

BUNBURY HARVEY REGIONAL COUNCIL TERMS AND CONDITIONS OF SALE

1. DEFINITIONS

In this Agreement, unless the context otherwise requires:

- i. **"Agreement"** means these terms and conditions of sale (including any quote, Confirmation Form, credit application, schedule or annexure);
- ii. **"CCA"** means the *Competition and Consumer Act 2010* (Cth) as amended from time to time;
- iii. **"Council"** means the City of Bunbury and the Shire of Harvey collectively known as the Bunbury Harvey Regional Council (ABN 79 907 325 881);
- iv. **"Confirmation Form"** means the Order Confirmation Form issued by the Council to the Customer to confirm the Customer's order;
- v. **"Customer"** means the party referred to in the Confirmation Form;
- vi. **"Default Event"** means any of the following events:
 - A. an Insolvency Event;
 - B. the Customer ceases or threatens to cease conducting business in the normal manner, applies for deregistration or receives a deregistration notice;
 - C. any cheque the Customer provides to the Council is dishonoured for payment;
 - D. the Customer fails to pay any invoice or demand for payment issued by the Council by the due date; or
 - E. the Customer breaches any term of this Agreement or any other agreement between the Council and the Customer.
- vii. **"goods"** means the goods described in the Confirmation Form;
- viii. **"Guarantor"** means the party referred to in the Confirmation Form. If the Customer is a company, it means the company's directors and any other person who signs the Council's credit application form on the Customer's behalf;
- ix. **"Insolvency Event"** means the happening of any of the following events in relation to the Customer or a Guarantor (**"relevant party"**):
 - A. in the case of a corporation:
 - I. the relevant party is unable to pay its debts or fails to comply with a statutory demand under section 459F(1) of the *Corporations Act 2001* (Cth) or it is deemed to be unable to pay its debts under section 585 or 589(4) of the *Corporations Act 2001* (Cth);
 - II. the relevant party calls a meeting of creditors or enters into or proposes to enter into any composition with creditors, including a deed of company arrangement;
 - III. an application is made to the court that the relevant party be wound up;
 - IV. a liquidator, administrator or trustee is appointed in respect of the relevant party or a controller, as defined in the *Corporations Act 2001* (Cth), is appointed in respect of any of the relevant party's assets; or

V. the relevant party is wound up or dissolved; or

B. in the case of a natural person:

- I. he or she is unable to pay all his or her debts as and when they become due and payable; or
- II. he or she proposes to enter into or enters into any form of arrangement (formal or informal) with his or her creditors or any of them or he or she becomes bankrupt; and

x. **"Purchase Price"** means the price specified in of the Confirmation Form.

2. INTERPRETATION

- i. In this Agreement, the following rules of interpretation apply unless the context requires otherwise:
 - A. where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
 - B. a reference to any party to this Agreement or any other agreement or document includes that party's agents, sub-contractors, successors or permitted assigns;
 - C. a reference to **dollars** or **\$** is to Australian currency unless otherwise specified;
 - D. a reference to a right or obligation of any two or more persons confers that right or imposes that obligation, as the cause may be, jointly or severally;
 - E. a reference to **conduct** includes any omission, statement or undertaking, whether or not in writing;
 - F. a reference to **includes** means "includes without limitation"; and
 - G. the *Sale of Goods (Vienna Convention) Act 1986* (WA) is excluded.
- ii. If there is any conflict between this Agreement and an Confirmation Form, this Agreement shall prevail to the extent of any inconsistency.

3. GENERAL

- i. The terms of this Agreement apply in every case where the Council provides the goods to the Customer unless otherwise agreed in writing between the Council and the Customer. Acceptance of the goods by the Customer is conclusive evidence before any court that this Agreement (and any variation) applies and is binding on it and the Guarantor.
- ii. If the Customer provides the Council with a purchase order, the Council is not deemed to have accepted the purchase order until it is confirmed in writing by the Council at its discretion.

