

# BGC (Australia) Purchase Order: Terms and Conditions: BGC is the Purchaser

## 1. Definitions

**Agreement** means the agreement of the Vendor to supply the Goods and perform the Services as set out in the letter or purchase order issued by BGC; and these Terms; and includes any Instructions given by BGC.

**BGC** means the BGC entity listed on the Agreement letter to which these Terms apply and the authorised agents, employees, heirs and successors of that BGC entity.

**Chain of Responsibility** means the road transport laws contained in the *Road Traffic (Administration) Act 2008 (WA)* and the *Road Traffic (Vehicles) Act 2012 (WA)* and associated regulations.

**CLA** means the *Civil Liability Act 2002 (WA)* as amended from time to time.

**Company** has the meaning provided for under the *Corporations Act 2001 (Cth)* as amended from time to time.

**Defective** means (regarding any Goods or Services or any part of them) that those Goods or Services (or part of them) do not accord with the Agreement or are damaged, deficient, faulty, inadequate, or incomplete.

**Delivery Address** means the address described as the address in the Agreement to which the Goods are to be delivered and/or the address where the Services are to be performed.

**Delivery Date** means the delivery date specified in the Agreement.

**Employment Law** means any law regarding the employment of employees including any act, regulation or industrial instrument (including awards and enterprise agreements) whether State or Federal, dealing with the entitlements, terms and conditions of employment and/or income taxation of employees, including but not limited to income tax legislation, superannuation legislation, industrial relations or workplace relations legislation (including but not limited to the *Fair Work Act 2009 (Cth)*, long service leave legislation and workers' compensation legislation).

**Goods** means the goods, if any, described in the Agreement.

**GST, GST Law** and other GST related terms used in the Agreement and these Terms have the meanings given to them by the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* as amended from time to time.

**Instruction(s)** means the lawful and reasonable directions of BGC provided to the Vendor to supplement and compliment these Terms, including but not limited to, any schedules or annexures to these Terms.

**Law** means any: Commonwealth, State or local government legislation (including regulations, bylaws, orders, awards and proclamations); common law or rule of equity; Authority requirements, consents, certificates, licenses, permits or approvals (including conditions in respect of those consents, certificates, licenses, permits and approvals); and guidelines of Authorities with which the Vendor is legally required to comply.

**Notice** means any written notice supplied by either party under these Terms. Such Notices are effective once sent.

**Owner-Driver** has the meaning provided for in the *Owner-Driver (Contract and Disputes) Act 2007 (WA)*.

**Price** means the price set out in the Agreement, or as otherwise advised by BGC, which is inclusive of all currency fluctuations, charges for tax and duties (except GST) and of all costs and charges that BGC will pay for 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.

**Services** means the services, if any, described in the Agreement.

**Site** means the Delivery Address and/or BGC's premises at any other location where the Vendor is required to provide Goods or Services to BGC.

**Terms** means the terms and conditions set out in this document.

**Vendor Personnel** means the Vendor's employees, agents suppliers or subcontractors.

**Vendor** means the party who will supply the Goods and/or Services in consideration for payment of the Price.

**Warranty Period** means the period of 7 years commencing on the date of delivery of the Goods and/or 7 years commencing on the date on which the Services are completed.

## 2. General

The Vendor will supply to BGC the Goods and/or perform the Services in accordance with the Instructions in consideration of payment of the Price by BGC.

The Vendor's terms and conditions, howsoever provided, do not form part of these Terms (even if any representative of BGC signs those terms and conditions and/or they are annexed to these Terms or any quote or purchase order). The parties agree that any amendments to these Terms (other than an update to these Terms by BGC), whether to apply to all subsequent Orders or any Particular Order, may only be made if it:

- (a) is in writing;
- (b) signed by authorised managers of both parties; and
- (c) expressly states that it is a variation to these Terms, and

the parties agree and acknowledge that their representatives and employees that are not authorised managers as referred to above do not have the authority to vary these Terms, or to agree that these Terms do not apply to a supply to which these Terms would otherwise apply.

