition or other arrangement with his or her creditors or if, being a company, the other party goes into liquidation whether voluntary or compulsory (except for the purposes of reconstruction) or has a receiver appointed over all or any of its assets or if any person or corporation goes into possession of or appoints an agent over all or any of the assets of the other party.

- (c) The Council may at any time for its own convenience terminate the Contract in whole or in part by giving the Seller 30 days' written notice provided that the Council must pay the Seller that part of the Price incurred and unpaid up to the date on which the termination takes effect ("the PDET"). To the extent permitted by Law, the PDET will be a limitation upon the Council's liability to the Seller arising out of, or in connection with, the termination of the Contract under clause 15(c), and the Seller may not make a claim against the Council arising out of or in any way connected with the termination of the Contract under this clause 15(c) other than for the PDET.
 - (d) Termination of the Contract pursuant to this clause shall be without prejudice to the rights of either party accruing before termination.
 - (e) Where the Contract is validly terminated by a party under clause 15(b), then subject to clause 13 the party in breach shall be liable to the other party for any direct loss suffered by the other party to the extent directly arising out of such termination or prior breach.
 - (f) Upon termination or expiry of the Contract, the Seller must make available to the Council the Materials and, subject to Law, all files, records, reports and information (including all electronic files) held by the Seller or its subcontractors in respect of the Goods and/or Services.
 - (g) From the date a party gives a termination notice to the other party under this clause until the effective date of termination of the Contract:
 - (i) the parties must continue to perform their obligations in accordance with the Contract; and
 - (ii) upon request by the Council, the Seller must provide all reasonable assistance to the Council to facilitate the transfer of the Goods and/or Services to the Council or to a third party nominated by the Council.
 - (h) If the Seller breaches a term of the Contract and the Council does not terminate the Contract pursuant to clause 15(b), the Council:
 - (i) shall not be bound to perform its obligations under the Contract until the breach is remedied by the Seller; and
 - (ii) may suspend the supply of the Goods and/or Services (or part thereof) by issuing a written notice to the Seller. The Seller must immediately comply with such notice and suspend the progress of the whole or part of the supply of the Goods and/or Services for such time as is specified in the notice, or if no time is stated, for such time as the Council reasonably directs. The Seller must recommence the supply of the Goods and/or Services in accordance with any further written notice issued by the Council. The Seller is not entitled to make any claim arising out of or in connection with a suspension under this clause 15(h) but may seek an extension of time for supply of the Goods and/or Services in order to comply with clause 4.
- 16. ASSIGNMENT AND CHANGE IN CONTROL**
- (a) The Seller must not assign, novate, sub-licence, sub-contract or transfer in whole or in part any of its interests or obligations under the Contract without the Council's prior written consent, which consent may be granted, withheld or granted subject to reasonable conditions.
 - (b) A Change of Control of the Seller (or any body corporate that Controls the Seller) will be taken to be an assignment of the rights of the Seller under the Contract and clause 16(a) will apply.
 - (c) In this clause 16(b), the expressions "Change of Control" and "Control" have the same meanings as set out in the *Corporations Act 2001* (Cth)...
- 17. SUB-CONTRACTING**
- (a) Where the Council consents to the Seller sub-contracting any work pursuant to the Contract, the Seller remains responsible for the whole of the work to be performed pursuant to the Contract or any obligation contained therein.
 - (b) A copy of each sub-order must be provided by the Seller to the Council immediately upon their issue.
 - (c) The Council reserves the right to inspect all sub-contracted work.
- 18. DISPUTE RESOLUTION**
- (a) If either party wishes to raise a dispute or difference in connection with the Contract ("Dispute"), it must promptly give the other party notice in writing ("Dispute Notice") and within 14 days, the other party must provide its written response to the Dispute Notice stating its position and thereafter:
 - (i) within 14 days of that response, the respective involved managers must meet in person or electronically at least once to try to resolve the dispute in good faith in a first meeting; and
 - (ii) failing a resolution within 14 days of that first meeting, within a further 14 days from that first meeting, the managing director of the Seller and a Director of the Council must meet in person to try to resolve the Dispute in good faith in a second meeting.
 - (b) If the Dispute is not resolved under clause 18(a), then before the commencement of any legal proceedings about the Dispute:
 - (i) where the amount in, or the value of, the Dispute, exceeds \$100,000.00 (ex GST) the Dispute must be referred to mediation; or
 - (ii) where the amount in, or the value of, the Dispute, is less than \$100,000.00 (ex GST), the parties agree to use reasonable endeavours to agree on and participate in an alternative dispute resolution procedure to resolve the Dispute.
 - (c) If there is a Dispute, the parties must continue to perform their obligations under the Contract.
 - (d) Nothing in this clause 18 prevents either party from seeking urgent interim or interlocutory relief in relation to the Dispute.
- 19. GENERAL**
- (a) If any provision or part of any provision of the Contract is unenforceable, such unenforceability shall not affect any other part of such provision or any other provision of the Contract.
 - (b) The Contract shall be governed by the law of New South Wales and the parties agree to submit to the jurisdiction of the courts of that State and any courts having appellate jurisdiction from them.
 - (c) Nothing in the Contract shall be construed as requiring the Council to do anything that would cause it to be in breach of any of its obligations at Law, and without limitation, nothing shall be construed as limiting or fettering in any way the Council's exercise of any statutory discretion or duty.
 - (d) A party may only waive a requirement or breach of the Contract in writing signed by it, and any such waiver is limited to the instance referred to (or if no instance is referred to in the waiver), to past breaches only.
 - (e) Nothing constitutes a joint venture, agency, partnership or other fiduciary relationship between the Council and the Seller.