

PURCHASE ORDER IT SOFTWARE CONDITIONS

1 FORMATION OF CONTRACT

The Principal has issued a Purchase Order for the supply of the Software and the Services (if any). The Purchase Order creates a contract between the Supplier and the Principal on the terms referred to in the definition of the word "Contract" in clause 2.

If the Purchase Order refers only to the supply of Software, references to "Services" shall be disregarded and vice versa. For the avoidance of doubt, a Purchase Order may refer to the supply of both Software and Services.

2 DEFINITIONS

In the Contract, the following terms shall, if not inconsistent with the context, have the meanings indicated:

"Acceptance Tests" means tests (if any) necessary to demonstrate that the Software conforms with the Specifications, as specified in the Purchase Order;

"Certificate of Acceptance" means a certificate issued in respect of the Software under clause 5.5;

"Conflict of Interest" means any circumstance, condition or thing which may adversely affect the Supplier's ability to perform the Services efficiently, effectively and in accordance with the highest standards of probity, integrity and honesty, including, without limitation, any interest of a Relevant Party;

"Contract" means the Contract evidenced by the Purchase Order IT Software Conditions, the Purchase Order and any other documents to which reference is made in the Purchase Order as forming part of the Contract;

"Defect" means any inability or failure of any Software to operate, function or perform in accordance with the Specifications;

"Documentation" means operating manuals, user instructions, technical literature, online help procedures and support documentation which will enable the Principal and its personnel to understand the structure, function, application and operation of any Software and includes operating manuals and user instructions.

"GST" means the goods and services tax within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

"Intellectual Property Rights" means all intellectual property rights including, without limitation, copyright (including moral rights), trade marks, designs, patents, semiconductor or circuit layout rights existing in Australia or elsewhere, whether or not such rights are registered or capable of being registered;

"Licensed Software" means Software specified in the Purchase Order, which is to be licensed by the Supplier to the Principal under this Contract;

"Moral Rights" has the meaning given to that expression in the *Copyright Act 1968* (Cth),

"OH&S" means occupational health and safety;

"Personal Information" means information or an opinion (including information or an opinion forming part of a database) whether true or not, and whether recorded in a material form or

not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion;

“**Principal**” means the Greater Geelong City Council;

“**Purchase Order**” means the purchase order referred to in clause 1 which initiates the Contract;

“**Relevant Party**” means:

- 2.1 the Supplier and the Supplier’s employees, agents or sub-contractors;
- 2.2 an associate of the Supplier or the Supplier’s employees, agents or sub-contractors;
- 2.3 a company in which the Supplier or the Supplier’s employees, agents or sub-contractors are involved, whether as an officer, shareholder, employee or otherwise; or
- 2.4 any other person with whom the Supplier or Supplier’s employees, agents or sub-contractors has or have a financial or business association, whether directly or indirectly;

“**Services**” means the services (including Software Support Services) to be performed by the Supplier, as indicated in the Purchase Order and includes any matters reasonably inferred from the Contract or trade usage;

“**Software**” means Licensed Software and Third Party Software, as the context requires;

“**Software Support Services**” means the maintenance and support services (if any) to be performed by the Supplier in relation to the Software, as specified in the Purchase Order;

“**Supplier**” means the party nominated as such in the Purchase Order;

“**Third Party Software**” means Software specified in the Purchase Order which is to be licensed by a person other than the Supplier to the Principal under this Contract;

“**Warranty Period**” means the period stated in the Purchase Order and commencing on the date on which a Certificate of Acceptance is issued in respect the Software.

