

**TERMS AND CONDITIONS**

**1 Contract**

- 1.1 The Supplier must supply the Goods and Services in accordance with this Goods and Services Agreement.
- 1.2 This Goods and Services Agreement comprises:
- (a) the Purchase Order Form referring to these Terms and Conditions;
  - (b) these Terms and Conditions; and
  - (c) any other document that the Purchase Order Form expressly states is to apply to the supply of the Goods and Services.
- 1.3 To the extent of any inconsistency between the documents forming part of this Goods and Services Agreement, a document higher in the list in **clause 1.2** prevails over each lower document.
- 1.4 This Goods and Services Agreement supersedes all other communications and negotiations between KPA and the Supplier in relation to the Goods and Services and is the entire agreement between the parties.
- 1.5 The terms and conditions of this Goods and Services Agreement apply to the Goods and Services to the exclusion of any terms and conditions contained in any Supplier's quotation, invoice, order acknowledgement, delivery docket, invoice or other document unless agreed in writing referring to this **clause 1.5**.
- 1.6 All provisions of the Port Standards and Procedures apply to and bind the Supplier in respect of the supply of the Goods and Services pursuant to this Goods and Services Agreement. To the extent of any inconsistency between anything in this Goods and Services Agreement and the Port Standards and Procedures, this Goods and Services Agreement prevails.
- 1.7 Nothing in this Goods and Services Agreement:
- (a) affects the operation of the Port Authorities Legislation;
  - (b) diminishes KPA's rights, powers, defences, indemnities or limitations of liability under the Port Authorities Legislation;
  - (c) fetters any discretion that KPA has under the Port Authorities Legislation; or
  - (d) precludes KPA from accessing, relying upon or using any of its rights, powers, defences, immunities, indemnities or limitations of liability under the Port Authorities Legislation in relation to any matter concerning the Supplier, the

Goods and Services or any matter arising out of or relating to this Goods and Services Agreement.

**2 Supply of Goods and Services**

- 2.1 The Supplier must supply the Goods to KPA at the Point of Delivery, on the Date for Delivery, during the Delivery Hours, for the Price. The Date for Delivery is of the essence in the Goods and Services Agreement. Unless specified otherwise in the Purchase Order, delivery includes all packing, loading, transport, unloading, unpacking, installing, commissioning and testing. KPA is not required to accept early or late delivery.
- 2.2 The Supplier must supply the Services to KPA by the Date for Delivery for the Price.
- 2.3 The Supplier is taken to have carefully examined all documents and other information furnished by KPA relating to the supply of the Goods and Services and to have fully satisfied itself as to all conditions, risks, contingencies and other circumstances which might affect the supply of the Goods and Services including conditions at the point of performance or delivery, and to have made due allowance for these in the Price.
- 2.4 The Supply of the Goods and Services is not deemed to be complete until KPA has accepted the Goods and Services. KPA's acceptance of the Goods and Services entitles the Supplier to issue an invoice pursuant to **clause 4.2** and:
- (a) is not evidence or an admission that the Goods and Services have been delivered in accordance with this Goods and Services Agreement; and
  - (b) if KPA signs a delivery slip or other acknowledgement, this will constitute acceptance by KPA but, unless agreed in writing referring to this **clause 2.4**, will not have the effect of incorporating additional terms into, creating new terms with respect to, varying or waiving any part of this Goods and Services Agreement.
- 2.5 The Supplier must notify KPA immediately upon the Supplier becoming aware that it will not be able to deliver the Goods on, or perform the Services by, the Date for Delivery.
- 2.6 If the Goods and Services are not delivered by the Date for Delivery, then the Supplier will be in breach of this Goods and Services Agreement and KPA may, without prejudice to its other rights, cancel the whole or part of the order.
- 2.7 The Supplier must deliver all applicable material safety data sheets with the Goods
- 2.8 The Supplier must:
- (a) carry out the Works in accordance with this Services Agreement, all Laws and

