



MOUNT BARKER
DISTRICT COUNCIL

GOODS AGREEMENT FOR THE SUPPLY OF INSERT

CONTRACT REF: 202X.XXX

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Schedule

Item 1 Council	Name: Mount Barker District Council Address: 6 Dutton Road, Mount Barker SA 5251 Postal Address: PO Box 54, Mount Barker SA 5251 ABN: 54 250 395 713 Email: council@mountbarker.sa.gov.au Phone: (08) 8391 7200
Item 2 Supplier	Name: Business Address: Registered Address: Postal Address: ABN: ACN: Email: Phone:
Item 3 Date of Commencement	
Item 4 Date for Completion	
Item 5 Insurance requirements	Public Liability Insurance Amount: \$20 million for any one occurrence Professional Indemnity Insurance Amount: \$ Product Liability Insurance Amount: \$ Property & Facilities Amount: \$ Contents Amount: \$ Vehicle, Plant & Equipment Insurance Amount: \$ Cyber Liability Insurance

	Amount: \$ Return to Work SA – Current Registration
Item 6 Warranty Period	Twelve (12) months commencing on the date on which the Goods are accepted by the Council
Item 7 Confidential Sections	Refer Annexure B – Price
Item 8 Council’s Representative	insert and any other person as may be advised by the Council in writing
Item 9 Supplier’s Representative	insert and any other person as may be advised by the Supplier in writing

EXECUTED as an agreement

By the Council

SIGNED by insert name and title under delegated authority in the presence of:	
Signature Date: ____/____/____	Signature of witness Name of witness (print) Date: ____/____/____

By the Supplier

If the Supplier is a company, the document must be executed as follows:

Executed by insert name pursuant to section 127 of the <i>Corporations Act 2001</i>	
Signature of Director Name of Director (print) Date: ____/____/____	Signature of Director/Company Secretary (Please delete as applicable) Name of Director/Company Secretary (print) Date: ____/____/____

OR

.....
Signature of Sole Director and Sole Company Secretary

.....
Name of Sole Director and Sole Company Secretary
(print)

Date: ____/____/____

OR

Signed for **insert company name** by an authorised representative pursuant to section 126 of the *Corporations Act 2001* in the presence of::

.....
Signature of witness

.....
Name of witness (print)

Date: ____/____/____

.....
Signature of authorised representative

.....
Name of authorised representative (print)

.....
Position of authorised representative (print)

Date: ____/____/____

If the Supplier is an individual, the document must be executed as follows:

Signed by **insert name** in the presence of:

.....
Signature of witness

.....
Supplier

..... Name of witness (print) Date: ____/____/____	Date: ____/____/____
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If the Supplier is a Discretionary Trust, the document must be executed as follows:

Executed by insert names of Trustees as Trustees for the insert names of Trust	
..... Signature of Trustee Name of Trustee (print)	 Signature of Trustee Name of Trustee (print)

If the Supplier is a partnership, the document must be executed as follows:

Partner 1:

Signed by insert name in the presence of:	
..... Signature of witness Name of witness (print)	 Signature of partner Date: ____/____/____

Partner 2:

Signed by insert name in the presence of:
--

Signature of witness Name of witness (print)	Signature of partner Date: ____/____/____
--	---

Parties

The council specified in Item 1 of the Schedule (**Council**)

and

The person specified in Item 2 of the Schedule (**Supplier**)

Background

- A. Pursuant to a request for insert tender OR quote, the Council sought tenders from suitably qualified parties for the supply of the Goods.
- B. The Supplier submitted a insert tender, quote, etc for the supply of the Goods, and the Council has accepted it.
- C. The Supplier agrees to supply the Goods on the terms in this Agreement.

Agreed Terms

1. Definitions and Interpretation

1.1 Definitions

In this agreement:

Agreement means this agreement and includes the Schedule and the Annexures.

Annexure means to an Annexure of this Agreement.

Business Day means a day that is not a Saturday, Sunday, or public holiday in the State of South Australia.

Confidential Information means any documentation or information of a confidential nature supplied by either of the parties to the other in connection with this Agreement and includes all scientific, technical, manufacturing, performance, sales, financial, commercial, contractual or marketing information possessed by each party, but specifically excludes any documentation or information which has been previously published or otherwise disclosed to the general public or is required to be disclosed by Law.

Confidential Sections means those clauses, Schedules and/or Annexures specified in Item 7 of the Schedule that are deemed to be confidential for the purposes of the FOI Act.

Council means the Council specified in Item 1 of the Schedule.

Council's Representative means the person specified in Item 8 of the Schedule.

CPI means the Consumer Price Index (All Groups) Adelaide figure published from time to time by the Australian Bureau of Statistics or, if no Consumer Price Index (All Groups) Adelaide figure is published at the relevant time by the “Australian Statistician” under the Census and Statistics Act 1905 (whether by public notice or by specific advice to the Council or the Contractor).

