

Purchase Order Terms and Conditions – WA, NT, SA, NSW, QLD

BGC Contracting

Date – As per Purchase Order

1. Definitions

BGC means the BGC entity named in the Purchaser Order, and its authorised agents, employees, heirs and successors.

Building Code means the *Code for the Tendering and Performance of Building Work 2016* (as in force and varied from time to time) and as applicable to "building work" as defined in the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth).

Consequential Loss means any indirect or consequential loss or damage arising from a breach of contract, in tort (including negligence), in law, in equity or under statute, including without limitation; loss of use, loss of profit, loss of production, loss of business, loss of opportunity, loss of chance, loss of goodwill, loss of business reputation, loss of access to markets or market share.

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

Delivery Address means the address described as the address to 'Ship To' in the Purchase Order.

Delivery Date means the delivery date specified on the Purchase Order.

Goods means the goods, if any, described on the Purchase Order in the Item Description.

"GST", "GST law" and other terms used in clause 15 have the meanings given to them by the *A New Tax System* (Goods and Services Tax) Act 1999 (as amended from time to time).

Law means:

- (a) Commonwealth, State and local government legislation including regulations, bylaws, orders, awards and proclamations;
- (b) common law and equity;
- (c) Authority requirements and consents, certificates, licences, permits and approvals (including conditions in respect of those consents, certificates, licences, permits and approvals) applicable in connection with the Purchase Order and these terms and conditions, including but not limited to applicable codes of practice and supporting guidelines, employment, industrial relations and workplace relations legislation (including but not limited to the *Fair Work Act 2009*), work health and safety laws and applicable obligations under the *Migration Act 1958* (Cth) and the *Privacy Act 1988* (Cth) and any subordinate legislation; and
- (d) guidelines of Authorities with which the Vendor is legally required to comply.

Purchase Order means the purchase order for Goods and/or Services issued by BGC to the Vendor from time to time containing, amongst other things, a description of the Goods and/or Services.

Price means the price set out in the Purchase Order which is exclusive of GST, but is inclusive of all other costs and charges.

Services means the services, if any, described on the Purchase Order in the Item Description.

SOPA means the security of payment legislation (as amended from time to time) applicable to 'construction work' being undertaken in the State in which the Goods or Services were supplied or performed:

- (a) *Building and Construction Industry Payments Act 2004* (Qld) and *Queensland Building and Construction Commission Act 1991* (QLD);
- (b) *Building and Construction Industry Security of Payment Act 1999* (NSW);
- (c) *Building and Construction Industry Security of Payment Act 2009* (SA);
- (d) *Construction Contracts (Security of Payments) Act 2004* (NT); or
- (e) *Construction Contracts Act 2004* (WA).

Vendor means the party named in the box 'Vendor's name and address' in the Purchase Order.

Vendor Personnel means the Vendor's employees, agents, suppliers or subcontractors.

Warranty Period means the period of 12 months commencing on the date of delivery of the Goods and/or 12 months from the date on which the Services are performed.

2. Supply of Goods or Services

- 2.1. In consideration of payment of the Price by BGC, the Vendor must supply to BGC the Goods and/or perform the Services in accordance with the Purchase Order.
- 2.2. To the extent the Vendor's terms and conditions are supplied with the Goods or Services (including as printed on consignment notes or other documents), those terms and conditions will be of no legal effect and will not constitute part of this Purchase Order (even if any of representative of BGC signs those terms and conditions or annexes the terms and conditions to this Purchase Order).
- 2.3. The parties' relationship is one of principal and independent contractor, not employer and employee, principal and agent or partnership and no contractual relations will arise between any of the Vendor's employees, agents or subcontractors and BGC as a result of the Vendor's and BGC's relationship, and the Vendor does not have the right or authority to act on behalf of or bind BGC unless the Vendor has been expressly authorised by BGC in writing.

3. Delivery

- 3.1. The Vendor must deliver the Goods to the Delivery Address by the Delivery Date.

4. Time for Performance

- 4.1. The Vendor must supply the Goods and/or Services in accordance with the terms of this Purchase Order by the Delivery Date. If the Vendor does not supply the Goods and/or Services by the Delivery Date, BGC, in addition to all other rights and remedies available to BGC, may set off against the Price any additional costs reasonably incurred by BGC (with the exception of those costs excluded under clause 12) as a consequence of the Vendor's failure to supply the Goods and/or Services by the Delivery Date.

