

## CITY OF SWAN GENERAL CONDITIONS OF CONTRACT FOR THE SUPPLY OF ARTWORK

(Part 3 of Request Document)

### 3.1 Governing Law

The Contract shall be governed by the Laws of the State of Western Australia and all parties submit to the jurisdiction of the Courts of Western Australia to resolve any dispute.

### 3.2 Definitions

In these Conditions:

**Artist** means the party to the Contract who is not the Principal.

**Artist Failure** means any or all of the events referred to in Clause 3.22(a).

**Artwork** means the Artwork expressly identified in the Contract.

**Clean Up** means clearing away and removing from the Place for Delivery all of the Artist's plant, equipment, surplus materials, rubbish, temporary works and packaging and leaving the whole of the Place for Delivery and Artwork in a clean and tidy condition to the satisfaction of the Principal.

**Contract** means all the documents which constitute the parties' written agreement.

**Contract Sum** means:

- (a) where payment is to be for a fixed amount, then that amount exclusive of GST; or
- (b) if the Contract expressly provides for the supply of the Artwork to the Principal on a price per unit or by weight or volume, then the amount determined by having regard (as is applicable) to the number, weight or volume of the Artwork supplied by the Artist to the Principal and GST.

Unless otherwise expressly provided for in the Contract, the Contract Sum is inclusive of any and all applicable excises, tariffs, levies, duties, taxes, securities and charges applicable to the Artist's supply or Principal's purchase of the Artwork.

**Date of Acceptance** means the date that the Principal accepts the Artwork in accordance with Clause 3.11.

**Date for Delivery** means:

- (a) if the Contract specifies a date for the supply of Artwork, that date; or

- (b) if the Contract specifies a period of time for the supply of Artwork, the last day of that period.

**Date of Delivery** means the date that the relevant Artwork is actually supplied to the Place for Delivery or if the contract requires the Artwork to be installed, tested and/or commissioned then the date that the relevant Artwork is completely and satisfactorily installed, tested and commissioned (as are applicable).

**GST** means goods and services tax as is applicable pursuant to *A New Tax System (Artwork and Services Tax) Act 1999* (Cth).

**Laws** means all relevant Acts, Regulations, by-laws, order, proclamations, the common law and equity.

**Order** means the written order issued by the Principal to the Artist which expressly:

- (a) identifies the Artwork;
- (b) identifies the Contract Sum, alternatively all of the information required to determine and the method for determining the Contract Sum; and
- (c) requires the Artist to supply the Artwork to the Principal.

**parties** means both of the Principal and Artist.

**party** means each of the Principal and Artist.

**Place for Delivery** means the location for the delivery of the Artwork as expressed in the Contract.

**Principal** means the City of Swan.

**Safety Management Plan** means the Artist's written plan to establish and maintain an effective health and safety management system.

**Specifications** means all of the technical specifications, designs, drawings and schedules that form part of the Contract.

**supply; supplied; and supplying** each include, but are not limited to, the designing, creating, selling, collecting from any place, loading, packing, labelling, placarding, transporting, craneage, rigging, lifting, lowering, unloading and Clean Up, and if expressly specified in an Order - unpacking, installing, testing and commissioning (as are applicable).

**tax invoice** has the same meaning as in *A New Tax System (Artwork and Services Tax) Act 1999* (Cth).

### 3.3 No Rise and Fall Adjustment

The Contract Sum is not subject to rise and fall adjustment.

### **3.4 Notices**

- (a) Any notice given under the terms of the Contract must be in writing, signed by the issuing party and sent by pre-paid post or email to or left at the recipient's address recorded in the Contract.
- (b) A notice is deemed to have been received by a party:
  - (i) if sent by pre-paid post, upon the expiration of 3 business days after the date on which it was sent;
  - (ii) if sent by email:
    - a. prior to 5.00pm on a business day, that business day; or
    - b. if not prior to 5.00pm on a business day, the next business day; or
  - (iii) if left at an appropriate place at the recipient party's address:
    - a. prior to 5.00pm on a business day, that business day; or
    - b. if not prior to 5.00pm on a business day, the next business day.
- (c) A notice sent by email is deemed to have been signed by the sender if it expressly records that it is sent by the sender.

### **3.5 Legal Compliance**

- (a) The Artist must, at its expense, comply with all applicable Laws.
- (b) The Artist must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss, liability or penalty by reason of the Artist's failure to comply with Clause 3.5(a).

### **3.6 Assignment**

Neither party may assign its rights or obligations under the Contract.

