

**PURCHASE ORDER TERMS AND CONDITIONS****1. GENERAL**

- 1.1 The issuing of a Purchase Order by NEXTDC to the Supplier constitutes an offer by NEXTDC to acquire the Goods and/or Services described in the Purchase Order from the Supplier on the terms contained in the Purchase Order and these Purchase Order Terms and Conditions (the "Agreement").
- 1.2 The Supplier will be deemed to have accepted the Agreement if it does not notify NEXTDC within 3 days of receipt of the Purchase Order that it does not accept the Agreement or by supplying the Goods and/or Services to NEXTDC, whichever occurs first.
- 1.3 In the event and to the extent of any inconsistency between the Purchase Order, these Purchase Order Terms and Conditions and the Special Conditions, they shall be interpreted in the following order of precedence: the Special Conditions, the Purchase Order, these Purchase Order Terms and Conditions.
- 1.4 To the extent permitted by law, in relation to its subject matter, the Agreement embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties, and supersedes any prior written or other agreement of the parties.
- 1.5 For the avoidance of doubt, the Agreement applies to the exclusion of any terms and conditions contained on or referred to in the Supplier's invoice, conditions of sale, quotation or otherwise (whether or not those documents are attached to or referenced in the Purchase Order).
- 1.6 Despite clauses 1.1 to 1.5, these Purchase Order Terms and Conditions do not apply where NEXTDC and the Supplier have entered into a longer form written agreement with respect to the supply of the Goods and/or Services, in which case the terms and conditions of that agreement will apply.

2. SUPPLY OF GOODS AND/OR SERVICES

- 2.1 The Supplier must supply the Goods and/or Services in accordance with the Agreement.
- 2.2 The Supplier must deliver the Goods and the Documentation, DDP (Incoterms 2010), to the Delivery Address by the Delivery Date (time being of the essence).
- 2.3 Unless otherwise stated in the Purchase Order, delivery of the Goods includes unloading the Goods at the Delivery Address.
- 2.4 The Supplier must ensure that the Goods are suitably packed to avoid damage in transit or in storage. Packages must be marked with the Purchase Order number, item number, destination, contents, quantity, date and method of dispatch and weight of each package.
- 2.5 The Supplier must perform the Services by the Delivery Date (time being of the essence).
- 2.6 The Supplier must keep NEXTDC fully informed on all aspects of the supply of the Goods and/or Services as required by NEXTDC from time to time.
- 2.7 If the Supplier becomes aware of any delay or potential delay to the supply of the Goods and/or Services, the Supplier must promptly notify NEXTDC of the delay or potential delay and the estimated duration of the delay or potential delay.
- 2.8 If the Supplier fails to supply the Goods and/or Services by the Delivery Date, the Supplier must pay NEXTDC the Liquidated Damages for each day between the Delivery Date and the date that the Goods and/or Services are supplied.
- 2.9 The Delivery Date will be extended to the extent that supply of the Goods and/or Services is delayed by any act, default or omission of NEXTDC or its employees, agents or contractors (other than the Supplier).

3. QUALITY OF GOODS AND/OR SERVICES

- 3.1 The Goods and/or Services must:
- match the description of the Goods and/or Services referred to in the Purchase Order;
 - be consistent in all material respects with all descriptions, specifications, illustrations, drawings, data, dimensions, weights and representations as to quality or performance pertaining to the Goods and/or Services advised, provided or made available to NEXTDC;
 - be of the same nature and quality as any sample or demonstration of the Goods and/or Services given;
 - be fit for the purpose for which Goods and/or Services of the same kind are commonly supplied and for any other purpose NEXTDC specifies prior to the date of the Purchase Order;
 - be free from defects in materials and workmanship.
- 3.2 The Goods must be of merchantable quality and, unless otherwise specified in the Purchase Order, must be new.
- 3.3 The Services must be performed with due care and skill and in a safe, proper, workmanlike and professional manner.
- 3.4 The Services must be performed by appropriately qualified and trained personnel.
- 3.5 The Supplier must, in supplying the Goods and/or Services:
- not interfere with NEXTDC's activities or the activities of any other person at the Delivery Address; and
 - be aware of and comply with, and ensure that the Supplier's employees, agents and contractors are aware of and comply with, all applicable laws and all lawful directions and orders given by or on behalf of NEXTDC, by NEXTDC's nominee or by any person authorised by law to give directions to the Supplier.

