

Whittens Pty Ltd

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Procurement

Purchase Order – Terms & Conditions

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RECITALS

- a. Whittens and the Principal have executed a contract in respect of the Project [**Head Contract**].
- b. Whittens requires the Goods to be supplied in respect of the Project.
- c. This Purchase Order sets out the terms on which the parties agree that the Supplier will supply the Goods.

1.0 DEFINITIONS & INTERPRETATION

1.1 Definitions

In this Purchase Order:

Business Day means that term as defined in the SOPA.

Confidential Information means information that:

- a. is by its nature confidential;
- b. is designated as confidential on its disclosure; or
- c. the Supplier knows or ought to know is confidential.

Date for Delivery means the date in Item 1.

Date of Purchase Order means the date in Item 2.

Defects Liability Period means the period in Item 3, as extended in accordance with this Purchase Order.

Delivered means the point when:

- a. where Item 4 states that the Supplier is to unload the Goods, the Goods have been delivered to and safely unloaded at the Delivery Point; or
- b. where Item 4 states that the Supplier is not required to unload the Goods, the Goods have been delivered to the Delivery Point and are ready for unloading by or on behalf of Whittens; and
- c. the Supplier has satisfied all other delivery obligations identified in Item 5.

Delivery Point means the point identified in Item 6.

Goods means the goods identified in Item 7.

Heavy Vehicle National Law means the Heavy Vehicle National Law as it applies in Western Australia, Australia Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria, and the regulations made under it.

Item means an item of the Schedule.

Insurances means that term as defined in clause 15.

Law means all:

- a. acts, regulations, by-laws and orders;
- b. licences, approvals and authority requirements; and
- c. fees payable in connection with the foregoing.

Personnel means a party's employees, agents, officers and contractors, excluding the Supplier in the case of Whittens.

Price means the price for the Goods set out or determined in accordance with Item 8.

Principal means the person named in Item 9.

Project means the project named in Item 10.

Proportionate Liability Legislation means, where a claim is brought in:

- a. Queensland, Chapter 2, Part 2 of the Civil Liability Act 2003 [QLD],
- b. New South Wales, Part 4 of the Civil Liability Act 2002 [NSW];
- c. Australian Capital Territory, the Civil Law [Wrongs] Act 2002 [ACT];

- d. Victoria, Part IVAA of the Wrongs Act 1958 [VIC];
- e. Tasmania, Part 9A of the Civil Liability Act 2002 [TAS];
- f. South Australia, Part 3 of the Law Reform [Contributory Negligence and Apportionment of Liability] Act 2001 [SA];
- g. Western Australia, Part 1F of the Civil Liability Act 2002 [WA]; or
- h. Northern Territory, the Proportionate Liability Act 2005 [NT].

Purchase Order means these terms and the Schedule.

Schedule means the schedule attached to these terms.

Site means the site identified in Item 11.

Site Rules means all rules, procedures and directions of Whittens or the Principal that apply to the Site.

SOPA means, where the Goods are supplied in:

- a. Queensland, the Building and Construction Industry Payments Act 2004 [QLD];
- b. New South Wales, the Building and Construction Industry Security of Payment Act 1999 [NSW];
- c. Australian Capital Territory, the Building and Construction Industry [Security of Payment] Act 2009 [ACT];
- d. Victoria, the Building and Construction Industry Security of Payment Act 2002 [VIC];
- e. Tasmania, the Building and Construction Industry Security of Payment Act 2009 [TAS];
- f. South Australia, the Building and Construction Industry Security of Payment Act 2009 [SA];
- g. Western Australia, the Construction Contracts Act 2004 [WA]; or
- h. Northern Territory, the Construction Contracts [Security of Payments] Act 2004 [NT].

Supplier means the supplier named in Item 12.

Supplier Reference Document means a docket which identifies this Purchase Order, the Delivered Goods, including their quantity, weight, price, date of Delivery and all other things required by Whittens.

Supplier's Representative means the person named in Item 13 or such other person approved by Whittens.

Time for Delivery means the time in Item 14.

