

# Openn Negotiation App Terms and Conditions (NSW)

## 1. Acknowledgement

- 1.1 The Users acknowledge that Openn Negotiation:
- a. will be conducted through the Openn Negotiation App in accordance with the Terms and Conditions set out below;
  - b. is an auction as defined by s.3 of the *Property and Stock Agents Act 2002*;
  - c. is an extended Auction with a flexible end date; and
  - d. is facilitated by the Agent as defined on the Agency Agreement between the Vendor and Agent.

## 2. Terms and Conditions

- 2.1 Openn Tech Pty Ltd ("The Owner") owns the App that conducts the Openn Negotiation Process and provides the App for Vendors and Vendor's Agents to list property for auction and for Qualified Bidders to purchase the Property.
- 2.2 These App Terms and Conditions outline the Agreement between Users and the Owner of the App.
- 2.3 By registering to use the App, You agree to be bound by these Terms and Conditions as amended from time to time.
- 2.4 Your continued use of the App acknowledges Your agreement to these App Terms and Conditions.
- 2.5 If You do not agree to comply with these App Terms and Conditions, do not use (or continue to use) the App.
- 2.6 The Owner reserves the right to terminate Your access to the App if You breach any term or condition, or if Your ongoing use of the App is unacceptable to it.
- 2.7 Users acknowledge that these App Terms and Conditions are to be read in conjunction with the Openn Negotiation Bidding Rules and Terms of Use signed by the bidder or Annexure A of the relevant agency agreement signed by the Vendor.

## 3. The Owner's Service

- 3.1 The Owner does not conduct the Openn Negotiation process, the Owner:
- a. is not an auctioneer or real estate agent and does not claim to be;
  - b. does not own or offer for sale the real estate listed on the App; and
  - c. role is limited to providing the App for the sale of the Property.
- 3.2 The Owner is therefore not responsible or liable:
- a. in the event that a Vendor or Buyer fails to complete the contract;
  - b. for the completion of the sale of the Property;
  - c. for the state and condition of any Property listed on the App; and
  - d. for verifying the Property listed on the App.

## 4. Commencement of the Openn Negotiation/Auction Process

- 4.1 The Openn Negotiation process and Auction Conditions commence once the Property has been uploaded onto the App and will prevail until the Fall of the Hammer.
- 4.2 At all times, the Openn Negotiation process will be the subject of the Conditions for the Sale of Auction.
- 4.3 At the commencement of the Openn Negotiation process, the Agent will make the following available for public inspection;
- a. These App Terms and Conditions;
  - b. The Vendors Contract for the Sale of Land;
  - c. Buyers Registration and Authority to Bid and Terms of Use (NSW);
  - d. Auction Conditions; and
  - e. The NSW Fair Trading Consumer guide
- 4.4 A Bidder must first Register to Bid in accordance with the Act.
- 4.5 Once a Bidder is Registered, they may undertake to become a Qualified bidder, in accordance with Clause 3 of the Buyers Registration and Authority to Bid and Terms of Use (NSW), a Qualified Bidder will then be granted access to use the App.
- 4.6 Prior to using the App to bid, it is recommended that prior to Bidding as a Qualified Bidder that you obtain independent legal advice on the vendors Contract for the Sale of Land. It is prudent advice to undertake Property inspections and searches, such as Pest, Building and Strata Searches.
- 4.7 Prior to using the App to bid, it is recommended that the Qualified Bidder have their finance in place prior to Bidding as in New South Wales, a Property sold at Auction has no cooling off period.
- 4.8 It is recommended that the Qualified Bidder organise to be in a position to pay the 10% deposit to the Agent on the fall of the Hammer.
- 4.9 The Buyer acknowledges that, pursuant to a Contract Execution and Exchange Authority, the Contract will be signed on their behalf by the Auctioneer at the fall of the hammer and the parties will be bound to that Contract.
- 4.10 The Seller acknowledges that, pursuant to the Authority to Conduct the Sale of Land by Openn Negotiation and Vendors Contract Execution and Exchange Authority (NSW), the Contract can be signed on their behalf by the Auctioneer at the Fall of the Hammer and the parties will be bound to that Contract.

