

# CITY OF MELBOURNE PURCHASE ORDER TERMS AND CONDITIONS

## **1. AGREEMENT, MERGER, MODIFICATION, WAIVER, AND REMEDIES**

This agreement contains the entire understanding between City and Seller with respect to the subject matter hereof and merges and supersedes all prior and contemporaneous agreements, dealings and negotiations. No modification, alteration, or amendment shall be effective unless made in writing by change order, dated and signed by the City's Procurement and Contracts Manager. Any additional or different terms in Seller's documents are deemed to be material alterations and notice of objection to and rejection of them is hereby given. Seller shall not substitute the Goods. In the event this purchase order is a result of an awarded formal solicitation with an executed purchase agreement/contract, the executed purchase agreement/contract shall take precedence. No waiver of any breach hereof shall be held to be a waiver of any other or subsequent breach. City's rights and remedies herein are in addition to any other rights and remedies provided by law or in equity. If any provision of this Purchase Order is determined by a court of competent jurisdiction to be invalid, illegal, or unenforceable, such determination shall not affect the validity of the remaining provisions unless City determines in its discretion that the court's determination causes this Purchase Order to fail in any of its essential purposes.

**2. PRICING** Prices set forth on this purchase order shall remain fixed for the duration of this purchase order except as provided herein. Prices shall include transportation and delivery charges, prepaid by Seller to the destination specified in this purchase order. The price charged City for any Good shall always be Seller's lowest price charged any customer for that Good regardless of any special terms, conditions, rebates, or allowances of any nature. If Seller sells any Good to any customer at a price less than that set forth herein, Seller shall adjust its price to the lower price for any un-invoiced Goods and for all future invoices for such Good. For Goods designated as custom Goods, for purposes of comparing price under this Paragraph, the price of the Good shall include those Seller cost components which are generic to the Good as compared to other similar Goods sold by Seller. In the event Seller offers a lower price, either as a general price drop or only to some customer(s) for any reason, Seller shall immediately inform City of this price and price protect City's inventory of affected Goods by rebating to City an amount equal to the difference in the price paid by City and the lower price for all such Goods pulled into City's manufacturing process for consumption during the preceding thirty (30) days. All applicable taxes and other charges such as duties, customs, tariffs, imposts, and government imposed surcharges shall be stated separately on Seller's invoice and borne by Seller. In the event that City of Melbourne is prohibited by law from remitting payments to the Seller unless City of Melbourne deducts or withholds taxes therefrom on behalf of the local taxing jurisdiction, then City of Melbourne shall duly withhold such taxes and shall remit the remaining net invoice amount to the Seller. City of Melbourne shall not reimburse Seller for the amount of such taxes withheld. The purchase of equipment, materials, and/or service by the City may be exempt from the payment of excise, transportation and sales tax imposed by the federal, state and/or other city governments. Additional costs including such taxes, surcharges and delivery costs, except those described on this purchase order, will not be paid or reimbursed without City's prior written approval. CITY reserves the right to have Seller's records inspected and audited to ensure compliance with this purchase order. At City's option or upon Seller's written demand, such audit will be performed by an independent third party at City's expense. However, if Seller is found to not be complying with this purchase order in any way, Seller shall reimburse City for all costs associated with the audit, along with any discrepancies discovered, within thirty (30) days after completion of the audit. The results of such audit shall be kept confidential by the auditor to the extent allowed by law and, if conducted by a third party, only Seller's failures to abide by the obligations of this agreement shall be reported to City.