Whittens means Whittens Pty Ltd.

Whittens Representative means the person named in Item 15 or such other person notified to the Supplier by Whittens.

1.2 Interpretation

In this Purchase Order:

- a. a person includes an individual, firm, joint venture, association or body, corporate or unincorporated;
- b. a party includes its successors and permitted assigns;
- c. the time for doing anything is, if it ends on a non-Business Day, deemed to end on the next Business Day;
- d. headings are for convenience only;
- e. communications must be in English;
- f. a reference to a Law or a provision of it is to it as amended, re-enacted or replaced; and
- g. an agreement on the part of two or more persons binds them jointly and severally.

1.3 Contra Proferentem

This Purchase Order is not to be interpreted against a party merely because it proposed it or a provision in it.

1.4 Ambiguity or Discrepancy

If the Supplier discovers an error or inconsistency in or between this Purchase Order, it must promptly advise Whittens Representative in writing and follow any direction given by Whittens Representative as to the interpretation that applies.

2.0 REPRESENTATIONS & WARRANTIES

2.1 General

The Supplier warrants and repeats on each day of the term of this Purchase Order that:

- a. it has all approvals needed to perform this Purchase Order;
- b. its performance of this Purchase Order does not violate any Law or agreement;
- c. it is not aware of any thing which may prevent it from performing this Purchase Order;
- d. it did not rely on any representation made to it by or on behalf of Whittens in entering into this Purchase Order;
- e. all Delivered Goods will:
 - i. have unencumbered title;
 - ii. comply with this Purchase Order, the Head Contract and all relevant Laws;
 - iii. be new, defect free and fit for the purposes for which they are to be used;
 - iv. have a life expectancy commensurate with that expected of similar goods; and
 - v. be defect free for the Defects Liability Period;
- f. it and its Personnel will comply with all Site Rules, Laws and Whittens directions; and
- g. Whittens will have the benefit of all manufacturer's warranties applicable to the Goods on Delivery.

2.2 Supplier Acknowledgments

The Supplier acknowledges and agrees that Whittens enters into this Purchase Order relying on the warranties included in clause 2.1 and would not have done so without them.

3.0 ENGAGEMENT OF THE SUPPLIER

- a. The Supplier must Deliver the Goods in accordance with this Purchase Order and Whittens must pay the Supplier the Price for doing so.
- b. This Purchase Order is deemed to be accepted by the Supplier on the earliest of the Supplier:
 - i. indicating to Whittens its intention to supply the Goods; or
 - ii. commencing the supply of the Goods after receipt of the Purchase Order.

4.0 RELATIONSHIP & SUBCONTRACTING

4.1 Relationship

The Supplier is engaged by Whittens as an independent contractor and has no authority to, and must not represent itself as having authority to, act on behalf of Whittens.

4.2 Whittens Representative

Whittens Representative has authority to act as Whittens agent and for all purposes in connection with this Purchase Order.

4.3 Supplier's Representative

- a. The Supplier must not change its Representative without the consent of Whittens Representative.
- b. Any notice, direction or information given to the Supplier's Representative by or on behalf of Whittens is deemed to have been given to the Supplier.

4.4 Subcontracting

The Supplier may only engage subcontractors to perform any of its obligations under this Purchase Order with the consent of Whittens Representative, which may be withheld for any reason or provided subject to conditions.

5.0 DELIVERY

The Supplier must:

- a. ensure that all Delivered Goods are:
 - i. packed and labelled in accordance with all relevant Laws;
 - ii. packed in a manner that avoids damage during their transit and storage; and
 - iii. accompanied by a Supplier Reference Document;
- b. Deliver the Goods to the Delivery Point:
 - i. at the Delivery Time on the Delivery Date; and
 - ii. in accordance with all Laws;

- c. without limiting any other provision of this Purchase Order, comply with, and ensure that its subcontractors comply with, their obligations under the Heavy Vehicle National Law and upon request provide Whittens with evidence of such compliance;
- d. co-operate with and do all things necessary to assist Whittens and its Personnel to discharge their obligations under the Heavy Vehicle National Law; and
- e. immediately inform Whittens upon becoming aware of any non-conformance by it or its subcontractors with the Heavy Vehicle National Law and:
 - i. cooperate with Whittens in relation to the investigation of any non-compliance; and
 - ii. where appropriate, take steps to immediately rectify the non-conformance.

