

Port of Newcastle Operations Pty Ltd Purchase Order Terms and Conditions

Purpose and intent of Terms and Conditions

These Purchase Order Terms and Conditions provide details of Port Of Newcastle's (PON) requirements for the supply of non-complex goods and services from external providers.

For the purposes of these terms, the supply is provided by a "Supplier" and is categorised as either "Goods" or "Services.

Goods relates to the supply of consumables, materials and equipment.

Services relates to the supply of:

- minor to moderate repairs and maintenance;
- performance of defined tasks; or
- provision of reports and detailed advice.

These terms are drafted to apply to each of the above supplies in general. Most of the terms apply to both goods and services. Some terms are dedicated to either goods or services and are identified as such throughout the document.

Parties

Name:	Port of Newcastle Operations Pty Ltd (PON)
Address:	6 Newcomen Street, Newcastle NSW 2300
Name:	As specified in the Purchase Order (Supplier)
Address:	As specified in the Purchaser Order

1 Definitions

In this Contract:

- (a) **Business Day** means any day other than: (i) a Saturday, Sunday or public holiday; or (ii) 27, 28, 29, 30 or 31 December.
- (b) **Confidential Information** includes technical, commercial, financial or other information (whether written or oral) which is by its nature confidential;
- (c) **Completion** means when, in the reasonable opinion of PON, the Goods have been delivered to PON's nominated delivery point in accordance with the Contract or the Services are complete and defect-free;
- (d) **Contract** means the Purchase Order and these Terms and Conditions;
- (e) **Date for Completion** means the date for delivery of Goods or for the completion of services as stated in the Purchase Order;
- (f) **Defects Liability Period** means a period of 12 months after Completion, unless stated otherwise in the Purchase Order;
- (g) **Goods** includes but is not limited to materials, items, goods, chattels or products provided by the Supplier under the Contract;
- (h) **Payment Schedule** has the meaning given in clause 10.2;

- (i) **Purchase Order** is the document issued by PON to the Supplier which specifies the Goods or Services;
- (j) **Services** means all works or deliverables (as applicable) to be carried out, supplied or completed in accordance with the Contract and any other specifications or documents provided by PON;
- (k) **Site** means any location made available by PON from time to time for the performance of the Services;
- (l) **Supplier** means the supplier of the Goods or Services to PON under the Contract;
- (m) **Terms and Conditions** means this document, entitled Port of Newcastle Purchase Order Terms and Conditions; and

2 Contract

- (a) These Terms and Conditions and the Purchase Order comprise the Contract.
- (b) The Contract will be formed when PON issues a Purchase Order and the Supplier communicates its acceptance or commences the supply of Goods or Services.

2.2 Goods

Where the Contract involves the provision of Goods:

- (a) The Supplier will hold the title and carry the risk on any Goods supplied by the Supplier until they are unloaded, properly secured, signed for and inspected by a representative of PON at the delivery address notified to the Supplier by PON, where risk and property passes to PON.
- (b) All Goods must be accompanied by appropriate delivery documents including numbered advice notes showing the Purchase Order number and a full description of the Goods together with any other documents necessary to enable PON to verify the Goods at the time of delivery. The Supplier must provide Purchase Order references on each package and/or crate and comply with any other request by PON with respect to the identification of the Goods.
- (c) Signed delivery dockets are not evidence that the quality or quantity of the Goods has been accepted by PON.
- (d) PON will accept delivery of Goods on Business Days between the hours specified in the Purchase Order or, if not specified in the Purchase Order, then between the hours of 8:30am to 5.00pm.
- (e) Unless PON agrees otherwise, the Supplier must ensure that all Goods supplied under the Contract are new and unused.
- (f) If the Goods are defective, if the full quantity of the Goods is not delivered, or if the Goods are not delivered by the Date for Completion, PON has the right immediately to terminate the Contract. If PON does not terminate the Contract, the Supplier must replace the defective Goods or supply the correct quantity of the Goods within 7 days of PON giving notice.
- (g) If the Purchase Order has not been prepared on an F.I.S. (Freight Insurance Shipping) basis, the Supplier must pay any freight on the Goods. The Supplier must show the cost as a separate item on its payment claim for the Goods. Freight charges must be supported by copies of freight tax invoices. The Supplier must not send Goods "Freight On", unless specified in the Purchase Order.
- (h) The Supplier must ensure that PON obtains the benefit of any warranties to the extent provided by manufacturers of:

- (i) Goods supplied by the Supplier; and/or
- (ii) materials and other components which are used in the performance of the Contract where ownership of those materials ultimately vests in PON.

