1. GENERAL

1.1. Application of terms and conditions

(a) These terms and conditions apply to the order for goods (Goods) or services (Services) placed by Macquarie University (University) as described in the attached purchase order (Purchase Order).

(b) These terms and conditions are to be read as in addition to any terms and conditions specified in the Purchase Order and/or any attachment to it that is expressly incorporated in writing. No other terms or conditions apply to this Purchase Order except where:

(i) the University first provides its agreement in writing; or

(ii) enters into a longer form agreement on the University’s terms and conditions and that agreement is quoted in the Purchase Order in which case the terms of that agreement will apply between the parties.

1.2. Amendments

No amendments to these terms and conditions will be binding on the parties unless approved in writing by the University staff member with the delegated authority to approve any such amendments.

1.3. Definitions

Business Day means any day other than:

(a) a Saturday, Sunday or public holiday in Sydney; or

(b) 27, 28, 29, 30 or 31 December.

Background IP means Intellectual Property owned by a party prior to the date of this Agreement.

Contract IP means Intellectual Property created in providing the Goods and/or Services.

Contract Materials means Goods and/or Services containing Background IP or Contract IP.

Confidential Information means all data and/or information in any form or medium exchanged between the parties for the purposes of this Agreement before, on or after the date of this Agreement (including the terms of this Agreement) relating to the past, present or future operations, business, research or technology of the disclosing party or the controlled entities of the University.

Losses means liabilities, losses, damages and costs (including legal costs on a full indemnity basis, whether incurred by or awarded against a party) and consequential and indirect losses and damages including those arising out of any third party claim.

Intellectual Property means all present and future rights conferred by law in or in relation to copyright, trademarks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions, confidential information and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields whether or not registrable, registered or patentable.

Supplier means the party named in the Purchase Order as providing the Goods and/or Services.

Warranty Period means the period commencing on the date of supply of any Goods and/or Services to the University premises and lasting for a period of one year unless otherwise stated in the Purchase Order.

1.4. Interpretation

Unless the contrary intention appears, in this Agreement:

(a) references to the singular includes the plural and vice versa;

(b) references to person or individuals include that person’s successors, administrators, executors and assigns and a firm, a body corporate, a partnership, a joint venture, an unincorporated body or association, or any government agency; and

(c) if an example is given of anything such as by saying it includes something else, the example does not limit the scope of that thing.

2. OFFER AND ACCEPTANCE

(a) The Supplier is taken to have accepted a Purchase Order if it notifies the University that it accepts the Purchase Order or delivers the Goods and/or Services described in the Purchase Order.

(b) If the Supplier is unable or unwilling to accept the Purchase Order, it must notify the University promptly. It may propose a variation to the Purchase Order, or offer other Goods and/or Services in substitution, but these must first be approved in writing by the University before delivery.

(c) The Purchase Order once accepted, combined with these terms and conditions and any terms and conditions in the Purchase Order and/or any attachment expressly incorporated in writing, will form a binding agreement between the parties (Agreement).

3. CANCELLATION AND VARIATIONS

(a) The University may at any time before delivery vary or cancel a Purchase Order.

(b) If the University cancels a Purchase Order and the Supplier establishes to the University’s satisfaction the Supplier already incurred expense in arranging for the order or delivery of the Goods and/or Services specified in the Purchase Order, the University agrees to pay the Supplier’s reasonable costs or expenses incurred.

(c) Cancellation of a Purchase Order operates to terminate the Agreement.

(d) If the University varies the Purchase Order and the variation causes an increase or decrease in the cost of the Goods and/or Services, or time required to deliver the Goods and/or Services, the Supplier must promptly notify the University of:

(i) the additional or reduced cost resulting from the proposed variation; and
(ii) any revised delivery or completion times as a result of the variation.

(e) If the parties agree, the Purchase Order will be varied by the University to reflect the agreed variation including costs and delivery times.

4. PERFORMANCE AND QUALITY

4.1 Warranties of Supplier

(a) The Supplier represents and warrants that:

(b) it has all rights, title, licences, interests and property necessary to provide the Goods and/or perform the Services;

(c) the Supplier and its personnel are suitably qualified, skilled and competent to perform the Services;

(d) each of its personnel providing Services is entitled to work in Australia and the Supplier has procedures in place to ensure, and must verify in accordance with the Migration Act 1958 (Cth), that each of its personnel is entitled to work in Australia. On request by the University the Supplier will provide evidence, within seven Business Days, that it is complying with its obligations under this clause;

(e) the Goods and/or Services will be fit for the purposes intended and the Services will be completed to a high standard in accordance with best practice;

(f) if applicable, the Goods and Services will meet any agreed design and performance criteria and correspond with any sample;

(g) the Goods will be complete, accurate and free from material faults in design and free from defects in materials, workmanship and installation;

(h) as far as it is aware it is entitled to licence any Intellectual Property transferred to the University under this Agreement;

(i) the University’s use of Contract Materials will not infringe the Intellectual Property of any person;

(j) it will supply to the University in English all complete, accurate and up-to-date documentation associated with the use of the Goods and/or Services; and

(k) all claims made regarding sustainability of the Goods are documented and can be demonstrated on request.