6.0 DELAY

6.1 Notice

The Supplier must, within 24 hours after it became or should have become aware of a matter likely to delay its Delivery of Goods, give written notice to Whittens Representative detailing the:

- a. cause of the delay;
- b. estimated duration of the delay; and
- c. actions it has taken or will take to mitigate it,

and thereafter:

- a. every 2 days during the delay provide written reports to Whittens Representative updating it on the matters referred to in this clause 6.1; and
- b. take all steps to avoid or minimise the delay.

6.2 Relief

If the Subcontractor:

- a. is delayed in performing this Purchase Order by a breach of it by Whittens; and
- b. complies with clause 6.1,

Whittens Representative must grant a reasonable extension of time to the Date for Delivery as the Supplier's sole entitlement for such breach and the Supplier is not entitled to relief for delay in any other circumstances.

6.3 Whittens Rights

If the Goods are not Delivered by the Date for Delivery then, without limiting its other rights, Whittens may:

- a. refuse to take further deliveries of Goods;
- b. at the Supplier's cost, cause the Supplier to use another form of delivery nominated by Whittens;
- c. direct the Supplier to obtain the Goods from a third party within a nominated period;
- d. cancel the supply and obtain substitute goods from a third party; or
- e. terminate this Purchase Order with immediate effect.

7.0 INSPECTION, TESTING & ACCEPTANCE

- a. Acceptance of Goods by Whittens is subject to them passing all testing and inspections required by Whittens during manufacture and/or after Delivery.
- b. If Whittens believes Delivered Goods do not comply with this Purchase Order, it may:
 - i. reject some or all of them and require the Supplier to immediately refund all amounts paid to it by Whittens in respect of them;
 - ii. require the Supplier [at its cost] to repair or replace them within a nominated period; or
 - iii. convert them into a condition acceptable to Whittens and all associated costs will be due and payable from the Supplier to Whittens.

8.0 RISK & TITLE

- a. Risk in Goods passes to Whittens upon their Delivery in accordance with clause 5.
- b. Title in Goods passes to Whittens upon the earlier of payment or Delivery.

9.0 VARIATIONS**9.1 Directions to Vary**

- a. Whittens may direct the Supplier to vary the Goods [including by way of increase, decrease, omission or change] and the Supplier must comply with such direction.
- b. If Whittens issues a variation direction which omits Goods, it may obtain them from a third party.

9.2 Valuation of Variations

Unless otherwise agreed in writing by the parties, variations must be valued using:

- a. the rates set out in this Purchase Order; or
- b. if the Purchase Order does not include a relevant rate, rates that Whittens considers reasonable.

10.0 SUSPENSION OF DELIVERY

- a. Whittens Representative may immediately suspend the Delivery of some or all Goods by written notice to the Supplier and it must comply with such direction.
- b. The Supplier must resume Delivery of suspended Goods promptly after being directed to do so by Whittens Representative.
- c. The Supplier is not entitled to compensation as a result of a suspension of Delivery.

11.0 PAYMENT**11.1 Payment Claims**

- a. The Supplier must claim payment of the Price progressively in accordance with this Purchase Order.
- b. Each payment claim must be given in writing to Whittens Representative and include:
 - i. detail of the value of the Delivered Goods;
 - ii. a duly executed subcontractor's statement and statutory declaration as required by Law;
 - iii. certificates of currency in respect of the Insurances; and
 - iv. such other details required by Whittens.
- c. If the Supplier serves a payment claim:
 - i. that:
 - A. is not in accordance with this clause 11.1; or
 - B. includes an amount which is barred,

Whittens is not obliged to provide a payment schedule or make any payment in respect of it until the Supplier serves a payment claim that complies with this clause 11.1; or

- ii. before the date for submitting payment claims, stated in Item 16, Whittens is not required to issue a payment schedule in respect of it any earlier than it would have had the Supplier submitted it in accordance with this Purchase Order.

