



## **Swanson Industries Standard Terms and Conditions of Purchase**

These Terms and Conditions shall apply to the Order (as defined below). The following definitions shall be used for the purpose of interpreting the Order:

**"Buyer"** means Swanson Industries, its subsidiaries and/or its affiliates.

**"Goods"** means the goods identified in the Order, including any Materials and Equipment and any associated documentation required under the Order.

**"Order"** means collectively the following documents: (i) the Purchase Order; (ii) these Terms and Conditions; (iii) supplemental terms and conditions, including those set forth in drawings or specifications, if applicable.

**"Products"** means collectively the Goods and Services.

**"Purchase Order"** means the form entitled "Purchase Order," consisting of one or more pages, which identifies the Products, Supplier and certain related information.

**"Services"** means services provided by Supplier, including services incidental to the Goods, that relate to the Order.

**"Supplier"** means the entity designated as such on the face of the Purchase Order.

**1. OFFER AND ACCEPTANCE.** The Order is an offer to purchase the Products on the terms and conditions set forth in the Order (collectively **"Buyer's Terms"**). Supplier's written acceptance (including by electronic mail) or Supplier performing under the terms of the Order shall be deemed an effective mode of acceptance of Buyer's offer. Any acceptance of the Order is limited to acceptance of Buyer's Terms. If the Order shall be deemed an acceptance of a prior offer by Supplier, such acceptance is limited to the Buyer's Terms. The terms and conditions of any Supplier's purchase order, bid, proposal, invoice, statement, published rate schedule or any other type of memoranda or attachment, whether written or oral, shall NOT govern the transaction between Buyer and Supplier. Additional or different terms proposed by Supplier or any attempt by Supplier to vary in any degree any of the terms of the Order constitutes a counteroffer by Supplier, which counteroffer is hereby rejected by Buyer, unless the terms are explicitly accepted by Buyer in writing.

The Order sets forth the entire agreement of the parties and may not be varied by any understanding or agreement, oral or written, express or implied, made prior to, or contemporaneous with, the issuance of the Purchase Order. In the event of a conflict or variation between these Terms and Conditions and the terms set forth in the Purchase Order, the terms of the Purchase Order shall govern.

**2. SCHEDULE.** Supplier acknowledges that Buyer and/or Buyer's customers are dependent on Supplier's timely performance of the Order. Time is therefore, of the essence and delivery of Products shall be strictly in accordance with the schedule set forth in the

Order, which delivery schedule is a material provision of the Order. Supplier shall take all reasonable steps to avoid or end any delay in its performance, and Buyer is not responsible for any additional cost thereof, except to the extent that Buyer is the cause of such delays. Supplier shall be obligated to indemnify, defend, and hold harmless Buyer from any increased costs associated with late delivery including, without limitation, increased costs expended by Buyer to effectuate expedited shipping to Buyer's contractors or customers.

**3. TITLE, TAXES, TRANSPORTATION, AND RISK OF LOSS.** Title, cost allocation, and risk of loss to the Goods shall pass from Supplier to Buyer upon delivery of Goods, in accordance with the terms identified in the Purchase Order. All Goods shall be suitably packed, marked and shipped by Supplier in accordance with best industry standards and practices unless otherwise specified in the Order. Supplier shall be responsible for loading and tie-down to prevent damage during transportation. Buyer's weight and/or count will be accepted as final and conclusive on all shipments not accompanied by a packing list. In addition to any other remedies available, at Buyer's option, damaged Goods will be repaired or replaced on a rush basis and at no extra cost to Buyer.

Unless otherwise specified in the Purchase Order, Supplier shall pay or cause to be paid all taxes, fees, import duties, levies, penalties, licenses, charges or interest imposed by any government authority and any customs fees, clearance, brokerage and associated requirements ("**Taxes**") on or with respect to the Products prior to or at the delivery point(s). Any party entitled to an exemption from any such Taxes shall furnish the other party any necessary documentation thereof.

**4. INSPECTION.** All Products furnished hereunder will be subject to inspection and testing by Buyer at all times and places and will be subject to Buyer's final inspection and approval within a reasonable time after delivery. Buyer may reject Products not in accordance with Buyer's instructions or specifications; Supplier's warranties (expressed or implied); or for untimely delivery. Neither Buyer's inspection nor failure to inspect Products shall relieve Supplier of any obligation hereunder or any obligation under the law, including without limitation, any liability for latent defects that are not discoverable upon reasonable inspection. Buyer may return rejected Products to Supplier at Supplier's expense and Buyer shall have no further obligation for such Products. Alternatively, upon notice to Supplier, Buyer may take such actions as may be required to cure all defects and/or bring the Products into conformity with all of the requirements of the Order, in which event all costs and expenses thereby incurred shall be at Supplier's expense.