## 5. The Openn Negotiation Auction

- 5.1 A Registered Bidder must become a Qualified Bidder to participate in the Openn Negotiation Auction process and use the App. The Vendor has instructed the Agent to only accept bids made by Qualified Bidders in accordance with these Terms. Any bids made that do not comply with this clause would not be passed to the Vendor.
- 5.2 In the Campaign Bidding Stage on the App, other Qualified Bidders can join the Openn Negotiation process.
- 5.3 Throughout the Campaign Bidding Stage, any Qualified Bidder may increase their Pending Bid by providing further bids through the App.
- 5.4 Each Qualified Bidder will be able to see all Bids made on the Property through the App.
- 5.5 The Campaign Bidding Stage finishes at the commencement of the Final Bidding Stage. This will be displayed on the App.
- 5.6 The Buyer acknowledges that, pursuant to a Contract Execution and Exchange Authority, the Contract will be signed on their behalf by the Auctioneer at the fall of the hammer and the parties will be bound to that Contract.

## 6. Final Bidding Stage of the Auction

- 6.1 The Final Bidding Stage on the App will commence at the date and time nominated by the Vendor for the Final Bidding Stage to begin, which can be at any time, provided that:
- a. the Final Bidding Stage must commence between 8.00am and 9.00pm; and
  - b. if the date and time for the Final Bidding Stage has changed since the Qualified Bidder entered their Pending Bid, the Vendor's Agent and/or the Auctioneer will use reasonable endeavours to contact that Qualified Bidder (at that Qualified Bidder's contact details) no less than 12 hours prior to the commencement of the Final Bidding Stage to advise when the Final Bidding Stage will commence.
- 6.2 During the Final Bidding Stage:
- a. in order to bid each Qualified Bidder must be logged onto the App;
  - b. the App will indicate:
    - i. the minimum sum by which any bid must exceed the previous bid, determined by the Auctioneer, through the App; and
    - ii. the time limit during which further bids may be made before the current bid is final and successful, as set by the App.
  - c. the App will display the current highest bid. Qualified Bidders may choose to make a further bid exceeding what is then the highest bid in increments determined by the Auctioneer.

## 7. Purchase of the Property by a Sole Bidder

- 7.1 When using the App, the Vendor may sell the Property prior to the Final Bidding Stage when there is only one Qualified Bidder (they will then be the Sole Bidder), as follows:
- a. all bids by the Sole Bidder must be made through the App;
  - b. the Vendor's Agent or Auctioneer will request an acknowledgement from the Sole Bidder, through the App, that:
    - i. the Vendor is willing to sell the Property to the Sole Bidder at its current bid;
    - ii. upon acknowledgement from the Sole Bidder that acceptance by the Vendor of the Sole Bidder's current bid will conclude the auction of the Property by the Fall of the Hammer without the Final Bidding Stage having commenced, the Sole Bidder will have the Winning Bid at the Fall of the Hammer.
- 7.2 If the Reserve Price has not yet been met, the Auctioneer must receive in writing from the Vendor they will accept a lower reserve price.

## 8. Purchase of the Property otherwise than during the Campaign Bidding Stage or Final Bidding Stage

- 8.1 If the Property does not sell during the Final Bidding Stage, but an offer is made by a Qualified Bidder that is accepted by the Vendor, the sale must be on the same terms and conditions (other than price) as negotiated between the bidder and Vendor prior to the bidder being approved as a Qualified Bidder, in accordance with clause 4.5. If the sale is concluded on the same day as the Final Bidding Stage, no cooling off will apply.

## 9. Reserve Price

- 9.1 The Property is offered for sale by auction subject to a Reserve Price.
- 9.2 If no bid exceeds the Reserve Price in the Final Bidding Stage, the Vendor is not obliged to sell the Property to any Qualified Bidder.
- 9.3 If one or more bids in the Final Bidding Stage equals or exceeds the Reserve Price, then the Vendor must sell the Property to the highest bidder.
- 9.4 If none of the bids made by the Qualified Bidders equals or exceeds the Reserve Price, the Vendor may choose to negotiate with one or more of the Qualified Bidders to sell the Property but is under no obligation to do so.

## 10. Dummy Bidding

- 10.1 Dummy Bidding and/or encouraging another party to engage in Dummy Bidding constitutes a breach of these Terms and Conditions and may also constitute fraud and misleading or deceptive conduct and attract serious consequences.
- 10.2 Any party who becomes aware of the occurrence of Dummy Bidding must inform the Agent and/or the Auctioneer as soon as possible.
- 10.3 The Qualified Bidders and Sellers warrant that they will not engage in Dummy Bidding nor encourage or permit any other party to engage in Dummy Bidding.

