



# **GENERAL TERMS AND CONDITIONS OF PURCHASE FOR THERMIT AUSTRALIA PTY LTD**



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## 1. Definition

In these Conditions:

- (a) "Goods" shall include any goods, materials or equipment provided or to be manufactured and any services to be performed under this Purchase order.
- (b) "Conditions" means the terms and conditions contained in this document.
- (c) "Contract" means the contract between Purchaser and Seller consisting of the Purchase Order, the Conditions and any other documents (or parts thereof) specified in the Purchase Order (which will have precedence in that order should there be an inconsistency between those documents).
- (d) "Intellectual Property Rights" means any patent, copyright, design, trade mark, any inventions, processes, know-how, trade secrets and proprietary and confidential information.
- (e) "Purchase Order" means the Purchaser's purchase order to which these Conditions apply.
- (f) "Purchaser" means Thermit Australia Pty. Ltd.
- (g) "Seller" means the persons, firm or company providing the Goods.

Where applicable, Inco terms 2010 will govern the interpretation of any term of trade contained in the Purchase Order.

## 2. Acceptance of Conditions

This Purchase Order is expressly limited to and made conditional on the Seller's acceptance of and assent to the Conditions. The Contract is the entire agreement between the Purchaser and Seller on everything connected with the subject matter of the Contract and supersedes any prior agreement or understanding on anything connected with that subject matter. This Contract prevails over any terms and conditions of the Seller if inconsistent with it, notwithstanding that the Seller's terms and conditions may be received after the date of the relevant Purchase Order.

## 3. Specifications

Notwithstanding the previous clause, where specifications are referred to in this Purchase Order such specifications are deemed to be incorporated in and form part of the Contract. The Seller must satisfy itself as to the accuracy of the specifications and information supplied by the Purchaser and must advise the Purchaser, prior to any work commencing, of any discrepancy or errors contained in the specifications and information. All Goods supplied under this Contract must strictly comply with the specifications. Where the Seller has submitted a quotation based on a sample, the bulk of the Goods supplied by it in accordance with this Purchase Order must correspond strictly with the sample given.

## 4. Proprietary Rights

- 4.1 Any specifications, plans, drawings, designs, patterns, dies, fixtures and other confidential information supplied by the Purchaser to the Seller ("Confidential Information") remain the property of the Purchaser. Unless otherwise agreed to in writing by the Purchaser, all information supplied by Purchaser shall be kept confidential by Seller and shall not be used for any purpose other than the supply of the Goods to the Purchaser.
- 4.2 Any invention or improvement made by Seller, attributable in whole or in part to the Confidential Information, is the property of the Purchaser and Seller agrees to assign all Intellectual Property Rights in any such invention or improvement to Purchaser.
- 4.3 All information supplied by Purchaser to Seller, whilst in the care, custody and control of the Seller,



is at its risk and Seller will be strictly responsible for all loss, damage and injury sustained to Purchaser's information, whether such damage occurs through negligence or otherwise and in any case regardless of fault. In any calculation of damages under this clause the loss to the Purchaser shall be calculated on the cost of replacing the materials involved.

- 4.4 The Seller indemnifies the Purchaser against any loss and shall render to the Purchaser all profits resulting from any breach of confidentiality committed by itself, its servants or agents regardless of fault or blame on the Seller's part.
- 4.5 The Confidential Information must be returned to the Purchaser in good order and condition by and at the expense of the Seller within seven days of completion by it of its obligations under this Purchase Order or otherwise upon demand by the Purchaser.

## **5. Material Supplied**

Where materials of any kind are provided by the Purchaser to the Seller to be processed or otherwise treated by the Seller in the course of it carrying out its requirements under this Purchase Order, or alternatively incorporating the materials without alteration into the Goods it supplies, the material shall be properly handled by the Seller in compliance with all applicable legislation, regulations and other governmental requirements in Australia. Any destruction, damage or act rendering the material unsuitable for the purpose for which it was supplied by the Purchaser to the Seller must be remedied or replaced by material of the same quality at the Seller's expense and will in no way result in cost to the Purchaser.