3 Supplier's obligations

3.1 General obligations

The Supplier must:

- (a) carry out and complete its obligations under the Contract:
 - (i) in a conscientious, diligent, expeditious, proper and workmanlike manner in accordance with PON's directions and the Contract;
 - (ii) so that the Goods or Services are fit for their intended purpose; and
 - (iii) to the standard of care and skill expected of a Supplier who regularly acts in the capacity in which the Supplier is engaged under this Contract and who possesses the knowledge, skill and experience of a Supplier qualified to act in that capacity;
- (b) ensure that each person who supplies Goods or performs the Services holds all appropriate licences and certificates and is experienced, competent and qualified;
- (c) ensure that the supply of Goods or Services and the execution of the Services comply with:
 - (i) all requirements of the Contract, applicable standards, including relevant Australian Standards, laws, regulations, by-laws and codes of practice; and
 - (ii) the requirements of all government, statutory and regulatory authorities or bodies having jurisdiction in relation to the Works.

If the Contract involves the provision of Services on Site, the Supplier, its subcontractors and personnel must:

- (d) fully co-operate with, and co-ordinate its work with the activities of PON and its other contractors;
- (e) ensure that all Services carried out on the Site are only carried out during working hours directed by PON;

- (f) comply with any site requirements notified by PON to the Supplier from time to time, including those relating to industrial relations, safety, site induction, environment and community relations;
 - (g) keep the Services clean and tidy as they proceed and, on Completion, remove all its plant and equipment and leave the site ready for immediate use;
 - (h) remove from the Site any person who, in the opinion of PON, is incompetent or misconducts themselves;
 - (i) ensure that any Goods or Services in progress on the Site are safe and secure, not accessible to third parties and do not pose a risk to any person or property;
 - (j) obey all signs and notices on Site;
 - (k) obtain PON's approval prior to conducting any crane operation or other heavy loading operations within or in the vicinity of Newcastle Port;
 - (l) immediately notify PON's Representative of any significant event(s) observed while on PON property, regardless of whether it is related to the Services. Significant events include an accident or near miss, unsafe work practices, oil spill, dumping or environmental incident, discovery of antiquities or any likely latent conditions; and
 - (m) not interfere with the operations of Newcastle Port.
- (d) The Supplier acknowledges that there may be a lead time before inductions can be conducted.
 - (e) The Supplier must instruct those delivering the Goods or performing the Services to follow safe work practices and procedures at all times, take reasonable care of their safety and take reasonable care for the health and safety of anyone else who may be affected by anything that they do or fail to do in connection with the delivery of the goods or the performance of the service.
 - (f) If the Contract involves the provision of Services on Site, the Supplier must, prior to commencing Works:
 - (i) prepare a work, health and safety plan that addresses safe work method procedures and work health and safety requirements relating to the carrying out and use of the Services; and
 - (ii) provide the following documents to PON and have a copy on Site at all times:
 - (A) risk assessment/safe work method statements; and
 - (B) any other document outlining the safe use of any Goods and the Services.

Provision of these documents does not relieve the Supplier of its responsibilities to PON under this Contract.

PON has a right to inspect the Services at any stage convenient to PON. Any comment, approval, consent or direction by PON does not relieve the Supplier from, or in any way diminish or affect the Supplier's obligations under the Contract.

3.2 Work Health & Safety/Inductions

- (a) Where required by PON, the Supplier must hold a current induction card prior to accessing any Site to deliver Goods or to commence the Services.
- (b) If the Supplier does not hold a current induction card, the Supplier must apply to complete a PON Level 1 (Access) induction and Level 2 (Works) induction (if required).
- (c) The Supplier acknowledges that it must arrange any necessary inductions by emailing PON at inductions@portofnewcastle.com.au.
- (g) If the Contract involves construction work as defined under the *Work Health and Safety Regulation 2011* (NSW) and the construction work is valued at \$250,000 or more, the Supplier, having responsibility for the construction work at all times until the Services reach Completion under the Contract, is appointed principal contractor and controller of the Site for the purposes of that Act.
- (h) Whilst the Supplier is working on the Site or part of the Site and it is able to work on and occupy that part of the Site exclusively, then it will have exclusive control of the Site. Where the Supplier does not have exclusive control of the Site (or the part of the Site) then it must take all safety measures and precautions in relation to the Site, its employees, contractors, PON's employees and contractors and any visitors on the Site when carrying out the Services and will have full responsibility for the Services.