The parties' relationship is one of principal and independent contractor, not employer and employee or principal and agent. There is no partnership arrangement between the parties. No contractual relations will arise between BGC and any of the Vendor Personnel as a result of the Vendor and BGC's relationship. If, notwithstanding these Terms, there is a deemed employment relationship (as a result of any Employment Law) then the Price is in satisfaction of all minimum entitlements under the relevant Employment Law including (without limitation) any payroll or fringe benefit tax, superannuation contributions, workers' compensation claims, termination payments, salary, overtime, penalties and statutory leave.

The Vendor:

- (a) does not have the right or authority to act on behalf of or bind BGC unless the Vendor has been expressly authorised to do so by BGC in writing;
- (b) will ensure that all Vendor Personnel faithfully, skilfully and diligently perform the Services in a careful, competent, professional and responsible manner and comply with these Terms; and
- (c) acknowledges that it is independent from BGC and the Vendor will be responsible for all employment and industrial relations issues regarding all Vendor Personnel.

The Vendor must:

- (a) provide to BGC all such information and assistance as BGC reasonably requires to identify, evaluate, implement and report on any matter required by Law in respect of anything used, produced or created in connection with the performance of the Vendor's obligations under these Terms;
- (b) not interfere with BGC's activities or the activities of any other person at the Delivery Address or the Site; and
- (c) ensure that any Vendor Personnel working pursuant to these Terms have satisfactorily completed any Site induction processes required by BGC or BGC's customers as a requirement for entry to their respective Sites. Such induction will be at the cost of the Vendor unless otherwise agreed by BGC in writing.

The Vendor agrees that BGC may use a tracking device or other surveillance device at the Site and in relation to the Vendor in the course of the Vendor performing the Services.

## 3. Delivery and Time for Performance

The Vendor must deliver the Goods to the Delivery Address and/or provide the Services by the Delivery Date as required by the Instructions and these Terms.

The Vendor must ensure that the Goods are suitably packed to avoid damage in transit or in storage and in such a way to comply with any applicable Laws.

If the Vendor fails to deliver all required Goods and/or Services by the Delivery Date BGC may:

- (a) acting reasonably, reject all or part of the Goods and/or Services;

- (b) terminate the Agreement at any time until full delivery of all required Goods and/or Services by giving Notice to the Vendor and no payment or part payment for any Goods and/or Services undelivered or rejected will be payable;
- (c) set off against the Price any additional costs incurred by BGC as a consequence of the Vendor's failure to supply the Goods and/or Services by the Delivery Date; and/or
- (d) exercise any other rights or remedies available to BGC under these terms or any Law.

## 4. Title and Risk

Title in the Goods passes to BGC upon the earlier of the payment of the Price or delivery of the Goods to the Delivery Address. Risk in the Goods passes to BGC when the Goods are delivered to the Delivery Address.

## 5. Price

BGC will pay the Price for the Goods and/or Services in the Agreement after they have been delivered and/or performed PROVIDED THAT BGC is entitled to deduct, from any amount owed to the Vendor, the value of any claim BGC has against the Vendor under this Agreement or otherwise in relation to the Goods and Services.

On delivery of the Goods and/or completion of the Services, the Vendor must provide to BGC, if BGC directs, a Tax Invoice which includes:

- (a) a reference to the Agreement and these Terms including any purchase order or contract number;
- (b) a detailed description of the delivered Goods or performed Services, including the date of delivery and/or period of Services and the relevant quantity of the Goods and/or Services; and
- (c) an individual reference number for BGC to quote with remittance of payment.

If BGC requests, the Vendor must provide BGC with all relevant records to calculate and verify the amount set out in any Tax Invoice.

Provided that the Vendor has complied with the paragraphs above, BGC will pay each Tax Invoice provided by the Vendor within 30 days (or such other period as the parties agree) of the date on which the relevant Tax Invoice is generated (in the case of a recipient created tax invoice) or the date on which the relevant Tax Invoice is received by BGC, except where BGC:

- (a) is required by Law to pay within a shorter time frame, in which case BGC must pay within that time frame;
- (b) exercises any right to retain, withhold, reduce or set-off any amount due to the Vendor; or
- (c) is required by Law to withhold a portion of payment for Goods or Services rendered by a foreign contractor.