- Good Industry Practice and with due care, diligence, skill and judgment and to a high standard using materials that are new and of good quality;
- (b) when attending the Site, ensure that it and all of its Associates comply with the Port Standards and Procedures, the Supplier's Handbook, the Fit for Work Policy and the Code of Conduct as well as any safety, security and general Site rules as may be specified by KPA;
- (c) work with KPA and its Associates and contractors in an efficient and co-ordinated manner;
- (d) use suitably qualified and experienced personnel to carry out the Works;
- (e) use all reasonable endeavours to overcome any delays (howsoever caused) in carrying out the Works; and
- (f) ensure that it (and its Associates) minimise interference as far as reasonably practicable with the activities of KPA any anyone else who uses or visits the Port.
- 2.9 The Supplier must keep the Site clean and tidy and regularly remove rubbish and surplus material.
- 2.10 At all times while at the Port, the Supplier must (and must ensure that its Associates) comply with KPA's (and KPA's Associates and authorised representatives') directions.
- 2.11 The Supplier must not (and must ensure that its Associates do not) cause any Pollution or Contamination at the Port or surrounding areas.
- 2.12 The Supplier must not, in the course of performing the Works, cause any damage to property (other than as expressly required by this Services Agreement) or injury or death to any person.
- 3 Quality assurance
- 3.1 The Supplier must ensure that the Goods are manufactured or procured, and the Services are performed, in accordance with any specific quality assurance requirements set out in the Purchase Order. Where none is specified, the Goods and Services must comply with the best standards applicable to goods and services of that type.
- 3.2 The Supplier must test the Goods at its own cost to ensure compliance with this Goods and Services Agreement.
- 4 Price and payment
- 4.1 Unless otherwise specified in the Purchase Order, the Price is fixed and will not be subject to rise and fall or any other adjustment.
- 4.2 Subject to **clause 5**, if the SOPA Act does not apply to supply of Goods or Services under this Goods and Services Agreement, then the Supplier may deliver to KPA an invoice for Goods and Services accepted under this Goods and Services Agreement. KPA must pay the Supplier the amount determined by KPA as the appropriate proportion (having regard to the provisions of this Goods and Services Agreement and the proportion of the Goods and Services supplied) of the Price for the Goods and Services within 30 days of receipt by it of an invoice that complies with **clause 4.3**.
- 4.3 Invoices must:
- (a) be in the form of a tax invoice;
- (b) include a valid KPA Purchase Order number;
- (c) include an adequate description of the Goods and Services to which it relates;
- (d) state the full details of the Supplier, including address and ABN;
- (e) set out the amount of GST (if any) payable; and
- (f) be accompanied by all other documentation and material required by this Goods and Services Agreement or under any law.
- 4.4 The Price includes all taxes, levies and fees (including goods and services tax) which are payable in relation to the supply and delivery of the Goods and Services. The Supplier must pay such taxes, levies and fees.
- 4.5 The Price will not be varied for any reason except where expressly agreed in writing, signed by an authorised representative of KPA.
- 4.6 KPA may deduct from any amount owing to the Supplier under this Goods and Services Agreement, including any part payment of the Price, any amount which KPA asserts is or may become payable by the Supplier to KPA.
- 4.7 All payments will be on account only and will not be an admission that the Goods and Services comply with this Goods and Services Agreement.
- 5 If SOPA Act applies**
- 5.1 If the SOPA Act applies to the supply of Goods or Services under this Goods and Services Agreement then following terms of this **clause 5** apply to payments on account of the Price instead of **clause 4.2**.
- 5.2 The Supplier may submit Payment Claims at the times stipulated in the Purchase Order. If no times are stipulated in the Purchase Order, the Supplier may submit Payment Claims at the end of each month (**Designated Claim Date**).
- 5.3 Any early Payment Claim is deemed to have been made on the Designated Claim Date.
- 5.4 Each Payment Claim must be given in writing to KPA and must include details of:
- (a) the amount of the Price claimed; and
- (b) a detailed breakdown of the Works in relation to which the Payment Claim applies to.
- 5.5 Following the submission of a Payment Claim to KPA, the Supplier must, within 5 Business