4. INSPECTION AND ACCEPTANCE

- 4.1 NEXTDC may carry out inspections of, and witness tests on, the Goods and/or Services at all reasonable times, at the Supplier's or its suppliers' or contractors' premises, and whether during or after manufacture of the Goods or performance of the Services.
- 4.2 The Supplier shall provide and maintain for NEXTDC free and safe access to the Goods and/or Services and to the premises where the Goods are being manufactured or stored and/or the Services are being performed so that the NEXTDC may carry out such inspections and witness such tests.
- 4.3 NEXTDC will not be deemed to have accepted any Goods and/or Services until NEXTDC has had a reasonable time to inspect and test the Goods and/or Services following delivery or performance. Payment for any Goods and/or Services or the signing of delivery or other receipts before inspection and testing does not constitute acceptance of the Goods and/or Services.
- 4.4 If, upon inspection and/or testing, any of the Goods and/or Services are found to be Defective, NEXTDC may at its option:
- return the Defective Goods to the Supplier;
 - reject the Defective Services;
 - repair or make good the Defective Goods; or
 - re-perform or make good the Defective Services.
- 4.5 The Supplier must, if so requested to do so by NEXTDC, at the Supplier's cost:
- refund any payments made by NEXTDC in respect of any Defective Goods or Defective Services returned or rejected by NEXTDC;
 - repair or replace the Defective Goods; or
 - re-perform or make good the Defective Services.

- 4.6 The Supplier must reimburse NEXTDC for any expenses incurred by NEXTDC in returning, repairing, replacing, re-performing or making good (as the case may be) any Defective Goods or Defective Services.
- 4.7 NEXTDC's inspection, testing or acceptance of any Goods and/or Services does not in any way change or affect the Supplier's obligations under the Agreement or affect any right or remedy NEXTDC may have in relation to any breach of the Supplier's obligations under the Agreement.

5. AMENDMENT

- 5.1 Prior to completion of the Agreement, NEXTDC may, by a written notice at any time and for any reason, make changes to the quantity, quality, descriptions, specifications, illustrations, drawings, data, dimensions or weights with which the Goods and/or Services are required to conform.
- 5.2 If any such changes cause an increase or decrease in the cost of, or the time required for, the supply of the Goods and/or Services under the Agreement, an equitable adjustment may be made to the Price or Delivery Date, or both, and the Agreement will be modified in writing accordingly.

6. CANCELLATION

- 6.1 Prior to completion of the Agreement, NEXTDC may, by a written notice at any time and for any reason, cancel the Agreement.
- 6.2 The Supplier must immediately cease all work in accordance with and to the extent specified in the notice and do everything possible to mitigate any costs incurred in relation to the Goods and/or Services.
- 6.3 NEXTDC will pay reasonable compensation to the Supplier as a result of the cancellation, provided that NEXTDC will not be required to pay any compensation in respect of any economic loss, loss of contract, loss of profit or revenue, business interruption, loss of production, production stoppage, loss of data, loss of goodwill, loss of use, loss or denial of opportunity or indirect or consequential loss or damage.
- 6.4 The Supplier shall provide auditable details of its proposal for compensation within 14 days of receiving NEXTDC's notice under clause 6.1. If the Supplier fails to provide such details within such 14 day period, the Supplier will not be entitled to any compensation as a result of the cancellation.

7. PRICE

- 7.1 NEXTDC must pay the Supplier the Price for the Goods and/or Services.
- 7.2 The Price is firm and fixed and is inclusive of all costs incurred by the Supplier in the supplying the Goods and/or Services including all charges for packing, insurance and delivery of the Goods and the cost of any items used or supplied in the performance of the Services.
- 7.3 The Price is inclusive of all taxes and duties, including GST.

8. INVOICING AND PAYMENT

- 8.1 The Supplier will invoice NEXTDC upon delivery of the Goods and/or performance of the Services.
- 8.2 To be valid, an invoice must:
- state the Purchase Order number to which the invoice relates;
 - correctly identify the Goods and/or Services supplied;
 - be a Tax Invoice; and
 - be sent to the Invoice Address.
- 8.3 If NEXTDC requests, the Supplier must provide NEXTDC with all relevant records to calculate and verify the amount set out in any invoice.
- 8.4 NEXTDC will pay all valid invoices within 30 days of their receipt, except where NEXTDC disputes the invoice, in which case:
- NEXTDC must pay the undisputed amount (if any);
 - NEXTDC may withhold payment of the disputed amount pending resolution of the dispute; and
 - if the resolution of the dispute determines that NEXTDC must pay an amount to the Supplier, NEXTDC must pay that amount upon resolution of that dispute.