Payment by BGC does not constitute an acceptance by BGC that the Goods and/or Services are not Defective and does not in any way affect BGC's rights under the Agreement, these Terms or any law.

## 6. Quality

The Goods and/or Services must match the description (if any) referred to in the Agreement.

If the Vendor gives BGC a sample of the Goods or a demonstration of the Services, the Goods and/or Services must be of the same nature and quality as the sample or demonstration given.

The Goods and/or Services must be fit for the purpose for which Goods and/or Services of the same kind are commonly supplied or bought and for any other purpose BGC specifies.

The Goods must be of merchantable quality, unencumbered and (unless otherwise specified in the Agreement) new.

The Vendor must ensure that BGC has the full benefit of any manufacturer's warranties that may be applicable to the Goods (and the Vendor must pursue any manufacturer's warranties on BGC's behalf if BGC so requests).

The Services must be provided by persons who are appropriately licensed, qualified and trained.

If the Goods are Defective or otherwise do not comply with these Terms:

- (a) the Vendor must replace the Goods at the Vendor's cost. This clause does not prejudice BGC's rights to terminate the Agreement for breach; and

- (b) BGC may hold the Goods for the Vendor at the Vendor's risk. The Goods will be returned at the Vendor's cost.

## 7. Warranties

The Vendor warrants that:

- (a) it will provide the Services in a safe manner free from risks to health and safety including (without limitation) in compliance with all safety Laws;
- (b) the Vendor, and all Vendor Personnel have the appropriate level of skill, training and competence to perform the Services safely and to a reasonable standard of workmanship expected in the profession or industry of the Vendor and the Vendor Personnel;
- (c) the Vendor and all Vendor Personnel will comply with all relevant Laws in the performance of the Services including without limitation all safety law applicable to the supply of Goods and/or the performance of Services and Chain of Responsibility obligations in the performance of the Services;
- (d) there is no prohibition or restriction or other obligation which would preclude, prevent or hinder the Vendor or the Vendor Personnel from providing the Services in accordance with these Terms;
- (e) the Vendor, and all Vendor Personnel, will comply with all relevant policies and procedures of BGC;
- (f) it will take all steps needed to ensure that BGC is not subject to any claim or finding that the Vendor and/or any Vendor Personnel are deemed to be employees of BGC;
- (g) information, documentation and certification provided to BGC are accurate, valid and in good order;
- (h) the Vendor will not engage in any action that could conflict with BGC's rights or with the Vendor's obligations under these Terms; and
- (i) the Vendor is aware that BGC is relying on these warranties.

The Vendor indemnifies BGC in respect of any and all claims giving rise to liability on the part of BGC in respect of a breach of this warranty clause howsoever such claims arise.

## 8. Warranty Period

If, before the end of the Warranty Period, any of the Goods or Services are found to be Defective or otherwise fail to comply with these Terms, BGC may:

- (a) return the Defective Goods to the Vendor at the Vendor's cost;
- (b) reject the Defective Services;
- (c) repair or make good the Defective Goods or re-perform or make good the Defective Services.

If required by BGC, the Vendor must:

- (a) repair or replace the Defective Goods or re-perform or make good the Defective Services all at its own cost; and/or
- (b) reimburse BGC for any expenses incurred by BGC in repairing, re-performing or making good (as the case may be) any Defective Goods or Services.

The Vendor must:

- (a) pay for any damage made by the Vendor or any Vendor Personnel (or arising from Defective Goods or Services) to property on or near any Sites.
- (b) assign the benefits of any warranties provided by manufacturers of the Goods or materials and other components that are used in the performance of these Terms where BGC will ultimately take ownership of those Goods, materials or components.