11.2 Payment Schedule

Whittens Representative must, within 10 Business Days after receiving a payment claim in accordance with clause 11.1[b], issue to the Supplier a payment schedule evidencing the moneys due from Whittens to the Supplier pursuant to the payment claim and its reasons for any difference.

11.3 Progress Payment

Whittens must pay the Supplier the amount set out as payable by Whittens to the Supplier [if any] in a payment schedule by the date that is 30 Business Days after Whittens Representative's receipt of the relevant payment claim, however, if the result is a negative balance, the Supplier must pay that amount to Whittens within 5 Business Days after the date of the Supplier's receipt of the payment schedule.

11.4 Effect of Payment Schedule & Payment

Neither a payment schedule nor payment is evidence that Goods have been supplied in accordance with this Purchase Order and payment is on account only.

11.5 No Other Payments

The Supplier agrees that the Price includes:

- a. all charges for packaging, packing, insurance and Delivery;
- b. all Supplier costs associated with performing this Purchase Order; and
- c. the cost of performing any miscellaneous services.

11.6 Conditions Precedent

The Supplier must not serve a payment claim on Whittens unless the Supplier has:

- a. effected all insurances required by this Purchase Order and provided Whittens with evidence;
- b. supplied Whittens with a Supplier Reference Document in relation to the Delivered Goods referred to in the payment claim; and
- c. where required by Whittens provided all materials certificates, technical data sheets, installation & operation maintenance manuals via email to QA@whittensgroup.com.au with the relevant Purchase Order number or Project name in the subject line.

11.7 Set Off

Whittens may deduct any amount due from the Supplier to Whittens, whether under this Purchase Order or otherwise, from any amount due to the Supplier from Whittens.

11.8 SOPA

- a. If a subcontractor is entitled to suspend Delivery under the SOPA:
 - i. it must promptly give Whittens Representative a copy of all relevant correspondence; and
 - ii. Whittens may pay the subcontractor all outstanding amounts and they will be due and payable from the Supplier to Whittens.
- b. To the fullest extent permitted by Law, the Supplier indemnifies Whittens and its Personnel from and against all claims and losses they suffer or incur arising out of a:
 - i. suspension of supply pursuant to the SOPA by a subcontractor; or
 - ii. breach of clause 11.8[a].

12.0 TAXES & GST

- a. Subject to the remainder of this clause 12, the Supplier must pay all taxes concerning the supply of Goods.
- b. Each party warrants to the other that it is registered for GST and must immediately notify the other if it ceases to be so registered.
- c. If consideration given by a party [Payer] in connection with this Purchase Order does not include GST and is consideration for a taxable supply for which the party who makes the supply [Supplier] is liable for GST, the Payer must pay the Supplier an additional amount equal to the consideration multiplied by the rate of GST.

13.0 DEFECTS LIABILITY PERIOD

- a. The Defects Liability Period will commence on the date Delivered Goods are accepted by Whittens and expire at the end of the period in Item 3.
- b. Upon receipt of a notice from Whittens of a defect in a Delivered Good during the Defects Liability Period, the Supplier must repair or replace it at no cost to Whittens and within the period directed by Whittens.
- c. If the Supplier fails to rectify a defect in accordance with clause 13[b], Whittens may rectify or cause to be rectified the defect at the Supplier's risk and expense and all costs incurred by Whittens in doing so will be due and payable from the Supplier to Whittens.
- d. A separate Defects Liability Period will apply in respect of rectified Goods, commencing on the date rectification is finished.