9. TITLE AND RISK

- 9.1 The Supplier warrants that it holds title to the Goods, free from all liens, claims or encumbrances.
- 9.2 Title in the Goods passes to NEXTDC upon payment of the Price for the Goods.
- 9.3 Risk in the Goods passes to NEXTDC upon delivery of the Goods to the Delivery Address.

10. DEFECTIVE GOODS AND/OR SERVICES

- 10.1 If, during the Warranty Period, any of the Goods and/or Services are found to be Defective, NEXTDC may at its option:
- return the Defective Goods to the Supplier;
 - reject the Defective Services;
 - repair or make good the Defective Goods; or
 - re-perform or make good the Defective Services.
- 10.2 The Supplier must, if so requested to do so by NEXTDC, at the Supplier's cost:
- repair or replace the Defective Goods; or
 - re-perform or make good the Defective Services.
- 10.3 The Supplier must reimburse NEXTDC for any expenses incurred by it in removing, returning, reinstalling, repairing, replacing, re-performing or making good (as the case may be) any Defective Goods or Defective Services.

11. INDEMNITY

- 11.1 The Supplier indemnifies NEXTDC, its employees, agents and contractors against all losses, damages, costs or expenses which it or any of them may incur or sustain and all actions, proceedings, claims and demands which may be brought or made against any of them by any person in respect of or arising out of any use of the Goods and/or Services, any breach of the Agreement by the Supplier, any negligence, fraud, or other wrongful act or omission of the Supplier, its employees, agents or contractors, or any death, personal injury or damage to property in connection with the supply or use of the Goods and/or Services.
- 11.2 The Supplier's liability under this clause is reduced to the extent that any action, proceeding, claim or demand arises out of any negligence, fraud or other wrongful act or omission of NEXTDC, its employees, agents or contractors (other than the Supplier).
- 11.3 NEXTDC holds the benefit of the indemnity in this clause for the benefit of NEXTDC, its employees, agents and contractors (other than the Supplier).

12. INTELLECTUAL PROPERTY

- 12.1 The Supplier warrants that the Goods and/or Services will not infringe any Intellectual Property of a third party.
- 12.2 The Supplier indemnifies NEXTDC, its employees, agents and contractors (other than the Supplier) against all expenses, demands and liabilities arising from or in connection with any infringement or alleged infringement of any Intellectual Property of a third party or any breach of the warranty in clause 12.1.
- 12.3 Without limiting clause 12.2, in the event that the Goods and/or Services or any part of the Goods and/or Services are held to infringe any Intellectual Property of a third party, the Supplier must, at its own expense and at NEXTDC's option:

- (a) procure for NEXTDC the right to continue using the Goods and/or Services or part of the Goods and/or Services (as the case may be);
- (b) replace the Goods with substantially equal but non-infringing Goods; or
- (c) re-perform the Services with substantially equal but non-infringing Services.
- 12.4 Any Intellectual Property brought into existence by either party as a result of the supply of the Goods and/or Services ("Material") vests in NEXTDC.
- 12.5 Ownership of Intellectual Property that is in existence prior to the date of the Purchase Order or brought into existence after that date (other than as a result of the supply of the Goods and/or Services) and which is made available by a party for the supply of the Goods and/or Services ("Background IP") will remain with the party that makes it available.
- 12.6 NEXTDC grants the Supplier a non-exclusive, world-wide, royalty-free licence to use the Material and Background IP owned by NEXTDC only to the extent required for the supply of the Goods and/or Services.
- 12.7 If Material is reliant upon the Background IP owned by the Supplier, the Supplier grants NEXTDC a non-exclusive, irrevocable, world-wide, royalty-free licence to use that Background IP, only to the extent required for NEXTDC's use of the Material.
- 13. INSURANCE**
- 13.1 The Supplier shall maintain adequate insurance including, without limitation, public liability, workers' compensation (including common law liability), product liability and transit insurance upon such terms and for such amounts as are reasonable in the circumstances of the Agreement.
- 13.2 The Supplier shall provide evidence of such insurance if so requested by NEXTDC.
- 14. TERMINATION**
- 14.1 NEXTDC may, by a written notice, terminate the Agreement in whole or in part if:
- (a) the Supplier fails to comply with any provision of the Agreement where time is of the essence;
- (b) the Supplier fails to comply with any other provision of the Agreement and that failure is not remedied within 7 days of NEXTDC requesting the Supplier to remedy it;
- (c) the Supplier fails to make progress which NEXTDC believes, acting reasonably, endangers the supply of the Goods and/or Services in accordance with the Agreement; or
- (d) an Insolvency Event occurs in respect of the Supplier.
- 14.2 The Supplier may, by a written notice, terminate the Agreement in whole or in part if:
- (a) NEXTDC fails to comply with any provision of the Agreement and that failure is not remedied within 7 days of the Supplier requesting NEXTDC to remedy it; or
- (b) an Insolvency Event occurs in respect of NEXTDC.
- 14.3 Any termination of the Agreement does not affect any rights of the parties which may have accrued up to and including the date of termination.
- 15. CONFIDENTIALITY**
- 15.1 Each party agrees to keep confidential, and not to use or disclose, other than as permitted by the Agreement, any Confidential Information of the other party provided to or obtained by that party prior to or after entry into the Agreement.
- 15.2 The obligations of confidence in clause 15.1 do not apply to Confidential Information:
- (a) that is in the public domain otherwise than as a result of a breach of the Agreement or other obligation of confidence; or
- (b) that is already known by, or rightfully received by, or independently developed by, the recipient of that Confidential Information free of any obligation of confidence.
- 15.3 Each party may disclose Confidential Information of the other party that is required to be disclosed by applicable law, or under compulsion of law by a court or government agency or by the rules of any relevant stock exchange or regulator, as long as the disclosing party:
- (a) discloses the minimum amount of Confidential Information required to satisfy the law or rules; and
- (b) before disclosing any information, gives a reasonable amount of notice to the other party in writing and takes reasonable steps (whether required by the other party or not) to maintain such Confidential Information in confidence.
- 15.4 Each party may use and disclose Confidential Information of the other party only:
- (a) with the prior written consent of the other party; or
- (b) to that party's directors, agents, professional advisors, employees and contractors solely for the exercise of rights or the performance of obligations under the Agreement.
- 15.5 If either party discloses Confidential Information under clause 15.4, that party must ensure that such information is kept confidential by the person to whom it is disclosed.
- 15.6 Each party acknowledges that:
- (a) the other party may suffer financial and other loss and damage if any unauthorised act occurs in relation to Confidential Information of the other party, and that monetary damages would be an insufficient remedy; and
- (b) in addition to any other remedy available at law or in equity, the other party is entitled to injunctive relief to prevent a breach of, and to compel specific performance of, this clause 15.
- 16. PUBLICITY**
- 16.1 The Supplier must not advertise or issue any information, publication, document or article for publication or media relations or other publicity relating to the Agreement or NEXTDC's Confidential Information or NEXTDC's Intellectual Property without the prior written approval of NEXTDC.
- 17. NOTICES**
- 17.1 Each notice under or in connection with the Agreement must be in writing, must be signed by the party making it and must be delivered by hand or posted by prepaid post to the address, or sent by fax to the number, of the addressee as notified by the addressee from time to time. A notice is taken to be received by the addressee on delivery by hand or on the third day after the date of posting or at the time in the place to which it is sent equivalent to the time shown on the transmission confirmation report produced by the fax machine from which it was sent (as the case may be).
- 18. MISCELLANEOUS**
- 18.1 The Agreement is governed by and must be construed according to the law applying in Queensland.
- 18.2 Each party irrevocably:
- (a) submits to the non-exclusive jurisdiction of the courts of Queensland and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to the Agreement; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 18.2(a).
- 18.3 Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under the Agreement by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under the Agreement. A waiver or consent given by a party under the Agreement is only effective and binding on that party if it is given or confirmed in writing by that party. No waiver of a breach of a term of the Agreement operates as a waiver of another breach of that term or of a breach of any other term of the Agreement.
