

TERMS AND CONDITIONS FOR PURCHASE ORDERS
ISSUED BY VARCON

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

Agreement means these terms and conditions, the Purchase Order issued by Varcon and any attachments included with or referred to in the Purchase Order.

Authorities means any State, municipal, public, local or other authority or body claiming authority or jurisdiction over the Project or the Goods and/or Services.

Business Day means a day on which banks are open for general banking business in Melbourne, excluding Saturdays, Sundays and public holidays.

Contract Sum means the price specified in item 2 of the Purchase Order.

Date for Delivery means:

- (a) the date(s) for delivery set out in the Purchase Order; or
- (b) such other date(s) as may be:
 - i. directed by Varcon in writing; or
 - ii. accepted by Varcon in accordance with clause 3(b).

day means calendar day.

Documentation means all documents prepared by or developed by or on behalf of, or provided to, the Subcontractor in the course of or arising out of the Project (including all documents, designs, plans, specifications, computer readable disks, tapes, other machine-readable records, models and samples prepared, received, processed or generated by or on behalf of the Subcontractor) other than documents which are for the sole purpose of its own records.

Goods means the goods (if any) specified in Item 1 of the Purchase Order, to be supplied by the time specified in Item 1 of the Purchase Order.

Law or **Laws** means acts, ordinances, regulations, by-laws, proclamations and subordinate legislation made under, by or pursuant to any commonwealth or state statute (including amendments to such legislation), or a requirement of any Authorities (including but not limited to any licence, permit, consent, approval, determination, certificate or other requirement), affecting the Project or the Goods and/or Services.

Project means the project or site (if any) set out in the Purchase Order.

Purchase Order means the purchase order issued by Varcon.

Services means the work and other services (if any) specified in Item 1 of the Purchase Order, to be carried out and completed by the time specified in Item 1 of the Purchase Order.

SOPA means the *Building and Construction Industry Security of Payment Act 2002* (Vic).

Subcontractor means the party specified in the Purchase Order as the subcontractor or supplier of the Goods and/or Services.

Termination Event means, where the Subcontractor:

- (a) is an individual and commits an act of bankruptcy, has a bankruptcy petition presented against it or is made bankrupt;
- (b) is a corporation and is placed under official management (voluntarily or otherwise), has a receiver, liquidator, controller, receiver and manager or administrator appointed to it, enters into a deed of company arrangement with creditors or has a winding up order made or creditors petition served on it; or
- (c) is in substantial breach of this Agreement by:
 - i. refusing or failing to comply with, or ignoring, a direction from Varcon;
 - ii. failing to provide the Goods and/or Services by the Date for Delivery;
 - iii. unlawfully suspending the provision of Goods and/or Services; or
 - iv. otherwise being in breach of this Agreement.

Varcon means the party specified in the Purchase Order as Varcon.

Warranties means the following warranties given by the Subcontractor to Varcon at the time of acceptance of the Purchase Order and repeated on delivery of the Goods and/or supply of the Services, in addition to any other express warranties in the Agreement:

- (a) that it has and will at all times have the particular skills, experience and ability to provide the Goods and/or Services;
- (b) that it will provide the Goods and/or perform the Services with the degree of skill, care and diligence of a professional experienced in the provision of these type of Goods and/or Services for a project similar to the Project, and within the times stipulated in this Agreement;
- (c) that the Goods and/or Services are suitable and complete in all respects for the requirements of this Agreement and the Project, and that there are no ambiguities or discrepancies in the Agreement;
- (d) that all Goods and/or Services provided by the Subcontractor will comply with all relevant Laws and will meet or exceed any relevant Australian Standard and will be fit for the purpose for which they are intended;
- (e) that where no Australian Standard is applicable to the Goods and/or Services, then the Goods and/or Services will meet or exceed best industry practice and standards; and
- (f) that the Goods and/or Services and the provision of the Goods and/or performance of the Services do

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not infringe any patent, registered design, copyright or other protected right or intellectual property right.