14.0 INDEMNITY & LIABILITY

14.1 Indemnity

- a. The Supplier must indemnify Whittens and its Personnel from and against all claims, damage, expenses, losses and liabilities in respect of any:

- i. breach of this Purchase Order by the Supplier;
 - ii. wilful, unlawful or negligent act or omission of the Supplier or its Personnel;
 - iii. loss of, loss of use of, destruction or damage to, property, caused or contributed to by the Supplier or its Personnel;
 - iv. injury to, or disease, illness or death of, persons caused or contributed to by the Supplier or its Personnel;
 - v. breach by the Supplier or its Personnel of a duty of confidence owed to Whittens; or
 - vi. act of abandonment of some or all of this Purchase Order by the Supplier.
- b. The Supplier's liability under clause 14.1[a] will be reduced to the extent a negligent act or omission of Whittens contributed to the relevant liability.
 - c. Each indemnity in this Purchase Order is a continuing obligation, separate and independent from all other obligations and survives the termination or expiration of this Purchase Order.
 - d. It is not necessary for a party to incur an expense before enforcing an indemnity.

14.2 Indirect Loss

To the fullest extent permitted by Law, Whittens has no liability to the Supplier or any of its Personnel under or arising out of this Purchase Order for any:

- a. loss of revenue, use, production, goodwill, profit, business, contract or anticipated savings;
- b. financing costs or increase in operating costs; or
- c. other financial, special or indirect loss or damage.

14.3 Proportionate Liability

The parties acknowledge and agree that:

- a. to the fullest extent permitted, Proportionate Liability Legislation is excluded in relation to claims arising out of this Purchase Order; and
- b. if any provision of the Proportionate Liability Legislation applies to any claim between the parties arising out of this Purchase Order, the Supplier will indemnify Whittens and its Personnel from and against all losses, costs, expenses and claims they suffer or incur which the Supplier would be liable but for the operation of the Proportionate Liability Legislation.

15.0 INSURANCE

- a. Before the Date of Purchase Order and until the expiry of the last Defects Liability Period, the Supplier must effect and maintain the following insurances [together, the Insurances]:
 - i. a public and product liability insurance policy in the names of the parties [including a 'cross liability' clause] for at least \$20 million per claim;
 - ii. transit insurance for the full value of all Goods whilst they are in transit; and
 - iii. workers' compensation insurance as required by Law,and ensure that all subcontractors do likewise.
- b. Whenever requested by Whittens, the Supplier must produce certificates of currency in respect of the Insurances.
- c. If the Supplier fails to produce certificates of currency in accordance with clause 15[b], Whittens may affect some or all Insurance[s] itself and recover the costs of doing so from the Supplier.
- d. The Supplier must:
 - i. not do or permit, or omit to do, anything which prejudices any Insurance or insurance policy maintained by Whittens or the Principal;
 - ii. immediately rectify anything which prejudices or could prejudice any Insurance or insurance policy maintained by Whittens or the Principal;
 - iii. promptly reinstate any Insurance should it lapse;
 - iv. comply with each Insurance and insurance policy maintained by Whittens or the Principal;
 - v. give full details to its insurer[s] of all matters the non-disclosure of which might prejudice any Insurance or reduce its cover; and

- vi. to the extent it is able to recover under an Insurance [or could have but for a failure to maintain it], recover and indemnify Whittens and its Personnel up to the relevant level of cover.
- e. The Supplier must ensure that each Insurance is taken out with an insurer with a financial rating of at least A by Standard & Poor's.
- f. The effecting of the Insurances does not limit the Supplier's obligations and liabilities under this Purchase Order.

16.0 DISPUTE RESOLUTION

- a. If a dispute arises under or out of this Purchase Order, either party may issue a notice to the other setting out details of the dispute.
- b. Within 10 days after a notice is received by a party in accordance with clause 16[a], senior representatives from each party must meet to attempt to resolve the dispute in good faith.
- c. If a dispute is not resolved within 15 days after the meeting referred to in clause 16[b], either party may commence litigation to resolve it.
- d. The Supplier must continue to perform this Purchase Order despite the existence of a dispute.
- e. Nothing in this clause 16 prejudices the right of a party to seek injunctive or urgent relief.