3 INTERPRETATION

3.1 In the Contract, unless inconsistent with the context:

- 3.1.1 headings and underlinings are for convenience only and do not affect interpretation;
- 3.1.2 words expressed in the singular include the plural and vice versa;
- 3.1.3 where a term is assigned a particular meaning, other grammatical forms of that term have a corresponding meaning;
- 3.1.4 a reference to a person includes a reference to a firm, corporation or other corporate body and vice versa;
- 3.1.5 a reference to a party in a document includes that party and its legal representatives, successors, permitted assigns, receivers, receivers and managers, liquidators and administrators;

- 3.1.6 a reference to any Act includes all regulations, proclamations, planning schemes, local laws and by-laws made under that Act,
- 3.1.7 a reference to any Act, regulation, planning scheme, proclamation, local law or by-law includes all Acts, regulations, planning schemes, proclamations, local laws and by-laws amending, consolidating or replacing same;
- 3.1.8 a reference to any document includes a reference to that document as amended, rectified or replaced from time to time and to any document so amending, rectifying or replacing the document; and
- 3.1.9 a reference to the Supplier includes, where appropriate, the Supplier's:
 - (a) employees; and
 - (b) sub-contractors and the employees of such sub-contractors.
- 3.2 The Contract constitutes the whole understanding between the parties and embodies all terms and conditions under which the Services are to be performed by the Supplier. All previous negotiations and understandings between the parties on this subject matter shall cease to have effect from the date of the Contract.
- 3.3 The law of the State of Victoria governs the Contract and any legal proceedings under the Contract.
- 3.4 If the Supplier consists of two or more parties, the Contract shall bind each of them severally and jointly.
- 3.5 If a provision, or part of a provision, in this Contract is held to be illegal, invalid, void, voidable or unenforceable, that provision, or part of a provision, must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable. If it is not possible to read down a provision, or part of a provision, as required in this clause, that provision, or part of a provision, is severable without affecting the validity or enforceability of the remainder of the Contract.

4 SOFTWARE

- 4.1 The Supplier must supply the Software by any date stated in the Purchase Order (or, if no date is stated, within a reasonable time) in accordance with the Specifications and this Contract.
- 4.2 Title to the Software, free of encumbrances and all other adverse interests, will pass to the Principal upon the Software coming into the possession of the Principal or its employees or agents. The Supplier warrants that it is able to provide title to the Software to the Principal in accordance with this clause.
- 4.3 The Supplier must install and configure the Software and provide training to the Principal's personnel at the times and to the extent specified in the Purchase Order. Without limiting its obligations under this Contract, the Supplier must ensure that the Software is supplied, delivered, installed, fully integrated, configured and properly interfaced with the Principal's System
- 4.4 The Supplier must complete its own commissioning tests of all Software, and on the successful completion of those tests, must give the Principal written notice that such tests have been successfully completed.

- 4.5 The Principal will provide the Supplier with all reasonable assistance required by the Supplier to facilitate the Supplier's delivery and installation of the Software.

5 ACCEPTANCE TESTS

- 5.1 The Principal will conduct the Acceptance Tests on the Software which is susceptible to Acceptance Testing.
- 5.2 The Principal will conduct the Acceptance Tests on the Software referred to in clause 5.1 promptly after the Supplier notifies the Principal in writing that such Software is ready for Acceptance Testing.
- 5.3 The Supplier must assist the Principal, where requested by the Principal in writing to the Supplier, to conduct the Acceptance Tests. Such assistance as is provided by the Supplier to the Principal shall be at the Supplier's cost and expense, unless otherwise agreed in writing by the parties.
- 5.4 The Principal must notify the Supplier whether or not the Software has passed the Acceptance Tests provided that the Principal will not unreasonably withhold or delay notification to the Supplier that the Software in question has passed the Acceptance Tests.
- 5.5 If the Software has passed the Acceptance Tests, the Principal will notify the Supplier by promptly issuing the Supplier with Certificate of Acceptance for the Software.
- 5.6 The Software will not be considered to have been accepted by the Principal until the Principal has issued a Certificate of Acceptance for the Software concerned, regardless of whether or not the Principal has used the item in a production environment.
- 5.7 The Software is deemed to have been accepted by the Principal on the date shown on the relevant Certificate of Acceptance.
- 5.8 If in the reasonable opinion of the Principal, the Software fails an Acceptance Test, then:
- 5.8.1 the Principal will promptly issue to the Supplier a written notification of such failure specifying the aspects of the Software which has failed the Acceptance Test;
 - 5.8.2 subject to the remainder of this clause 5.8, the Principal will request the Supplier to make such corrections and modifications that are necessary to enable the Software to pass the Acceptance Test and be ready for re-testing at an agreed time, but no later than five Business Days from the date of the written notification of failure, unless otherwise agreed in writing between the parties; and
 - 5.8.3 the Supplier must, at its own expense, comply with the Principal's request and must notify the Principal when such corrections and modifications have been made to the Software. Upon notification by the Supplier, the Principal will then commence re-testing of the Software in accordance with the Acceptance Test procedures as soon as reasonably practicable.