1.2 Interpretation

- (a) References to the Subcontractor includes reference to its employees, subcontractors and agents unless the context requires otherwise.
- (b) Clause headings are for convenience only and shall not affect the interpretation of this Agreement.
- (c) Words in the singular include the plural and vice versa.
- (d) Words importing a gender include all genders.
- (e) The words 'including' and 'includes' and any variants of those words shall not be construed as words of limitation.
- (f) Where this Agreement provides for:
 - (i) the provision of Goods only, the references to "Goods and/or Services" shall be read as if they refer only to Goods;
 - (ii) the provision of Services only, the references to "Goods and/or Services" shall be read as if they refer only to the performance of Services; or
 - (iii) the provision of Goods and Services, the references to "Goods and/or Services" shall be read as if they refer to Goods and Services.
- (g) Subject to any express provision of this Agreement, a provision of the Agreement which says that Varcon "may" do or not do something is not to be construed as imposing an obligation on Varcon to do or not do that thing.
- (h) A reference to any document (including this Agreement) is to that document as varied, novated, ratified or replaced from time to time.
- (i) A reference to any law or legislative requirement includes any statutory amendments, modifications or re-enactment of it or any statutory provision substituted for it, and all ordinances, by-laws, regulations, rules and statutory instalments (however described) issued under it.
- (j) No term or provision of this Agreement will be construed against Varcon on the basis that the Agreement or the term in question was put forward or drafted by or on behalf of Varcon.

2. ENGAGEMENT OF SUBCONTRACTOR

2.1 Appointment

- (a) Varcon appoints the Subcontractor to provide the Goods and/or Services in accordance with this Agreement, and the Subcontractor must provide the Goods and/or Services as required by this Agreement.
- (b) The Subcontractor warrants that any drawings or specifications provided by or on behalf of Varcon are suitable and complete for the provision of the Goods and/or Services and the Subcontractor must

immediately advise Varcon in writing if the drawings and/or specifications are in any way unsuitable or deficient.

- (c) The Subcontractor must fully and completely inform itself of all of Varcon's requirements for the Goods and/or Services (and by providing or purporting to provide the Goods and/or Services the Subcontractor is deemed to have done so) and must comply with all instructions given by Varcon regarding the Goods and/or Services.
- (d) The Subcontractor acknowledges that Varcon may appoint a representative to carry out all of Varcon's functions and to give directions under this Agreement.

2.2 Variations

The Subcontractor shall not vary the Goods and/or Services except as directed in writing by Varcon. The Subcontractor acknowledges and agrees that it must receive a written direction and provide a notice in writing of its estimate of the cost of the proposed variation in order to have entitlement to cost of any variation. Failure by the Subcontractor to obtain a written direction and provide the notice in writing of its estimate of the cost of the proposed variation shall be an absolute bar to any claim by the Subcontractor to cost in relation to any variation.

Varcon may at any time direct the Subcontractor to vary the Goods and/or Services under the Agreement by decreasing or omitting any part.

The Subcontractor acknowledges that Varcon may at any time and from time to time and in its absolute and unfettered discretion engage other contractors to carry out any omitted work, and the Subcontractor shall not bring or make any claim against Varcon in relation to or in connection with the omitted work.

2.3 Warranties

The Subcontractor gives the Warranties to Varcon, and acknowledges that Varcon has entered into this Agreement in reliance on the Warranties.

2.4 Indemnity

The Subcontractor is liable for, and indemnifies and keeps Varcon indemnified against, any liability, claim, action, suit, demand, loss, damage, charge, expense and cost (legal or otherwise) ("Loss") suffered or incurred or alleged to have been suffered or incurred arising out of or by reason of a breach by the Subcontractor of any of its obligations under this Agreement (including a breach of any Warranties) or in any way connected with the provision (or non-provision) of the Goods and/or Services.