## 11. Use of the App

- 11.1 Users of the App must not disclose their Password to any other person nor allow any other person to access the App on his or her behalf.
- 11.2 If a User becomes aware of any unauthorised use of the App, the User agrees to immediately notify the Owner.
- 11.3 Users must ensure that they have adequate mobile and/or internet coverage to allow access to the App;
- 11.4 Users of the App will not hold the Owner responsible for any loss or damage arising from the misuse, improper use, or unauthorised use of their username and / or Password for the App.
- 11.5 The Owner reserves the right to deny access to the App:
- in the event any false or fraudulent information is provided;
  - in the event of any unauthorised use of the App; and
  - at its sole discretion.
- 11.6 Qualified Bidders will be approved by the Vendor, upon providing the completed Buyer Registration and Authority to Bid and Terms of Use (NSW).
- 11.7 The App will:
- notify the Qualified Bidder that they are a Qualified Bidder;
  - show when the Final Bidding Stage will commence;
  - provide the Qualified Bidder with a Unique Identification Number that will be used to identify them in the App; and
  - notify the Qualified Bidder of any change to the Final Bidding Stage commencement.
- 11.8 A Qualified Bidder must be provided with 12 hours' notice of any change to the commencement of the Final Bidding Stage.
- 11.9 Any bid made in the App using a Qualified Bidder's Unique Identification Registration Number will be deemed to have been made by that Qualified Bidder, and the Qualified Bidder is solely responsible for ensuring that each bid is in fact made by the Qualified Bidder.
- 11.10 The Auctioneer may withdraw bids that he or she thinks are likely to have been made in error or bad faith, at his or her complete discretion.

## 12. Withdrawal of Property from Sale

- 12.1 The Seller may instruct the Agent / Auctioneer to withdraw the Property from Openn Negotiation at any point on the App until the earlier of:
- the Commencement of the Final Bidding Stage; or
  - a bid being made through the App by any Qualified Bidder that equals or exceeds the Reserve Price.

## 13. Suspension of Openn Negotiation

- 13.1 The Auctioneer may cancel the Openn Negotiation including, but not limited to, the Final Bidding Stage, if:
- he or she reasonably considers that a technical problem has occurred with the App such that the Openn Negotiation cannot properly proceed; or
  - he or she reasonably considers that one or more Qualified Bidders are experiencing difficulties with the use of the App such that the Openn Negotiation cannot properly proceed.
- 13.2 If the Auctioneer cancels the Openn Negotiation in accordance with clause 13.1, the Vendor's Agent will contact the Qualified Bidders at their contact details to advise them of a new Openn Negotiation (and a new Final Bidding Stage) provided that upon the Openn Negotiation restarting in these circumstances, no Qualified Bidder shall be bound by any prior bid and shall be free to recommence bidding at any amount the Qualified Bidder wishes.
- 13.3 The Auctioneer may also pause the Final Bidding Stage for the purpose of taking instructions from the Vendor or conferring with Qualified Bidders. This pause will be displayed on the App and visible to all Qualified Bidders.

## 14. Further Auction Rules

- 14.1 It is agreed that in the event that any of these App Terms and Conditions being in conflict with the conditions of sale by auction prescribed by s.15 of the *Property and Stock Agents Regulation 2014*, the Auction Conditions shall prevail.

## 15. Liability and Indemnity

- 15.1 The Operator, the Owner, Vendor's Agent, Auctioneer and their officers, directors and employees will not be held liable, in any circumstances, for any loss or damages which arise out of:
- any use, attempted use and/or any technical failure of the App;
  - acting, or failing to act, on any information contained on or referred to on the App; and
  - any errors or defects in the App.
- 15.2 The Qualified Bidders and the Vendors release and hold harmless the Vendor's Agent, Auctioneer, the Owner and the Operator and their officers, directors and employees from and against all actions, suits, demands, claims, losses, damages and costs whatsoever, whether at law or in equity arising out of:
- any use, attempted use and/or any technical failure of the App;
  - acting, or failing to act, on any information contained on or referred to on the App; and
  - any errors or defects in the App.
- 15.3 Users of the App will indemnify and keep indemnified the Vendor's Agent, Auctioneer, the Owner and the Operator and their officers, directors and employees from and against all actions, suits, demands, claims, losses, damages and costs whatsoever, whether at law or in equity arising out of any breach of these App Terms and Conditions by You.

## 16. Compliance with Law

- 16.1 These App Terms and Conditions are to be interpreted so that they comply with all applicable laws in New South Wales.
- 16.2 If any part of these App Terms and Conditions are unenforceable, illegal or void then it is severed and the remainder of these App Terms and Conditions remain in force.

## 17. Intellectual Property

- 17.1 Unless otherwise indicated, the Owner and the Operator owns or has a license to use all intellectual property (including copyright, trademarks and designs) subsisting in the content (including any graphics, images, logos, text, material, software) on the Openn Negotiation App.
- 17.2 Content on the Openn Negotiation App must not be modified, copied, reproduced, republished, framed, uploaded to a third party, posted, transmitted or distributed in any way except as expressly provided for on the Openn Negotiation App, or as expressly authorised in writing by the Owner and Operator.