## **6. Price**

- 6.1 The Seller and the Purchaser agree that the price payable is the price shown on the Purchase Order, which includes delivery and all packages, labor materials, tools and implements necessary to supply the Goods ("Price").
- 6.2 The Price will not be subject to variation unless it is stated to be so in the Purchase Order.
- 6.3 Despite any other provision of the Contract, if a goods and services tax or similar value added tax ("GST") is imposed on any supply made under or in accordance with the Contract, then subject to being issued with a valid GST tax invoice (or other documentation required to enable input tax credits to be obtained or GST adjustments to be made) the amount the recipient must pay for that supply is increased by the amount of that GST.

## **7. Inspection**

Unless otherwise specified in the Contract, all Goods (including those being supplied by subcontractors) will be subject to approval and inspection by the Purchaser at the Seller's (or subcontractor's) premises and at the point of destination before final acceptance. The Purchaser's inspectors or representatives shall have access at all reasonable times to the Seller's (or subcontractor's) manufacturing plants, factories, shops or premises for the purpose of inspection. Any inspection, checking, approval or acceptance given on behalf of Purchaser will not relieve Seller from any obligation under the Contract.

## **8. Delivery**

- 8.1 The date of delivery of the Goods will be as specified in the Purchase Order unless agreed otherwise between Purchaser and Seller. Failure by the Seller to deliver the Goods by the delivery date will, at the option of the Purchaser, relieve it of any obligation to accept and pay for the Goods and any



other undelivered installments of the Goods.

- 8.2 All Goods must be delivered at the delivery point specified in the Purchase Order and the Seller must pay the costs of transportation of the Goods to that delivery point.
- 8.3 Time is of the essence with respect to Seller's obligations under the Contract and Seller indemnifies Purchaser for any costs, expenses and losses resulting from delays in delivery.
- 8.4 If by reason of a cause which is beyond the reasonable control of the Seller it is delayed in its performance of work, it must apply in writing to the Purchaser for an extension of time of delivery date within seven (7) days of that event occurring.
- 8.5 The Purchaser will consider justified requests for extensions of time only in circumstances where written notice has been received within the time specified in clause 8.4. The grant of extension will not be unreasonably withheld in the case of valid force majeure circumstances, but is otherwise at the absolute discretion of the Purchaser.

## **9. Warranty**

- 9.1 The Seller warrants to the Purchaser that all Goods:
- (a) Will be of merchantable quality, free from defects in materials and workmanship and suitable for their intended purpose;
  - (b) Are newly manufactured (unless otherwise specified) and comply with the specifications and other conditions contained in the Purchase Order;
  - (c) Are free from any charge or encumbrance; and
  - (d) Comply with all applicable legislation, regulations and other governmental requirements in Australia and with the relevant Australian Standards.
- 9.2 The Seller shall at its cost replace, repair or resupply any Goods or component part of any Goods which are not in accordance with the Contract provided the Purchaser notifies the Seller within one (1) year after use or within eighteen (18) months after delivery, whichever first occurs. Goods repaired, replaced, or resupplied will be subject to a warranty period of 12 months from the date of delivery, reinstallation or passing of tests (if any) whichever is appropriate after the repair, replacement or resupply.

## **10. Intellectual Property Indemnity**

The Seller indemnifies the Purchaser for all claims against the Purchaser for infringement of Intellectual Property Rights by reason of the possession, use or sale of any Goods, materials or equipment supplied by the Seller, or by reason of the performance of any work by the Seller, under this Contract. The Seller agrees to defend, at its sole expense, all suits against the Purchaser and to hold the Purchaser harmless from and against all costs, expenses, judgments and damages which the Purchaser shall be obliged to pay or incur by reason of any such infringement of Intellectual Property Rights. The Purchaser agrees that it will render to the Seller whatever assistance it reasonably can in the way of information and access to records in connection with any such suit.

## **11. Assignment and Subcontracting**

- 11.1 Neither this Contract nor any rights, obligations or monies due under it are assignable or transferable (as security for advances or otherwise) without the Purchaser's prior written consent, except as to purchases of raw materials or standard commercial articles.
- 11.2 The Seller may subcontract its obligations under the Contract to the subcontractors named in the Contract or otherwise with Purchaser's written consent but Seller remains liable for the



performance subcontracted and the acts and omission of all subcontractors.