Delivery Docket means a document issued by the Supplier upon delivery of the Goods which records the Purchase Order or Contract details (including purchase order or contract number).

Date of Commencement means the date specified in Item 3 f the Schedule.

Date for Completion means the date specified in Item 4 of the Schedule, as adjusted from time to time in accordance with this Agreement.

Existing Conditions means the conditions as described in clause 2.2 of this Agreement, a summary of which is detailed in Annexure C.

FOI Act means *Freedom of Information Act 1991* (SA).

Force Majeure Event means an unforeseeable and unknown event occurring after the date of this Agreement beyond the reasonable control of the parties which precludes a party from performing on time an obligation under this Agreement. Such circumstances include:

- a) acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires, and any natural disaster; and
- b) acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution;
- c) a pandemic is declared by a Governmental Agency and measures are implemented by the Governmental Agency to address the pandemic; and/or
- d) a suspension or termination of services or works is necessitated by legislative requirement or is ordered by a Governmental Agency;

but does **not** include any event or circumstance which the Supplier ought to have reasonably foreseen from or as a result of the Existing Conditions.

Goods means the goods or materials specified in Annexure A.

Governmental Agency means any government or any government, semi-governmental, administrative, fiscal, or judicial body, commission, authority, tribunal, agency or entity including any self-regulatory organisation established under statute or any stock exchange.

Law means any statute, regulation, order, rule, subordinate legislation, or other document enforceable under any statute, regulation, order, rule, or subordinate legislation.

Notice means a notice, demand, consent, approval, or communication under this Agreement.

Recipient means a party who receives a supply pursuant to the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Price means the price for the supply of the Goods specified in Annexure B.

Purchase Order means a document issued by the Council setting out the types, quantities and agreed prices of the Goods required at a point in time under this Agreement, and identifiable by a unique purchase order number;

Schedule means the Schedule of this Agreement.

Special Conditions means the special conditions set out in Annexure D, if any.

Supplier means the person bound to supply the Goods as specified in Item 2 of the Schedule.

Supplier means a party who makes any supply under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Supplier's Representative means the person specified in Item 9 of the Schedule.

Term means the period starting on the Commencement Date and finishing on the Termination Date, subject to any extension or renewal.

Variation means any change to the supply of the Goods as set out under this Agreement or in any Purchase Order, including:

- a) any increase or decrease in the quantity of the Goods; and
- b) any changes to the character, specifications, quality, scope, and/or origin of the Goods.

Warranty Period means the period specified in Item 6 of the Schedule, commencing on the date on which the Goods are accepted by the Council.

1.2 Interpretation

In this Agreement, unless the context otherwise requires:

- 1.2.1 a reference to a party includes its executors, administrators, successors and permitted assigns;
- 1.2.2 words importing persons shall include individuals, partnerships, bodies corporate or unincorporated;
- 1.2.3 a reference to this Agreement includes any schedules and annexures to this Agreement;

- 1.2.4 an agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- 1.2.5 an agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- 1.2.6 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;
- 1.2.7 an expression defined in the *Corporations Act 2001* (Cth) has the meaning given by that Act at the date of this Agreement;
- 1.2.8 an expression defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) has the meaning given by that Act at the date of this Agreement.

2. Engagement of Supplier

2.1 General

- 2.1.1 The Council engages the Supplier who accepts the engagement for the Term to supply the Goods in accordance with this Agreement.
- 2.1.2 The parties acknowledge that nothing in this Agreement creates or infers a relationship between the parties of partnership, agency, or employer/employee.

2.2 Existing Conditions

- 2.2.1 The Supplier acknowledges and agrees that it enters into this Agreement with knowledge of the existence and impact of the COVID-19 pandemic in the State of South Australia, Australia and the world as at the date of this Agreement (**Existing Conditions**), and has had regard to those Existing Conditions in entering into this Agreement.
- 2.2.2 The Supplier warrants to the Council that it has not relied on any advice or statements by the Council regarding the Existing Conditions and has taken appropriate advice in respect of the Existing Conditions or chosen not to seek or receive such advice. The Council has relied on the Supplier's warranties in entering into this Agreement.

2.3 Publicity and Changes

- 2.3.1 The Supplier must not (without the prior written consent of the Council) advertise, promote, or publish in any form, the fact that the Supplier is providing the Goods to the Council.
- 2.3.2 The Supplier must immediately notify the Council in writing of:
 - 2.3.2.1 any change in the financial or technical capacity of the Supplier which a reasonable person would consider adversely impacts upon the Supplier's ability to provide the Goods to the Council; and/or

2.3.2.2 any change in the Supplier's ownership.

PLEASE NOTE - There are 3 options for Basis of Engagement Below. The first option is based on a one off purchase, the second is continuing for a set period of time and the third option is if Council wish to include Supplier on a panel continuing. Council to delete as applicable.