4. QUOTING AND PRICING

- i. The Purchase Price is exclusive of any delivery costs, as well as any taxes, tariffs, duties or charges levied. The Customer agrees to pay any such costs, taxes, tariffs, duties or charges irrespective of whether they are directly charged to the Customer or the Council.
- ii. The Council may:

- A. amend or withdraw a quote for the provision of the goods at any time before it is accepted by the Customer; and
 - B. adjust the Council's standard charges from time to time, and the Customer agrees to pay any such adjusted price.
- iii. The Customer may not vary or cancel an Confirmation Form without:
- A. the Council's written consent; and
 - B. indemnifying the Council for any loss or damage the Council suffers or incurs as a result of the variation or cancellation.

5. OBLIGATIONS

- i. The Council will:
 - A. use reasonable endeavours to provide the goods in a timely and efficient manner; and
 - B. not be liable for any delay or non-performance in providing the goods if the delay or non-performance is attributable, either directly or indirectly, to circumstances beyond the control of the Council.
- ii. The Customer will pay all amounts due and payable to the Council without deduction or set-off.
- iii. In each and every respect, time shall be of the essence, in the performance of a party's obligations under this Agreement.

6. PAYMENT

- i. The Customer agrees to pay the Purchase Price and all monies which may be owing to the Council for the goods supplied to the Customer, within ~~kNo.>~~ days of the date of the invoice issued by the Council in respect of those goods, unless the Council has requested earlier payment.
- ii. The Council may:
 - A. charge the Customer a surcharge for payments made by credit card; and
 - B. charge interest on the daily balance of any amount overdue calculated at the rate of 11% per annum.

7. DELIVERY, OWNERSHIP AND RISK

a. Delivery

- i. If delivery is required, the Council will deliver the goods as agreed between the parties.
- ii. The Customer acknowledges that any dates and times quoted for delivery are estimates only. Maximum delivery times for goods vary by State and Territory and delivery of such will be determined by the Council on a case by case basis.

b. Ownership

- i. Ownership in the goods supplied by the Council to the Customer under this Agreement does not pass to the Customer until the goods, and any goods previously supplied, have been paid for in full. The Customer in the meantime takes custody of the goods and retains them as the fiduciary agent and bailee of the Council.
- ii. Until the goods have been paid for in full:

- A. the Customer may sell the goods, in the ordinary course of its business, but only as fiduciary agent of the Council. Any right to bind the Council to any liability to a third Party by contract or otherwise is expressly negated. The Customer receives all proceeds, whether tangible or intangible, direct or indirect, of any dealing with the goods (including any proceeds from insurance claims) on trust for the Council and must keep the proceeds in a separate bank account until the liability to the Council is discharged; and
- B. the Customer agrees not to sell, assign, charge or otherwise encumber or grant any interest over any obligations which any third Party may owe to the Customer as a result of the use, manufacture or re-sale of the goods;

- iii. If the Customer uses any of the goods in a commercial process of its own, or a third Party and sells the product of that process ("**Commercial Product**"), then the Customer holds such part of the proceeds of the sale of any Commercial Product as relates to any goods sold by the Council to the Customer and used in the commercial process on trust for the Council. That part must be treated, for the purpose of quantifying how much the Customer holds on trust for the Council (but for no other purpose) as being equal in dollar terms to the amount owing by the Customer to the Council at the time of the receipt by the Customer of the proceeds of sale for all goods sold by the Council to the Customer.

- iv. If the amount owing by the Customer to the Council is greater than the proceeds of sale of the Commercial Product the balance remains owing by the Customer to the Council.

- v. The Customer irrevocably authorises the Council at any time, to enter any premises:

- A. upon which the Council's goods are stored to enable the Council to inspect the goods and (if the Customer has breached the Agreement), to reclaim possession of the goods; and
- B. upon which the Customer's records pertaining to the goods are held to inspect and copy the records.

- vi. The Council's property in the goods is not affected by the fact that the goods become fixtures attached to premises of the Customer or a third party, and if the Council enters those premises for the purpose of reclaiming possession of the goods, and incurs any liability to any person in connection with the entry or reclamation, the Customer indemnifies the Council against that liability.

- vii. The provisions of this clause apply despite any arrangement between the parties under which the Council grants the Customer credit. Where the Council grants the Customer credit for a specific period the credit period is for that period or until the resale of the goods by the Customer or their use by the Customer in a commercial process of its own or a third party, whichever is the earlier.