3.3 Subcontracting and Assignment

The Supplier must not, without the prior written consent of PON:

- (a) subcontract the whole or any part of the supply of Goods or Services; or
- (b) assign or encumber a right or interest under the Contract.

Any subcontracting of the Goods or Services does not relieve the Supplier of its obligations under the Contract and the Supplier is fully responsible for the acts and omissions of its subcontractors.

4 Confidential Information and Intellectual Property

- (a) The Supplier must keep all Confidential Information confidential and not disclose it to an unauthorised person.
- (b) The Supplier warrants that it will not infringe any third party intellectual property rights in performing the Contract and indemnifies PON against any claims which may be brought against PON for an infringement of intellectual property rights by the Supplier or its employees, agents or subcontractors.
- (c) All intellectual property rights arising out of or in connection with the Services or the Contract, including all copyright in any documents prepared or provided by the Supplier, vest in PON on their creation absolutely (including those created before the date of the Contract) and nothing in the Contract confers on the Supplier any ownership rights or intellectual property rights arising out of or in connection with the Services or the Contract.
- (d) Any individuals who have 'moral rights' in any material provided as part of the Services must give their written consent to PON to deal with the Services (including by way of destruction or alteration) as PON may direct.

5 Commencement and Completion

Unless notified otherwise by PON, the Supplier must commence the delivery of the Goods or Services immediately upon receiving the Purchase Order, and must regularly and diligently continue with the delivery of the Goods or Services so that Completion occurs by the Date for Completion.

6 Variations

- (a) The Supplier must vary the Contract, timing or scope of the delivery of the Goods or Services (including by omission) as required by PON,

but is not entitled to payment for any variation not directed by PON in writing.

- (b) PON will determine the value of a variation acting reasonably.

7 Suspension

- (a) PON may direct the Supplier to suspend the whole or part of the delivery of the Goods or Services for any reason and for a period determined by PON.
- (b) PON may direct the Supplier to recommence the delivery of the Goods or Services by giving notice in writing. The Supplier must recommence the delivery of the Goods or Services as soon as possible upon receipt of the notice.
- (c) If the Supplier does not recommence within a reasonable period as notified by PON, PON may terminate the Contract pursuant to clause 12.1.

8 Defects

- (a) The Supplier must:
 - (i) maintain the Goods or Services in progress until Completion; and
 - (ii) make good all defects or omissions in the Goods or Services prior to Completion.
- (b) If a defect, omission or failure in the Goods or Services is discovered during the Defects Liability Period, the Supplier must promptly repair or replace, as PON requires, such defect, omission or failure.
- (c) If the Supplier does not make good a defect, omission or failure within the time required by PON, PON may recover, as a debt due from the Supplier, the amount of the cost reasonably estimated by PON for making good the relevant defect, omission or failure.

9 Insurance

9.1 Public and product liability insurance

Before commencing any delivery of the Goods or Services, the Supplier must at its own expense procure and maintain for the duration of the Contract with reputable insurers, public and product liability insurance cover for an amount not less than \$20,000,000 per event.

9.2 Professional indemnity insurance

If the Contract involves the provision of professional advice or services, the Supplier must, before commencing any service, at its own expense procure and maintain for the duration of the Contract and for a period of not less than 7 years after termination of the Contract or Completion, with reputable insurers, professional indemnity insurance with respect to any negligent acts, errors or omissions of the Supplier. This insurance must provide cover for an amount not less than \$5,000,000 for any one claim.

9.3 Works Insurance

If the Contract involves construction work or the installation of Goods, before commencing any service, the Supplier must at its own expense procure and maintain for the duration of the Contract with reputable insurers, insurance of the service in progress against loss or damage resulting from any cause until the Supplier is no longer responsible for the care of the Service. Such insurance must include cover for the transit and storage of any goods, materials or parts of the Services. This insurance must provide cover for an amount equal to the value of reinstatement of the Services plus 20% of the Purchase Order sum.

9.4 Marine insurance

If the Contract requires the use of watercraft, the Supplier must, before commencing the Services, at its own expense procure and maintain for the duration of the Contract with reputable insurers marine liability insurance for an amount of not less than \$20,000,000 per event.

9.5 Workers compensation insurance

Before commencing any deliver of Goods or provision of Services, the Supplier must at its own expense procure and maintain for the duration of the Contract with reputable insurers workers compensation insurance as required by law.

9.6 Evidence of insurance

As and when it is required to do so by PON, the Supplier must produce for inspection documentary evidence to show that the insurances referred to in this clause 10 are being maintained.