5. Title and Risk

- 5.1. Title in the Goods passes to BGC upon the earlier of payment of the Price or delivery of the Goods to the Delivery Address.
- 5.2. Risk in the Goods passes to BGC when the Goods are delivered to the Delivery Address.
- 5.3. If BGC pays any deposit or other part payment of the Price prior to delivery of the Goods to BGC, then the Vendor charges the Goods (and any materials purchased for incorporation into the Goods) with the obligations owed or which may be owed by the Vendor to BGC under or in respect of this Purchase Order, including any obligation to repay any sums paid by BGC in the event of non-delivery of the Goods.
- 5.4. The Vendor shall not part with possession of the Goods, except by delivery to or at the direction of BGC.
- 5.5. The Vendor consents to BGC registering its interest in the Goods on the Personal Property Securities Register. The Vendor shall sign all documents and provide all information and assistance required to effect that registration. The Vendor waives the right to receive a verification statement in relation to any such registration.

6. Price

- 6.1. BGC must pay the Vendor the Price for the Goods and/or Services.
- 6.2. The Price is inclusive of all costs incurred by the Vendor in the supply of the Goods and/or performance of the Services including all charges for taxes, packing, insurance and delivery of the Goods and the cost of any items used or supplied in the performance of the Services.
- 6.3. The Price is inclusive of all taxes and duties, except GST.
- 6.4. Upon supply of the Goods or performance of the Services in accordance with a Purchase Order, the Vendor will submit a claim for payment in the form of a tax invoice.
- 6.5. BGC will pay any undisputed portion of the tax invoice within 45 calendar days from invoice date month unless the Goods or Services is 'construction work' as that term or a similar term is defined in respective State security of payment legislation ("**SOPA**"). With respect to Goods or Services subject to SOPA, payment terms are as follows:
 - (a) WA – payment to be made within 42 days after payment is claimed;
 - (b) NT – payment to be made within 28 days after payment is claimed;

- (c) SA – payment to be made within 15 business days after payment is claimed;
- (d) NSW – payment to be made within 30 business days after payment is claimed;
- (e) QLD – payment to be made within 15 business days after payment is claimed.

6.6. Payment shall not constitute an acceptance by BGC that the Services or Goods are not Defective and shall not in any way effect BGC's rights under the Purchase Order including but not limited to those rights set out in clauses 7 and 9.

7. Quality

- 7.1. The Goods and/or Services must match the description (if any) referred to in the Purchase Order.
- 7.2. If the Vendor gave BGC a sample of the Goods or a demonstration of the Services, the Goods and/or Services must be of the same nature and quality as the sample or demonstration given.
- 7.3. The Goods and/or Services must be fit for the purpose for which Goods and/or Services of the same kind are commonly supplied or bought and for any other purpose BGC specifies.
- 7.4. The Goods must be of merchantable quality, unencumbered and, unless otherwise specified in the Purchase Order, must be new.
- 7.5. All Services provided by the Vendor must be undertaken by persons who are appropriately licensed, qualified and/or trained to provide those Services.
- 7.6. If the Goods are found to be Defective or otherwise do not comply with this clause 7, the Vendor must replace the Goods at the Vendor's cost.
- 7.7. If the Goods are Defective or otherwise do not comply with this clause 7, BGC may hold the Goods for the Vendor at the Vendor's risk. The Goods will be returned at the Vendor's cost.
- 7.8. If the Services are Defective or otherwise do not comply with this clause 7, the Vendor must, if requested by BGC, re-perform the Services at the Vendor's cost.