- viii. The Customer's right to possession of goods still owned by the Council under this Agreement shall cease if a Default Event occurs.

- ix. If a Default Event occurs, the Customer agrees that the Council is entitled to enter any premises where the goods supplied by the Council are located to repossess, remove and sell such goods. The Customer (its successors and assigns, including any external manager or administrator) shall not object to the Council (or its agents) entering any premises for

Comment [XD1]: Civic to Council: what are the Council's payment terms? Eg: 30 days?

the purpose of this clause and agrees to indemnify and keep the Council indemnified in respect of any claims, actions and costs that may arise against the Council in relation to the removal, repossession and sale of the goods pursuant to this Agreement, including any claims brought by third parties.

- x. For avoidance of doubt, this Agreement applies even where the customer is a Consumer (as that term is defined in Schedule 2 of the CCA).

c. Risk

The Council will take reasonable precautions to preserve the goods pending delivery to the Customer. Notwithstanding this, the risk in the goods passes to the Customer from the time the goods leave the Council's premises.

9. CREDIT

- i. The Customer authorises the Council to carry out any credit checks with third parties.
- ii. The Council reserves the right at any time (without providing any reasons) to:
 - A. impose credit limits, which may be varied from time to time. If the Customer exceeds the credit limit, then the goods may be withheld until the Customer's account is back within the credit limit;
 - B. withdraw any credit trading account granted to the Customer; and
 - C. refuse to extend any further credit to the Customer.
- iii. The Customer warrants that the credit to be provided to it by the Council is to be applied wholly or predominantly for business purposes or investment purposes (other than investment in residential property).

10. WARRANTIES AND LIMITATION OF LIABILITY

- i. Except as required by law, the Council gives no express warranty in relation to the goods supplied to the Customer. The Customer acknowledges that it has not relied on any representation or warranty made on behalf of the Council.
- ii. All warranties, guarantees and conditions implied at common law or under statute are expressly excluded from this Agreement unless such exclusion would be illegal or void.
- iii. To the extent permitted by law, liability under the Agreement or a warranty, guarantee or condition which cannot legally be excluded is limited to paying the value of the goods the subject of this Agreement.
- iv. Except as expressly provided in this Agreement, the Council is not liable for any:
 - A. loss or damage suffered by the Customer arising from a failure to comply with clause 11.i; and
 - B. consequential loss or damage (including but not limited to loss of profits, loss of revenue, loss of business opportunities, loss of anticipated savings and damage to goodwill).
- v. This clause survives the termination of this Agreement.

11. CUSTOMER ACKNOWLEDGEMENTS

The Customer acknowledges and agrees that the:

- i. goods may contain bacteria and other pathogens. The Customer must adopt appropriate safety measures and ensure its contractors and employees wear adequate protective clothing; and
- ii. Council takes every care in the production of its but does not and cannot guarantee that the goods are weed free as they are produced and stored in outside environments.

12. INDEMNITY

- i. The Customer shall indemnify the Council and the Council's officers, employees, contractors and agents against all liability, loss, claims, actions, suits, demands, costs, expenses, including all debt collection and legal costs (on a solicitor/client basis) arising in any way out of a breach by the Customer of this Agreement.
- ii. This clause survives the termination of this Agreement.

13. TERMINATION

- i. The Customer may give notice to the Council at any time that it wishes to terminate this Agreement. If this occurs, the Customer must pay the Council's fees for work done, including all reasonable and unavoidable costs incurred by the Council that are attributable to the termination.
- ii. Without prejudice to any of the Council's accrued rights or remedies:
 - A. if an Insolvency Event occurs, the Council may immediately terminate the Agreement upon notice to the Customer; and
 - B. if a Default Event occurs, then:
 - I. any moneys payable by the Customer to the Council whether due for payment or not will become immediately due and payable;
 - II. the Council may cancel any outstanding order or arrangement with the Customer; and
 - III. the Council may terminate the Agreement immediately upon the Default Event not being remedied within 7 days of the receipt of a notice from the Council requesting the Default Event be remedied.