**5. REPRESENTATIONS AND WARRANTIES.** Supplier represents and warrants that:

(a) Supplier is familiar with Applicable Law affecting the Order, and shall comply and cause all its employees, agents, subcontractors and other representatives to comply with Applicable Law and with any and all Buyer policies that are identified in Buyer's Terms;



(b) The Goods (i) conform to all Buyer specifications, Supplier representations and warranties, and to industry standards and practices for similar goods, (ii) are new and of good material and workmanship and free from defects in design (to the extent designed by Supplier), (iii) are and will remain free from defects in material, workmanship and design (to the extent designed by Supplier Group) for the later of eighteen (18) months from the date of delivery or twelve (12) months from date placed into operation by Buyer, (iv) are of merchantable quality and fit for any ordinary or known particular purpose, and (v) are manufactured, fabricated, procured and produced in compliance with Applicable Law.

(c) Any Services shall be performed in a professional, proper and workmanlike manner in accordance with all Buyer specifications and in the absence of Buyer specifications, customary methods and practices, and with that degree of diligence reasonably and ordinarily exercised by suppliers of similar services. Services are and will remain free from defects for a period of eighteen (18) months from the date of completion of the Services; and

(d) Supplier has and shall transfer good title to the Goods to Buyer free and clear of any liens, adverse claims or other encumbrances.

The representations and warranties made by Supplier hereunder are in addition to, and shall not be construed as restricting or limiting any warranties of Supplier, expressed or implied, which are otherwise provided by Applicable Law. Upon Buyer's election, Supplier shall correct any defects in the Products by repairing, replacing or re-working the defective Product or refunding Products to Buyer the price paid for such defective Product. **BUYER IS ENTITLED TO ALL REMEDIES UNDER THE ORDER, LAW OR EQUITY, WITHOUT LIMITATION AS TO SCOPE OR TIME, FOR BREACH OF THE ABOVE WARRANTIES.**

**6. INVOICING AND PAYMENT.** Goods and services provided pursuant to the Order shall be invoiced at the price set forth in the Purchase Order. Payment shall not be evidence of satisfactory performance of this Purchase Order or shall be construed to be an acceptance of defective or nonconforming materials or services.

All of Supplier's invoices shall reference the Purchase Order number and identify each charge with the applicable Purchase Order line items, unit prices, units of measure and the specific milestone progress payment achievement for which the invoice is issued, if any. Compensation due shall be calculated, requested and paid as specified in the Purchase Order. If Buyer has any good faith objections to all or any portion of an invoice, Buyer shall notify Supplier of the objections, give reasons for Buyer's objections and pay only that portion of the invoice to which Buyer has not objected. Representatives of Buyer and Supplier shall confer to resolve any disputed invoices.

**7. LIENS.** Supplier shall pay when due all of its obligations to third parties incurred in connection with performance of the Order and shall keep Buyer's property free and clear of all liens and other encumbrances arising out of the Order. If Supplier breaches this section, then, in addition to any other rights which Buyer may have against Supplier, Buyer may withhold payment from Supplier until

{J2134855.1}

sufficient funds have been withheld to satisfy such obligations and/or to cause the release of such liens or other encumbrances.

**8. CANCELLATION FOR CONVENIENCE.** Buyer reserves the right for its own convenience to cancel the Order, in whole or in part, without cause at any time by giving Supplier written notice of such cancellation. Upon receipt by Supplier of any such notice, Supplier will (a) as soon as is reasonably practical but in no event later than five days after such notice stop performance to the extent set forth in such notice, (b) cancel all purchase orders and subcontracts and any other commitments related to the Order to the extent set forth in such notice, (c) preserve and protect Materials and Equipment, work in progress, and completed Goods both in its own and in its subcontractors' plants, pending Buyer's instructions, (d) comply with Buyer's directions to terminate the delivery of Products, and (e) promptly use commercially reasonable efforts to minimize the amount of third party termination charges associated with any such cancellation. Buyer shall pay for Supplier's performance to the extent satisfactorily completed or otherwise in progress pursuant to the Order as of the date of receipt of Buyer's notice of cancellation and for the costs of Supplier complying with (b) through (e) of this Section, as substantiated by documentation satisfactory to and verified by Buyer. Under no circumstances shall Supplier be entitled to any prospective profits or damages because of any such cancellation. Buyer shall not have liability whatsoever from the cancellation of the Order beyond the cancellation payment specified in this paragraph.