### **3.7 Supply**

- (a) The Artist must supply all of the Artwork in full, to each relevant Place for Delivery and by the Date for Delivery.
- (b) Time is of the essence.
- (c) Immediately upon the Artist becoming aware that:

- (i) its supply of any of the Artwork may be delayed beyond the Date for Delivery; or
- (ii) any of the Artwork has been damaged or contains a defect;

the Artist must, in writing, notify the Principal of (as is applicable):

- a. the likely duration of the delay, damage or defects; and
- b. the cause of the delay, damage or defects.

### **3.8 Packaging, Labelling and Placarding**

During supply, the Artist must ensure that the Artwork is properly, safely, securely and lawfully packaged, labelled and placarded.

### **3.9 Quality of Artwork**

- (a) All Artwork supplied by the Artist must conform with the Specifications and Contract and, if no Specifications are incorporated into the Contract, then:
  - (i) unless the Contract expressly provides otherwise, all Artwork must be new; and
  - (ii) the Artwork must comply with:
    - a. the standards published by the Standards Association of Australia that are relevant to the Artwork and current as at the Date of Delivery;
    - b. if the Standards Association of Australia has not published any standards that are relevant to the Artwork and current as at the Date of Delivery, then the standards published by the International Standards Organisation that are relevant to the Artwork and current as at the Date of Delivery; or
    - c. if neither the Standards Association of Australia nor the International Standards Organisation have published any standards that are relevant to the Artwork and current as at the Date of Delivery, then, the Artwork must:
      - 1. be of a high standard of quality and craftsmanship;
      - 2. be supplied with due care, skill and diligence;
      - 3. comprise high quality materials;
      - 4. be durable and, save for ordinary wear and tear, not be subject to damage by the environmental conditions reasonably expected at the Place for Delivery;
      - 5. be fit and proper having regard to and comply with the Contract and all Laws; and

6. not expose persons, property or the environment in the vicinity of the Artwork to an unnecessary risk of injury, damage or harm.
- (b) All Artwork supplied by the Artist must be fit for its intended purpose, free of damage and defects and safe to use.

### **3.10 Expenses of Supply and Removal**

- (a) Unless otherwise expressly provided by the Contract, the Artist must at its own expense:
- (i) supply the Artwork to the Place for Delivery; and
  - (ii) decommission, unfix and remove from the Place for Delivery all Artwork that does not comply with the Contract.
- (b) The Artist must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss or liability by reason of the Artist's failure to comply with Clauses 3.9, 3.10(a) or 3.17.

### **3.11 Acceptance and Protection of the Artwork**

- (a) Neither the:
- (i) Artist's supply of the Artwork to the Place for Delivery or any other place; nor
  - (ii) Principal's receipt of the Artwork;
- shall constitute the Principal's acceptance of the Artwork.
- (b) The Principal shall be deemed to have accepted the Artwork only if and when:
- (i) it notifies the Artist, in writing, that the Principal has accepted the Artwork; or
  - (ii) subject to Clause 3.11(c), after 21 days have lapsed after the Artist has both:
    - a. supplied the Artwork to the Place for Delivery; and
    - b. satisfied its obligations expressed in Clause 3.16.
- (c) Clause 3.11(b)(ii) has no effect and the Principal is not deemed to have accepted the Artwork if:
- (i) within 21 days of the Artist supplying the Artwork to the Place for Delivery, the Principal rejects the Artwork in accordance with Clause 3.12; or
  - (ii) the Contract requires the Artist to test, install or commission the Artwork. In those circumstances, the Artwork may only be accepted in accordance with Clause 3.11(b)(i) and the Principal is not obliged to accept any of the Artwork

until 21 days have passed after all testing, installing and commissioning is successfully completed to the Principal's satisfaction.

- (d) During the period commencing from the Principal's issue of the Order and ending on the Date of Acceptance, alternatively the Contract's termination, the Artist must protect the Artwork (**Protection Period**).
- (e) The Artist:
  - (i) is solely liable to the Principal for any and all damage suffered by or loss of the Artwork that occurs during the Protection Period; and
  - (ii) must, if any damage occurs to the Artwork or any of the Artwork is lost during the Protection Period from any cause whatsoever, indemnify the Principal for the replacement or repair (at the Principal's election) of the Artwork.
- (f) The indemnity referred to in Clause 3.11(e) is reduced proportionately to the extent that the damage to or loss of the Artwork was directly caused by the Principal's negligence.

