

PURCHASE ORDER TERMS AND CONDITIONS

SUPPLY OF GOODS AND/OR SERVICES

APPLICATION

1. These Purchase Order Terms and Conditions (the “**Terms**”) apply to all procurements by ONTC except:
 - (a) If the Purchase Order relates to Goods and/or Services that are the subject of a separate written agreement between the Supplier and ONTC, the terms of that agreement apply to the extent of any inconsistency with these Terms; and,
 - (b) If the Procurement Document contains contradictory terms, those terms shall apply to the extent of the inconsistency with these Terms.
2. If the Supplier's terms and conditions are supplied to ONTC in respect of the Goods or Services (including as printed on consignment notes or other documents), those terms and conditions will be of no legal effect and will not constitute part of the Contract Documents (even if any representative of ONTC signs those terms and conditions or annexes the terms and conditions to the Contract Documents) unless ONTC expressly agrees in writing to be bound by all or any of the terms and conditions.

DEFINITIONS

3. In these Terms (unless the context otherwise requires):

“**Background IP**” means any Intellectual Property owned or licensed by a party prior to the issuance of the Purchase Order which that party makes available, contributes, brings to or uses in connection with this Purchase Order.

“**Confidential Information**” means information (including Personal Information), whether oral, written, visual, electronic, or in any other form, relating in any way to this Purchase Order and ONTC’s information made available to the Supplier at any time in connection with this Purchase Order and the Goods and/or the Services, which is identified as confidential or that would reasonably be considered as being confidential.

“**Contract**” means the agreement created between the Supplier and ONTC upon the issuance of a Purchase Order and includes the Contract Documents.

“**Contract Documents**” means the following documents:

- (a) The Procurement Document, if any;
- (b) These terms and conditions;
- (c) The scope of work and specifications;
- (d) The Supplier’s bid or quote; and,

(d) The Purchase Order.

“Defect” or “Defective” with respect to:

- (a) Goods: means non-conformity to the quantity, quality, specifications, and/or other requirements set out in the Contract Documents; and,
- (b) Services: means non-conformity with section 9 of these Terms.

“Delivery Date” means the delivery date specified on the Purchase Order.

“Delivery Place” means the place for delivery of the Goods specified on the Purchase Order.

“Goods” means the supplies, materials, equipment or other things specified in the Contract Documents (including any part of the goods specified).

“Intellectual Property Rights” means all domestic and foreign intellectual property rights including, without limitation: (i) patents, applications for patents and reissues, divisions, continuations, renewals, extensions and continuations-in-part of patents or patent applications, (ii) copyrights, copyright registrations and applications for copyright registration and all related rights and including all moral rights, (iii) mask works, mask work registrations and applications for mask work registrations, (iv) designs, design registrations, design registration applications and integrated circuit topographies, (v) trade names, business names, corporate names, domain names, website names and world wide web addresses, common law trade-marks, trade-mark registrations, trade mark applications, trade dress and logos, and the goodwill associated with any of the foregoing, (vi) trade secrets, proprietary information, know-how, technology, inventions, processes, discoveries, data, including computer data, business ideas, drawings, and specifications, and (vii) the right to commence legal proceedings with respect to the past or present infringement of the foregoing, including the right to recover all damages and profits, as provided for herein.

“Personal Information” means all information and data pertaining to an identifiable individual other than the name, business telephone number and business address of such individual as an employee of an organization, as more particularly described in section 2 of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c.F.31.

“Personnel” means directors, officers, employees, agents, suppliers, subcontractors or any other entity that forms part of that person’s supply chain, but a reference to ONTC’s Personnel excludes the Supplier.

“Price” means the price or rates specified in the Contract Documents.

“Procurement Document” means a Request for Quotations, Request for Tenders or Request for Proposals or any similar document issued by ONTC for the supply of the Goods and/or Services.

“Purchase Order” means the purchase order for Goods and/or Services issued by ONTC to the Supplier containing, amongst other things, a description of the Goods and/or Services and includes these Terms.