**3. INVOICING AND PAYMENT** Payment for the materials, supplies, equipment, or services as specified in this purchase order shall be processed promptly after completion of delivery of items or performance of services and after receipt of properly prepared invoice(s). Original invoices or packing lists shall be submitted and shall include: Contract number from the Purchase Order, if any, purchase order number, line item number, Order number, part number, complete bill to address, description of Goods or Services, quantities, unit price, extended totals, and any applicable taxes or other charges. For payment, Seller must render original invoice to the City of Melbourne, Accounts Payable Division, 900 East Strawbridge Avenue, Melbourne, Florida 32901. Discounts for prompt payment will not be considered in bid evaluations, unless otherwise specified. Offered discounts, however, will be taken if payment is made within the discount period. Payment is made when City's check is mailed or EDI funds transfer initiated. City is a local governmental entity subject to the Local Government Prompt Payment Act, §218.70, Fla. Stat. and payment by City shall be made in compliance with said Act. No payments shall be made in advance of acceptance of delivery of Goods or Services nor for Goods or Services not covered under this Purchase Order nor for Goods or Services not acceptable to City. Seller agrees to invoice City no later than sixty (60) days after shipment of Goods. City will not be obligated to make payment against any invoices submitted after such period. Payment by the City shall be subject to approval and acceptance of Goods by City. Notwithstanding the foregoing, City's payment shall not constitute acceptance.

**4. TERMINATION** City may terminate this Purchase Order, or any part thereof, at any time for its sole convenience by giving thirty (30) days written notice of termination to Seller. CITY may terminate this Purchase Order upon written notice to Seller in the event Seller defaults on any of the terms and conditions of this Purchase Order and such failure continues for a period of fifteen (15) days following notice from City specifying the default. Notwithstanding the foregoing, City may immediately terminate this Purchase Order, without providing Seller with notice of default or an opportunity to cure, if City determines that Seller has failed to comply with any of the terms and conditions of this Purchase Order related to safety, indemnification or insurance coverage. Notwithstanding the foregoing, City reserves the right to immediately terminate this Purchase Order by providing written notice to Seller but without an opportunity to cure if City determines Seller knowingly furnished any statement, representation, warranty or certification in connection with the solicitation of Seller's bid or this Purchase Order, which representation was materially false, deceptive, incorrect, or incomplete. Notwithstanding the foregoing, City reserves the right to immediately terminate the contract by providing written notice to Seller if the State of Florida or the federal government enacts a law, which removes or restricts the authority of City to conduct all or part of its function. Upon receipt of such notice of termination, Seller shall: (1) discontinue the terminated work in accordance with City's instructions, (2) thereafter perform only such portion of the work not terminated, (3) not place further orders or enter into further subcontracts for Goods and/or Services relating to this Purchase Order, and (4) terminate all existing orders and subcontracts insofar as such orders and subcontracts relate to the performance of this Purchase Order. There shall be no charges for termination of orders for Goods or Services. Notwithstanding anything to the contrary, Seller shall not be compensated in any way for any work done after receipt of City's notice, nor for any costs incurred by Seller's vendors or subcontractors after Seller receives the notice, nor for any costs Seller could reasonably have avoided. Notwithstanding anything else in this Purchase Order, failure to meet the delivery date(s) in the Purchase Order shall be considered a material breach of contract and shall allow City to terminate the order for the Goods and/or any subsequent Orders in the Purchase Order without any liability whether the Purchase Order was for standard or custom Goods. Furthermore, failure to meet the performance date(s) in the Purchase Order shall be considered a material breach of contract and shall allow City to terminate the order for services without any liability.

**5. ACCEPTANCE AND WARRANTY** City may inspect and test all Goods at reasonable times in such manner as shall not unreasonably hinder or delay Seller's performance. All Goods shall be received subject to City's inspection, testing, approval, and acceptance at City's premises notwithstanding any inspection or testing at Seller's premises or any prior payment for such Goods. Goods rejected by City as not conforming to this Purchase Order or Good specifications, whether provided by City or furnished with the Good, may be returned to Seller at Seller's risk and expense and, at City's request, shall immediately be repaired or replaced. Seller makes the following warranties regarding Goods furnished hereunder, which shall survive any delivery, inspection, acceptance, payment, or resale of the Goods: (i) Goods will not infringe any party's intellectual property rights; (ii) Seller has the necessary right, title, and interest to provide said Goods to City, and the Goods will be free of liens and encumbrances; (iii) Goods are new, and of the grade and quality specified; (iv) Goods are free from defects in workmanship and material, conform to all samples, drawings, descriptions, and specifications furnished or published by Seller, and to any other agreed-to specifications; and (v) Goods conform to the manufacturing quality provisions set forth in this purchase order. If Seller breaches any of the foregoing warranties, or Goods are otherwise non-conforming, during a period of three (3) years after City's acceptance of Goods, Seller shall, at CITY's option, promptly repair, replace, or refund the amount paid for such Goods, and shall pay to City all incidental and consequential damages arising from breach of the foregoing warranties. Seller shall bear the cost of shipping and risk of loss of all defective or non-conforming Goods while in transit. Notwithstanding the foregoing, the parties agree that the term of the manufacturer's standard warranty shall apply to all manufacturing defects.