- (i) identify the Goods or Services to which it relates, including the Purchase Order sum and Purchase Order number;
 - (ii) indicates the amount of payment that the Supplier claims to be due (claimed amount); and
 - (iii) contains any other information reasonably required by PON.
- (b) Where the Services have a duration of more than one month and it is stated on the Purchase Order that monthly payments apply, the Supplier may make payment claims on the 25th day of each month.
 - (c) Payment claims must be addressed to PON's representative as notified by PON to the Supplier from time to time
 - (d) Subject to clause 10.2 and 10.3, PON will pay the Supplier the amount properly payable, at the end of the month subsequent to the month in which the payment claim is received.

10 Payment

10.1 Payment claims

- (a) The Supplier may serve a payment claim on PON upon delivery of the goods or Completion of the Services, which must:

10.2 Payment Schedules

If PON intends to pay the Supplier an amount less than the claimed amount, PON will provide the Supplier with a payment schedule within 10 Business Days of receipt of the payment claim (**Payment Schedule**) which:

- (a) identifies the payment claim to which it relates;
- (b) indicates the amount (if any) that PON proposes to pay (**the scheduled amount**); and
- (c) indicates why the scheduled amount is less and the reasons for withholding payment.

If a Payment Schedule is provided by PON to the Supplier, the Supplier must provide PON with a tax invoice for the scheduled amount.

10.3 Right to set-off

PON may set-off or deduct from any amounts due to the Supplier under the Contract any moneys due or which may become due from the Supplier to PON, whether in respect of the Contract or otherwise.

10.4 Payment on account

Payment claims, Payment Schedules or any payments of money are not evidence that the Works have been carried out satisfactorily. Payment is on account only.

11 GST

- (a) If a goods or services made under this Contract is a taxable supply, the recipient of that taxable supply (**Recipient**) must, in addition to any other consideration, pay to the party making the taxable supply (**Supplier**) the amount of GST in respect of the supply.
- (b) The Recipient will only be required to pay an amount of GST to the Supplier if and when the Supplier provides a valid tax invoice to the Recipient in respect of the taxable supply.
- (c) The amount of a party's entitlement under this Contract to recovery or compensation for any of its costs, expenses, losses, damages or other liabilities is reduced by the input tax credits to which that party is entitled in respect of those costs, expenses, losses, damages or liabilities.

12 Termination

12.1 Termination for cause

- (a) Without limiting its other rights, PON may by notice terminate the Contract if, in the reasonable opinion of PON, the Supplier:
 - (i) becomes, or is likely to become, insolvent;
 - (ii) fails to proceed with the delivery of the Goods or Services in a regular and diligent or in a competent manner; or
 - (iii) commits any breach of the Contract.
- (b) If PON terminates the Contract under clause 12.1:
 - (i) PON will not be bound to make any further payment to the Supplier until the full and final cost of completion of the delivery of the Goods or Services by others has been ascertained but, upon such cost being ascertained, the amount of any damage loss and/or expense suffered or incurred by PON by reason of termination of Contract will be notified by PON to the Supplier and, if such amount when added to the monies paid to the Contractor before the date of termination exceeds the total value of work properly executed up to the date of termination, the difference will be a debt payable to PON by the Supplier; and
 - (ii) for clarity, the Supplier is not entitled to claim any consequential loss or other damage arising in relation to the termination, including loss of profits or loss of opportunity; and

- (c) termination does not prejudice any right of PON to recover from the Supplier damages for any breach of the Contract.

12.2 Termination for convenience

- (a) Without prejudice to any of PON's other rights or entitlements under this Contract, PON may, at any time, for its sole convenience, terminate the engagement of the Supplier under this Contract, by written notice to the Supplier.
- (b) The Supplier will be entitled to payment of the following amounts as reasonably determined by PON:
 - (i) the value of all Services carried out in accordance with the Contract to the date of termination (less any amounts already paid to the Supplier in respect of that Service and any amount PON is or may be entitled to deduct or set off); and
 - (ii) the cost of Goods reasonably ordered by the Supplier for incorporation in the Services, which the Supplier is legally liable to accept, but only if the materials become the property of PON upon payment.
- (c) The Supplier is not entitled to claim any consequential loss or other damage arising in relation to the termination, including loss of profits or loss of opportunity.