## 18. Privacy

- 18.1 The Operator's Privacy Policy (available at <https://www.openn.com.au/privacy-policy>) forms part of these Terms and Conditions. By using the App, You consent to the Operator collecting, handling and using Your personal information in accordance with the Privacy Policy.

## 19. Governing Laws

- 19.1 These App Terms and Conditions are governed by the laws of New South Wales, and all Users submit to the exclusive jurisdiction of the State's Court.

## 20. Definitions

- 20.1 **Agent** means the Agent/Licensee who is a contracting party to an Agency Agreement with the Vendor to sell the Property for reward.
- 20.2 **App** means the specialised software program designed to facilitate the Openn Negotiation and known as "Openn";
- 20.3 **Auction** has the same meaning provided to it in s.3 of the *Property and Stock Agents Act 2002*.
- 20.4 **Auction Conditions** means the standard conditions of auction for the sale of residential land and property as prescribed in Clause 15 of the *Property and Stock Agents Regulation 2014*.
- 20.5 **Auctioneer** means the Auctioneer appointed by the Vendor's Agent to conduct the Openn Negotiation, who must be an accredited auctioneer pursuant to the *Property and Stock Agents Act 2002* and the *Property and Stock Agents Regulation 2014*.
- 20.6 **Bidders Guide** means an information guide produced by NSW Fair Trading provided with the Buyers Registration and Authority to Bid and Terms of Use (NSW). ;
- 20.7 **Bidders Record** means a record kept and maintained by the Agent or Auctioneer which, pursuant to Regulation 13 of the *Property and Stock Agents Regulation 2014*.
- 20.8 **Campaign Bidding Stage** means the stage of the Openn Negotiation that commences when the Property is listed on the App and ends at the commencement of the Final Bidding Stage;
- 20.9 **Contract** means the relevant contract in respect of the Property;
- 20.10 **Dummy Bidding** means false or fictitious bids made by non-genuine bidders with no intention of buying the Property and also includes any bidding practices prohibited by the relevant Legislation in each jurisdiction;
- 20.11 **Fall of the Hammer** means the time in the Openn Negotiation process at which the Auctioneer, through the App, announces the process has ended and no further bids will be accepted from Qualified Bidders;
- 20.12 **Final Bidding Stage** means the stage of the Openn Negotiation at which Qualified Bidders make competing bids to purchase the Property through the App, with a time limit applying to the making of bids and the process concluding when the Property is sold or all bids are exhausted;
- 20.13 **Legislation** means unless the context indicates otherwise, the relevant legislation and regulations in the State;
- 20.14 **Openn Negotiation** means the process set out in these conditions according to which the sale is to be conducted;
- 20.15 **Operator** means Openn Pty Ltd ACN 612 338 477.
- 20.16 **Owner** means Openn Tech Pty Ltd ACN 607 908 636;
- 20.17 **Password** means the unique word or combination of letters, number and other characters used to access the App;
- 20.18 **Pending Bid** means the opening bid made by each Qualified Bidder through the App, which may be increased during the Campaign Bidding Stage;
- 20.19 **Purchaser means the successful bidder at the Fall of the Hammer who becomes the Purchaser as described on the Contract for the Sale of Land.**
- 20.20 **Property** means the Property described in the Contract for the Sale of Land;
- 20.21 **Qualified Bidder** means a bidder who has fulfilled the requirements set out in the Openn Negotiation Buyers Registration an dAuthority to Bid and Terms of Use and has been approved by the Vendor in accordance with those terms and conditions therein;
- 20.22 **Reserve Price** means the reserve price specified by the Vendor;
- 20.23 **Vendor** means the vendor of the Property described in the Contract;
- 20.24 **Vendor's Agent** means the real estate agent duly authorised to act on behalf of the Vendor;
- 20.25 **Sole Bidder** means a Qualified Bidder who is the only Qualified Bidder in relation to the Property;
- 20.26 **State** means New South Wales;
- 20.27 **Unique Registration Identification Number** means the unique identifying number provided by the App to each Qualified Bidder to allow them to be identified in the App; (check with Peter as we have it on the form?)
- 20.28 **User(s), You, Your** means Vendor(s), Vendor's Agent(s), Auctioneer(s), Qualified Bidder(s), any person(s) who creates a login for the App and any other person(s) who accesses the App for whatever reason; and
- 20.29 **Winning Bid** means the successful bid made in the App which will be confirmed by the Auctioneer as the price for which the Property will be sold under auction conditions.