### **3.12 Rejection and Removal of Artwork**

- (a) If, acting lawfully, the Principal determines that the Artwork does not comply with the Contract or is defective or damaged, the Principal may reject the Artwork by, prior to the Date of Acceptance, issuing to the Artist a written notice expressly:
  - (i) rejecting the Artwork;
  - (ii) identifying the grounds upon which the Principal rejects the Artwork; and
  - (iii) directing the Artist to, within a specified time remove, replace or rectify the Artwork.
- (b) The Artist must, at its expense, comply with the Principal's direction made in accordance with Clause 3.12(a)(iii). Time for the Artist's compliance is of the essence.
- (c) The Artist must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss or liability by reason of the Artist's failure to comply with Clause 3.12(b).

### **3.13 Ownership**

- (a) The legal and beneficial ownership of the Artwork passes to the Principal on the Date of Acceptance.
- (b) As the legal and beneficial owner of the Artwork, the Principal may sell, gift, dispose of or destroy the Artwork.

**3.14 Payment**

- (a) Upon the Artist satisfying Clauses 3.7(a), 3.9, 3.12(a)(iii), 3.12(b), 3.12(c), 3.16 and 3.17 and after the Date of Acceptance, the Artist may issue to the Principal a tax invoice.
- (b) The Artist must not issue to the Principal a tax invoice that is unlawful or does not accord with the Contract.
- (c) Subject to Clauses 3.14(a), 3.14(b) and 3.14(d), the Principal must, within 35 days of receiving the Artist's lawfully issued and accurate tax invoice, pay the tax invoice.
- (d) The Principal may setoff from any monies owed by it to the Artist pursuant to the Contract any amount owed by the Artist to the Principal by reason of Clause(s) 3.5(b), 3.10(b), 3.11(e), 3.12(c), 3.20(b) and/or 3.22(c)(ii).

**3.15 Variation**

This Contract may only be varied by prior written agreement between the Artist and Principal.

**3.16 Warranties and Manuals**

On or before the earlier of the Date for Delivery or termination of the Contract, the Artist must:

- (a) obtain and transfer to the Principal and ensure that the Principal receives the benefit of all warranties specified in the Contract; and
- (b) supply to the Principal all operation, service, maintenance and every other manual relevant to the Artwork.

**3.17 Workmanship**

If the Contract requires the Contract to test, install or commission any of the Artwork, then such services and workmanship carried out or to be carried out must:

- (a) be performed with due care, skill and diligence; and
- (b) be fit and proper having regard to and comply with the Contract and all Laws.

**3.18 Occupied Sites**

The Artist must consult and cooperate with all other persons authorised to be at the Place for Delivery so as to ensure that:

- (a) no person, property or the environment at the Place for Delivery is exposed to a risk of injury, damage, loss or harm by reason of the supply of the Artwork; and

- (b) the supply of the Artwork does not obstruct or interfere with other persons authorised to be at the Place for Delivery.

### **3.19 Safety Management Plan**

- (a) At least 7 days prior to the Artist entering the Place for Delivery, the Artist must submit to the Principal the Artist's Safety Management Plan.
- (b) The Artist's Safety Management Plan must expressly provide for and oblige all persons under the Artist's control to, prior to entering the Place for Delivery, successfully complete induction training on all of the hazards and risks relevant to the supply of the Artwork at the Place for Delivery and the controls and methods to be used to eliminate, or if it is not reasonably practicable to do so minimise, those hazards and risks.
- (c) The Artist must, at its expense, comply with the Principal's direction to review and amend its Safety Management Plan.
- (d) Throughout the term of the Contract, the Artist must implement, comply with and enforce its Safety Management Plan.

### **3.20 Intellectual Property**

- (a) The Artists warrant that its:
  - (i) supply of the Artwork; and
  - (ii) supply or use of any design, document, working method or material that relates to the Artwork;does not infringe any copyright, patent, registered design, trademark or other intellectual property right of any person.
- (b) The Artist must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss or liability by reason of the Artist's breach of warranty expressed in Clause 3.20(a).
- (c) Immediately upon the legal and beneficial ownership of the Artwork passing to the Principal, the Artist grants to the Principal an irrevocable licence permitting the Principal to:
  - (i) use, reproduce, make images of and publish, for any purpose, the Artwork and any document relevant to its design; and
  - (ii) relocate, modify, destroy or dispose of the Artwork.
- (d) The Artist must not reproduce the Artwork without the Principal's prior written consent.



**3.21 Confidentiality**

- (a) The Artist must treat as and keep confidential all information that is (**confidential information**):
  - (i) disclosed or made known to the Artist by the Principal or its agents; and
  - (ii) not information that is available to the general public in Western Australia.
- (b) The Artist must not use, disclose or authorise the use or disclosure of any confidential information to any person without the prior written consent of the Principal.