This indemnity extends to and includes any Loss suffered or alleged to have been suffered by Varcon for labour and equipment hire costs (including after hour costs) and any Authority or utility permit fees arising out of or in connection with the provision (or non-provision) of the Goods and/or Services.

The Subcontractor's liability under this clause will be reduced proportionately to the extent that Varcon has caused or contributed to any Loss.

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3. SUPPLY OF GOODS AND/OR PROVISION OF SERVICES

- (a) The Subcontractors must deliver the Goods and/or supply the Services by the Date for Delivery.
- (b) If the Subcontractor proposes any change to the Date for Delivery for any reason, the Subcontractor must immediately give written notice to Varcon, who may in its absolute discretion accept or reject any such proposal.
- (c) If the Subcontractor fails to deliver the Goods and/or Services by the Date for Delivery, or fails to comply with this Agreement, then Varcon may without prejudice to any of its other rights under this Agreement:
 - (i) refuse the Goods and/or Services delivered or left at the delivery site, or proposed to be provided or performed; and
 - (ii) procure the same or similar Goods and/or Services elsewhere,

and the Subcontractor will be liable for all costs and losses incurred by Varcon as a consequence of such failure (including any delay damages which Varcon is liable to pay to any principal or head contractor).
- (d) Acceptance of the Goods and/or Services is subject to Varcon's approval. Varcon reserves the right to inspect any or all Goods prior to despatch from the Subcontractor's premises or on or after delivery. Such inspection does not imply acceptance of Goods by Varcon and does not relieve the Subcontractor from its responsibilities, liabilities, warranties or guarantees.
- (e) Where Varcon finds that the Goods are not acceptable, Varcon may at the Subcontractor's expense either rectify the Goods to a condition acceptable to Varcon or return the Goods to the Subcontractor and may deduct the costs of such repair or return in accordance with clause 5.5.
- (f) The property and the risk in Goods delivered or left at the delivery site nominated by Varcon does not pass from the Subcontractor to Varcon until Varcon has inspected and accepted the same by written notice to the Subcontractor.
- (g) The Subcontractor must do all things to provide to Varcon (and its successors, customers, assignees, purchasers and users of the Goods and/or Services) the benefit of all warranties, guarantees and undertakings in respect of the Goods and/or Services:
 - (i) directly from the Subcontractor; and
 - (ii) from the manufacturer and supplier(s) of the Goods and/or Services.

4. INSURANCES

- (a) Before the Subcontractor provides the Goods and/or Services, the Subcontractor must, at its cost, effect and maintain the insurances set out in Schedule 1.

- (b) All insurances shall be effected with an insurer and on terms approved by Varcon.
- (c) The Subcontractor must as soon as possible notify Varcon if for any reason any policy of insurance under this Agreement terminates, lapses or is otherwise not renewed.
- (d) Other than for Professional Indemnity and Workers Compensation insurance, insurances shall be effected in the joint names of Varcon and the Subcontractor, or alternatively, note the interests of Varcon, and shall provide that all conditions, agreements and endorsements (with the exception of the limit of liability) operate as if there was a separate policy of insurance covering each of the insured.
- (e) When requested by Varcon, the Subcontractor must permit Varcon to inspect and take copies of any policy, evidence of payment by the Subcontractor, and certificates of currency of the insurances referred to in this clause 4. If the Subcontractor does not comply with its obligations under this clause 4, Varcon may take out insurance of the type which is the subject of the Subcontractor's failure, defer making any further payment to the Subcontractor until the Subcontractor has complied, or do both. Any cost incurred by Varcon in taking out such insurance shall be a debt due and payable by the Subcontractor to Varcon and may at any time be set off by Varcon against payment of the Contract Sum.

