

Purchase Order General Conditions (Services)

1 Conditions

- (a) The supply of any and all Services by the Supplier to Ports Victoria is governed by:
- the relevant Purchase Order; and
 - these Conditions (which are deemed to be incorporated into each and every Purchase Order),
- (collectively, the **Agreement**).
- (b) If there is any inconsistency or conflict between a Purchase Order and these Conditions, the inconsistency or conflict must be resolved by applying the following order of precedence:
- any terms set out in the Purchase Order; and
 - the terms set out in these Conditions.
- (c) Terms contained in any quotes, invoices or other documentation provided by or on behalf of the Supplier or otherwise exchanged between the parties shall not form part of the agreement between the parties with respect to the supply of the Services nor be binding on Ports Victoria unless any such document expressly provides that it overrides these Conditions and/or the relevant Purchase Order (as the case may be) by name and is signed by authorised representatives of Ports Victoria and the Supplier.
- (d) Unless otherwise agreed in writing between the parties, the Supplier acknowledges and agrees that:
- the Supplier is not the exclusive provider of the Services and Ports Victoria may (in its absolute discretion) acquire services the same as or similar to the Services from any other person or entity; and
 - Ports Victoria gives no representations or warranties that it will (nor is it obligated to) engage the Supplier to provide a minimum volume of Services.

2 Acceptance of Purchase Orders

Without limiting the ways in which a Purchase Order may be accepted, the Supplier will be deemed to have accepted a Purchase Order if the Supplier:

- does not reject the Purchase Order in writing to Ports Victoria within ten (10) days of receipt of the Purchase Order; or
- after receipt of the Purchase Order, performs any part of the Purchase Order.

3 Provision of Services

The Supplier must (and must ensure that the Supplier's Personnel) provide the Services to Ports Victoria in accordance with the Agreement and must at all times:

- complete the Services by the Completion Date and/or any other dates for delivery specified in the Purchase Order;
- have, and ensure that all Personnel supplying the Services or otherwise performing any of the Supplier's obligations under or in connection with the Agreement have, suitable qualifications, accreditations, Authorisations, knowledge, skills, experience and expertise to supply the Services and/or perform the obligations in accordance with the Agreement;
- provide the Services in a proper, timely and efficient manner using that standard of care, skill, diligence, prudence and foresight that would reasonably be expected from a prudent, expert and experienced provider of services that are similar to the Services;
- ensure the highest quality of work and the delivery of the Services with the utmost efficiency;
- act in good faith and in the best interests of Ports Victoria;
- ensure that the Services are provided to the reasonable satisfaction of Ports Victoria; and
- provide any and all equipment necessary for the performance of the Services and ensure that such equipment complies with Ports Victoria's reasonable specifications from time to time, is of acceptable quality, is appropriately operated and maintained, is safe and complies with all applicable Laws.

Time is of the essence in relation to the provision of the Services under the Agreement.

4 Price for the Services

The Rates and/or Fees applicable to the Services are set out in the relevant Purchase Order and are fixed and other than expressly set out in this Agreement are inclusive of all costs and expenses incurred by the Supplier in connection with supplying the Services to Ports Victoria in accordance with the Agreement. Additional expenses may only be charged by the Supplier to Ports Victoria in accordance with the Purchase Order or with the prior written consent of Ports Victoria.

5 Cancellation

Ports Victoria may cancel the Services at any time by giving written notice to the Supplier if Ports Victoria determines that such cancellation is reasonably necessary, including as a result of change in government policy or a restructure. The Supplier must, on receipt of a written notice from Ports Victoria under this clause, immediately cease all work and take appropriate action to mitigate any loss or prevent further costs being incurred with respect to the Services. Ports Victoria must pay all reasonable amounts due in accordance with **clause 4** for all work performed by the Supplier up until cancellation as well as an amount reflecting the reasonable costs incurred by the Supplier as a consequence of the cancellation (which for the avoidance of doubt will not include any loss of prospective profits).

6 Invoicing and Payment

- The Supplier must submit to Ports Victoria a tax invoice in respect of the Services once the Services are completed, or at such other time or times as agreed in writing by the parties (including as specified on the Purchase Order). A tax invoice submitted for payment must contain the information necessary to be a tax invoice for the purposes of the GST Act together with such other information as Ports Victoria may reasonably require and be sent to the address specified in the Purchase Order.
- Subject to the Supplier's compliance with its obligations under the Agreement, Ports Victoria will pay the invoiced amount by the end of the calendar month following the calendar month within which an accurate invoice was received. However, if Ports Victoria disputes the invoiced amount it must pay the undisputed amount (if any) and notify the Supplier of the amount Ports Victoria reasonably believes is due for payment. Any dispute amount will be dealt with in accordance with the dispute resolution process outlined in **clause 18**.
- Payment of an invoice is not to be taken as evidence that the Services have been supplied in accordance with the Agreement but must be taken only as payment on account.
- Ports Victoria will, on demand by the Supplier, pay simple interest on a daily basis on any Overdue Amount, at the rate for the time being fixed under the *Penalty Interest Rates Act 1983 (Vic)* as amended or replaced from time to time.