Notwithstanding the foregoing, subject to the Principal's consideration of any explanation provided by the Supplier, the Principal may at its discretion:

- 5.8.4 waive the requirement for the Acceptance Test in question to be satisfactorily completed;
- 5.8.5 conditionally accept the Software, subject to the Supplier agreeing to deliver a workaround or to otherwise rectify any deficiency within a timeframe agreed by the parties; or
- 5.8.6 subject to the Principal having provided the Supplier with at least one opportunity to conduct further tests pursuant to clause 5.8.3, reject the Software concerned, whereupon the Supplier will be in default of this Contract. Without limiting any other remedy which may be available in these circumstances, the Principal may require the removal of the rejected Software.

6 LICENSED SOFTWARE

- 6.1 The Supplier grants to the Principal a perpetual, irrevocable, non-exclusive licence of the Intellectual Property Rights in the Licensed Software:
 - 6.1.1 to copy the Licensed Software into machine-readable form to the extent permitted under the *Copyright Act 1968* (Cth);
 - 6.1.2 to use the Licensed Software on the Principal's System;
 - 6.1.3 to use, reproduce, revise, adapt and modify the Documentation supplied by the Supplier with the Licensed Software; and
 - 6.1.4 to make such number of copies of the Licensed Software as is specified in the Purchase Order.

7 THIRD PARTY SOFTWARE

Where any Software is Third Party Software, the Supplier must procure from the third party licensor direct to the Principal a non-exclusive, non-transferrable licence to use such Third Party Software to meet the Principal's requirements.

8 SOFTWARE SUPPORT SERVICES

- 8.1 To the extent specified in the Purchase Order the Supplier must provide the Principal with the Software Support Services in respect of the Software.
- 8.2 The Software Support Services will commence on the date specified in the Purchase Order and will be renewable as specified in Purchase Order.
- 8.3 For the avoidance of doubt, the term of the Software Support Services will not commence until the expiry of the relevant Warranty Period for the Software unless specified to the contrary in Purchase Order.
- 8.4 Unless specified to the contrary in Purchase Order, the Software Support Services must include:
 - 8.4.1 ensuring, by responding to the Principal's notification of defects, that the Software remains in conformity with the Specifications;
 - 8.4.2 ensuring the provision of a help desk service (if any) as specified in Purchase Order; and

- 8.4.3 ensuring the correction of Documentation so that such Documentation is at all times complete, accurate and up to date.
- 8.5 Unless specified to the contrary in Purchase Order, the Software Support Services do not include services involving:
 - 8.5.1 correction of defects caused by:
 - (a) operation of the Software in a manner which breaches the Principal's obligations under this Contract;
 - (b) failure by the Principal to operate the Software in accordance with stipulations which have been made known in writing by the Supplier to the Principal provided that stipulations are not inconsistent with the Supplier's obligations under this Contract;
 - (c) use by the Principal of the Software in an information technology environment other than that provided for in the Specifications; or
 - (d) failure by the Principal to use the Software in conformity with the Documentation;
 - 8.5.2 correction of errors or defects caused by the reproduction or adaptation of the Software by the Principal pursuant to section 47E or section 47F of the *Copyright Act 1968* (Cth);
 - 8.5.3 equipment maintenance; or
 - 8.5.4 any other service expressly excluded in Purchase Order.