4.2 Statutory Warranties

The warranties in clause 4.1 are in addition to any statutory warranties applicable to the Goods and/or Services.

4.3 Defects

(a) During the Warranty Period the University may give written notice to the Supplier of any failure or defect in the Goods and/or Services.

(b) The Supplier must promptly correct any defect or failure notified by the Supplier during the Warranty Period at no cost to the University by repair, replacement, modification or other means acceptable to the University.

(c) If the Supplier fails to correct any defect or failure of which it has been notified under this clause 4.3 within the time specified in the notice, the University has the right to rectify the defect or failure itself or have the rectification undertaken by a third party. All costs incurred constitute a debt due and payable by the Supplier to the University and may be deducted from moneys otherwise payable by the University to the Supplier.

5. DELIVERY, ACCEPTANCE AND TITLE

5.1. Delivery

If a time period for delivery is specified in the Purchase Order, then time is of the essence with respect to the Supplier’s delivery obligations under this Agreement. If no time period is specified in the Purchase Order the Supplier will deliver the Goods and/or Services within a reasonable time period and on a Business Day.

5.2. Acceptance

Payment of any invoice by the University will not be deemed acceptance of any Goods and/or Services, but rather such Goods and/or Services will be subject to a four month period of inspection, testing, acceptance or rejection by the University.

5.3. Title

The property and risk in the Goods will pass to the University on delivery to the location at the University premises specified in the Purchase Order.

6. SUB-CONTRACTING

(a) Except as expressly provided in the Purchase Order, the Supplier may not sub-contract any obligations under this Agreement without the prior written consent of the University.

(b) Where the Supplier sub-contracts any of its obligations under this Agreement, the Supplier remains liable for carrying out and completing those obligations.

7. FEES AND INVOICES

7.1. Fees

In consideration of the Supplier providing the Goods and/or Services under this Agreement, the University agrees to pay to the Supplier the fees specified in the Purchase Order (Fees). Subject to clause 7.3 the Fees include all taxes, costs and charges including freight and courier charges.

7.2. Invoices

(a) The Supplier must issue the University with an itemised tax invoice for Goods and/or Services for which it requires payment. The invoice must:

(i) specify the Purchase Order number;

(ii) specify the date of delivery;

(iii) describe the Goods and/or Services delivered – including quantity;

(iv) specify bank account details for electronic payment; and


(b) Unless otherwise specified in the Purchase Order, the University agrees to pay the Supplier the Fees within 30
days of receipt and acceptance of an invoice by the University.

7.3. GST

If GST is payable in connection with the Goods and/or Services to be supplied under this Agreement, then the Supplier irrevocably warrants and agrees that the Fees payable to it under this Agreement and specified in the Purchase Order is the GST inclusive price of those Goods and/or Services unless otherwise agreed in the Purchase Order.

8. INDEMNITY AND INSURANCE

8.1. Indemnity

The Supplier indemnifies the University (and each of the University’s employees, officers, students and agents, for whom the University holds the benefit of this indemnity in trust) against all Losses it directly or indirectly sustains or incurs as a result of:

(a) any negligent or unlawful act or omission of the Supplier Supplier personnel, or any subcontractor engaged by the Supplier; and

(b) any infringement of the Intellectual Property or moral rights of a third party arising out of the provision or use of the Goods and/or Services.

8.2. Third Party Claims

If a third party claims, or the University reasonably believes that a third party is likely to claim, that all or part of the Contract Materials infringe their Intellectual Property or breach confidentiality, the Supplier must, in addition to the indemnity under this Agreement and to any other rights that the University may have against it, promptly, at the Supplier's expense:

(a) use its best efforts to secure the rights for the University to continue to use the affected Contract Materials free of any claim or liability for infringement; or

(b) replace or modify the affected Contract Materials so that the Contract Materials or the use of them does not infringe the Intellectual Property of any other person without any degradation of the performance or quality of the affected Contract Materials.

8.3. Insurance

(a) The Supplier must have and maintain Public and Products Liability Insurance ($10 million for each occurrence and other reasonably required insurances having regard to the nature of the business and obligations to supply Goods and/or Services under the Agreement) throughout the term of this Agreement.