## 9. Indemnities

The Vendor must indemnify BGC and agrees to hold BGC harmless from all claims for the following circumstances:

- (a) any willful, reckless or negligent act or omission and any breach or non-performance of the Agreement by the Vendor or the Vendor Personnel (including, without limitation, for legal fees on a solicitor-client basis) except to the extent the claim arises from BGC's negligence or breach of the Agreement;

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- (b) any performance of the Services that infringes the Intellectual Property Rights of any person;
- (c) any damage to property or injury or death of any person caused or contributed to by the Vendor and/or the Vendor Personnel;
- (d) any actions, claims, proceedings, demands, liabilities, losses, damages, expenses and costs (including legal costs on a full indemnity basis) that may be brought against BGC or which BGC may pay, sustain or incur as a direct or indirect result of any claim brought by, or in respect of, the Vendor and/or any Vendor Personnel in relation to an Employment Law including workers compensation insurance payments, annual leave and long service leave accruals and payments, notice payments, redundancy payments, unfair or unlawful dismissal verdicts and taxation (including, without limitation, PAYG tax instalment deductions, superannuation guarantee contributions and payroll tax payments) or any other such payments that BGC may be required to pay in relation to or arising out of the provision of the Goods and Services;
- (e) damage to or destruction of any property belonging to the Vendor or in the Vendor's possession or under the Vendor's control except to the extent the claim for such damage or destruction arises solely as a result of BGC's negligence or breach of the contract constituted by the Agreement by BGC; or
- (f) failure by the Vendor to comply with any Law including the payment of any taxes required at Law or in accordance with the Agreement or these Terms.

## 10. Equipment

The Vendor will supply its own plant and equipment as required for the performance of the Services or for the provision and installation of the Goods.

## 11. Insurance

The Vendor will use reasonable endeavours to obtain, and maintain, the following insurances on terms to the reasonable satisfaction of BGC:

- (a) public and products liability insurance which:
  - (i) names BGC and extends cover to BGC as Principal;
  - (ii) provides a waiver of subrogation; and
  - (iii) has a limit of indemnity of at least \$10 million.
- (b) If the Vendor is a sole trader or partnership, income protection insurance to cover the Vendor in circumstances of a work related injury or illness which prevents the Vendor from attending work;
- (c) If the Vendor is a Company, workers compensation and employer's liability insurance, covering all claims and liabilities in respect of any statutory to common law liability for the death, injury or illness of or to any person employed by (or deemed to be employed by), the Vendor including, but not limited to, the Vendor Personnel;
- (d) If the Vendor is supplying Services, professional indemnity insurance of at least \$2 million per claim;
- (e) any other insurance required by Law in force; and
- (f) if the Vendor is an Owner-Driver:
  - (i) Goods in transit insurance;
  - (ii) if the Vendor owns or rents a single trailer then Trailer in Control insurance with minimum coverage of \$100,000 is required;
  - (iii) if the Vendor has multiple trailers, or BGC is supplying trailers to the Vendor, Comprehensive Trailer in Control insurance with minimum coverage of \$300,000 is required;
  - (iv) third party insurance; and
  - (v) either Owner-Driver insurance or hirer insurance as appropriate.

## 12. Owner-Drivers

Where the Vendor is an Owner-Driver, the following provisions apply.

Owner-Drivers acknowledge that they are aware that the "Guideline Rates" and "Owner-Driver (Contracts and Disputes) Act 2007

Pamphlet" are available either online at [www.transport.wa.gov.au](http://www.transport.wa.gov.au) or upon request from BGC.

BGC may refuse for the Services to be provided by a particular driver where BGC has reasonable grounds to believe that such a driver is:

- (a) not a fit and proper person, or sufficiently qualified or capable person to perform the Services; or
- (b) not acceptable to BGC or a customer of BGC for reasonable and lawful grounds.

The Owner-Driver:

- (a) will ensure that their vehicle used to perform the Services or deliver the Goods is maintained in a mechanically sound, properly painted and clean condition that is fit for the purposes of providing the Services or delivering the Goods to BGC.
- (b) will promptly advise BGC if any vehicle used in the provision of the Services or the delivery of the Goods is involved in any accident or subject to any damage.
- (c) is responsible for all working expenses and statutory charges, including tolls, incurred in the course of their business, unless otherwise specified in writing by BGC.
- (d) is not entitled to any payment from BGC during any period of non-performance of the Services or the delivery of the Goods as required by these Terms.