9 SERVICES GENERALLY

- 9.1 The Supplier must provide the Services:
 - 9.1.1 by any date stated in the Purchase Order or, if no date is stated, within a reasonable time;
 - 9.1.2 in a diligent manner;
 - 9.1.3 in conformity with all applicable standards issued by Standards Australia and the International Organization for Standardisation;
 - 9.1.4 in accordance with the principles of quality assurance;
 - 9.1.5 in accordance with the highest professional standards;
 - 9.1.6 with a level of care, skill, knowledge and judgement in accordance with best industry practice;
 - 9.1.7 in a manner which meets and is fit for the Principal's intended purpose (including, without limitation, ensuring that any document produced as part of the Services is fit for the Principal's purposes); and
 - 9.1.8 in accordance with the Contract.
- 9.2 The Supplier will remain responsible for the performance of Services notwithstanding the acceptance or review of the Services, or any element of the Services, by the Principal or any member of the Principal's staff.

- 9.3 If the Purchase Order names the persons who are to perform the Services, the Supplier must ensure that the Services are performed by and only by the named persons.
- 9.4 The Supplier must obey and must ensure that its employees, sub-contractors and agents obey any Acts, regulations, local laws and by-laws in any way applicable to the performance of the Services or the Contract.

10 DOCUMENTATION

The Supplier must ensure that the Documentation is:

- 10.1 of a high standard in terms of presentation, accuracy and scope;
- 10.2 the most current, accurate and up-to-date versions available at the date of this Contract; and
- 10.3 published in English with all key terms, words and symbols adequately defined or explained.

11 WARRANTIES

- 11.1 The Supplier warrants and represents to the Principal that:
 - 11.1.1 the Software will perform and function in accordance with the Specifications;
 - 11.1.2 the function and performance of the Principal's System will not be materially and adversely affected to the point of unacceptable performance following the installation and integration of any Software;
 - 11.1.3 the use of the Software by the Principal in accordance with this Contract will not infringe the Intellectual Property Rights of any third party; and
 - 11.1.4 no virus will be introduced into the Principal's System as a result of the supply by the Supplier of any Software which contains a virus or as a result of any willful or negligent act or omission by the Supplier in providing a Service.
- 11.2 Without limiting any other right of the Principal, the Supplier will promptly rectify any Defect in any Software at no charge to the Principal if the Supplier becomes aware of the Defect during the Warranty Period.
- 11.3 This assignment does not in any way relieve the Supplier of the obligation to comply with warranties and representations offered directly by the Supplier to the Principal under this Contract.

12 INTELLECTUAL PROPERTY RIGHTS INDEMNITY

- 12.1 The Supplier must indemnify, keep indemnified, and hold harmless the Principal (including its personnel) against any loss or liability (including indirect losses, consequential losses, and all legal costs on a full indemnity basis) that the Principal incurs as a result of a claim made by a third party against the Principal in which it is alleged that any Software or Service (including the Principal's use of that Software or Service) infringes the Intellectual Property Rights or Moral Rights of a third party.

- 12.2 If a claim of infringement of Intellectual Property Rights or Moral Rights is made or threatened by a third party, the Principal will allow the Supplier, at the Supplier's expense, to either:
- 12.2.1 obtain for the Principal the right to continued use of the Software or Service; or
 - 12.2.2 replace or modify the Software or Service so that the alleged infringement ceases so long as the Software or Service continues to provide the Principal with equivalent functionality and performance as required in the Specifications.
- 12.3 This clause 12 survives the termination or expiry of this Contract.