“Services” means the labour, work, efforts, repairs, maintenance, quality control, quality assurance, transportation, administration and services specified in the Contract Documents (including any part of the specified services and any ancillary services).

“Site” means the place described in the Purchase Order as the place for the use or storage of the Goods by ONTC or for the performance of the Services.

“Supplier” means the party or parties to whom the Purchase Order is issued.

“Warranty Period” means the period of 12 months from the later of the Delivery Date, the date the Goods are accepted by ONTC, the date on which the Services are completed and the termination of the Contract.

“Work Product” includes all deliverables and intellectual property produced by or resulting from (a) the Services rendered by the Supplier, or which are otherwise developed or first reduced to practice by the Supplier in the performance of the Services, and (b) the Background IP which is used or incorporated in the Services, or required for use of the Services.

SUPPLY OF GOODS AND/OR SERVICES

4. In consideration of payment of the Price by ONTC, the Supplier shall supply the Goods and/or provide the Services to ONTC in accordance with, and as specified in, the Contract Documents.
5. The Supplier must, in supplying the Goods or performing the Services:
 - (a) not interfere with ONTC's activities or the activities of any other person at the Delivery Place or the Site;
 - (b) be aware of and comply with:
 - (i) all applicable laws;
 - (ii) all ONTC policies, to the extent applicable to the supply of the Goods or the performance of the Services by the Supplier; and
 - (iii) all lawful directions and orders given by ONTC's representative;
 - (c) ensure that the Supplier's Personnel entering the Site perform the Services or deliver the Goods in a safe manner and in a way that does not prejudice safe working practices, safety and care of property and continuity of work at the Site;
 - (d) on request by ONTC, provide to ONTC and its Personnel any information and assistance required to identify, evaluate, implement and report on any matter required by law in respect of anything used, produced or created in connection with the performance of the Supplier's obligations under the Contract Documents.

DELIVERY

6. The Supplier shall supply the Goods and/or perform the Services to the Delivery Place by the Delivery Date. If no Delivery Date is specified, the Supplier shall supply the Goods and/or complete the Services within a reasonable time after the Supplier receives the Purchase Order. Time is of the essence in the Supplier's performance of its obligations under the Contract Documents.

7. Except as otherwise provided in the Contract Documents, the Supplier shall pay all costs incurred in connection with the shipping and delivery of Goods to the Delivery Place including all duties, excise taxes and brokerage fees. If the Contract Documents specify a delivery service, the Supplier shall use that service for the delivery of the Goods.

TITLE AND RISK

8. Except as otherwise provided in the Contract Documents, title to the Goods and all risk of damage thereto remains with the Supplier until the Goods are delivered to and accepted by ONTC at the Delivery Place.

QUALITY OF THE GOODS AND THE SERVICES

9. With respect to the Services, the Supplier warrants that:
 - (a) the Services will be performed in a skillful and workmanlike manner, which is consistent with the level of expertise, care, skill and diligence demonstrated by experienced and reputable service providers performing services of a similar nature;
 - (b) the Supplier shall always act diligently in the performance of the Services under this Purchase Order and shall comply with all laws applicable to the Services and with all aspects of the Contract Documents; and
 - (c) to the extent that the Services are design Services, the works being designed will be fit for their intended purpose as described in the Contract Documents.
10. With respect to the Goods, the Supplier warrants that:
 - (a) the Goods will: (i) be of good quality and workmanship; (ii) conform to the specifications and/or standards in the Contract Documents; (iii) comply with all applicable local, provincial and federal laws and regulations; (iv) be free from Defects in design, materials and workmanship; and (v) be fit for the intended purpose;
 - (b) if the Supplier gave ONTC a sample of the Goods before ONTC issued the Purchase Order, the Goods correspond with the sample;
 - (c) the Supplier has good title to the Goods and the right to transfer title to the Goods free and clear of any encumbrances (including liens); and,
 - (d) ONTC has the full benefit of any manufacturer's warranties that may be applicable to the Goods (and the Supplier must make any claims under the manufacturer's warranty on ONTC's behalf if ONTC so requests).
11. The Supplier further warrants that the Goods and Services and their use, manufacture, sale, lease, distribution, or other commercialization do not and will not infringe, misappropriate or violate the Intellectual Property Rights of a third party. The Supplier shall be liable for and fully indemnify and hold harmless ONTC against any liability, whether direct or indirect, arising out of a claim by any third party against ONTC alleging that the Goods and Services and their use by ONTC, infringes any Intellectual Property Rights.