17.0 DEFAULT & TERMINATION

- a. If the Supplier commits a substantial breach of this Purchase Order, Whittens may issue it with a written notice to show cause which states:
 - i. the alleged substantial breach;
 - ii. that the Supplier is required to rectify it; and
 - iii. the time by which the Supplier must do so.
- b. If the Supplier fails to rectify a default to Whittens satisfaction by the required time, Whittens may immediately terminate this Purchase Order by written notice to the Supplier.
- c. Notwithstanding the remainder of this clause 17, if the Supplier commits a substantial breach of this Purchase Order that is incapable of remedy, Whittens may immediately terminate this Purchase Order by written notice to the Supplier.

18.0 TERMINATION FOR CONVENIENCE

- a. Whittens may:
 - i. at any time, for its convenience and by written notice to the Supplier, terminate this Purchase Order effective from the time stated in the notice; and
 - ii. thereafter procure some or all undelivered Goods from others.
- b. If Whittens terminates this Purchase Order under clause 18[a], it must pay the Supplier the applicable portion of the Price for Delivered Goods up to the date of termination and the Supplier is not entitled to any other compensation in respect of the termination.

19.0 CONFIDENTIALITY

- a. The Supplier must not, without the prior written consent of Whittens Representative, divulge or permit its Personnel to divulge [other than to properly perform this Purchase Order] any Confidential Information.
- b. The restrictions in clause 19[a] do not apply to Confidential Information which is:
 - i. made public through no default of the Supplier or any of its Personnel; or
 - ii. required to be disclosed by Law.

20.0 NOTICES

A notice under this Purchase Order is only effective if it is in writing, signed by the party's Representative, addressed to the other party's Representative and left at, mailed or emailed to the addressee's address in the Schedule. If:

- a. left at the addressee's address between 9:00am and 5:00pm on a Business Days, it is taken to have been immediately received;
- b. sent by mail, it is taken to have been received 4 Business Days after posting; or

- c. sent by email, the earliest date of receipt by the sender of an email acknowledgement from the recipient or its information system stating that the notice has been received.

21.0 WAIVER

Nothing in this Purchase Order will be waived, discharged or released unless it is done so in writing.

22.0 GOVERNING LAW

This Purchase Order is governed by the laws of the jurisdiction identified in Item 17 and each party irrevocably submits to the jurisdiction of the courts of that State.

23.0 ENTIRE AGREEMENT

This Purchase Order contains the entire agreement between the parties in respect of its subject matter.

24.0 ASSIGNMENT & NOVATION

The Supplier must not assign, transfer, novate or otherwise create an interest in any or all of its rights or benefits under this Purchase Order without the prior written consent of Whittens Representative.

25.0 GIVING EFFECT TO THIS PURCHASE ORDER

The Supplier must do anything, and ensure that its Personnel do anything, Whittens requires to give full effect to this Purchase Order.

26.0 INVALIDITY & ENFORCEABILITY

The invalidity or unenforceability of any provision of this Purchase Order does not affect the validity or enforceability of any other provision of this Purchase Order and the invalid or unenforceable part is severable.

27.0 AMENDMENT

This Purchase Order may only be amended by a document signed by or on behalf of each party.

28.0 SURVIVAL

This clause 28 and clauses 1 - 4, 6.3 and 8 - 27 survive the expiry or termination of this Purchase Order.

29.0 SCHEDULE

Item	Issue	Variable
1	Date for Delivery	[*]
2	Date of Purchase Order	[*]
3	Defects Liability Period	[*] weeks
4	Party Responsible for Unloading	[Supplier / Whittens]
5	Supplier's Other Delivery Obligations	[*]
6	Delivery Point	[*]
7	Goods	[*]
8	Price	\$[*]
9	Principal	[*]
10	Project	[*]
11	Site	[*]
12	Supplier	Name: [*] ABN: [*] Address: [*]
13	Supplier's Representative	Name: [*] Address: [*] Email: [*] Telephone: [*]
14	Time for Delivery	[*]
15	Whittens Representative	Name: [*] Address: [*] Email: [*] Telephone: [*]
16	Day for Payment Claim	[*]
17	Jurisdiction	[*]