13 CONFLICTS OF INTEREST

- 13.1 The Supplier warrants that it is unaware at the date of the Contract of any Conflict of Interest existing or likely to arise during the performance of its obligations under the Contract.
- 13.2 The Supplier must:
- 13.2.1 not enter into any contract or arrangement, or do any other thing, which may give rise to a Conflict of Interest with respect to its obligations under the Contract; and
 - 13.2.2 use its best endeavours to ensure that no Relevant Party enters into any contract or arrangement, or does any other thing, which may give rise to a Conflict of Interest with respect to the Supplier's obligations under the Contract.
- 13.3 The Supplier must immediately make a full disclosure in writing to the Principal of the existence, nature and extent of any actual or potential Conflict of Interest with respect to the Supplier's obligations under the Contract.

14 CONFIDENTIALITY

The Supplier must not and must ensure that its employees, sub-contractors and agents do not disclose any information or documents obtained in the course of performing the Services to any third party without the prior written consent of the Principal.

15 PERSONAL INFORMATION

- 15.1 The Supplier agrees with respect to any information held or obtained by the Supplier under or in connection with the Contract:
- 15.1.1 to use Personal Information only for the purposes of fulfilling its obligations under the Contract;
 - 15.1.2 to comply at all times with the *Privacy Act 1988* (Cth) and the *Information Privacy Act 2000* (Vic) and all other legislation in force at any time while the Contract is operative relating to the privacy of Personal Information;
 - 15.1.3 at the time of collecting Personal Information, to obtain all necessary consents and authorisations from the persons to whom that Personal Information relates to enable any use of the Personal Information necessary for the performance of the Services; and

15.1.4 to take all reasonable measures to ensure that Personal Information is protected against loss and unauthorised access, use, modification or disclosure.

15.2 The Supplier indemnifies the Principal in respect of any loss, liability or expense suffered or incurred by the Principal arising out of or in connection with a breach of the obligations of the Supplier under this clause, or any misuse of Personal Information by the Supplier or any of its employees, sub-contractors or agents, or any disclosure by the Supplier or any of its employees, sub-contractors or agents in breach of an obligation of confidence, whether arising under the *Privacy Act 1988* (Cth), the *Information Privacy Act 2000* (Vic) or otherwise.

16 FINANCIAL PROVISIONS

16.1 If the Supplier complies with its obligations under the Contract, the Principal must, unless different terms of payment are specified in the Purchase Order, make the payment or payments specified in the Purchase Order within 30 days of the beginning of the month following its receipt of a valid tax invoice for the amount payable. The Principal will not make payment on any tax invoice, unless it specifies the Purchase Order number issued by the Principal. Unless otherwise specified in the Purchase Order, the Supplier must not forward a tax invoice to the Principal until all of the Software and Services have been supplied.

16.2 If a payment under clause 16.1 is calculated on a basis which is described as exclusive of GST, the payment must be increased by the applicable amount of GST (“**GST Amount**”). The GST Amount must be calculated by multiplying the amount upon which GST is payable by the prevailing rate of GST. The Supplier must provide to the Principal a valid tax invoice prior to the time of, and as a condition of, payment of any GST Amount.

16.3 All payments to the Supplier will be made by way of electronic funds transfer. The Supplier must, prior to commencing the supply of the Software and the Services, provide details of the Supplier’s BSB and bank account to enable payments to be made by this means.

17 DEFAULTS AND TERMINATION

17.1 If the Supplier defaults in the performance or observance of any obligation it has under the Contract, the Principal may terminate the Contract without prior notice to the Supplier. If the Principal terminates the Contract under clause 17.1, the Principal shall not be liable to make any payments to the Supplier with respect to the termination of the Contract, the supply of Software, or the performance of Services.

17.2 The Principal may terminate the Contract at any time by written notice to the Contractor. If the Principal terminates the Contract under clause 17.2, the Principal must make reasonable payment to the Contractor for the supply of Software and the performance of any Services until the date of the termination of the Contract.