3. **Basis of Engagement – One Off**

- 3.1 The Supplier acknowledges that it is being engaged on a one-off basis to deliver the Goods to a specified location on a specified date.
- 3.2 The Council must either record in this Agreement or provide the Supplier with a Purchase Order specifying the location to which the Goods must be delivered and the date and time at which the Goods must be delivered to that Location.

4. **Basis of Engagement – Continuing**

- 4.1 The Supplier hereby irrevocably grants the Council with a standing offer during the Term to supply the Goods for the Price at the times requested by the Council.
- 4.2 The Council may place orders with the Supplier for the Goods at any time during the Term.
- 4.3 Each order by the Council constitutes an acceptance of the standing offer by the Supplier to supply the Goods and will constitute an agreement for the Supplier to supply the Goods to the Council in accordance with the Purchase Order and/or the terms and conditions of this Agreement.
- 4.4 Nothing in this Agreement gives rise to an obligation on the Council's part to purchase a minimum quantity of the Goods from the Supplier.
- 4.5 The arrangements contemplated by this Agreement are not an exclusive arrangement and the Council may, at its discretion, engage other suppliers to supply the Goods.

5. **Basis of Engagement – Panel**

5.1 **Panel Arrangement**

- 5.1.1 The Supplier acknowledges that the Council has established a panel of suppliers (**'the Panel'**) for the supply of the Goods.
- 5.1.2 The Council has agreed to include the Supplier in the Panel during the Term for the supply of the Goods and the Supplier has agreed to supply the Goods to the Council on the terms and conditions of this Agreement.
- 5.1.3 The Council may select any member of the Panel to supply the Goods. If selected by the Council, the Supplier shall supply the Goods upon the terms and conditions of this Agreement.
- 5.1.4 The Council may:
 - 5.1.4.1 request that all or any members of the Panel provide a quotation for the supply of the Goods, notwithstanding that pre-agreed rates may form part of this Agreement;

5.1.4.2 seek quotation from suppliers not on the Panel; or

5.1.4.3 appoint new suppliers as members of the Panel at any time.

5.1.5 If the Council engages the Supplier to supply the Goods and does not seek a quotation, the Goods shall be paid for at any pre-agreed rates forming part of this Agreement.

5.1.6 Notwithstanding any methodology of allocating work or ranking Panel members which has been specified in this Agreement, the Council may adjust the methodology or ranking as a consequence of the Supplier's performance or availability to supply the Goods.

5.1.7 The Council and the Supplier mutually acknowledge and agree that the inclusion of the Supplier on the Panel for the provision of the Goods does not guarantee that the Supplier will be engaged by the Council to provide the Goods to the Council during the Term.

5.2 **Standing Offer Arrangement**

5.2.1 The Supplier hereby irrevocably grants the Council with a standing offer during the Term to supply the Goods for the Price at the times requested by the Council.

5.2.2 The Council may place an order with the Supplier for the Goods at any time during the Term.

5.2.3 Each order by the Council constitutes an acceptance of the standing offer by the Supplier to supply the Goods and will constitute an agreement for the Supplier to supply the Goods to the Council in accordance with the Purchase Order and/or the terms and conditions of this Agreement.

5.2.4 Nothing in this Agreement gives rise to an obligation on the Council's part to purchase a minimum quantity of the Goods from the Supplier.

6. **Delivery**

6.1 The Supplier must:

6.1.1 supply the Goods to the Council in the sizes, quantities and types specified by the Council in any Purchase Order or this Agreement;

6.1.2 deliver the Goods to the location and at the time specified by the Council in any Purchase Order or this Agreement;

6.1.3 supply the Goods to the Council for the Price specified in the Purchase Order or this Agreement; and

6.1.4 comply with the reasonable requirements of the Council for the sale, supply and delivery of the Goods.

6.2 Upon delivery of the Goods to the specified location, the Supplier must provide a Delivery Docket to the Council.

- 6.3 The Supplier bears all risk for the Goods until the Goods are delivered to the location specified by the Council and accepted by the Council's representative counter signing the Delivery Docket.
- 6.4 No liability to pay for any Goods arises until the Goods are approved by the Council and delivery is accepted by the Council's Representative counter signing the Delivery Docket.
- 6.5 If the Council determines, acting reasonably, that the Goods do not meet the description of the Goods in this Agreement and/or the Purchase Order, the Council may return such Goods to the Supplier and the Supplier must reimburse the Council for:
 - 6.5.1 all transport and other costs incurred by the Council in returning any such Goods to the Supplier for replacement;
 - 6.5.2 all transport and other costs in the Supplier delivering any replacement Goods to the Council;
 - 6.5.3 any damage or loss caused during transport of any Goods under this clause, and
 - 6.5.4 all losses suffered and all costs incurred by the Council as a result (direct and indirect) of the replacement of the relevant Goods under this clause.
- 6.6 Times for the fulfilment of the Supplier's obligations are essential terms of this Agreement.
- 6.7 Title passes to the Council when the Goods are approved by the Council and delivery is accepted by the Council's Representative counter signing the Delivery Docket.