5. CONTRACT SUM AND PAYMENT

5.1 Contract Sum

The parties agree that the Contract Sum is sufficient for the provision of Goods and/or Services under the Agreement which includes such ancillary Goods and/or Services as could have been reasonably anticipated by an experienced and competent subcontractor as being necessary for the provision of Goods and/or Services having regard to the Project, or was otherwise capable of reasonable inference from this Agreement.

5.2 Contract Sum fixed

The parties agree that the Contract Sum is fixed and is not subject to rise and fall except as expressly set out in this Agreement.

5.3 Claims for payment

- (a) The Subcontractor shall submit written progress claims for payment of the Contract Sum in accordance with Item 2 of the Purchase Order setting out the Subcontractor's valuation of the provision of Goods and/or Services and accompanied by such information and documentation as is required by Varcon to verify the claim. An early progress claim shall be deemed to have been made on the date for making that claim.
- (b) The Subcontractor must not include in a progress claim any claim for a variation or any other claim under this Agreement which purports to adjust the Contract Sum or is a claim for any amount in addition to the Contract Sum unless the amount of

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any such claim has been agreed by Varcon in writing, or the amount has been disputed and has been referred to and resolved under the dispute resolution procedure under this Agreement.

- (c) The Subcontractor acknowledges that Varcon may withhold retention moneys from any amount payable to the Subcontractor under this Agreement or seek other security from the Subcontractor ("Security") as a precondition to any payment being made to the Subcontractor. Such Security will not exceed 10% of the Contract Sum and (if not called upon) will be returned at the expiration of such defects liability period advised in writing by Varcon or twelve months after the last date of the provision of Goods and/or Services, whichever is the later.
- (d) Within 10 Business Days of a progress claim being made (or deemed to have been made), Varcon will assess the progress claim and provide a payment schedule to the Subcontractor setting out the amount that Varcon intends to pay and the reasons for any difference from the amount claimed. Varcon will assess the progress claim on the basis of valuing the cost to complete the Goods and/or Services remaining under the Agreement and the amount of the Contract Sum paid to date less the estimated costs of rectifying any defects in the Goods and/or Services.

5.4 Payment

- (a) Within 14 days of the payment schedule being issued or as otherwise agreed in writing with the Subcontractor (whichever is later), and subject to clause 5.5 and any other entitlement under the Agreement to deduct moneys from the Subcontractor, Varcon shall pay to the Subcontractor the amount assessed by Varcon as due to the Subcontractor.
- (b) Any payment made by Varcon to the Subcontractor does not constitute approval of any work nor will it be taken as an admission or evidence that any work, Goods and/or Services have been satisfactorily carried out in accordance with this Agreement.
- (c) Any adjudication application pursuant to SOPA must be made to one of the following authorised nominating authorities: The Resolution Institute, Building Adjudication Victoria Inc or Rialto Adjudications Pty Ltd.

5.5 Set off

Varcon may deduct from moneys due to or claimed by the Subcontractor the amount of any moneys to which Varcon holds a bona fide belief as to entitlement (either immediate or contingent) whether under the Agreement or otherwise (including Varcon's reasonable estimate of its entitlement to damages for breach of Agreement, costs and losses under clause 3(c), and including any moneys due from the Subcontractor to Varcon under any other Agreement) and if those moneys are insufficient, then Varcon may have recourse to security provided under the Agreement and any balance owing shall be a debt due and payable to Varcon from the Subcontractor immediately.

5.6 Adequacy of Contract Sum

The Subcontractor warrants that the Contract Sum:

- (a) is appropriate and sufficient for the Goods and/or Services and takes account of all risks and contingencies (ascertainable and unascertainable) that may affect the Goods and/or Services; and
- (b) includes minor or ancillary items not expressly mentioned in Item 1 of the Purchase Order which are necessary for the satisfactory completion of and provision of the Goods and/or performance of the Services.