13 Liability and indemnity

- (a) The parties agree that, to the extent permitted by the law, Part 4 of the *Civil Liability Act 2002* (NSW) is excluded in relation to all and any rights, obligations and liabilities of the parties under or in relation to the Contract, whether they are sought to be enforced as a breach of contract or a claim in tort or otherwise.
- (b) The Supplier indemnifies PON against any liability, cost, loss, expense, damage or claim (including for death or personal injury) caused by the act, omission, negligence or breach of the Contract or any law or regulation by the Supplier, its employees, contractors, agents or invitees.
- (c) PON is not liable for, and is released from, any claims of any nature not notified to it in writing within 14 days of the occurrence of the event or circumstance giving rise to the claim, together with full particulars of the claim.

- (d) Upon the Supplier accepting the final payment from PON, the Supplier releases and discharges PON from any and all claims, demands, liability and causes of action which the Supplier has or may have under or relating to the Contract.

14 Fraud and Corruption Prevention

- (a) PON will not tolerate fraudulent or corrupt conduct. The Supplier must act ethically at all times. The Supplier must notify PON of any corrupt activity or suspected corrupt activity as that information comes into their possession. The Supplier must assist PON in any investigation in relation to corrupt activity or suspected corrupt activity. All reports pursuant to this clause 15 must be made to General Manager Commercial – Port of Newcastle ph 4908 8215 or email michael.dowzer@portofnewcastle.com.au

15 Personal Property Securities Act

- (a) In this clause:
- (i) **PPSA** means the *Personal Property Securities Act 2009* (Cth);
 - (ii) all capitalised terms not otherwise defined in the Contract have the meaning given to them in the PPSA; and
 - (iii) **'PPS Register'** means the Personal Property Securities Register established under section 147 of the PPSA.
- (b) The Supplier acknowledges and agrees that PON may determine that the Contract (or a transaction in connection with it) is or contains a Security Interest for the purposes of the PPSA in:
- (i) materials, equipment and other things intended for use in the Service which are located on Site or off Site;
 - (ii) construction plant, temporary works and other things on Site or off Site as are used by the Contractor or any subcontractors; and
 - (iii) documents used for the Services, (together, **Collateral**).
- (c) The Supplier consents to PON registering PON's Security Interest over the Collateral.
- (d) The Supplier undertakes to:
- (i) promptly sign any further documents and provide any further information (such information to be complete,

accurate and up-to date in all respects) which PON may reasonably require to:

- (A) register a Financing Statement or Financing Change Statement on the PPS Register in relation to a Security Interest over the Collateral;
 - (B) register any other document on the PPS Register which is necessary to perfect PON's Security Interest over the Collateral; or
 - (C) correct a defect in any document referred to in clause 15(d)(i)(A) or clause 15(d)(i)(B);
- (ii) not register, or permit to be registered by any third party including a subcontractor, a Financing Statement or a Financing Change Statement in respect of the Collateral without the prior consent of PON; and
- (iii) keep full and complete records of the Collateral.
- (e) PON and the Supplier agree that, subject to the terms of the Contract and to the extent permitted by law, the following provisions of the PPSA do not apply to the Contract: (i) section 95; (ii) section 121(4); (iii) section 125; (iv) section 129; (v) section 130; (vi) section 132(3)(d); (vii) section 132(4); (viii) section 135; (ix) section 142; and (x) section 143.
- (f) Unless otherwise agreed to by PON, the Contractor waives its right to receive a Verification Statement in accordance with section 157 of the PPSA.

16 General

- (a) Where this purchase order requires the performance of construction works to which the *Building and Construction Industry Security of Payment Act 1999* (NSW) applies, the Supplier agrees to indemnify PON against any loss, expense or damage of any nature suffered or incurred by PON under or in connection with such Act except to the extent that the same arose due to any breach, negligence, default or non-compliance of the PON.

- (b) The Contract constitutes the entire agreement between the parties and supersedes any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of the Contract, whether orally or in writing.
- (c) Part or all of any provision of the Contract that is unenforceable or illegal will be severed from the Contract and will not affect the enforceability of the remaining provisions of the Contract.
- (d) This Contract does not create a partnership, fiduciary, agency or any other relationship between PON and the Supplier except the relationship of contracting parties. No party is liable for an act or omission of another party except as expressly stated in the Contract.
- (e) All services undertaken or performed by the Supplier prior to the date of this Contract in connection with the Services is taken to form part of the Services and is subject to the Contract. All amounts paid to the Supplier in connection with the Services before the date of this Contract are taken to have been paid under and in accordance with the Contract.
- (f) Any notice to be given to PON under or in connection with this Contract must be in writing and delivered by hand, post or facsimile addressed to PON's representative as notified to the Supplier from time to time.
- (g) Unless otherwise specified in the Purchase Order, a reference to dollars or \$ is to Australian currency.
- (h) This Contract is subject to the laws of New South Wales