DEFECTIVE GOODS & SERVICES

12. All Goods and/or Services shall be received subject to ONTC's inspection and approval. If there is a specified inspection and approval process provided by ONTC, the Supplier shall comply with the process and complete such documents and other requirements as requested by ONTC.
13. If ONTC determines that any Goods or Services provided by the Supplier, even if ONTC has already accepted them, do not comply with ONTC's specifications or are Defective, then ONTC may:
 - (a) keep the Goods or accept the Services and adjust the Price in accordance with their diminished value, as determined by ONTC;
 - (b) reject the Goods, return them (or require the Supplier to retrieve or undo them) at the Supplier's expense, and either require the Supplier to replace them at the Supplier's cost or terminate the Purchase Order. If ONTC rejects the Goods, it shall not be responsible for any re-stocking charge.; or,
 - (c) reject the Services and either require the Supplier to re-perform, at the Supplier's expense, the Defective Services or terminate the Purchase Order.
14. If ONTC chooses to have the Goods replaced or the Services re-performed, all or part of any payment under an invoice or any holdback may be withheld by ONTC or set-off against the payments owing to the Supplier until the Supplier has remedied the Defects to ONTC's satisfaction.

PRICE

15. The Supplier shall supply the Goods and/or Services for the Price specified in the Contract Documents.
16. Except as otherwise provided in the Contract Documents, the Price is inclusive of:
 - (a) all charges for packaging, packing, insurance and delivery of the Goods and/or Services;
 - (b) the cost of any miscellaneous services of a kind which are commonly provided with the Goods and any miscellaneous items of a kind which are commonly used or supplied in the performance of (and in conjunction with) the Services; and,
 - (c) other than Goods and Services Tax (GST)/Harmonized Sales Tax (HST), Quebec Sales Tax (QST) or provincial sales tax imposed by the laws of a Canadian province (PST) applicable, all taxes for which the Supplier is responsible under applicable laws.
17. ONTC will pay disbursements incurred by the Supplier which are approved in writing in advance by ONTC. The Supplier acknowledges that any travel expenses will only be approved in accordance with section 8 of the Management Board of Cabinet Travel, Meal & Hospitality Directive.

INVOICING AND PAYMENT

18. Unless specified otherwise in the Contract Documents, the Supplier will invoice ONTC within 30 days after the supply of Goods and/or Services.

19. ONTC will pay the Supplier the properly charged amounts for the Goods and/or Services, less any holdbacks required under the Contract Documents or the applicable lien legislation, within 30 days after approval by ONTC of the invoice and applicable backup information. Payment of an invoice is not evidence or an admission that the Goods or Services meet the requirements of the Contract Documents.
20. ONTC may reduce any payment due to the Supplier by any amount which the Supplier must pay ONTC, including costs, charges, damages and expenses and any debts owed by the Supplier to ONTC on any account whatsoever. This does not limit ONTC's right to recover those amounts in other ways.
21. ONTC will withhold payment of amounts required to satisfy tax withholding obligations for Suppliers of Services that are a foreign entity or non-resident alien individual unless provided with valid exemption documentation.
22. On shipments originating outside of Canada, the supplier must furnish, in addition to its invoice, properly certified Canadian Customs invoices and NAFTA certificates, made up in accordance with the Canadian Customs requirements. The Supplier is responsible for all customs and duty charges, if applicable.
23. ONTC shall not be subject to interest charges in the event it fails to make payments as they become due.
24. Upon receipt from ONTC of amounts invoiced pursuant to section 19, the Supplier waives and releases all rights to, and at its sole cost shall obtain the prompt removal of, any mechanics', materialmen's, construction or any similar lien, encumbrance or claim fixed against ONTC or its assets, which then exist or which may thereafter arise for Goods furnished or Services performed. All payments owed to Supplier shall be contingent upon Supplier providing proof of its compliance with this provision to ONTC upon request.