**9. CANCELLATION FOR CAUSE.**

(a) Default. Supplier shall be in default if Supplier: (i) breaches any provision of the Order and fails to cure such condition within five (5) days following Supplier's receipt of written notice from Buyer advising of the breach, or, if such condition is not reasonably capable of being cured within such time, fails to commence a cure during such five (5) day period and promptly and thereafter in a continuous fashion diligently pursues the cure, (ii) makes an assignment for the benefit of creditors or consents to or acquiesces in the appointment of a receiver, liquidator, fiscal agent, or trustee, or (iii) becomes insolvent or enters into a voluntary or involuntary bankruptcy or receivership (singularly and collectively, a "**Default**").

(b) Remedies. If Supplier is in Default, Buyer may, in its sole discretion, avail itself of any or all of the following remedies: (i) hold any monies due for the purpose of set-off and/or recoupment against and to the extent of Buyer's loss(es) caused by Supplier's Default, (ii) terminate or suspend Supplier's performance hereunder, in whole or in part, effective twenty-four hours after Supplier's receipt of Buyer's written notice thereof, or (iii) pursue and enforce any and all other rights or remedies of Buyer hereunder or available under law or in equity.

(c) Wrongful Cancellation. If a court should determine that Buyer's alleged cancellation for cause was wrongful, then Buyer's cancellation shall be considered cancellation for convenience.

**10. INDEMNITY.**



(a) SUPPLIER AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS BUYER FROM AND AGAINST ALL LOSSES, DAMAGES, ACTIONS, JUDGMENTS, COSTS, AND EXPENSES (INCLUDING, BUT NOT LIMITED TO, REASONABLE ATTORNEY'S FEES AND OTHER EXPENSES OF SETTLEMENT/LITIGATION) SUFFERED, INCURRED, OR ASSERTED BY OR AGAINST BUYER (A) BY REASON OF SUPPLIER'S BREACH OF WARRANTY, (B) BY REASON OF SUPPLIER'S BREACH OF ANY TERM OF THE ORDER, OR (C) BY REASON OF PERSONAL INJURY, INCLUDING DEATH, PROPERTY DAMAGE, OR POLLUTION DAMAGE SUSTAINED BY ANY PERSON, RESULTING FROM OR ARISING OUT OF AN ACT OR OMISSION OF SUPPLIER, ITS REPRESENTATIVES OR AGENTS, EMPLOYEES, OR CONTRACTORS IN FULFILLMENT OF THE ORDER (INCLUDING ACTIVE, PASSIVE, SOLE, JOINT OR CONCURRENT NEGLIGENCE OR GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF SUPPLIER).

(b) At the option of the person entitled to indemnity under the Order ("Indemnitee"), the party obligated to indemnify ("Indemnitor") shall assume the defense of any claim or demand made against the Indemnitee ("Third Party Claim") within thirty (30) days of notice from Indemnitee of the Third Party Claim, at Indemnitor's expense, with counsel reasonably satisfactory to Indemnitee. Indemnitee may participate in the defense thereof, at its expense. If Indemnitee does not opt for Indemnitor to assume the defense, or if Indemnitor shall, after commencing any such defense, fail to prosecute it, Indemnitee may undertake the defense or settlement thereof, at Indemnitor's expense. Neither Indemnitor nor Indemnitee shall admit any liability with respect to, or settle, compromise or discharge any Third Party Claim without the other's prior written consent, unless the other is unconditionally released from and has no liability in connection with such Third Party Claim, in which case consent is not required.

11. **INTELLECTUAL PROPERTY.** Supplier warrants that Products covered by the Order shall not infringe any patent rights, trademarks, copyrights, trade secrets, or any other legally protected intellectual property right. SUPPLIER SHALL, AT ITS SOLE EXPENSE, INDEMNIFY, HOLD HARMLESS AND DEFEND BUYER FROM AND AGAINST ALL LOSSES ARISING FROM OR RELATED IN ANY WAY TO ALLEGED INFRINGEMENT OF TRADEMARKS, COPYRIGHTS, PATENT RIGHTS OR OF ANY KIND OF TRADE SECRET OR OTHER LEGALLY PROTECTED PROPERTY RIGHT ARISING FROM THE USE, OWNERSHIP OR DISPOSITION OF PRODUCTS AND ANY PART THEREOF TO THE EXTENT THAT THE INFRINGING DESIGNS WERE PROVIDED BY SUPPLIER.