7 Failure to perform

- Without limiting any other available right or remedy of Ports Victoria (whether under the Agreement or otherwise), if the Supplier fails to provide any of the Services in accordance with the Agreement (**Defective Services**), Ports Victoria will not be required to pay for the Defective Services (until, subject to the remainder of this **clause 7(a)**, they are provided in accordance with the Agreement) and Ports Victoria may at Ports Victoria's option:
 - require the Supplier to and the Supplier must:
 - refund to Ports Victoria any payments made with respect to the Defective Services; or

- at no cost to Ports Victoria, make good or re-perform the Defective Services within the time specified by Ports Victoria (which must be reasonable having regard to the nature of the Services).

- Where Ports Victoria requires the Supplier to make good the Defective Services and the Supplier fails to do so to the reasonable satisfaction of Ports Victoria within the time specified Ports Victoria to make good, Ports Victoria may either have the Services remedied or re-performed by a third party or do so itself. In either case, the Supplier must pay the reasonable costs incurred by Ports Victoria in doing so.

8 Warranties

The Supplier represents and warrants to Ports Victoria and it is a condition of the Agreement that:

- (Agreement)** the Services will be supplied in accordance with, and the Supplier will and will procure that its Personnel will, comply with, the Agreement (including without limitation **clause 3** of these Conditions);
- (Purpose)** where Ports Victoria has, either expressly or by implication, made known to the Supplier any particular purpose for which the Services are required, the Services will be performed in such a way as to achieve that result and the Services will also be fit for the purpose for which services of the same kind are commonly supplied;
- (Conflict)** the Supplier and its Personnel do not hold any office or possess any property, are not engaged in any business or activity and do not have any obligations whereby duties or interests are or might be created in conflict with or might appear to be created in conflict with its obligations under the Agreement; and
- (IP)** the supply of the Services and any equipment, documents, materials or things in connection with the Services (**Ancillary Items**), Ports Victoria's subsequent use of the Services and/or any Ancillary Items and the performance of the Supplier's obligations under or in connection with the Agreement will not infringe the rights of any third party (including without limitation any Intellectual Property Rights).

9 Liability

The Supplier must indemnify and keep indemnified Ports Victoria and each of its Personnel against any and all Loss which any of them suffers or incurs or is liable or otherwise responsible for arising from or in connection with any failure to provide the Services in accordance with these Conditions, or any other breach of the Agreement. The indemnity in this **clause 9** does not apply to the extent that any Loss is caused or contributed to by Ports Victoria or Ports Victoria's Personnel. Ports Victoria holds the benefit of the indemnity for itself and on trust for each of its Personnel. The Supplier acknowledges and agrees that:

- it is not necessary for Ports Victoria to incur an expense or make a payment before enforcing a right of indemnity conferred by the Agreement or to mitigate its loss; and
- the indemnity in this **clause 9** is a continuing obligation separate and independent from any other obligation and survives the expiry or termination of the Agreement.

10 Intellectual Property Rights

- Subject to **clause 10(c)**, all Contract Intellectual Property vests in and is the property of Ports Victoria from the time of its creation and the Supplier irrevocably and unconditionally assigns to Ports Victoria, free of additional charge, all of its rights, title and interest in and to the Contract Intellectual Property. The Supplier must sign all documents and do all things reasonably required by Ports Victoria and at Ports Victoria's cost to ensure that such assignment is effected and that the Contract Intellectual Property is appropriately protected (including without limitation by obtaining registered protection in Ports Victoria's name).
- The Supplier represents and warrants that it has or will procure from all relevant persons who are authors or makers of any Contract Intellectual Property a written assignment of all Intellectual Property Rights of such persons in the Contract Intellectual Property as necessary to give effect to **clause 10(a)** and a written consent from all individuals involved irrevocably consenting to Ports Victoria exercising its rights in the Contract Intellectual Property in a manner that, but for the consent, would otherwise infringe the moral rights of those individuals.