7. Invoicing and Payment

7.1 Payment of Price

- 7.1.1 The Council will pay to the Supplier the Price for the supply of the Goods.
- 7.1.2 The Price includes all freight and other charges connected with the Supplier delivering the Goods to the location nominated by the Council and otherwise complying with the Supplier's obligations under this Agreement.

7.2 Payment Terms

- 7.2.1 The Supplier will issue a tax invoice on or after the first day of a calendar month for Goods supplied in the previous month.
- 7.2.2 Payment of the Price will be due within thirty (30) days from the invoice date on receipt by Council of a correctly rendered tax invoice from the Supplier.
- 7.2.3 A tax invoice is correctly rendered when it:
 - 7.2.3.1 describes the Goods provided and the period to which the Goods relate;
 - 7.2.3.2 displays the terms of payment of the Price described in the invoice;
 - 7.2.3.3 displays the Council's contract reference number INSERT;
 - 7.2.3.4 is emailed to accounts@mountbarker.sa.gov.au; and

- 7.2.3.5 sets out in reasonable detail the manner and basis of the calculation of the Price, including the component of GST.

7.3 Effect of payment

A payment of all or part of the Fee is not an acceptance of the Goods or a waiver of a right or action of the Council.

7.4 Right of set off

The Council may deduct from amounts otherwise payable to the Supplier any amount due from the Supplier to the Council.

8. Warranty

- 8.1 The Supplier warrants that all Goods supplied to the Council:
- 8.1.1 will conform to the description and specifications of the Goods in this Agreement and under any relevant Purchase Order;
 - 8.1.2 will be of good merchantable quality and fit for the purpose for which they are sold;
 - 8.1.3 will be new (unless otherwise specified);
 - 8.1.4 will be free from all liens and encumbrances and the Supplier has good marketable title to the Goods;
 - 8.1.5 will be delivered at the location and by the time and date specified in any Purchase Order or this Agreement;
 - 8.1.6 be free from defects in design, material, and workmanship; and
 - 8.1.7 operate in accordance with their intended use and in accordance with any operating instructions or specifications for the Goods.
- 8.2 The Supplier must, for the Term of this Agreement, and at its cost, effect product liability insurance in respect of the Goods from a reputable insurance carrier, for at least AUD \$20,000,000.00 combined single limit for bodily injury and property damage.
- 8.3 If any of the Goods are defective or fail to operate in accordance with their intended use and/or in accordance with any operating instructions or specifications for the Goods within the Warranty Period, the Council may return the defective Goods to the Supplier and the Supplier must repair or replace the returned defective Goods at no cost to the Council.
- 8.4 The Supplier is responsible for:
- 8.4.1 all transport and other costs incurred by the Council in returning any defective Goods to the Supplier for repair or replacement;
 - 8.4.2 all transport and other costs in the Supplier delivering any repaired or replacement Goods to the Council;
 - 8.4.3 any damage or loss caused during transport of any Goods under this clause; and

8.4.4 all losses suffered and all costs incurred by the Council as a result (direct and indirect) of the defective Goods.

8.5 Any Goods repaired or replaced under this clause are subject to the warranty under this clause for the full Warranty Period.

8.6 The Supplier acknowledges that the Council has relied on the Supplier's warranties in entering into this Agreement.

9. **Variation and Extensions of Time**

9.1 **Variations**

9.1.1 **General**

No Variation invalidates this Agreement.

9.1.2 **No unauthorised variation**

9.1.2.1 The Supplier must not, and is not authorised to, make any Variation to the supply of the Goods as set out under this Agreement except:

- a) a Variation instructed by the Council; and/or
- b) a Variation requested by the Supplier, which has been approved by the Council in writing.

9.1.2.2 Variations by the Supplier arising from, or related or attributable to the Existing Conditions which were, or ought to have been, reasonably foreseen as at the date of receipt of a Purchase Order or this Agreement from the Council are not permitted.

9.1.3 **Execute Variations**

The Supplier must provide any Variation in the supply of the Goods instructed by the Council.

9.1.4 **Variations in Writing**

All Variations must be documented in writing and must be signed by both the Council's and the Supplier's Representatives.

9.1.5 **Adjustment of Price**

For the purpose of any adjustment to the Price for a Variation:

- 9.1.5.1 if practicable, the value of a Variation must be agreed by the Supplier and the Council before the Supplier commences to execute the Variation; or
- 9.1.5.2 if the value of the Variation is not agreed by the Supplier and the Council, the value must be determined by the Council by application of rates accepted by the Council; and

- 9.1.5.3 if the Council gives the Supplier a written instruction that a matter is so urgent that the Supplier should proceed with the Variation before it is valued, the Supplier may proceed with the Variation and the Council's Representative and the Supplier's Representative will jointly negotiate a reasonable value for the Variation.

A Variation must be valued as soon as practicable, and the Supplier must promptly and diligently supply to the Council all information relevant to the valuation.