(b) The Supplier must ensure that any sub-contractor engaged by it is insured to a level commensurate with the insurance obligations of the Supplier under this Agreement.

(c) The Supplier must provide the University with a certificate of currency from its insurance broker certifying that it has the insurance required under this Agreement.

9. INTELLECTUAL PROPERTY RIGHTS AND CONFIDENTIAL INFORMATION

9.1. Intellectual Property

(a) All rights, title and interest in any Contract IP will be owned by the University, and to the extent needed, the Supplier assigns all rights, title and interest it may have now or in the future in the Contract IP to the University.

(b) Background IP remains with the contributing party.

(c) The Supplier grants to the University a permanent, irrevocable, royalty-free worldwide, non-exclusive licence (including a right of sub-licence) to use, reproduce, modify, publish, adapt, or communicate to the public and exploit the Supplier's Background IP in conjunction with the Goods and/or Services, and the Contract IP.

9.2. Confidential Information

Each party (recipient) must keep any Confidential Information disclosed to it confidential and must not deal with it in any way that might prejudice its confidentiality. These obligations continue indefinitely beyond the end of this Agreement, but do not extend to disclosures:

(a) required by law (including under the Government Information (Public Access) Act 2009 (GIPA)); and

(b) to a recipient’s officers or employees:

(i) who have a need to know for the purposes of this Agreement (but only to the extent that each has a need to know); and

(ii) before disclosure, have been directed by the recipient to keep that Confidential Information confidential.

10. DISPUTE RESOLUTION

10.1. Good faith

Each party must always try to resolve in good faith on a commercially realistic basis any disputes that arise under this agreement. Neither party can begin legal action (except interlocutory relief) against the other until this clause 10 has first been observed.

10.2. Dispute process

(a) If a party believes there is a dispute under this agreement, that party must notify the other in writing that a dispute exists, and give details of that dispute. The parties must then meet at a time and place identified by the University, within 14 days of notification of the dispute, in order to attempt to resolve the dispute. Each party must nominate a representative in writing to represent that party at that discussion and must ensure that person has authority to settle the dispute on that party’s behalf.

(b) If the dispute is still unresolved within a further 14 days, either party may refer the dispute to mediation and the parties will together agree on the appointment of a mutually acceptable mediator.

(c) If the parties cannot agree on a mediator within a further 14 days, the dispute will be referred by the parties to the President, Australian Commercial Disputes Centre, Sydney to nominate a suitably qualified mediator and the parties will accept that nomination.
11. GENERAL

11.1. Termination

The University may terminate this Agreement by:

(a) written notice to the Supplier if the Supplier breaches a term of this Agreement and fails to remedy the breach within 14 days after receiving notice requiring it to do so;

(b) written notice to the Supplier if the Supplier is or becomes subject to proceedings which may result in the Supplier becoming bankrupted, wound up, under voluntary administration or subject to the control of a receiver or receiver and manager; or

(c) cancelling a Purchase Order under clause 3.

11.2. Governing Law

This Agreement is governed by the law in force in New South Wales.

11.3. Giving effect to the Agreement

Each party agrees to do anything (including execute any document) and must ensure that its employees and agents do anything (including executing any document) that the other party may require to give effect to this Agreement.

11.4. Notices

Any notice to be given by one party to the other under this Agreement must be in writing and sent to the other party at the address set out in the Purchase Order.

11.5. Rights and obligations

(a) The University reserves the right to retain other persons or entities to supply the Goods and/or Services, including any part of the Goods and/or Services.

(b) The Supplier may only assign its rights or novate its rights and obligations under this Agreement with the prior written consent of the University.

(c) Each warranty and indemnity in this Agreement survives termination of this Agreement.

11.6. Exercise of rights

The exercise of rights does not prevent any further exercise of that right or the exercise of any other right. Neither the exercise of a right nor a delay in the exercise of a right operates as an election or a variation of the terms of this Agreement.

11.7. Compliance with University policies

If the Supplier is required to provide any Services within any lands or buildings owned or occupied by the University, then the Supplier must comply with all reasonable directions of the University and must observe the University’s by-laws, rules and policies, which are downloadable from the following website: www.mq.edu.au.

11.8. Publication

If required to do so by law whether under GIPA or otherwise, the Supplier agrees that the University has the right to publish details of this Agreement and/or the Agreement itself in the manner set out in the applicable requirements.

11.9. Inconsistency

If there is an inconsistency between a provision of any two or more of:

(a) a longer form University contract entered into between the Supplier and the University for the Goods and/or Services described under the Purchase Order;

(b) these terms and conditions;

(c) any terms and conditions added to the Purchase Order; or

(b) any annexures or attachments to the Purchase Order, then the first-mentioned terms prevail in the order set out.