- All Pre-Existing Intellectual Property used by the Supplier in connection with the provision of the Services and/or the creation of Contract Intellectual Property remains the property of the Supplier or its licensors. However, the Supplier hereby irrevocably and unconditionally grants to Ports Victoria (or must procure the granting to Ports Victoria of), free of additional charge, a non-exclusive, perpetual, worldwide licence to use any and all Pre-Existing Intellectual Property to the extent that it forms part of or is integral to any works or other items created by the Supplier in connection with the provision of Services or the creation of Contract Intellectual Property or to the extent necessary for Ports Victoria to receive and/or enjoy the full benefit and use of the Services. Ports Victoria may sub-license the rights granted to it pursuant to this clause.
- (d) This **clause 10** survives the termination or expiry of the Agreement.

11 Insurance

- The Supplier must, at its own cost, obtain and maintain from a reputable insurer insurance coverage at all relevant times sufficient to cover any and all Loss that may be suffered or incurred and for which the Supplier is liable in connection with the provision of the Services including without limitation professional indemnity and, if applicable, public and products liability insurance.
- On request, the Supplier must provide Ports Victoria with evidence of the currency of any insurance it is required to obtain.

12 Confidentiality and Privacy

- Each party must (and must procure that its Personnel and shareholders (as applicable)):
 - not use or disclose (or cause or permit the use or disclosure of) any Confidential Information of the other party other than for the purposes of (and to the extent necessary for) performing its obligations and/or taking the benefit of any rights granted to that party under this Agreement (as the case may be) or as required by law, under any order or rule of a government agency or under the listing rules or rules of any stock exchange or other regulatory body;
 - except as permitted by **clause 12(a)(i)**, keep confidential and secure all Confidential Information of the other party and not disclose to any person any such Confidential Information without the prior written consent of the other party; and
 - at the request of the other party or upon termination or expiry of the Agreement, deliver up at its own cost (or, upon the request of the other party, destroy or erase) all Confidential Information of the other party (including without limitation copies and summaries of such Confidential Information) in the party's possession, power or control and permanently delete any such Confidential Information stored in electronic form.
- The Supplier hereby consents to (and, if required by Ports Victoria at any time, must procure that its Personnel consent to) Ports Victoria publishing or otherwise making available information in connection with the Supplier (and the provision of the Services) as may be required from time to time:
 - to comply with the Contracts Publishing System;
 - by the Auditor-General; or

- (iii) to comply with the *Freedom of Information Act 1982* (Vic) as amended or replaced from time to time.
- (c) The Supplier acknowledges and agrees that it will be bound by the Information Privacy Principles and any applicable Code of Practice with respect to any act or omission in connection with the provision of the Services in the same way as Ports Victoria would have been bound had the relevant act or omission been the act or omission of Ports Victoria.
- (d) This clause 12 survives the termination or expiry of the Agreement.

13 Access

When entering the premises of Ports Victoria and/or any third party in connection with this Agreement, the Supplier must and must ensure that its Personnel:

- (a) use reasonable endeavours to protect people and property and prevent nuisance;
- (b) act in a safe manner and in accordance with all applicable Laws (including without limitation all occupational health and safety Laws); and
- (c) comply with the safety standards and reasonable policies and directions of Ports Victoria and/or the relevant third party (as notified to the Supplier from time to time).

14 Subcontracting

(a) The Supplier must not subcontract to any third person any of its obligations in connection with the Agreement (including without limitation the Services) without the prior written consent of Ports Victoria (which may be given or withheld in its absolute discretion).

(b) The Supplier:

- (i) will not, as a result of any subcontracting arrangement, be relieved from the performance of any obligation under the Agreement;
- (ii) must procure that all subcontractors and employees and agents of the subcontractors comply with the Agreement to the extent applicable; and
- (iii) will be liable to Ports Victoria for the acts and omissions of all subcontractors and the employees and agents of subcontractors as though they were the acts and omissions of the Supplier.

15 Compliance with Laws, Policies and Directions

Without limiting any other obligation of the Supplier under the Agreement, the Supplier must (and must ensure that its Personnel) at all times act in a safe manner and comply with all applicable Laws, the lawful requirements and policies of any government agency affecting or applicable to the provision of the Services and the reasonable policies and directions of Ports Victoria from time to time.