9.2 **Extension of Time**

9.2.1 **Extension**

- 9.2.1.1 Subject always to clause 9.2.1.2 if the supply of the Goods is delayed by a cause beyond the control of the Supplier, the Supplier may, subject to clauses 9.2.2 and 9.2.3 request a fair and reasonable extension of the time for the Supply of the Goods.
- 9.2.1.2 Any request by the Supplier for an extension must be in writing and made within seven days after the commencement of the delay, and must state with particularity the cause of the delay, and include an estimate (if practicable) of the extent or likely extent of the delay in delivering the Goods.
- 9.2.1.3 For the avoidance of doubt, the Supplier is not entitled to an extension of time for any delays or disruptions arising from the Existing Conditions which were, or ought to have been, reasonably foreseen as at the date of receipt of a Purchase Order or this Agreement from the Council.

9.2.2 **Conditions precedent**

The Supplier is entitled to a time extension only if the Supplier took reasonable steps to minimise the delay in the supply of the Goods.

9.2.3 **Council's determination**

The Council must determine what (if any) fair and reasonable extension of time for the supply of the Goods should be allowed to the Supplier in respect of each request, and must give written notice of every such determination to the Supplier, and the date and time for the supply of the Goods must be extended accordingly.

9.2.4 **Documentation**

All extensions of time must be in writing, and must be signed by both the Council's Representative and a representative of the Supplier.

9.2.5 **No costs or damages**

The Supplier accepts the risk of all costs, losses and expenses incurred because of a delay in the supply of the Goods. The Supplier's sole remedy for such a delay is an extension of time approved by the Council under this clause. No costs or damages are payable by the Council in respect of such a delay.

10. **Statutory Requirements**

- 10.1 The Supplier must ensure that its supply and delivery of the Goods complies with all Laws applicable to the sale, supply and delivery of goods and materials.
- 10.2 Where required, the Supplier must, at its cost in all things, obtain all approvals and pay all fees incurred on the sale, supply and delivery of the Goods to the Council.

11. **Indemnity and Exclusion of Liability**

- 11.1 The Supplier must indemnify the Council and its employees, officers and contractors against all claims, demands, expenses, loss or damage whatsoever in respect of the supply of the Goods under this Agreement or any Purchase Order, including any claims, demands, expenses, loss or damage that arise as a result of loss of or damage to any property, or the death of or personal injury to any person, and any claim action or proceeding by a third party against the Council or its employees, officers and contractors caused or contributed to by the Supplier.
- 11.2 This indemnity is reduced by the extent to which the Council contributed to the event giving rise to the claim for indemnity.
- 11.3 The Supplier must supply the Goods at its own risk in all things and releases the Council and its employees, officers, members and contractors from all claims, actions, proceedings, costs, expenses, losses, suffering, and liabilities incurred by the Supplier or its employees, agents, subcontractors, third parties and customers which arise in relation to the supply of the Goods.

12. **Non Performance by Supplier**

If the Supplier breaches a provision of this Agreement and fails to remedy the breach within a reasonable time after receiving notice requiring it to do so, the Council may:

- 12.1 suspend any or all payment of the Price until the breach is remedied; and/or
- 12.2 remedy the breach itself whether by the use of the Council's employees or other suppliers and deduct the cost of remediation from any Price due to the Supplier; and/or
- 12.3 terminate this Agreement in accordance with clause 14.1 and/or
- 12.4 pursue any other legal remedies available to the Council.

13. **Force Majeure**

- 13.1 If a Force Majeure Event causes delay or failure by a party to perform its obligations under this Agreement:

- 13.1.1 neither party is liable for such delay or failure; and
- 13.1.2 all obligations of a party under this Agreement are suspended until the Force Majeure Event ceases to apply.
- 13.2 A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this Agreement must:
 - 13.2.1 notify the other party as soon as possible giving:
 - 13.2.1.1 reasonably full particulars of the Force Majeure Event;
 - 13.2.1.2 the date of commencement of the Force Majeure Event and an estimate of the time required to enable it to resume full performance of its obligations; and
 - 13.2.1.3 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
 - 13.2.2 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;
 - 13.2.3 resume performance as soon as possible after termination of the Force Majeure Event or after the Force Majeure Event abates to an extent which permits resumption of performance;
 - 13.2.4 notify the other party when the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and
 - 13.2.5 notify the other party when resumption of performance occurs.
- 13.3 If a delay or failure under this clause exceeds sixty (60) days, the Council may immediately terminate this Agreement by written notice to the Supplier (**Termination Date**).
- 13.4 In the event of the Council terminating this Agreement pursuant to clause 13.3:
 - 13.4.1 the Council will be liable to pay the Supplier any unpaid invoices already issued to the Council; and
 - 13.4.2 within twenty (20) Business Days of the Termination Date the Supplier must give the Council a final invoice for Goods supplied up to and including the Termination Date and not the subject of any previous invoice.
- 13.5 Without limiting the effect of clause 13.4, the Council will not be liable to compensate the Supplier for loss of potential profits or other consequential loss incurred by the Supplier arising from termination by the Council pursuant to clause 13.3.