6. TERMINATION AND SUSPENSION

- (a) This Agreement may be terminated at any time by Varcon giving written notice to the Subcontractor. Varcon will not be liable to the Subcontractor for any payment, damages or compensation whatsoever in the event of such termination, other than as set out in clauses 6(b) and 6(c).
- (b) If the termination is without cause and not connected with a Termination Event then the Subcontractor shall be paid a reasonable amount as determined by Varcon having regard to the Contract Sum and commensurate to the Goods and/or Services provided by the Subcontractor to the date of termination.
- (c) If the termination is due to a Termination Event, then Varcon will not be required to make any further payment under the Agreement (if any is so payable) and may apply any Security held by Varcon:
- (i) against any moneys due and payable from the Subcontractor to Varcon; and
 - (ii) progressively to meet the costs incurred by Varcon in obtaining any substitute or completing any incomplete Goods and/or Services or rectifying any defective Goods and/or Services.

Varcon's rights pursuant to this clause 6(c) are additional to, and do not derogate from, Varcon's other rights and remedies, which Varcon may pursue and recover as if the Agreement was repudiated at common law by the Subcontractor and Varcon accepted that repudiation

- (d) Varcon shall account to the Subcontractor for all costs and expenses incurred by it in obtaining any substitute or completing any incomplete Goods and/or Services or rectifying any defective Goods and/or Services ("completion cost"). If after Varcon applies any Security, the completion cost is:
- (i) greater than the balance of the Contract Sum owing to the Subcontractor pursuant to this Agreement, then Varcon may recover such difference from the Subcontractor as a debt due and payable; or
 - (ii) less than the balance of the Contract Sum owing to the Subcontractor pursuant to this agreement, then Varcon shall pay such surplus money to the Subcontractor

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in full and final settlement of any and all claims that the Subcontractor has or but for this clause may have had arising from the termination.

- (e) If this Agreement is terminated, the Subcontractor must immediately deliver to Varcon all Documentation.
- (f) Varcon may, without reason or cause and without any claim for extra cost or otherwise by the Subcontractor, direct the Subcontractor to suspend the provision of Goods and/or Services. Varcon may direct the Subcontractor to resume the provision of Goods and/or Services which have been suspended pursuant to this clause.

7. DISPUTES

- (a) If a dispute arises between the Subcontractor and Varcon concerning any matter arising out of or in connection with this Agreement either party may give written notice then to the other party. Such notice must state that it is a notice given pursuant to this clause 7(a) and must adequately describe the particulars of the alleged dispute.
- (b) Within 7 days of notice being given under clause 7(a), senior executives of the parties shall meet to endeavour to resolve the dispute.
- (c) If the dispute is not resolved within 14 days of that meeting (or, if the meeting has not occurred within the time prescribed by this clause) then the dispute shall be referred by either party to an expert agreed by the parties or, if the parties are unable to agree on an expert, then an expert appointed by the chair for the time being of the Resolution Institute. The expert determination shall be conducted in accordance with the Resolution Institute Expert Determination Rules.
- (d) A party must comply with the requirements of clauses 7(a) to 7(c) inclusive before seeking to exercise its rights to institute proceedings, except in the case of urgent injunctive or declaratory relief.
- (e) The existence of a dispute will not relieve the Subcontractor from supplying the Goods and/or performing the Services or any of its other obligations under and in accordance with this Agreement.

8. SAFETY AND PERSONNEL

8.1 Occupational Health & Safety

The Supplier shall ensure that:

- (a) the Goods and/or Services performed under this Agreement are at all times carried out in accordance with all requirements relating to industrial health and safety, including all occupational and/or work health and safety Laws in force and any directions, statements, protocols, guidelines or other similar material issued or published under those Laws;
- (b) all personnel engaged in performing the Goods and/or Services under this Agreement participate in safety induction courses and attend safety meetings, if so required by Varcon;

- (c) any accident, near-miss or other health and safety related incident is immediately report to Varcon; and
- (d) it complies promptly with health and safety directions, processes, policies and procedures issued by Varcon.