**6. PACKING AND SHIPMENT** It is understood and agreed that any item offered or shipped as a result of this purchase order shall be new (current production model at the time of the bid or quote). All containers shall be suitable for storage or shipment, and all prices shall include standard commercial packaging. Title and risk of loss shall pass to City upon delivery of Goods to City's delivery location. All Goods shall be prepared for shipment in a manner which: (i) follows good commercial practice; (ii) is acceptable to common carriers for shipment at the lowest rate; and (iii) is adequate to ensure safe arrival. Seller shall mark all containers with necessary lifting, handling and shipping information, purchase order number, date of shipment, and the names of the City and Seller. Seller shall ship only the quantity of Goods specified in the Order. City may return at Seller's expense any Goods in excess of the quantity stated in the Order. All prices shall be based on delivery **F.O.B. Destination prepaid and allowed** with all charges prepaid to the actual point of delivery and inside delivery. Inspection and acceptance will be at *destination* unless otherwise stipulated. Title/risk of loss of damage to all items shall be the responsibility of Seller until delivery is verified by the City.

**7. OWNERSHIP AND BAILMENT RESPONSIBILITIES** Any specifications, drawings, schematics, technical information, data, tools, dies, patterns, masks, gauges, test equipment, and other materials furnished or paid for by City shall: (i) remain or become City's property; (ii) be used by Seller exclusively for City's orders; (iii) be clearly marked as City's property and segregated when not in use; (iv) be kept in good working condition at Seller's expense; and (v) be shipped to City promptly on demand. Seller shall insure City's property and be liable for loss or damage while in Seller's possession or control, ordinary wear and tear excepted.

**8. INTELLECTUAL PROPERTY INDEMNIFICATION** Seller shall defend, indemnify, and hold CITY and its employees, officers, agents, representatives, and subcontractors harmless from any costs, expenses (including reasonable attorneys' fees), losses, damages, or liabilities incurred because of actual or alleged infringement of any patent, copyright, trade secret, trademark, maskwork, or other intellectual property right, arising out of the use or sale of Goods or Services. City shall notify Seller of such claim or demand. If an injunction issues as a result of any such claim or action, Seller agrees at its expense and City's option to either: (i) procure the right to continue using Goods; (ii) replace them with non-infringing Goods; (iii) modify them so they become non-infringing; or (iv) refund to City the amount paid for any Goods returned to Seller or destroyed and services connected therewith. This indemnification shall not apply to the extent custom Goods are manufactured to City's detailed design.

**9. GENERAL INDEMNIFICATION** Seller shall, to the fullest extent permitted by law, protect, defend, indemnify, and hold City and its employees, officers, agents, representatives, and subcontractors harmless from and against any and all claims, liabilities, demands, penalties, forfeitures, suits, judgments, and the associated costs and expenses (including attorney's fees), which may hereafter incur, become responsible for, or pay out as a result of: death or personal injury (including bodily injury) to any person, destruction or damage to any property, contamination of or adverse effects on the environment, and any cleanup costs in connection therewith, or any violation of law, governmental regulation or orders, to the extent caused by (i) Seller's breach of any term or provision of this Purchase Order; (ii) any negligent or willful acts, errors, or omissions by Seller, its employees, officers, agents, representatives, or subcontractors in the performance of this Purchase Order; or (iii) dangerous defects in Goods. In agreeing to this paragraph the City does not intend to alter, extend or waive any defense of sovereign immunity to which it may be entitled under the Florida Constitution, §768.28, Fla. Stat. or otherwise;