18 SUB-CONTRACTING AND ASSIGNMENT

The Supplier must not sub-contract the whole or any portion of its obligations under the Contract or assign any of its rights under the Contract, except with the prior written consent of the Principal. Except in so far as any consent given by the Principal under clause 18 expressly provides otherwise, no sub-contractor or assignee will have any rights under the Contract against the Principal or be entitled to receive any payments under the Contract from the Principal.

19 INSURANCES

- 19.1 The Supplier must, at all times while performing the Services, be the holder of:
- 19.1.1 a current public liability policy of insurance in the name of the Supplier providing coverage for an amount per event of at least \$10,000,000;
 - 19.1.2 a current professional indemnity policy of insurance in the name of the Supplier providing coverage for an amount per event of at least \$1,000,000; and
 - 19.1.3 a WorkCover policy of insurance with respect to all of its employees.
- 19.2 The Supplier must:
- 19.2.1 ensure that any sub-contractor to the Supplier effects insurances in the terms stated in clauses 19.1.1, 19.1.2 and 19.1.3; and
 - 19.2.2 provide the Principal with certificates of currency in respect of the insurances referred to in clauses 19.1.1, 19.1.2 and 19.1.3 within two (2) days after a written request being made by the Principal.

20 INDEMNITY

The Supplier must indemnify, keep indemnified and hold harmless the Principal, and its Councillors and staff, from and against all actions, claims, losses, damages, penalties, demands or costs (including, without limitation, all indirect losses, consequential losses and legal costs on a full indemnity basis) consequent upon, occasioned by, or arising from any negligent act or omission, breach of statute, breach of intellectual property rights or breach of the Contract in the performance or purported performance of the Supplier's obligations under the Contract. The Supplier's obligation to indemnify the Principal under clause 20 shall not apply to the extent that any liability is caused by any negligent act or omission of the Principal.

21 OCCUPATIONAL HEALTH AND SAFETY

The Principal is obliged to provide and maintain, so far as is practicable, a working environment for its employees and members of the public that is safe and without risk to health.

The Supplier must itself, and must ensure that any sub-contractors of the Supplier, at all times identify and take all necessary precautions for the health and safety of all persons, including the Supplier's employees and sub-contractors, staff of the Principal and members of the public, who may be affected by the performance of the Services.

The Supplier must immediately comply with any and all directions by the Principal relating to OH&S.

The Supplier must -

21.1 comply with; and

21.2 ensure that its employees, sub-contractors and agents comply with -

any Acts, regulations, local laws, codes of practice and Australian Standards which are in any way applicable to OH&S and the performance of the Services.

If the Quotation Form for the Contract required the Supplier to submit details of its OH&S system, the Supplier must prepare an OH&S management plan (including a safe work method statement) for the performance of the Services and submit it to the Principal for approval. The Contractor must not commence the performance of the Services until the OH&S management plan is approved, in writing, by the Principal.

INCLUSIONS FOR PURCHASE ORDER FOR IT SOFTWARE CONTRACTS

- 22 Description of all Licensed Software (owned by Supplier and licensed direct to Principal).
- 23 Description of all Third Party Software (owned by third party and licensed by third party to Principal via Supplier).
- 24 Are acceptance tests required? If so, specify the Software which is subject to acceptance tests and the nature of the tests.
- 25 Delivery date and any other key dates for installation/configuration.
- 26 Any Software Support Services which are to be provided either during or post-Warranty Period, the nature of those Services and the fee for the Services, and the period of the Services (eg annually subject to renewal). Under the standard conditions, Software Support Services will include helpdesk, remedying of defects and correction of documentation. Specify any exceptions or additional inclusions. For defect remedy, specify service levels. For helpdesk, specify hours of availability and response times.
- 27 Specifications - technical or descriptive specifications of functional, operational performance or other characteristics of the Software.
- 28 Warranty Period (which applies post-acceptance by Council).
- 29 Training to be provided.
- 30 Any other specific services to be provided, and the date upon which those services are to be provided.