8.2 Industrial relations

The Subcontractor:

- (a) must ensure that all of its personnel employed on the Project have current Workcover and superannuation and all other entitlements as required by any applicable workplace agreement or award;
- (b) must pay its personnel engaged on the Project no less than the applicable award and shall observe all other award conditions; and
- (c) is responsible for maintaining good industrial relations with persons carrying out the Goods and/or Services under this Agreement at the Project while at the same time refraining from action which could affect Varcon and other contractors.

8.3 Breach

Any costs incurred by Varcon in relation to occupation health and safety, industrial action or industrial disputes as a result of the Subcontract breaching clauses 8.1 and 8.2 will be a debt due and payable to Varcon by the Subcontractor.

9. GENERAL

- (d) This Agreement will apply to any Goods and/or Services performed by the Subcontractor prior to the issue of the Purchase Order.
- (e) Varcon may at its discretion assign, transfer or novate this Agreement or any of its rights or obligations under this Agreement. The Subcontractor agrees to execute all necessary documents and do all acts necessary to give effect to such assignment, transfer or novation.
- (f) This Agreement is governed by the laws of Victoria and the parties submit to the non-exclusive jurisdiction of the courts of that State.
- (g) This Agreement is the entire agreement between the parties in relation to the Goods and/or Services and supersedes all previous agreements, proposals, representations, letters, correspondence and discussions. If the Subcontractor has provided any terms and conditions for the Goods and/or Services, (including qualifications and exclusions) then those terms and conditions are expressly excluded.
- (h) If any provision of this Agreement is invalid, illegal or unenforceable in any respect the validity, legality and enforceability of the remaining provisions will not be affected and such invalid, illegal or unenforceable provision is to be severed from this Agreement.
- (i) This Agreement does not create a relationship of employment, agency, partnership or joint venture between the parties.



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- (j) A right created by the Agreement cannot be waived except in writing signed by the party entitled to that right on each specific occasion of waiver. Delay by a party in exercising a right does not constitute a waiver of that right, nor will a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same or of any other right of that party.
- (k) To the extent permitted by law, if any of the provisions of Part IVAA of the *Wrongs Act 1958* (Vic) are applied to any claim by Varcon against the Subcontractor, whether in contract, tort (including negligence) or otherwise, the Subcontractor will indemnify, keep indemnified and hold harmless Varcon against any cost, expense, loss and damage that forms part of a claim by Varcon against the Subcontractor that Varcon is not able to recover because of the operation of that Part.

Schedule 1

Insurances

	Requirements for insurance	Duration of cover
Public Liability	A public liability policy of insurance which covers Varcon and the Subcontractor and is in a form reasonably acceptable to Varcon. The policy of insurance shall be for an amount in respect of any one occurrence and in the aggregate not less than \$10 million.	The insurance cover shall be maintained until the Subcontractor completes carrying out the Services.
Workers Compensation / Personal Injury	The Subcontractor shall insure against liability for death or injury to persons employed by the Subcontractor, any subcontractor or employee of any subcontractor, including liability by statute and at common law or other statutory insurance scheme (Commonwealth or State).	The insurance cover shall be maintained as required by law.
Plant and Equipment Insurance	A policy of insurance to cover claims for loss of or damage to those things used, or work undertaken, by the Subcontractor to perform the Services or any part of them but which will not form part of any works being constructed by or the construction of which is being managed by, Varcon, including a waiver of rights against Varcon, the Subcontractor and all subcontractors engaged by the Subcontractor.	The insurance cover shall be maintained until the Subcontractor completes carrying out the Services.

Where the Subcontractor transports Goods:

Transit / Motor Vehicle Insurance	A policy of insurance to cover claims for loss of or damage to goods in transit from the time such goods leave any warehouse or place of storage for the commencement of the transit, and continuing during the ordinary course of transit until delivery to the site the subject of the Project.	The insurance cover shall be maintained until the Subcontractor completes carrying out the Services.
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