- Days of a request, provide KPA with any information concerning the Payment Claim requested by KPA (acting reasonably).
- 5.6 KPA must, within 10 Business Days of receipt of a Payment Claim, assess the claim and issue the Supplier a Payment Schedule evidencing KPA's opinion of the moneys due to the Supplier or KPA, as the case may be. If the amount is more or less than the amount claimed by the Supplier, the Payment Schedule must set out the reasons for the difference.
- 5.7 Within 2 Business Days of receipt of a Payment Schedule, the Supplier must provide KPA with a tax invoice for the scheduled amount. If the Supplier does not provide a tax invoice within the specified time, the Supplier agrees that KPA can issue a recipient created tax invoice for that scheduled amount.
- 5.8 Within 10 Business Days of receipt by KPA of a valid Payment Claim, KPA or the Supplier, as the case may be, must pay:
- the scheduled amount, if KPA has issued a Payment Schedule with respect to the Payment Claim; or
  - the amount of the Payment Claim, if KPA has not issued a Payment Schedule.
- 5.9 Neither a Payment Schedule nor payment of money shall be evidence that the relevant Works have been carried out satisfactorily. Payment is on account only.
- 6 Risk and Title**
- 6.1 Property and title in Goods or Deliverables will pass to KPA on the first to occur of payment of any part of the Price for the Goods or Deliverables and delivery to the Point of Delivery.
- 6.2 Risk in the Goods and Deliverables will pass to KPA on delivery of those Goods or Deliverables to the Point of Delivery.
- 6.3 The Supplier must insure the Goods against all risks of loss, damage and depreciation for the full replacement value until delivery of the Goods to the Point of Delivery.
- 6.4 The Supplier indemnifies KPA and its Associates against any action, liability, costs, damages or expenses suffered or incurred by KPA or its Associates as a consequence of any act or omission by the Supplier or its Associates (including supply of defective Goods or Services).
- 7 Insurance**
- 7.1 The Supplier must effect and maintain, during any period it is supplying the Goods and Services, the following insurance policies with reputable insurers:
- workers' compensation to the extent required at law;
  - public and product liability insurance to an amount not less than the amount identified in the Purchase Order (and if nothing is stated, \$20,000,000); and
- where the Supplier is providing professional services, professional indemnity insurance to an amount not less than the amount identified in the Purchase Order (and if nothing stated, \$10,000,000 for any one claim and \$20,000,000 in the aggregate during any on 12 month period of insurance).
- 7.2 If KPA requests, the Supplier must immediately provide certificates of currency for the policies effected under **clauses 6.3 and 7.1**.
- 7.3 If KPA requests, the Supplier must promptly make and pursue a claim under its insurance policies where:
- liability, loss or damage has occurred and is covered under any of the Supplier's insurance policies (**Loss or Damage**);
  - there are reasonable prospects of the claim succeeding; and
  - some or all of the proceeds from a successful claim could be applied towards any Loss or Damage,
  - however, this clause does not apply in circumstances where the Supplier is ready, willing and able to pay for the Loss or Damage on its own account.
- 7.4 The insurances referred to in this Goods and Services Agreement are primary and not secondary to the indemnities in this Goods and Services Agreement and any insurance carried by KPA.
- 8 Warranties**
- 8.1 The Supplier warrants that:
- the Goods and Services will comply with this Goods and Services Agreement;
  - at delivery, the Goods will be new and in good order and condition;
  - it will supply the Services diligently, faithfully and conscientiously;
  - it will supply the Services with the same or higher level of care and skill as would reasonably be expected of a person qualified and experienced in the supply of the same or similar services;
  - the Goods and Service will comply precisely with the description in this Goods and Services Agreement;
  - the Goods will comply with any relevant patterns or specifications;
  - the Goods will be of good and merchantable quality;
  - the Goods and Services will be fit for the purpose made known to the Supplier by KPA or, if none was made known to the Supplier, fit for the purpose for which goods and services of that kind are ordinarily used;
  - the Goods and Services will comply with any other warranties and/or guarantees contained in the Purchase Order (or, if none specified, ordinarily supplied by the Supplier and, in respect of the Goods, the manufacturer of the Goods);
  - the Goods and Services comply with all applicable Australian standards;