TERMINATING THE CONTRACT

25. ONTC may terminate the Contract for any reason upon written notice to the Supplier, and:
 - (a) subject to sections 12 to 14, ONTC must pay for any part of the Goods delivered or Services performed prior to the termination;
 - (b) if the Supplier has shipped any Goods before the termination but the Goods have not been delivered to the Delivery Place at the date of termination, ONTC may either:
 - (i) subject to sections 12 to 14, accept those Goods when delivered, and pay the Price for them; or
 - (ii) return the Goods to the Supplier at ONTC's expense;
 - (c) if the Supplier has not shipped the Goods at the time of termination, on receiving the written notice of termination the Supplier shall stop manufacture of the Goods in accordance with and to the extent specified in the notice, and do everything possible to mitigate any costs incurred in relation to the Goods; and

- (d) if Subsection 25(b)(ii) or 25(c) apply:
 - (i) to the extent that the Goods were manufactured or fabricated in accordance with any specification prepared by the Supplier for ONTC, ONTC will reimburse the Supplier in respect of any expenditure reasonably incurred by the Supplier prior to the date of the termination which is directly attributable to the placing of the Purchase Order and which the Supplier is not able to recover in some other way; and
 - (ii) the Supplier is not entitled to the Price of those Goods or Services, or to any compensation, including for lost profit, for that termination other than as specified in this section 25.

CONFIDENTIAL INFORMATION

- 26. The Supplier must not advertise or issue any information, publication, document or article (including photographs or film) for publication or media releases or other publicity relating to the Goods, Services, this Purchase Order or ONTC's Confidential Information without the prior written approval of ONTC.
- 27. The Supplier must not, and must ensure that the Supplier's Personnel do not, without the prior written approval of ONTC:
 - (a) use Confidential Information other than as necessary for the purposes of fulfilling the Supplier's obligations under this Contract; or
 - (b) disclose the Confidential Information, other than to the Supplier's Personnel who need the information to enable the Supplier to perform its obligations under this Contract, to the Supplier's legal advisors, accountants or auditors, or where disclosure is required by law (including disclosure to any stock exchange).
- 28. The Supplier must, within 10 Business Days (or any other period agreed in writing by ONTC) after a direction by ONTC to do so, return or destroy all Confidential Information in the Supplier's possession, custody or control.
- 29. If ONTC or the Supplier is required by law to disclose Confidential Information, it shall promptly notify the other party so that that party may intervene to prevent the disclosure.
- 30. The Supplier specifically acknowledges that ONTC is subject to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 4, and that ONTC may be compelled by law to disclose certain Confidential Information.
- 31. The rights and obligations under this Part continue after the termination of this Contract.

PRIVACY

- 32. Where the Supplier collects, uses or discloses Personal Information in connection with this Agreement, the Supplier will:
 - (a) comply with all applicable privacy laws; and

- (b) take all appropriate technical and organisational measures against unauthorised or unlawful collection, use and disclosure of Personal Information and against accidental loss or destruction of, or damage to, Personal Information.