16 Termination or Expiry

(a) Either party (**Non-Defaulting Party**) may immediately terminate the Agreement by written notice to the other party (**Defaulting Party**) if the Defaulting Party:

- (i) breaches these Conditions and/or any other provision of the Agreement and, in the reasonable opinion of the Non-Defaulting Party, the breach:
- A. cannot be remedied; or
- B. can be remedied but is not remedied by the Defaulting Party within seven (7) days after the Non-Defaulting Party gives the Defaulting Party notice of the breach;
- (ii) becomes the subject of an Insolvency Event; or
- (iii) in the case of the Supplier, refuses or fails to comply with a reasonable direction of Ports Victoria, commits fraud, an act of serious or wilful misconduct or does or omits to do anything which, in Ports Victoria's reasonable opinion, materially damages or is likely to materially damage the reputation or brand of Ports Victoria; or
- (iv) in the case of Ports Victoria, fails to pay a tax invoice properly rendered by the Supplier in accordance with this Agreement within 45 days of the due date for payment (subject to Ports Victoria's right to dispute any amount set out in such tax invoice pursuant to clause 6).

(b) Upon termination or expiry of the Agreement:

- (i) the Supplier must immediately cease providing the Services (unless otherwise agreed in writing with Ports Victoria) and must take all necessary steps to mitigate any loss and prevent further costs being incurred with respect to the Services; and
- (ii) Ports Victoria must pay the Supplier such reasonable sum commensurate to the amount of Services rendered by the Supplier in accordance with the Agreement up to the date of termination or expiry only (less any amounts due or which may become due from the Supplier to Ports Victoria).

17 GST

- (a) Terms used in this clause have the same meanings given to them in the GST Act.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under or in accordance with a Purchase Order or these Conditions are exclusive of GST.
- (c) If GST is imposed on any supply made under or in accordance with a Purchase Order or these Conditions, the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply subject to the recipient receiving a valid tax invoice in respect of the supply at or before the time of payment. Payment of the additional amount will be made at the same time as payment for the taxable supply is required to be made.

18 Disputes

- (a) Any dispute, disagreement or claim relating to the Agreement (**Dispute**) will be dealt with in accordance with this clause.
- (b) The party claiming the Dispute will give notice of the Dispute to the other party which will include all facts on which that party relies in relation to that Dispute (**Dispute Notice**).
- (c) Within five Business Days after service of a Dispute Notice, representatives of each party will meet at least once to attempt, using their reasonable endeavours, to resolve the Dispute in good faith.
- (d) If the Dispute has not been resolved within 15 Business Days after the service of the Dispute Notice, a member of the senior management of each Party (or their respective nominees) having authority to settle the Dispute, will meet within 20 Business Days after the service of the Dispute Notice to attempt to resolve the Dispute in good faith or to mutually agree on an alternative dispute resolution process to be taken by the parties in relation to the Dispute.
- (e) If, within 15 Business Days after the first meeting of the senior management, the Dispute has not been resolved or an alternate dispute resolution process has not been agreed, then the matter may be referred to court proceedings.
- (f) A party may not start court proceedings in relation to a Dispute until it has complied with the procedures in this clause, unless it commences legal proceedings to preserve any rights it may have.
- (g) Nothing in this clause prevents a party seeking urgent injunctive or interlocutory relief.

19 General

(a) The Agreement is governed by and is to be construed in accordance with the laws applicable in Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the

courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

- (b) A waiver of any right arising under the Agreement must be in writing and signed by the party granting the waiver.
- (c) Any variation of the Agreement must be in writing and signed by Ports Victoria and the Supplier.
- (d) If a provision in the Agreement is wholly or partly void, illegal or unenforceable in any relevant jurisdiction that provision or part must, to that extent, be treated as deleted from the Agreement for the purposes of that jurisdiction. This does not affect the validity or enforceability of the remainder of the provision or any other provision of the Agreement.
- (e) The provisions of the Agreement which are capable of having effect after termination or expiry of the Agreement shall remain in full force and effect following the termination or expiration of the Agreement.
- (f) The parties are independent contracting parties and nothing in the Agreement makes either party the agent or legal representative of the other or grants either party any authority to assume or create an obligation on behalf of the other.

20 Definitions

In these Conditions, unless the context otherwise requires:

Australian Consumer Law means Schedule 2 of the *Competition and Consumer Act 2010* (Cth) as amended or replaced from time to time;

Authorisation means any right, consent, registration, certificate, licence, approval, permit, authority or exemption issued or required by any government agency in connection with the Services and/or the Agreement;

Code of Practice means a code of practice as defined in, and approved under, the *Privacy and Data Protection Act 2014* (Vic) as amended or replaced from time to time;

Completion Date means the date set out in the Purchase Order by which provision of the Services must be completed by the Supplier or such other date agreed in writing between the parties;

Conditions means these Purchase Order General Conditions (Services);