8. Warranties

- 8.1. The Vendor warrants that:
 - (a) it will provide the Goods and/or Services in a safe manner free from risks to health and safety including (without limitation) in compliance with all safety Laws in the performance of the Services;
 - (b) the Vendor and all Vendor Personnel have the appropriate level of skill, training and competence to perform the Services safely and to a reasonable standard of workmanship expected in the profession or industry of the Vendor and the Vendor Personnel;
 - (c) the Vendor and all Vendor Personnel will comply will all relevant Laws, and policies and procedures of BGC, in the performance of the Services and/or supply of Goods;
 - (d) the Vendor, and all Vendor Personnel, will act consistently with the Building Code in respect of the performance of the Services and the supply of Goods;
 - (e) there is no prohibition, exclusion sanction, restriction or other obligation which would preclude, prevent or hinder the Vendor or the Vendor Personnel from providing the Goods and/or Services in accordance with these Terms, including in respect of the Building Code;
 - (f) it will take all steps needed to ensure that BGC is not subject to any claim or finding that the Vendor and/or any Vendor Personnel are deemed to be employees of BGC;
 - (g) information, documentation and certification provided to BGC are accurate, valid and in good order;
 - (h) the Vendor will not engage in any action that could conflict with BGC's rights or with the Vendor's obligations under these terms and conditions; and
 - (i) the Vendor is aware that BGC is relying on these warranties.

9. Warranty Period

9.1. If, during the Warranty Period, any of the Goods or Services are found to be Defective, and BGC notifies the Vendor accordingly, the Vendor must as soon as practicable:

- (a) repair or replace the Defective Goods; or
- (b) re-perform or make good the Defective Services.

9.2. If the Vendor fails to rectify the Defective Goods or Services, BGC may:

- (a) return the Defective Goods to the Vendor at the Vendor's cost;
- (b) reject the Defective Services;
- (c) replace, repair or make good the Defective Goods or procure a third party to do so; or
- (d) re-perform or make good the Defective Services or procure a third party to do so,

and the Vendor shall reimburse BGC for the reasonable costs incurred by BGC in repairing, replacing, re-performing or making good (as the case may be) any Defective Goods or Services.

9.3. The Vendor must assign the benefits of any warranties provided by manufacturers of the Goods or materials and other components which are used in the performance of this Purchase Order where BGC will ultimately take ownership of those Goods, materials or components.

10. Indemnities

10.1. The Vendor must indemnify BGC and agrees to hold BGC harmless from all claims for:

- (a) injury to or death of any person;
- (b) damage to or destruction of any property belonging to any person,

arising out of or in connection with the supply of Goods or Services, except to the extent that BGC caused or contributed to such injury, death, damage or destruction.

11. Insurance

11.1. The Vendor must obtain and maintain the following insurances:

- (a) if the Vendor is supplying Goods, materials, plant and equipment insurance, including all constructional plant and equipment, in relation to the Goods to be supplied for not less than full replacement value;
- (b) if the Vendor is supplying Goods, transit (all risk) insurance covering transit, loading and unloading of the Goods for not less than full replacement value;
- (c) Workers compensation and employer's liability insurance, covering all claims and liabilities in respect of any statutory or common law liability for the death, injury or illness of or to any person employed by (or deemed to be employed by), the Vendor;
- (d) Public and products liability insurance for an amount not less than \$5,000,000 for any one occurrence (and in the annual aggregate in respect of products liability insurance); and
- (e) any other insurance which is required by law for the time being in force in the State of Western Australia.

11.2. All insurance policies to be obtained by the Subcontractor under this Subcontract must be with an insurer authorised by the Australian Prudential Regulation Authority, with a financial security rating of A- or better by Standard & Poors, or the equivalent rating with another recognised rating agency.

11.3. The Vendor shall provide evidence, to BGC's satisfaction, that it has obtained the insurances that it is obliged to obtain pursuant to these Purchase Order Terms and Conditions.

11.4. Each party must produce evidence to the other party's satisfaction that the insurances required under these Purchase Order Terms and Conditions have been obtained and are being properly maintained.

12. Consequential Loss

12.1. Despite any other provision in these Purchase Order Terms and Conditions, neither party is liable for any Consequential Loss suffered by the other party.

13. Jurisdiction

- 13.1. These Purchase Order Terms and Conditions shall be governed by and construed with reference to the laws of the State or Territory in which the Goods and/or Services are provided.
- 13.2. The parties submit to the non-exclusive jurisdiction of the Courts of that State or Territory.