#### 12. **FORCE MAJEURE.**

(a) As to Buyer, fire, flood, hurricane, windstorm, explosion, riot, war, sabotage, strikes, court injunction or order, or order by any Federal or state regulatory agency, or other similar causes in each case beyond the reasonable control of Buyer, which necessarily affects Buyer's ability to receive and/or use the Products or proceed with the project to which the Order pertains, shall entitle Buyer to (i) suspend acceptance of delivery of all or any part of the Products, which suspension shall be effective upon Supplier's receipt of Buyer's written notice thereof and without expense, penalty or cost to Buyer for a period not to exceed forty-five (45) days, or, if the force majeure event is not remedied within that 45 day period, (ii) cancel the Order.

(b) As to Supplier, fire, flood, hurricane, windstorm, explosion, riot, war, sabotage, strikes, court injunction or order, or order by any Federal or state regulatory agency, or other similar causes in each case beyond the reasonable control of Supplier, which necessarily affects Supplier's ability to perform under the Order ("**Supplier Force Majeure**"), shall entitle Supplier to suspend its obligation to perform the Order to the extent affected. Supplier shall notify Buyer of the occurrence of any Supplier Force Majeure event as soon as reasonably practicable after Supplier first becomes aware of (i) the occurrence of the event or (ii) the likelihood of an occurrence of such event. Supplier shall continuously and diligently use reasonable efforts to overcome and/or mitigate as quickly and as much as possible the effects of the Supplier Force Majeure. The date of delivery of Products and any milestones relating to the Order will be extended by a period of time reasonably necessary to overcome the effect of such Supplier Force Majeure.

13. **CONFIDENTIALITY.** Supplier shall maintain as confidential and proprietary information provided by Buyer during the course of the parties' commercial relationship (including, but not limited to, information provided during any bid process or negotiations related to the Purchase Order) ("**Buyer's Information**") and restrict disclosure of Buyer's Information solely to employees, servants or agents of Supplier who are actively engaged in the work relating to the Order and who have a good faith need to know Buyer's Information for purposes of performing such work, and not disclose it to any other person. Supplier shall use Buyer's Information only in connection with the performance of the Order, and for no other purpose whatsoever.

14. **INSURANCE.** To the extent that the Order provides for the Supplier to perform services on Buyer's location or a third party's or public location other than or in addition to the location of the delivery of goods, such as, but not limited to, Product installation at Buyer's destination, Supplier shall obtain and maintain through the warranty period of the Order, at Supplier's sole expense and with insurance companies reasonably satisfactory to Buyer and authorized to do business in the jurisdiction in which the Order is to be performed, insurance coverage of the types and limits described below. If Supplier hires a subcontractor to perform any or a portion of the Order, then Supplier warrants that, as a part of the subcontract, subcontractor shall obtain and maintain the same insurance coverage of the types and limits as required of Supplier and meeting all other requirements of this section applicable thereto. The limits set forth below are minimum limits and will not be construed to limit Supplier's liability.

(a) Workers' Compensation insurance sufficient to comply with the requirements and coverages specified by the laws of each jurisdiction in which Services will be performed.

(b) Commercial or Comprehensive General Liability insurance on an occurrence form with a combined single limit of \$1,000,000 each occurrence, and annual aggregates of \$2,000,000, for bodily injury and property damage, including coverage for premises-operations,

{J2134855.1}



blanket contractual liability, broad form property damage, personal injury liability, independent contractors, products/completed operations, sudden and accidental pollution and, if applicable, deletion of any explosion, collapse and underground exclusion.

(c) Automobile Liability insurance complying with any regulatory body having jurisdiction, or a combined single limit of \$2,000,000 each occurrence for bodily injury and property damage, whichever is the greater, but to include coverage for all vehicles used in performance of the Order, whether owned, non-owned, or hired.

In each of the above described policies, Supplier, its subcontractors, and their insurers agree to waive any rights of subrogation against Buyer. Buyer will be named as an additional insured as to all insurance coverage, and coverage will be on a primary, noncontributory basis. The Order price includes the cost of coverage naming Buyer as additional insured and waiving subrogation against Buyer. Non-renewal or cancellation of policies described above will be effective only after written notice is received by Buyer from the insurance company thirty (30) days in advance of any such non-renewal or cancellation. Prior to rendering performance under the Order, Supplier or its subcontractors as appropriate shall deliver to Buyer certificates of insurance evidencing the existence of the insurance required above. If the insurance policies described in this section are not obtained and maintained as required, Buyer shall have the right to immediately cancel the Order for cause or to suspend delivery of the Products until such time as the obligations of this section are satisfied, without any liability to Supplier.