Where the Owner-Driver is obliged to take mandatory rest or meal breaks under a Law, such rest breaks will not be paid for as time worked. To the extent possible without otherwise breaching this provision, the Owner-Driver must take meal breaks at a convenient time to BGC having regard to BGC's requirements.

The Price paid by BGC for the performance of the Services or the delivery of the Goods is in full and final settlement of any statutory liabilities that may be payable by BGC to or in respect of the Owner-Driver.

## 13. Goodwill

Under no circumstances may the Vendor and/or Vendor Personnel:

- (a) if an Owner-Driver, dispose of their vehicle to any other person and charge or receive goodwill as part of that sale;
- (b) sell or offer to sell, the rights under or in connection with these Terms or any future contract in consideration of receiving goodwill;
- (c) claim a right to introduce any new person or entity to the work to be performed under these Terms; and/or
- (d) make any representation to any person, whether written or verbal, implied or direct, that they have the right to do any of the matters referred to in paragraphs (a) to (c) above.

In this clause "goodwill" means any payment, benefit or premium, however described, which is paid by a purchaser, with the express or implied representation that the purchaser will obtain rights under these Terms with BGC or have any rights or expectation to continue to supply Goods or Services to BGC

## 14. No waiver

A waiver or relaxation of the requirements of these Terms will only be valid if expressed in writing and supplied by BGC to the Vendor. Waivers will only apply to the particular occasion to which the waiver relates, will be restricted to its terms and will not be of a continuing nature.

## 15. Jurisdiction

The Agreement and these Terms are governed by and are to be construed according to the laws of Western Australia and the parties submit to the exclusive jurisdiction of the courts of Western Australia.

## 16. Dispute Resolution

If a dispute or difference arises between BGC and the Vendor in respect of any fact, act, matter or thing arising out of or in any way connected with the Agreement or these Terms and one party requires the dispute of difference to be resolved, then that party will promptly give the other party a written Notice giving details of the dispute.

Within 14 days of a party receiving a Notice BGC and the Vendor and/or their delegates must meet and attempt to resolve the dispute in good

faith. If, within 14 days of the meeting, the dispute is still not resolved, then, either party may proceed to litigation.

## 17. Cancellation

- (a) BGC may cancel all, or any part of, an Agreement for Goods or Services with effect from 7 days after giving Notice. Upon receipt of a cancellation notice, the Vendor will, unless otherwise directed, cease work and follow BGC's directions as to disposal of work in progress and finished Goods.

(b) BGC's liability for the cancellation of Services, will be:

- (i) the Price for the Services fully performed prior to cancellation; and
- (ii) the Vendor's actual cost of the performing any Services which have only been partially performed prior to the cancellation, up to a maximum of the Price for those Services.

If any hourly or other time-based rate for Services is specified in the Agreement, such rate will be used in determining the Vendor's actual costs. In no case will BGC be liable for the Vendor's lost profits as a result of any cancellation.

- (c) BGC will pay for Goods delivered and accepted, and BGC's liability for the cancellation of Goods will be the lesser of:

- (i) the Vendor's actual price for raw materials, components, work in progress and any finished units on hand at the time of such cancellation that are attributable to the cancelled portion of the Agreement; or
- (ii) the Price per finished unit, after giving effect to any discount BGC would otherwise be entitled to, for the cancelled of a portion of the Goods.

## 18. Termination

- (a) The Agreement and these Terms may also be terminated by a party (**Non-Defaulting Party**) at any time effective immediately upon the giving of Notice if:

- (i) the other party (**Defaulting Party**) materially breaches any Terms or the Agreement and does not remedy that default within a reasonable time, and in any event no longer than 7 days, of Notice requiring it to be remedied; or
- (ii) the Defaulting Party is unable to pay its debts as when they fall due, goes into bankruptcy or a controller (as that term is defined in the *Corporations Act 2007*) is appointed in respect of the Defaulting Party.

If the Agreement or these Terms are terminated by BGC, BGC may have the Vendor's obligations performed by another party.