**3.22 Artist's Default**

- (a) If the Artist:
  - (i) fails to supply the Artwork to the Place for Delivery by the Date for Delivery;
  - (ii) fails to comply with Clause 3.9, 3.10, 3.11(d), 3.11(e), 3.12(c), 3.16, 3.17, 3.19, 3.20(b) or 3.21;
  - (iii) fails to provide to the Principal copies of the insurance contracts that the Artist is obliged to effect and maintain in accordance with the Contract; or
  - (iv) intimates that it is unwilling or unable to supply the Artwork;

and the Artist Failure persists for 7 days after the Principal has, in writing, notified the Artist of:

- a. the Artist Failure; and
- b. the Principal's intention to terminate the Contract if the Artist does not immediately remedy the Artist Failure;

then the Principal may, without prejudice to any other rights that the Principal has or may have pursuant to any Laws, terminate the Contract by written notice.

- (b) If the Artist:
  - (i) causes or contributes to the death of any person whilst at the Place for Delivery; or
  - (ii) becomes bankrupt or externally administered in accordance with Chapter 5 of the *Corporations Act 2001* (Cth) (as is applicable);

then the Principal may, by giving the Artist written notice, immediately terminate the Contract.

- (c) If the Principal terminates the Contract pursuant to Clause 3.22(a) or 3.22(b), then:
- (i) the Principal's liability to the Artist arising from or in any way connected to the Contract is limited to that portion of the Contract Sum that is payable for the Artwork that has been supplied to the Principal, is fit for their purpose, undamaged, free of defects, complies with the Contract and has been accepted by the Principal pursuant to Clause 3.11;
  - (ii) the Artist must indemnify the Principal for any and all loss, costs, expenses and liability that the Principal suffers or incurs by reason of the Artist not having supplied all of the Artwork for the Contract Sum; and
  - (iii) without limiting the rights of the Principal, the Principal may recover from the Artist any loss, expense or damage suffered or incurred by the Principal by reason of the Artist not having supplied all of the Artwork for the Contract Sum.

### **3.23 Principal's Default**

If the Principal fails to make a payment that is by reason of Clause 3.14, due and payable to the Artist and that failure persists for 7 days after the Artist has, in writing, notified the Principal of:

- (a) the Principal's failure; and
- (b) the Artist's intention to terminate the Contract if the Principal does not immediately remedy the Principal's failure;

then the Artist may, without prejudice to any other rights that the Artist has or may have pursuant to any Laws, terminate the Contract by written notice.

### **3.24 Resolution of Disputes**

All disputes or differences between the Artist and the Principal arising out of the Contract or Artwork whether raised before or after the Date of Acceptance which cannot be resolved by negotiation must, unless the parties agree otherwise in writing, be referred to a mediator, who shall be appointed either by:

- (a) the written agreement of the parties; or if agreement cannot be reached
- (b) the Resolution Institute.

### **3.25 Document Retention**

Subject to Clause 3.16, the Artist must, at its own cost, for 7 years following the completion or termination of the Contract, keep and maintain in good condition all documents and records that the Artist prepared, created or received that relate to the Contract or Artwork and, within 7 days of receiving the Principal's written request, permit the Principal to inspect and copy those documents and records.

**3.26 Entire Agreement**

The Contract constitutes the entire agreement between the parties regarding the Artwork and Contract Sum. It supersedes any and all previous arrangements, correspondence, quotes, purchase orders, tenders, representations, proposals, understandings and communications between the parties.

**3.27 Severability**

If any provision or part of the Contract becomes void or unenforceable, then that provision or part will be severed from the Contract and the rest of the Contract will remain in full force and effect and will be unaffected by such severance.

**3.28 Amendment and Waiver**

- (a) No term of the Contract or right or obligation of a party arising from or under the Contract is amended, waived, discharged or released without the parties' prior written agreement signed by them.
- (b) A party's waiver of a right arising from or under the Contract does not prejudice that party's rights in respect of any subsequent breach of the Contract.

**3.29 Joint and Several Obligations and Liabilities**

If the Artist is a partnership or comprised of two or more entities, then each of the partners or entities comprising the Artist shall be bound to the Contract jointly and severally.

**3.30 Survival**

The following Clauses survive the expiry or termination of the Contract 3.2, 3.5(b), 3.10(b), 3.11(e), 3.11(f), 3.12, 3.13, 3.14(d), 3.16, 3.20(b), 3.20(c), 3.20(d), 3.21, 3.22(c) and 3.24 to 3.30.