INTELLECTUAL PROPERTY

- 33. Subject to the provisions of this part, a party's Background IP remains vested in that party.
- 34. All the Intellectual Property Rights which form part of the Work Product, unless approved by ONTC in writing to the contrary, shall vest in ONTC and is the sole and absolute property of ONTC as and when created. The Supplier hereby irrevocably assigns and conveys, and agrees to assign and convey, without further consideration, all right, title and interest in and to the Intellectual Property Rights in the Work Product, in perpetuity and throughout the world, to ONTC and its successors and assigns.
- 35. The Supplier shall promptly sign all documents and take all actions that may be necessary to ensure that ONTC owns all the rights in and to the Work Product Intellectual Property Rights. The Supplier shall not under any circumstances use the Work Product for the benefit of any other client of the Supplier.
- 36. The Supplier shall provide ONTC, at the Supplier's cost, with a perpetual, irrevocable, royalty-free, non-exclusive, fully transferable, fully paid-up licence to:
 - (a) use such of the Background IP as is required for the use of the intellectual property in the Work Product, in whole or in part;
 - (b) disclose any Background IP to any person who requires such Background IP in respect of any of the actions referred to in (a);
 - (c) use, reproduce, copy, transmit, modify and create derivative works from any Background IP in respect of any of the actions referred to in (a); and,
 - (d) sublicense any or all rights granted to ONTC under this section to any person who provides goods or services to ONTC in respect of any of the actions referred to in (a).
- 37. ONTC grants the Supplier a non-exclusive, royalty free, revocable, non-transferable licence to use the Work Product and ONTC's Background IP to the extent required to perform the Supplier's obligations under this Contract.

WARRANTY

- 38. If, during the Warranty Period, ONTC finds any Defective Goods or Services, ONTC may:
 - (a) reject the Goods with the Defect and return them to the Supplier, in which case the Supplier must replace the Goods free of charge and reimburse ONTC for any expenses incurred;
 - (b) reject the Services with the Defect, in which case the Supplier must re-perform the Services free of charge; or

- (c) make good or engage another supplier to make good the Defect, in which case the Supplier must reimburse ONTC for any expenses incurred.
39. If the Supplier does not replace the Goods pursuant to Section 38(a) or re-perform the Services pursuant to Section 38(b) and:
- (a) ONTC has already paid the Supplier for the Goods or Services with the Defect, the Supplier must repay ONTC the Price for those Goods or Services; or
 - (b) ONTC has not already paid the Supplier for the Goods or Services with the Defect, ONTC is not liable to pay the Supplier for those Goods or Services.
40. The acceptance of any Goods or Services with a Defect by ONTC will not bind ONTC to accept any other Goods or Services with a Defect and does not affect any of ONTC's other rights under this Contract or at law.
41. Where the Supplier has made good any Defect under this clause, those Goods or Services will be subject to an additional warranty period of 12 months, from the date the Supplier made good the Defect.
42. ONTC shall benefit from all legal and manufacturer's warranties available in connection with the Equipment, equipment, machinery, tools and consumables incorporated in the Equipment and/or Services and the Supplier shall assign all such warranties to ONTC on the same terms in which these warranties have been provided to the Supplier. The Supplier shall cooperate with ONTC in the enforcement of the assignment and the warranties against the manufacturers.

LIABILITY AND INDEMNIFICATION

43. ONTC's liability to the Supplier arising out of or in connection with this Contract is limited to the total Price paid or payable by ONTC.
44. The Supplier agrees to indemnify and hold harmless ONTC and its Personnel from and against any and all liability that ONTC or its Personnel may suffer, sustain or incur, and any claim against ONTC or its Personnel (including legal fees incurred in defending any claim on a full indemnity basis), arising as a result of, in respect of, or arising out of Supplier's performance, non-performance or breach of the Contract, except to the extent caused by the negligence of ONTC or its Personnel; provided however, the Supplier shall not be relieved of any pro rata, proportional, contributory or other allocation of liability or fault imposed by applicable laws. For the purpose of making the Supplier's promise to indemnify ONTC's Personnel enforceable, the parties acknowledge that ONTC is acting as the agent and trustee for its Personnel.
45. Except for the representations and warranties and conditions expressly set out in this Contract, ONTC hereby excludes any and all representations, warranties and conditions of any kind, express or implied, including any implied warranty of merchantability or fitness for a particular purpose.