14. Termination

14.1 Termination by Council

- 14.1.1 The Council may immediately terminate this Agreement by giving notice to the Supplier if the Supplier:

- 14.1.1.1 ceases to carry on business or becomes otherwise unable to perform its obligations under this Agreement; or
- 14.1.1.2 breaches a material or essential term of this Agreement and fails to remedy the breach within a reasonable time after receiving notice requiring it to do so; or
- 14.1.1.3 becomes an externally administered body corporate or an insolvent under administration; or
- 14.1.1.4 becomes insolvent or bankrupt,

and in such circumstances, the Council will be liable to the Supplier only in respect of the Price properly owing up to the date of termination in respect of the supply of the Goods (or part thereof) performed to that time. Without limiting the effect of this clause 14.1.1 the Council will not be liable to compensate the Supplier for loss of potential profits or other consequential loss incurred by the Supplier arising from termination by the Council pursuant to this clause.

14.2 **Termination by Supplier**

The Supplier may immediately terminate this Agreement if the Council breaches a material term of this Agreement and fails to remedy the breach within a reasonable time after receiving notice requiring it to do so.

14.3 **Accrued rights and remedies**

Termination of this Agreement under this clause does not affect any accrued rights or remedies of either party.

15. **Confidential Information and Freedom of Information**

- 15.1 Each party agrees that it will not use any Confidential Information of the other party or allow any Confidential Information of the other party to be used for any purpose, except for the purposes of and in the manner contemplated by this Agreement, and agrees that it will:

- 15.1.1 keep confidential;
- 15.1.2 take reasonable steps to ensure that the party's officers and employees do not disclose to a third party;
- 15.1.3 maintain proper and secure custody of; and
- 15.1.4 not use or reproduce in any form;

any Confidential Information belonging to the other party. Any departure from a party's obligations pursuant to this clause may only be with the written consent of the other party or as required by law or the terms of this Agreement.

- 15.2 The Supplier consents to any disclosures made as a result of the Council complying with its obligations under the FOI Act, subject to any legally required consultation.

- 15.3 Unauthorised disclosure of any Confidential Sections constitutes a breach of a party's obligations under this Agreement.

16. **Dispute Resolution**

16.1 **General**

- 16.1.1 A party must not commence arbitration or court proceedings (except for urgent equitable or injunctive relief) in respect of a dispute under this Agreement unless it first attempts to resolve the dispute by negotiation and mediation under this clause.
- 16.1.2 A party claiming that a dispute has arisen under this Agreement must give written notice to the other party specifying the nature and details of the dispute.
- 16.1.3 On receipt of that notice by the other party, the parties must negotiate in good faith to resolve the dispute.
- 16.1.4 If the parties are unable to resolve the dispute within ten (10) Business Days, they must promptly refer the dispute:
- 16.1.4.1 in the case of the Council to the Chief Executive Officer; and
 - 16.1.4.2 in the case of the Supplier to the Supplier's Representative.
- 16.1.5 Those persons must meet to resolve the dispute and must be authorised to resolve the dispute.
- 16.1.6 Where a dispute or difference remains, those disputes or differences between the Council and the Contractor must be referred to a mediator, agreed by the parties or in the absence of agreement appointed by the Chairperson for the time being of the South Australian Chapter of the Institute of Arbitrators and Mediators Australia.

16.2 **Mediation**

- 16.2.1 If those persons are unable to resolve the dispute within ten (10) Business Days of referral, a party may refer the dispute for mediation under the mediation rules of the Law Society of South Australia Inc to:
- 16.2.1.1 a mediator agreed by the parties; or
 - 16.2.1.2 if the parties are unable to agree a mediator within five (5) Business Days, a mediator nominated by the President of the Law Society or the President's nominee.
- 16.2.2 The role of a mediator is to assist in negotiating a resolution of the dispute. A mediator may not make a decision that is binding on a party unless that party has agreed in writing.
- 16.2.3 Any information or documents disclosed by a party under this clause:
- 16.2.3.1 must be kept confidential; and

16.2.3.2 may not be used except to attempt to resolve the dispute.

16.2.4 Each party must bear its own mediation costs. The parties must bear equally the costs of any mediator.

16.3 **Arbitration**

16.3.1 If the dispute is not resolved within ten (10) Business days of appointment of the mediator, a party may refer the dispute to:

16.3.1.1 an arbitrator agreed by the parties; or

16.3.1.2 if the parties are unable to agree an arbitrator within five business days, an arbitrator nominated by the Chairperson of the South Australian Chapter of The Institute of Arbitrators and Mediators Australia or the Chairperson's nominee.

16.3.2 A referral to arbitration is a submission to arbitration within the meaning of the *Commercial Arbitration Act 2011* (SA).