- (b) The Defaulting Party will be responsible for, and will indemnify the Non-Defaulting Party against, any damages, costs (including, without limitation, legal fees on a solicitor-client basis), losses and expenses, incurred by the Non-Defaulting Party as a result of the breach.

- (c) On termination of the Agreement or these Terms, each party retains its rights against the other party in respect of any past breach, in addition to any other rights, powers or remedies provided by law.

- (d) The rights set out in these Terms comprise the Vendor's sole entitlements upon cancellation or termination of the Agreement.

## 19. Goods and Services Tax (GST)

Unless otherwise stated, the Price or other amounts payable by BGC to the Vendor, are exclusive of GST.

If a Supply under these Terms is subject to GST, BGC will pay to the Vendor an additional amount equal to the amount for the amount multiplied by the prevailing GST rate. The additional amount is payable at the same time as the amount payable for the supply is to be paid. However, the additional amount need not be paid until the Vendor provides a Tax Invoice to BGC.

If the amount of GST payable is found to differ from the amount paid in relation to a Supply then:

- (a) the Vendor will refund to BGC the excess amount of GST paid to; or

- (b) BGC will pay the difference to the Vendor in circumstances where the GST is less than the amount required to be paid under the GST Law.

If either BGC or the Vendor is entitled to be reimbursed or indemnified under the Agreement, the amount to be reimbursed or indemnified by either party is to be the GST exclusive amount. For the avoidance of doubt, the amount of any reimbursement does not include any amount attributable to GST for which either BGC or Vendor is entitled to an Input Tax Credit.

## 20. Entire Agreement & Variation

The Agreement constitutes the entire understanding between the parties and supersedes all prior communications and agreements between the parties, including any prior written or verbal undertakings or statements. No variations to the Goods or Services required under the Agreement or to these Terms are to be made unless in accordance with clause 2 of these Terms.

## 21. No assignment

The parties may not assign, or otherwise transfer, this Agreement or any of its rights or obligations under this Agreement without the written consent of the other party. Either party may elect whether to provide such consent in its sole and absolute discretion, except that where BGC may without consent, (a) where this agreement is a sub-contract assign the benefit of this agreement to its head contractor or principal, and (b) assign any warranties to any person taking the benefit of the Goods or Services.

The Vendor must not consider, or take any steps to sell, assign, factor or otherwise dispose of the Vendor's present or future rights to payments that are due to a sub-contractor of the Vendor (hereinafter referred to as "Account"), nor shall the Vendor encumber any Account without the prior written consent of BGC acting entirely in BGC's sole and unfettered discretion, any consent may be on such terms and conditions as BGC deems fit.

## 22. PPSA

Where BGC makes a payment in advance of delivery of any Goods, the Vendor charges the Goods (including any item identified for incorporation into the Goods) to BGC with its obligations under this Agreement and consents to BGC registering its interest in the Goods on the Personal Property Security Register and will sign all documents and provide all information and assistance required to effect that registration. To the extent that the law permits the Vendor waives its rights to receive any notice required from BGC (or any of its related entities) under any provision of the Personal Property Security Act 2009 (Cth) (PPSA) (including a notice of a verification statement). However nothing in this clause prohibits BGC (or its related entities) from giving a notice under the PPSA or any other law.

## 23. Proportionate liability

The provisions of Part 1F of the CLA are specifically excluded from these Terms and have no operation or application to the rights, obligations and liabilities of BGC and the Vendor under these Terms with respect to any matter to which Part 1F of the CLA applies.

To the fullest extent permitted by law, the parties agree that the provisions of Part 1F of the CLA:

- (a) are specifically excluded from any subcontract or other agreement entered into pursuant to these Terms by the Vendor; and
- (b) have no operation or application to the rights, obligations and liabilities of the parties under any subcontract or other agreement entered into pursuant to these Terms by the Vendor, with respect to any matter to which Part 1F of the CLA applies.

## 24. Privacy

BGC collects the Vendor's personal information for the purpose of acquiring Goods and/or Services and keeping a record of transactions on our file. Personal information can include sensitive health information as required by BGC from time to time. Our Privacy Policy can be found at [www.bgc.com.au](http://www.bgc.com.au).