14. Dispute Resolution

- 14.1. If a dispute or difference arises between BGC and the Vendor in respect of any fact, act, matter or thing arising out of or in any way connected with the Purchase Order and one party requires the dispute or difference to be resolved, then that party shall promptly give the other party a written notice giving details of the dispute.
- 14.2. Within 14 days of a party receiving a notice referred to in clause 14.1, BGC and the Vendor and/or their delegates must meet and attempt to resolve the dispute in good faith.
- 14.3. Any party may, but need not, appoint a delegate/representative of their choice for the purposes of the procedures in this clause.
- 14.4. If, within 14 days of the meeting referred to in clause 14.2, the dispute is still not resolved, then either party may proceed to litigation.
- 14.5. This clause does not prevent a party from electing to follow a process in the applicable SOPA in relation to a dispute about payments in the event that mediation is unsuccessful.

15. Cancellation, Breach and Termination

- 15.1. BGC may for its convenience and in its sole and absolute discretion, cancel all or any portion of a Purchase Order upon 14 days written notice to the Vendor. In the event of cancellation, BGC will be liable for:
- (a) Goods delivered or Services provided before the date of cancellation, the amount which would have been payable if the Purchase Order had not been cancelled;
 - (b) the Vendor's reasonable actual demobilisation costs (not including any amount for overheads or profit);
 - (c) the reasonable costs of goods or materials reasonably ordered by the Vendor for the Goods, provided that the value of the goods or materials is not included in clause 14.1(a) and the title in the goods or materials will vest in BGC on payment; and
 - (d) the costs reasonably incurred by the Vendor in preparing for the supply of Services or in part-performing the Services, provided that the value of those preparatory or part-performed Services is not included in clause 15.1(a).
- 15.2. If the one party commits a breach of the Purchase Order ("**Defaulting Party**") then without limiting any other rights of the other party ("**Affected Party**") upon breach or repudiation by the Defaulting Party, the Affected Party may by notice in writing serve a notice entitled 'Default Notice' on the Defaulting Party. The Default Notice shall:
- (a) state that it is a notice under this clause;
 - (b) specify the breach upon which it is based; and
 - (c) if the default is capable of rectification, specify the time (which must be reasonable in the circumstances) within which the default must be rectified.
- 15.3. If the Defaulting Party does not remedy a breach to the Affected Party's reasonable satisfaction within the time prescribed in a Default Notice, the Affected Party may:
- (a) in the case of substantial breach terminate the Purchase Order immediately by written notice to the Defaulting Party;
 - (b) in all other cases, carry out or engage others to carry out the obligation on the Defaulting Party's behalf and any costs incurred shall be a debt due by the Defaulting Party to the Affected Party; or
 - (c) take such alternative action as it sees fit.
- 15.4. The parties' respective rights and remedies under clause 15 are without prejudice to any other rights and remedies they may have under the Purchase Order or at law.

16. Goods and Services Tax (GST)

- 16.1.** Unless otherwise stated, the Price or any other amounts payable by BGC to the Vendor, is exclusive of GST.
- 16.2.** If a Supply under this agreement is subject to GST, BGC will pay to the Vendor an additional amount equal to the amount of the Price multiplied by the prevailing GST rate.
- 16.3.** The additional amount under clause 16.2 is payable at the same time as the amount payable for the Supply is to be paid. However, the GST need not be paid until the Vendor provides a Tax Invoice to BGC.
- 16.4.** If the amount of GST payable in accordance with clause 16.3 is found to differ from the amount paid in relation to a Supply then:
- (a) If the amount of GST paid is more than is required under the GST law the Vendor shall refund the excess amount to BGC;
 - (b) If the amount of GST paid is less than is required under the GST law, BGC shall pay the Vendor the difference.
- 16.5.** For the purposes of calculating further variations under clause 16.4, any additional amount referred to in clause 16.2 is taken to be amended by the amount of any earlier variation made under clause 16.4.
- 16.6.** If either BGC or the Vendor is entitled to be reimbursed or indemnified under these Purchase Order Terms and Conditions, the amount to be reimbursed or indemnified by either party is to be the GST exclusive amount. For the avoidance of doubt, the amount of any reimbursement does not include any amount attributable to GST for which either BGC or the Vendor is entitled to an Input Tax Credit.