**10. COMPLIANCE WITH LAWS** Seller shall comply with all national, state, and local laws and regulations governing the manufacture, transportation, and/or sale of Goods and/or the performance of services in the course of this Purchase Order. Lack of knowledge by the Seller shall in no way be cause for relief from responsibility. Seller represents and warrants that it is in compliance with Equal Employment Opportunity regulations, unless exempted or inapplicable. Seller represents and warrants that the Goods and Services supplied to the City shall conform in all respects to the standards set forth in the Occupational Safety and Health Act 1970, as amended. Upon request of CITY, VENDORS shall provide copies of Seller's OSHA 300 safety logs (summaries only) and the safety logs (summaries only) of Seller's subcontractors for the past twenty-four (24) months. City actively supports the Immigration and Nationality Act (INA), which includes provisions addressing employment eligibility, employment verification, and nondiscrimination. Under the INA, employers may hire only persons who may legally work in the United States (i.e., citizens and nationals of the U.S.) and aliens authorized to work in the U.S. The employer must verify the identity and employment eligibility of anyone to be hired, which includes completing the Employment Eligibility Verification Form (I-9). Seller shall establish appropriate procedures and controls so no services or products under this Purchase Order will be performed or manufactured by any worker who is not legally eligible to perform such services or employment. Seller represents and warrants that it is not listed on the State of Florida's convicted vendor listing established under the provisions of §287.133, Fla. Stat., whereby the State of Florida maintains a convicted vendor listing which excludes those suppliers from bid submittal for a period of thirty-six (36) months. Seller shall maintain, for the duration of the Agreement, all valid licenses and certificates required for the performance of work and provision of Goods. Subject to *Odebrecht Construction, Inc., v. Prasad and Odebrecht Construction, Inc., v. Secretary, Florida Department of Transportation* and their progeny, this sub-paragraph applies to any contract for goods or services of \$1 million or more. Seller certifies that it is not on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List and that it does not have business operations in Cuba or Syria as provided in §287.135, Fla. Stat., as may be amended or revised. CITY may terminate this Purchase Order at the City's option if Seller is found to have submitted a false certification as provided under subsection (5) of §287.135, Fla. Stat., as may be amended or revised, or been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List or has been engaged in business operations in Cuba or Syria, as defined in §287.135, Fla. Stat., as may be amended or revised. Failure to comply with this Paragraph shall be considered a breach of contract.

**11. INDEPENDENT CONTRACTOR** In performing Services under this Purchase Order, Seller is an independent contractor and its personnel and other representatives shall not act as nor be agents or employees of the City. Seller shall have complete charge and responsibility for personnel employed by Seller however; the CITY reserves the right to instruct Seller to remove from the City's premises immediately any of Seller's personnel. Such removal shall not relieve Seller's obligation to provide Services under this Purchase Order.

**12. ASSIGNMENT; SUBCONTRACTORS** Seller may neither assign nor factor any rights in nor delegate any obligations under this Purchase Order or any portion thereof without the written consent of the City. City may cancel this Purchase Order for cause should Seller attempt to make an unauthorized assignment of any right or obligation arising hereunder. This Purchase Order may be amended only in writing by change order, dated and signed by the City's Procurement and Contracts Manager. Nothing contained in this Purchase Order will be construed as establishing any contractual relationship between City and any subcontractor of Seller. Seller will be fully responsible to City for the acts and omissions of the Seller's subcontractor(s) and their employees. When subcontracting is allowed, any changes in subcontractors shall require prior written approval by the City.

**13. APPLICABLE LAW** This Purchase Order is to be construed and interpreted according to the laws of the State of Florida and all legal proceedings regarding this Purchase Order shall be filed in Brevard County, Florida.

**14. TIME IS OF ESSENCE** Time is of essence in the performance of this purchase order.