- (k) the Goods and Services comply with the provisions of any legislation applicable to them; and
- (l) title in the Goods and Deliverables passes to KPA free from all charges, liens and encumbrances.
- 8.2 The warranties in **clause 8.1** are in addition to any warranties or guarantees set out in the *Sale of Goods Act 1895 (WA)* and *Competition and Consumer Act 2010 (Cth)* which are deemed to apply to the Goods and Services as if KPA were the buyer or the consumer (as applicable) for the purpose of those warranties or guarantees.
- 8.3 The Supplier warrants that it has the necessary skills, resources and experience to successfully supply the Goods and Services in accordance with this Goods and Services Agreement.
- 8.4 The Supplier warrants that it has all intellectual property rights (including any patents, trademarks and copyright) necessary to supply the Goods, Services and Deliverables in accordance with this Goods and Services Agreement and indemnifies KPA against any loss, cost, damage or expense incurred by KPA as a consequence of any claim by a third party that it has a right to any intellectual property right in the Goods, Services or Deliverables.
- 9 Defective Goods and Services**
- 9.1 If within a reasonable time of delivery, it is apparent to KPA that the Goods or any part of the Goods are not in accordance with this Order, KPA may return those Goods to the Supplier.
- 9.2 If KPA exercises its rights under **clause 9.1**, the Supplier must pay KPA:
- (a) any amounts paid by KPA for the Goods returned; and
- (b) any costs incurred or losses suffered by KPA in connection with the delivery or return of those Goods.
- 9.3 If, at any time, (whether or not a reasonable time has passed for inspection after delivery of the Goods) KPA discovers that the Goods or Services do not comply with any warranty given under **clause 8.1** or are otherwise not in accordance with this Goods and Services Agreement, KPA may (without limiting any other right available to it):
- (a) rectify the Goods or Services or have the Goods or Services rectified and the cost, loss, damage and expense suffered or incurred by KPA will be a debt due from the Supplier to KPA; or
- (b) deliver to the Supplier a notice under **clause 9.4**.
- 9.4 The Supplier must, if KPA so requires by notice in writing, at the cost of the Supplier and within the timeframes KPA (acting reasonably) specifies:
- (a) in respect of Goods, either:
- (i) remove some or all of the Goods, rectify the defects in them and return them to KPA; or
- (ii) replace some or all of the Goods; and
- (b) in respect of Services, either:
- (i) rectify some or all of the Services; or
- (ii) resupply some or all of the Services.
- 10 Confidentiality**
- Each party must keep confidential, and not use or disclose, any of the other party's Confidential Information, except:
- (a) to the extent necessary for the performance of their obligations under this Goods and Services Agreement;
- (b) KPA may disclose Confidential Information to the Minister responsible for the Port Authorities Legislation or to any State or Federal department, agency or instrumentality or any local or statutory authority;
- (c) that a party may disclose Confidential Information to its legal and other advisers who are under a duty of confidence; and
- (d) that a party may disclose Confidential Information if required by law (including any order of a court of competent jurisdiction), the rules of any stock exchange or statutory duty.
- 11 Drawings and Tools**
- 11.1 All tools, patterns, materials, drawings, specifications and other data provided by KPA in connection with this Goods and Services Agreement:
- (a) remain the property of KPA (except that the Supplier is responsible for making good any damage done to them while they are in the possession of the Supplier);
- (b) must be used solely for the purpose of this Goods and Services Agreement;
- (c) must not be passed to or divulged to any third party except with KPA's prior written consent; and
- (d) must be returned by the Supplier to KPA on completion of this Goods and Services Agreement.
- 12 Termination**
- 12.1 In addition to the rights under this Goods and Services Agreement, the parties have the rights of termination available to them at statute and common law.
- 12.2 KPA may suspend all or part of the supply of the Goods or Services at any time for any period of time by notice in writing to the Supplier. The Supplier must comply with the notice and recommence supply when notified by KPA. The Supplier will not be entitled to any additional payment arising as a result of the suspension.