16.3.3 The party serving the notice of arbitration must lodge with the arbitrator a security deposit for the cost of the arbitration proceedings.

16.3.4 The arbitrator may determine the amount of costs, how costs are to be apportioned and by whom they must be paid.

16.4 **Performance**

If possible, each party must perform its obligations under this Agreement during negotiations, mediation, and arbitration proceedings.

17. **Subcontracting and Assigning**

17.1 The Supplier must not assign or subcontract this Agreement or any right or obligation under it without the prior written consent of the Council, which may be granted or withheld by the Council in its absolute discretion and subject to whatever conditions the Council deems necessary.

17.2 With any application for such consent, the Supplier must provide all information required by the Council, including evidence that the proposed assignee or subcontractor is capable of performing the Services to be assigned or subcontracted.

17.3 Unless otherwise agreed in writing by the Council, no such assignment or subcontract relieves the Supplier from any liability under this Agreement or at Law in respect of the performance or purported performance of this Agreement and the Supplier is responsible for the acts and omissions of any assignee or subcontractor or any assignee's or subcontractor's employees and agents as if they were the acts or omissions of the Supplier.

17.4 For the purpose of this clause, if the Supplier is a company, an assignment of this Agreement includes any change in the beneficial ownership of the share capital of the

Supplier, or the resignation, death or appointment of any director of the company, which alters the effective control of the Supplier.

18. **Miscellaneous**

18.1 **Special Conditions**

If there is an inconsistency between a Special Condition set out in Annexure D and the rest of this Agreement, the Special Conditions prevail to the extent of the inconsistency.

18.2 **Business Days**

Except for the commencement carrying out or completion of any works, if the day on which an act is to be done under this Agreement is not a Business Day, that act may be done on the next Business Day.

18.3 **Alteration**

This Agreement may be altered only in writing signed by each party.

18.4 **Entire agreement**

This Agreement:

18.4.1 constitutes the entire agreement between the parties about its subject matter;

18.4.2 supersedes any prior understanding, negotiations, agreements, condition, warranty, indemnity or representation about its subject matter.

18.5 **Waiver**

A waiver of a provision of or right under this Agreement must be in writing signed by the party giving the waiver and is effective only to the extent set out in the written waiver.

18.6 **Exercise of power**

18.6.1 The failure, delay, relaxation, or indulgence by a party in exercising a power or right under this Agreement is not a waiver of that power or right.

18.6.2 An exercise of a power or right under this Agreement does not preclude a further exercise of it or the exercise of another right or power.

18.7 **Survival**

Each indemnity, obligation of confidence and other term capable of taking effect after the expiration or termination of this Agreement, remains in force after the expiration or termination of this Agreement.

18.8 **Counterparts**

This Agreement may be executed in any number of counterparts each of which is taken to be an original. All of those counterparts taken together constitute one (1) instrument. An executed counterpart may be delivered by email.

18.9 **Conflict of Interest**

The Supplier must disclose in writing to the Council all actual and potential conflicts of interest that exist, arise, or may arise in the course of performing its obligations under this Agreement as soon as practical after it becomes aware of that conflict.

18.10 Severance

Should any term of this Agreement be found to be invalid or unenforceable then that provision will be severed and the remainder of this Agreement would continue in force, unless this would materially change the intended effect of this Agreement.

18.11 Further action

Each party must do all things necessary to give full effect to this Agreement and the transactions contemplated by this Agreement.

18.12 Governing law

18.12.1 This Agreement is governed by the law in South Australia.

18.12.2 The parties irrevocably submit to the exclusive jurisdiction of the courts in South Australia.

18.13 Ombudsman

The Supplier acknowledges that the *Ombudsman Act 1972* (SA) empowers the Ombudsman to investigate matters in the public interest. The Supplier must ensure compliance with all obligations arising under that or any other Act and all applicable Laws.

18.14 Work Health and Safety

In complying with its obligations pursuant to this Agreement, the Supplier agrees to:

18.14.1 comply with any environmental requirements of the Council communicated from time to time by the Council to the Supplier;

18.14.2 comply with all requirements of the *Work Health and Safety Act 2012* (SA) (**WHS Act**) and any regulations made under it;

18.14.3 comply with any reasonable requests of the Council in relation to the Supplier's performance of its obligations pursuant to this Agreement; and

18.14.4 promptly notify the Council of any accident, injury, property, or environmental damage of any potential breach of any law (reportable incident) that occurs during or as a result of this Agreement (including those involving the public). Within twenty-four (24) hours of a reportable incident, the Supplier must provide a report to the Council's Representative giving complete details, including the results of investigations into its cause and recommendations or strategies for prevention in the future, and

18.15 Return To Work SA

18.15.1 The Supplier must ensure that it is registered as an employer under the *Return to Work Act 2014* (**RTW Act**) and must pay all monthly levies due thereunder in respect of its employees engaged in and about the supply of Goods.