46. The Supplier shall make full and complete compensation for any bodily injury or death to any person and for any damage caused to ONTC's physical property by the Supplier's act or omission or that of any of its Personnel or those for whom it is at law responsible.
47. Notwithstanding any other provision of this Contract, ONTC shall not be responsible for indirect, consequential, special, incidental or contingent damages of any nature whatsoever, including loss or revenue or profit or damages resulting from interruption of service or transmission. This limitation shall apply regardless of the form of action, damage, claim, liability, cost, expense or loss, whether in contract (including fundamental breach), statute, tort (including negligence), or otherwise, and regardless of whether ONTC has been advised of the possibility of such damages.
48. Notwithstanding anything else in this Contract, any express or implied reference to ONTC providing an indemnity or any other form of indebtedness or contingent liability that would directly or indirectly increase the indebtedness or contingent liabilities of ONTC, whether at the time of issuance of the Purchase Order or at any time during the provision of the Goods and Services by the Supplier, shall be void and of no legal effect in accordance with s.28 of the *Financial Administration Act*, R.S.O. 1990, c. F.12.

INSURANCE

52. Without limiting Supplier's obligations or liabilities hereunder, and subject to any requirements contained in the Request for Tenders or Request for Proposals, Supplier shall, at its sole expense, purchase and maintain the following insurance:
 - (a) commercial general liability insurance covering all liabilities for personal injury and property damage arising from the Services/Goods, with limits of liability of \$5,000,000 for each occurrence;
 - (b) with no limitations on or exclusions from coverage arising from working on or around railway property;
 - (c) if the Supplier will use or provide for use motor vehicles in providing the Goods and/or performing the Services, automobile (motor vehicle) insurance covering all liabilities for personal injury and property damage arising from the use of such vehicles, with limits of liability of \$2,000,000 for each occurrence and in the aggregate; and
 - (d) if the Supplier will provide professional advice or services, professional liability insurance, with limits of liability of \$2,000,000 for each claim and in the aggregate.
53. The Supplier shall ensure that all the foregoing insurance is primary and does not call into contribution any other insurance coverage available to ONTC.
54. The Supplier shall on request provide to ONTC or its designee certificates of insurance and endorsements as evidence of the insurance required under the Purchase Order.

WSIB

55. If, at the time the Services commence, the Supplier is subject to the insurance requirements under the WSIA, the Supplier shall comply with its obligations under the WSIA and shall provide a certificate under the WSIA confirming compliance if requested by ONTC.

GOVERNING LAW

56. This Contract shall be governed by and constituted in accordance with the laws in force in the Province of Ontario excluding any conflict of laws principles. The Parties hereby irrevocably attorn to the exclusive jurisdiction of the courts of the Province of Ontario for any legal proceedings arising out of this Contract or the performance of the obligations hereunder.

GENERAL

57. The Supplier shall not assign, delegate or subcontract the Contract or any interest, including any performance or any amount that may be due hereunder, without ONTC's prior written consent.

58. The Supplier is an independent contractor of ONTC. The Supplier shall not, except as ONTC may specifically authorize in writing, enter into any contracts or commitments in the name of or on behalf of ONTC, or bind ONTC in any respect whatsoever. The Supplier is not a partner, joint venturer, agent or employee of ONTC.

59. The Contract Documents, including any attachments noted in the Purchase Order, constitutes the entire agreement relating to the subject matter hereof and supersedes all prior and contemporaneous understandings or statements unless expressly contained herein.

60. No modification or alteration of the terms hereof shall be binding unless such modification or alteration is in writing and signed by both ONTC and the Supplier.

61. Either party's waiver of any breach, or failure to enforce any of the Terms and Conditions hereof, at any time, shall not in any way affect, limit or waive such party's right thereafter to enforce and compel strict compliance with every term and condition hereof.