14. GUARANTEE AND INDEMNITY

- i. In consideration of the Council entering into this Agreement and granting credit to the Customer at the Customer's request, the Guarantor covenants and agrees with the Council that the Guarantor:
 - A. irrevocably guarantees to the Council due performance by the Customer of its obligations under this Agreement including payment of all monies owing to the Council for the goods supplied to the Customer;
 - B. separately and independently undertakes to indemnify the Council and will at all times keep the Council indemnified from and against all losses and expenses which the Council may suffer or incur as a result of any breach or non-observance by the Customer or the Guarantor of any term of this Agreement (including all enforcement expenses and legal costs on a full indemnity basis) or any part of this Agreement being void or unenforceable; and

- C. is deemed to be a primary debtor to the Council independent of the Customer.
- ii. This is a continuing guarantee, and the Guarantor remains liable to the Council under clause 14.i notwithstanding:
 - A. that the Council has exercised any of its rights under this Agreement;
 - B. that the guarantee given by the Guarantor may be for any reason unenforceable, either in whole or in part;
 - C. that the Customer (being a company) is wound up or dissolved, or (being a natural person) is declared bankrupt;
 - D. the granting of time or concession (including a release, waiver, variation, assignment, novation, compounding or relinquishment of rights) to the Customer by the Council;
 - E. any delay or laches on the part of the Council;
 - F. any variation of this Agreement between the Council and the Customer (whether or not such variation increases the Guarantor's liability under the Guarantee) or any assignment or novation of this Agreement.
- iii. The Customer acknowledges and agrees that a demand on the Guarantor is deemed to have been duly made if it is in writing and signed on behalf of the Council by its authorised representative or solicitor and has been given to the Guarantor or left at or posted to the address of the Guarantor or Customer or such last known address as notified to the Council in writing by the Guarantor.
- iv. The Council may apply any amounts received under this Guarantee towards satisfaction of any amounts under this Agreement in whatever manner it sees fit.
- v. The terms of this clause are not affected by any action taken or notice issued in relation to any other securities. The Council is under no obligation to marshal or appropriate in favour of the Guarantor any security held by the Council at any time or any funds or property that the Council may be entitled to receive or have a claim on.
- vi. To the fullest extent permitted by law the Guarantor waives such of the Guarantor's rights as surety or indemnifier which may at any time be inconsistent with any of the provisions of this clause.
- vii. The covenants and agreements made or given by the Guarantor are not conditional in any way and remain binding notwithstanding that any other person has not executed or duly executed this Agreement.
- viii. The obligations of the Guarantor under this clause continue in force until the Council confirms in writing that it has been released.
- ix. The Guarantor acknowledges that it has, prior to signing or execution of this Agreement obtained independent legal and financial advice and/or had the opportunity to obtain such advice as to its obligations and the true meaning, nature and effect of this Agreement.

15. NOTICES

- i. Any notices given in accordance with this Agreement must be in writing and sent by email or post to the recipient's last known place of address.

- ii. A notice sent by email is regarded as given and received when sent by the sender unless the:
 - A. sender receives a report of delivery failure or delivery delay;
 - B. sender receives an "Out of Office" reply or similar response; or
 - C. recipient informs the sender that the notice is illegible, incomplete or corrupted within 4 hours of the notice being transmitted.
- iii. A notice delivered other than on a business day or after 4.00pm (recipient's time) is to be regarded as being received at 9.00am on the following business day and a notice delivered before 9.00am (recipient's time) is to be regarded as being received at 9.00am.

16. GENERAL

a. No Waiver

No failure to exercise and no delay in exercising any right, power or remedy, under this Agreement will operate as a waiver. Nor will any single or partial exercise of any right, power or remedy preclude any other or further exercise of that or any other right, power or remedy.

b. Entire Agreement

This Agreement records the entire agreement between the parties and prevails over any earlier agreement, written or oral, which are of no further effect.

c. Variations

No variation to this Agreement is enforceable unless it is in writing and signed by the parties.

d. Severance

If any provision of this Agreement are invalid or unenforceable in accordance with its terms, all other provisions which are self-sustaining and capable of separate enforcement without regard to the invalid or unenforceable provision shall be and continue to be valid and enforceable in accordance with their terms.

e. Governing Law

This Agreement is governed by the laws of Western Australia and the Commonwealth of Australia and each party irrevocably submits to the non-exclusive jurisdiction of the Courts of Western Australia.