- 18.15.2 The Supplier must produce to the Council's Representative on the execution of this Agreement a current certificate of registration as an employer under the RTW Act.
- 18.15.3 The Supplier must ensure that all sub-contractors engaged by it have current certificates of registration as employers under the RTW Act and must produce the same to the Council's Representative upon request in writing by the Council's Representative.
- 18.15.4 The Supplier agrees to indemnify the Council in respect of any action, claim, demands, suit, or proceedings made by any employee of the Supplier or sub-contractor brought in connection with the RTW Act.
- 18.15.5 Insurance effected by the Supplier pursuant to this Clause is limited only by the amount stated in any statute and is in all other respects unlimited.
- 18.15.6 If the Supplier (or any sub-contractor) is unable to register as an employer under the RTW Act, then the Supplier must instead adequately insure against accident, personal injury and disability. The Supplier must maintain such insurance at all times during the currency of this Agreement (including the Warranty Period) and must produce evidence of:
 - 18.15.6.1 the existence and adequacy of such insurance; and
 - 18.15.6.2 the Supplier's (and/or any sub-Supplier's) inability to register as an employer under the RTW Act.

18.16 **ICAC**

The Supplier acknowledges and agrees that by entering into this Agreement with the Council the Supplier will be considered to be a public officer for the purposes of the *Independent Commissioner Against Corruption Act, 2012* (SA) (**ICAC Act**) and is obliged to comply with the ICAC Act and the Directions and Guidelines issued pursuant to the ICAC Act.

19. **Goods and Services Tax**

19.1 **Consideration does not include GST**

Unless specifically described as 'GST inclusive', any payment or consideration under this Agreement does not include GST.

19.2 **Gross up of consideration**

Where a supply by one party (**Supplier**) to another party (**Recipient**) under this Agreement is subject to GST (other than a supply specifically described as 'GST inclusive'):

- 19.2.1 the expressed consideration for that supply must be increased by, and the Recipient must pay to the Supplier, an amount equal to the GST payable by the Supplier in respect of that supply; and

19.2.2 the Recipient must pay that additional amount at the same time and in the same manner as the expressed consideration.

19.3 Reimbursements

If a payment to a party under this Agreement is a reimbursement or indemnification of an expense or other liability incurred or to be incurred by that party, then the amount of the payment must be reduced by the amount of any input tax credit to which that party is entitled for that expense or other liability, such reduction to be effected before any increase in accordance with the previous subclause.

19.4 Tax invoices

Notwithstanding any other provision of this Agreement, the Recipient need not make any payment for a taxable supply made by the Supplier under this Agreement until the Supplier has given the Recipient a tax invoice in respect of that taxable supply.

19.5 Adjustments

If an adjustment event has occurred in respect of a taxable supply made under this Agreement, any party that becomes aware of the occurrence of that adjustment event must notify each other party to that taxable supply as soon as practicable, and all of those parties agree to take whatever steps are necessary (including to issue an adjustment note), and to make whatever adjustments are required, to ensure that any GST or additional GST on that taxable supply, or any refund of GST (or part thereof), is paid no later than twenty-eight (28) days after the Supplier first becomes aware that the adjustment event has occurred.

20. Notices

20.1 A Notice must be:

- 20.1.1 in writing, in English and signed by a person authorised by the sender; and
- 20.1.2 hand delivered or sent by pre-paid post or electronic communication to the recipient's address specified in the Schedule, as varied by any Notice given by the recipient to the sender.

20.2 A Notice is deemed to be received:

- 20.2.1 if hand delivered, on delivery;
- 20.2.2 if sent by prepaid mail, two Business Days after posting (or seven Business Days after posting if posting to or from a place outside Australia); or
- 20.2.3 if sent by electronic communication, at the time deemed to be the time of receipt under the *Electronic Transactions Act 2000* (SA) if the notice was being given under a law of this jurisdiction.

20.3 However, if the Notice is deemed to be received on a day that is not a Business Day or after 5:00pm, the Notice is deemed to be received at 9:00am on the next Business Day.

20.4 If two or more people comprise a party, Notice to one is effective Notice to all.

21. **Costs**

Each party must pay its own costs of preparing this Agreement and any document required by it.

Annexure A Goods

Annexure B Price

Annexure C Existing Conditions

Emergency Management Directions were made pursuant to Section 25 of the Emergency Act 2004 and declared on 22 March 2020. These Emergency Management Directions are applicable for the duration of this Agreement.

On 24 May 2022 the Major Emergency Directions were lifted, and amendments made to the South Australian Public Health Act 2011 to enable public health measures to be maintained to limit the spread of COVID-19.

Despite the lifting of the Major Emergency Declaration, Emergency Management Directions continue to be in force under Section 90C of the South Australian Public Health Act.

In order to comply with the requirements of this Agreement, please ensure that you are up to date with the relevant directions – refer to the Government of South Australia website (see following link) for directions and updates to these Emergency Directions:

www.legislation.sa.gov.au/legislation/CV19

Annexure D Special Conditions

END OF DOCUMENT