12.3 KPA may terminate this Goods and Services Agreement at any time by giving notice in writing to the Supplier. Subject to any rights KPA may have of set off or deduction, on termination KPA's only obligation will be to pay the Supplier for Goods and Services which have been supplied in accordance with this Goods and Services Agreement prior to the date of termination.

### 13 Force Majeure

13.1 Neither party (**Affected Party**) will be liable to the other party for any default or delay in the performance of any of its obligations under this Goods and Services Agreement (other than an obligation to pay money) to the extent that the default or delay is due to a Force Majeure Event.

13.2 An Affected Party must give the other party prompt notice in writing of:

- (a) the event of the Force Majeure Event;
- (b) the anticipated effect on the ability of the Affected Party to perform its obligations under this Goods and Services Agreement including the probable extent to which it will be unable to perform, or be delayed in performing those obligations, so far as is known; and
- (c) the likely duration of that effect estimated as a whole number of days.

13.3 An Affected Party will be relieved of its relevant obligations under this Goods and Services Agreement (other than an obligation to pay money), so far as those obligations are affected by the Force Majeure Event, for the time necessary to remedy the effect of that event.

13.4 An Affected Party will, as soon as possible take or cause to be taken all necessary and reasonable steps to ameliorate and remedy the effects of the Force Majeure Event and resume its performance under this Goods and Services Agreement and must use all reasonable efforts to minimise any loss to the other party. However, the settlement of any strike or labour dispute which constitutes a Force Majeure event will be entirely within the discretion of the Affected Party and that party may refrain from settling the strike or labour dispute or may settle it at the time and on the terms as it considers to be in its best interests.

### 14 Definitions and miscellaneous

In this Goods and Services Agreement:

**Associates** means:

- (a) in the case of the Supplier, all affiliates, employees, officers, contractors, agents, invitees and consultants of the Supplier who are involved in any aspect of the supply of Goods or Services under this Goods and Services Agreement but excluding KPA and all of KPA's Associates; and

(b) in the case of KPA, all officers and employees of KPA.

**Business Day** means any day other than a Saturday, Sunday or public holiday in Western Australia.

**Code of Conduct** means the "Kimberley Ports Authority Code of Conduct version 2.3 (file reference: STM022/74175)" as available on the Website or from KPA on request.

**Confidential Information** means the terms of this Goods and Services Agreement and all information exchanged between the parties in connection with this Goods and Services Agreement (other than information that is or becomes public knowledge);

**Supplier's Handbook** means the "Kimberley Ports Authority Suppliers HSE Handbook version 4.1 (file reference: OSH121/166866) last reviewed February 2022" as published on the Website and also available from KPA on request.

**Date for Delivery** means the date for delivery specified in the Purchase Order or, if none, a reasonable time after the Supplier is taken to have accepted the terms and conditions of this Goods and Services Agreement;

**Deliverables** means all data, plans, drawings, software, specifications, procedures, reports, documents and other information prepared by the Supplier and to be delivered to KPA as part of the Services;

**Delivery Hours** means the delivery hours specified in the Purchase Order or, if none, between 8:30am and 4:30pm at the Point of Delivery;

**Fit for Work Policy** means the Kimberley Ports Authority fitness for work requirements set out in clause 5.8.7 of the Supplier's Handbook available on the Website or from KPA on request.