- 18.4 The Supplier must not assign, novate or otherwise transfer any of its rights or obligations under the Agreement without the prior written consent of NEXTDC.
- 18.5 If any part of the Agreement is determined to be invalid, unlawful or unenforceable for any reason then that part, to the extent of the invalidity, unlawfulness or unenforceability, will be severed from the rest of the Agreement and the remaining terms and conditions will be read and construed as if that part had never existed.
- 18.6 The Agreement does not create a relationship of employment, trust, agency or partnership between the parties.
- 18.7 Nothing in the Agreement is intended nor shall be construed as creating any exclusive arrangement with the Supplier or restricting NEXTDC from acquiring similar, equal or like Goods and/or Services from any other person.
- 18.8 The Supplier must not subcontract the performance of all or any part of the Supplier's obligations under the Agreement without the prior written consent of NEXTDC. If the Supplier subcontracts the performance of all or any part of the Supplier's obligations, the Supplier is responsible for the acts or omissions of the subcontractor as though they were the acts or omissions of the Supplier.
- 18.9 Despite any other provision of the Agreement, NEXTDC will have the right at any time to set-off any amount owing from the Supplier to NEXTDC against any amount payable by NEXTDC to the Supplier.
- 18.10 A right or remedy of NEXTDC under the Agreement is cumulative and does not exclude any other rights or remedies that NEXTDC may have.
- 18.11 The following clauses survive the cancellation, termination or completion of the Agreement: clauses 10, 11, 12, 15, 16, 18.1, 18.2 and 18.5 and any clauses necessary for the proper interpretation of those clauses.
- 19. DEFINITIONS AND INTERPRETATION**
- 19.1 In the Agreement:
- Agreement** has the meaning given to it in clause 1.1;
- Background IP** has the meaning given to it in clause 12.5;
- Confidential Information** of a party means any information:
- (a) relating to the business and affairs of that party;
- (b) relating to the customers, clients, employees, contractors or other persons doing business with that party;
- (c) which is by its nature confidential;
- (d) which is designated as confidential by that party; or
- (e) which the other party knows, or ought to know, is confidential, and includes all trade secrets, knowhow, financial information and other commercially valuable information of that party;
- Defective** means Goods and/or Services (or any aspect of them) which are not in accordance with the Agreement or which are damaged, deficient, faulty, inadequate or incomplete;
- Delivery Address** means the delivery address specified in the Purchase Order;
- Delivery Date** means the delivery date specified in the Purchase Order or, if a delivery date is not specified, a date which is consistent with the prompt and expeditious supply of the Goods and/or Services;
- Documentation** means all documentation necessary or desirable to allow NEXTDC to fully utilise, operate and maintain the Goods and/or Services;
- Goods** means any material, plant, item or equipment specified in the Purchase Order;
- GST** has the meaning given to that term in the GST Act;
- GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- Insolvency Event** means the happening of any of the following events:
- (a) an order being made for the bankruptcy, winding up or dissolution of the party;
- (b) a receiver, receiver and manager, trustee, administrator, liquidator or similar official being appointed to all or part of the assets or undertaking of the party;
- (c) the party entering into, or resolving to enter into, any arrangement or composition or compromise with, or assignment for the benefit of, its members or creditors; or
- (d) the party becoming insolvent within the meaning of section 95A of the *Corporations Act 2001* (Cth);
- Intellectual Property** means all intellectual property rights throughout the world and includes plant breeder's rights, patents, rights in respect of copyright, rights in circuit layouts, designs, trademarks, trade secrets, know-how and confidential information, any application or right to apply for registration of any of these rights and all rights of a similar nature to any of these rights that may subsist in a Australia or elsewhere, whether or not such rights are registered or are capable of being registered;
- Invoice Address** means the NEXTDC address specified in the top left corner of the Purchase Order or as otherwise notified by NEXTDC from time to time;
- Liquidated Damages** means the liquidated damages amount (if any) specified in the Purchase Order;
- Material** has the meaning given to it in clause 12.4;
- NEXTDC** means NEXTDC Limited ABN 35 143 582 521;
- Purchase Order** means a Purchase Order issued by NEXTDC;
- Price** means the price for the Goods and/or Services, as specified in the Purchase Order;
- Services** means any services specified in the Purchase Order and any services reasonably incidental to the performance of those services;
- Special Conditions** means the special conditions (if any) specified under the heading "Special Conditions" in the Purchase Order;
- Supplier** means the person specified as the Supplier in the Purchase Order;
- Tax Invoice** has the meaning given to that term in the GST Act; and
- Warranty Period** means:
- (a) for Goods, the period specified by the manufacturer of the Goods or the period of 12 months, whichever is the greater, commencing on the date of delivery of the Goods;
- (b) for Services, the period specified by the Supplier or the period of 12 months, whichever is greater, commencing on the date on which the Services are performed.
- 19.2 In the Agreement:
- (a) headings are for convenience only and do not affect interpretation; and unless the context indicates a contrary intention:
- (b) if more than one person is identified as the Supplier, that expression refers to them, and the obligations of the Supplier under the Agreement bind them, jointly and severally;
- (c) "person" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (d) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation;
- (e) a reference to a document (including the Agreement) is to that document as varied, novated, ratified or replaced from time to time;
- (f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
- (h) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning; and
- (i) "includes" in any form is not a word of limitation.