Confidential Information means any technical, scientific, commercial, financial or other information of, about or in any way related or connected to, a party (**Disclosing Party**), including without limitation any information designated by the Disclosing Party as confidential, which is disclosed, made available, communicated or delivered to or which is otherwise learnt by, or comes into the possession of, the other party (**Non-Disclosing Party**), but excludes information:

- (a) which is in or which subsequently enters the public domain other than as a result of a breach of these Conditions or another obligation of confidentiality;
- (b) which the Non-Disclosing Party can demonstrate was in its possession prior to the date of the Agreement;
- (c) which the Non-Disclosing Party can demonstrate was independently developed by the Non-Disclosing Party; or
- (d) which is lawfully obtained by the Non-Disclosing Party from another person entitled to disclose such information;

Contract Intellectual Property means any and all Intellectual Property Rights which are created by or on behalf of the Supplier as a result of, for the purpose of, or in connection with the provision of the Services and/or the Agreement;

Contracts Publishing System means the policy of the Victorian Government requiring publication of details of contracts entered into by Victorian Government departments, as amended or replaced from time to time;

Fee means a fixed fee payable to the Supplier for the provision of the Services;

GST has the meaning given to it in the GST Act;

GST Act means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) as amended or replaced from time to time;

Information Privacy Principles means the information privacy principles set out in the *Privacy and Data Protection Act 2014* (Vic) as amended or replaced from time to time;

Insolvency Event means the happening of any of the following events:

- (a) a party suspends payment of its debts generally or is or becomes unable to pay its debts within the meaning of the *Corporations Act 2001* (Cth) as amended or replaced from time to time;
- (b) a party enters into, or resolves to enter into, any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;
- (c) a receiver, receiver and manager, liquidator, provisional liquidator, administrator, trustee or similar official is appointed over any of the assets or undertakings of a party, an application or order is made for the winding up or dissolution of a party, or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of a party, except for the purpose of an amalgamation or reconstruction;
- (d) a party goes bankrupt; or
- (e) a party ceases, or threatens to cease, to carry on business;

Intellectual Property Rights includes without limitation all present and future copyright and neighbouring rights, all proprietary rights in relation to inventions (including without limitation patents), registered and unregistered trade marks, confidential information (including without limitation trade secrets and know how), registered designs, circuit layouts, and all other proprietary rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields whether or not registered or registrable;

Law includes any requirement of any statute, rule, regulation, proclamation, ordinance, by-law, industry code or standard, whether present or future, and whether local, state, federal or otherwise, and includes without limitation the common law and equity;

Loss means any and all claims, demands, allegations, suits, actions and proceedings of any nature and howsoever arising (whether under common law, equity, statute or otherwise), costs (including without limitation legal costs on a full indemnity basis), damages, expenses, charges, payments, interest, liabilities, taxes and losses of any kind whether direct, indirect, special or consequential;

Overdue Amount means an amount (or part thereof) that:

- (a) is not, or is no longer, disputed;
- (b) is due and owing under a tax invoice properly rendered by the Supplier in accordance with the Agreement; and
- (c) has been outstanding for more than thirty (30) days from the date that payment was due by Ports Victoria under the Agreement (or the date that the amount ceased to be disputed, as the case may be);

Personnel means officers, employees, agents, representatives, contractors and/or subcontractors of the relevant party but a party to the Agreement and its officers, employees, agents, representatives, contractors and subcontractors are not "Personnel" of the other party;

Ports Victoria means Ports Victoria, ABN 51 347 220 146 of East 1E, 13-35 Mackey Street, North Geelong, Victoria, 3125;

Pre-Existing Intellectual Property means any and all Intellectual Property Rights which are owned or used by the Supplier and which existed in substantially the same form and with substantially the same contents prior to the commencement of the provision of the Services;

Purchase Order means any form of order or acknowledgment from Ports Victoria for the provision of the Services which incorporates these Conditions;

Rates means the rates (whether charged on an hourly, daily, weekly or other time-related basis) payable to the Supplier for the provision of the Services;

Services means:

- (a) the services (or any of them) specified in the Purchase Order;
- (b) all services which should reasonably have been anticipated by a prudent, expert and experienced supplier as being necessary for the performance of the services described in paragraph (a) of this definition or which are otherwise reasonably capable of being inferred from the Agreement;
- (c) services incidental and related to the services described in paragraphs (a) and (b) of this definition required by Ports Victoria from time to time;
- (d) such other services agreed in writing between the Supplier and Ports Victoria from time to time; and
- (e) all variations of, and remedial work in connection with, the services described in paragraphs (a), (b), (c) and (d) of this definition;

Supplier means the person or entity supplying the Services to Ports Victoria as set out in the relevant Purchase Order; and