**Force Majeure Event** means any event beyond the reasonable control of a party or any of its Associates.

**Goods** means the goods, if any, referred to in this Goods and Services Agreement and includes all goods described in this Goods and Services Agreement, all manuals, spare parts and operating instructions KPA needs for the proper use of the Goods, and all things that can be reasonably inferred from the description of the Goods in this Goods and Services Agreement;

**Payment Claim** means a claim for payment issued by the Supplier in accordance with 5;

**Payment Schedule** means KPA's assessment and certification of a Payment Claim issued in accordance with clause 5;

**Point of Delivery** means the point of delivery set out in the Purchase Order or, if none, the point of delivery KPA nominates;

**Port Authorities Legislation** means the *Port Authorities Act 1999 (WA)*, the *Port Authorities Regulations 2001 (WA)* and the *Government Trading Enterprises Act 2023 (WA)*.

**Port Standards and Procedures** means the "Port Standards and Procedures version 9.0,

file reference CRE041/107726 last review date September 2021" as published on the Website and also available from KPA on request,

**Purchase Order** means the purchase order, setting out the details of the Goods and Services and referring to these Terms and Conditions;

**Services** means the services, if any, referred to in this Goods and Services Agreement and includes the delivery of the Deliverables and any good, document or activity necessary or incidental to the performance of the Services;

**Site** means the site specified in the Purchase Order;

**SOPA Act** means the Building and Construction Industry (Security of Payment) Act 2021 (WA);and

**Website** means the website found at [www.kimberleyports.wa.gov.au](http://www.kimberleyports.wa.gov.au) or any other website advised by KPA from time to time.

14.1 In this Goods and Services Agreement:

- (a) words in the singular include the plural and vice versa;
- (b) a promise on the part of 2 or more persons binds them jointly and severally;
- (c) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
- (d) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
- (e) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation; and
- (f) 'includes' in any form is not a word of limitation.

14.2 KPA's remedies under this Goods and Services Agreement are without prejudice to remedies at common law or under statute.

14.3 This Goods and Services Agreement is not to be construed to the disadvantage of a party because that party was responsible for its preparation.

14.4 All of the provisions of Part 1F of the *Civil Liability Act 2002* (WA) are expressly excluded and do not apply to anything arising out of this Goods and Services Agreement.

14.5 The Supplier must maintain proper business, accounting and financial records and any other records KPA reasonably requires. KPA may, from time to time, request copies of the Supplier's records relating to the Supplier's performance of, or compliance or non-compliance with, this Goods and Services Agreement. The Supplier must provide complete and accurate copies of the relevant records within 7 days of KPA's request.

14.6 The Supplier must cooperate with KPA and provide any information relating to the Goods and Services that KPA reasonably requests or that KPA requires in order to verify the Supplier's compliance with any of its obligations under this Goods and Services

Agreement (**Requested Information**). The Supplier must provide any Requested Information to KPA as soon as reasonably practicable.

14.7 No waiver by KPA of a breach of this Goods and Services Agreement by the Supplier constitutes a waiver for any subsequent or continuing breach by the Supplier.

14.8 This Goods and Services Agreement is governed by the laws of Western Australia and the parties submit to the jurisdiction of the courts of Western Australia and any courts which have jurisdiction to hear appeals from any of those courts.

14.9 If any of the provisions of this Goods and Services Agreement are held by a court of competent jurisdiction to be invalid or otherwise unenforceable that provision may be severed from the Goods and Services Agreement and the remainder of this Goods and Services Agreement will continue to be effective and valid notwithstanding such severance.

14.10 The Supplier must not assign, or deal with its interest under this Goods and Services Agreement. Any purported assignment or dealing in breach of this clause is invalid, unenforceable and otherwise void and does not bind KPA.