**15. SURVIVAL.** The indemnities, representations and warranties set forth in the Order and any other provisions that by their very nature continue shall survive acceptance of the Products by Buyer, payment therefore and the cancellation or expiration of the Order and continue in full force and effect.

**16. THIRD PARTY BENEFICIARIES.** Except as otherwise provided in the Order, nothing in the Order provides any legal rights to, or creates any liability on the part of, anyone other than Supplier and Buyer.

**17. INDEPENDENT CONTRACTOR.** Supplier shall supply Goods or perform Services as an independent contractor. Nothing herein shall create an employment relationship, partnership, joint venture, or agency relationship between Supplier and Buyer.

**18. SEVERABILITY.** If any provision of the Order is unenforceable due to Applicable Law, then the remaining provisions shall remain in full force and effect.

**19. WAIVER.** No delay or omission by Buyer exercising any right or remedy shall constitute a waiver of such right or remedy, or prejudice the right of Buyer to enforce such right or remedy at any subsequent time.

**20. ASSIGNMENT.** Neither the Order nor any part hereof nor any right, duty or obligation hereunder may be transferred, assigned, delegated or subcontracted by Supplier without Buyer's prior written consent. The Order shall be binding upon and inure to the

{J2134855.1}

benefit of the respective successors and permitted assigns of the parties hereto.

**21. GOVERNING LAW; DISPUTE RESOLUTION.** ANY CLAIMS OR DISPUTES ARISING OUT OF OR RELATING TO THE ORDER SHALL BE INTERPRETED AND GOVERNED IN ACCORDANCE WITH THE LAW OF THE STATE OF WEST VIRGINIA WITHOUT REGARD TO CHOICE OF LAW PROVISIONS.

THE PARTIES SHALL ENDEAVOR TO RESOLVE ANY CLAIMS OR DISPUTES BY MEDIATION. UPON NOTICE BY ONE PARTY TO THE OTHER OF A DISPUTE, THE PARTIES WILL COOPERATE TO SELECT A MEDIATOR AND TO CONDUCT AN IN-PERSON MEDIATION WITHIN SIXTY (60) DAYS. ANY CLAIMS OR DISPUTE ARISING OUT OF OR RELATING TO THE ORDER WHICH REMAIN UNRESOLVED MORE THAN SIXTY (60) DAYS AFTER NOTICE FROM ONE PARTY TO THE OTHER UNDER THIS SECTION SHALL BE RESOLVED AS FOLLOWS:

FOR ANY DISPUTE IN WHICH THE AMOUNT IN CONTROVERSY IS LESS THAN \$100,000.00, THE PARTIES SHALL PROCEED TO A SUMMARY BINDING ARBITRATION PROCEEDING THROUGH THE AMERICAN ARBITRATION ASSOCIATION BEFORE A SINGLE ARBITRATOR PANEL. THE ARBITRATION SHALL BE HELD IN MORGANTOWN, WEST VIRGINIA. UNLESS ALL PARTIES ARE IN AGREEMENT OTHERWISE, THE ONLY DISCOVERY PERMITTED WILL BE AN EXCHANGE OF RELEVANT, NON-PRIVILEGED DOCUMENTS AND NO DEPOSITIONS WILL BE CONDUCTED.

IF FOR ANY REASON THE ARBITRATION REQUIREMENT IS UNENFORCEABLE OR IF THE AMOUNT IN CONTROVERSY IS GREATER THAN \$100,000.00, ANY ACTION BROUGHT BY ANY PARTY SHALL BE BROUGHT IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WEST VIRGINIA, UNLESS FEDERAL SUBJECT MATTER JURISDICTION IS LACKING, IN WHICH CASE THE ACTION SHALL BE BROUGHT IN MONONGALIA COUNTY COURT, SEVENTEENTH JUDICIAL CIRCUIT FOR THE STATE OF WEST VIRGINIA. TO THE FULLEST EXTENT PERMITTED BY LAW, EACH PARTY HEREBY IRREVOCABLY WAIVES ITS RIGHT TO ANY JURY TRIAL WITH RESPECT TO SUCH ACTION ARISING UNDER, IN CONNECTION WITH, OR RELATED TO THE ORDER.

THE PREVAILING PARTY SHALL BE ENTITLED TO ITS REASONABLE ATTORNEY'S FEES AND EXPENSES INCURRED IN ANY ARBITRATION OR LITIGATION IN ADDITION TO ANY OTHER RELIEF TO WHICH IT IS ENTITLED.