11.3 The Seller must send copies of all subcontracts to Purchaser immediately when they are issued.

## **12. Work on Purchaser's Premises**

12.1 If the Seller, either as principal or agent or employee, enters the premises or property of the Purchaser in order to perform any work under this Contract including but not limited to construction, erection, inspection, delivery, servicing or repairing, the Seller:

(a) Indemnifies and holds harmless the Purchaser from and against all liability, action, claims and demands on account of personal injuries, including death, or property loss or damage to others (including the Seller and employees and invitees of the Seller and the Purchaser) arising out of or in any way connected with the performance of such work and caused by the negligent or willful act or omission of the Seller or a subcontractor or supplier of the Seller or employees or invitees or licensees of any of them; and

(b) Acknowledges that it is granted access to Purchaser's premises only for it to fulfill its obligations under this Contract; and

(c) Will comply with all reasonable directions given by the Purchaser in the event of an emergency or security breach or any other matter as it may arise.

12.2 The Seller shall at its own expense defend any and all actions arising under clause 12.1 and shall pay all legal fees and all costs and other expenses so arising.

## **13. Insurance**

The Seller is required to affect adequate insurance policies in relation to public liability (with a minimum cover of at least \$10,000,000), professional indemnity and workers' compensation insurance. The Seller must, upon request, provide the Purchaser with certificates of currency with respect to these insurance policies.

## **14. Indemnity**

14.1 The Seller indemnifies the Purchaser against all losses and all liabilities incurred by the Purchaser and all legal costs actually payable and other expenses incurred by the Purchaser arising out of or in connection with a breach or non-performance of the obligations or warranties of the Seller under this Contract.

14.2 The indemnity granted under this clause 14 is a continuing obligation and will survive the termination of the Contract.

## **15. Transfer of Risk and Property**

15.1 All Goods the subject matter of this Purchase Order remain the Seller's property and at its risk until delivery to and acceptance by the Purchaser at which time property and risk in the Goods pass to the Purchaser

15.2 The Seller agrees not to attempt to register any liens in respect of Goods supplied and Seller's subcontractors must agree to the same. Seller must provide lien waivers in a form acceptable to Purchaser in respect of any supply at Purchaser's request. Seller agrees to cause any liens registered despite this clause 15.2 to be removed at its cost.



## **16. Changes**

The Purchaser may, from time to time by written notice, make changes or additions to the instructions, drawings or specifications for the Goods and the Seller agrees to comply with such changes, which will become a part of the Contract. If a change causes an increase or decrease in the cost of the Goods or time required for performance of this Purchase Order, an equitable adjustment in the price and delivery schedule must be immediately advised to the Purchaser by the Seller, as determined by the same method of pricing contained in the Seller's tender/quotation for the provision of Goods.

## **17. Termination**

The Purchaser may terminate this Contract at any time in whole or part by giving two (2) days advance written notice to the Seller. In the event of such termination the Seller may claim its reasonable costs incurred prior to the effective date of termination plus a reasonable allowance for profit on the portion of the work completed, all to be determined in accordance with generally accepted accounting principles provided however, that the total sum payable upon termination does not exceed the Purchase Order price reduced by payments previously made. If it appears that Seller would have sustained a loss on the entire Purchase Order had it been completed, no profit shall be allowed. As to partially completed work or raw material included in the Seller's costs, the Seller shall hold the same for disposal in accordance with the Purchaser's instructions.

## **18. Retentions**

The Purchaser shall be entitled to withhold as retention money up to ten per centum (10%) of the total value of the Contract, including all contract variations. The maintenance period and the amount of retention will be agreed by the Purchaser and the Seller before any work commences.

## **19. Governing Law**

The Contract is governed by the laws of the State in which the Purchase Order is issued and the Purchaser and Seller submit to the jurisdiction of the courts of that State and of the Commonwealth of Australia.

## **20. Amendment of Terms and Conditions**

An amendment or variation to these Conditions is not effective unless it is in writing and signed by duly authorised representatives of both parties.

## **21. Waiver**

A party's failure or delay to exercise a right or remedy does not operate as a waiver of that right or remedy.

## **22. Liquidated Damages**

Without prejudice to the rights and remedies conferred on the Purchaser under this Contract or as may be implied by law, at the option of the Purchaser the Seller shall pay to the Purchaser or allow the Purchaser the sum of \$1,000.00 per day as liquidated and ascertained damages for the period during which the contract remains uncompleted by the Seller and the Purchaser may deduct such damages from any monies otherwise payable to the Seller.