

PURCHASE ORDER TERMS AND CONDITIONS

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In these terms and conditions:

- (a) **Agreement** means an agreement between the Purchaser and Supplier for an order for Goods and/or Services made by reference to the Purchase Order, these Conditions and any agreed variation;
- (b) **Authorised Dealer** means an approved dealer holding a franchising arrangement with the Purchaser for the sale and servicing of vehicles and/or associated spare parts;
- (c) **Conditions** mean these terms and conditions of purchase;
- (d) **Date for Delivery** means the date for delivery of the Goods and/or performance of the Services as set out in the Purchase Order;
- (e) **Defective** shall mean any of the following in respect of the Part:
 - a. does not conform to the Agreement;
 - b. has failed;
 - c. does not perform in a manner in which the Part has been promoted or sold by the Supplier; or
 - d. does not perform in a manner in which goods of the same or similar kind are ordinarily expected to perform;
- (f) **Delivery Point** means in relation to Goods, the delivery address for the Goods as set out in the Purchase Order and in relation to the Services, the place for performance of the Services as set out in the Purchase Order;
- (g) **Goods** means the goods described in the Purchase Order and includes a Part;
- (h) **GST** means goods and services tax chargeable or imposed under the Goods and Services Tax Act 1985 (New Zealand) ;
- (i) **Intellectual Property Rights** means any intellectual or industrial property right, whether protected by statute, at common law or in equity, including any patent, registered design, (whether or not registrable), invention, trade secret, circuit layout design, or right in relation to circuit layouts, right to confidential information, technical information, trademark or name, copyright or other protected right;
- (j) **Laws** includes any requirement of any statute, rule, regulation, proclamation, order in council, ordinance or by-law in relation to environmental and occupational health and safety matters;
- (k) **Loss** means any loss, liability, costs (including legal costs as the higher of an indemnity or solicitor-client basis) or expense incurred by the Purchaser relating to this Agreement;
- (l) **Part** means spare parts, accessories and product merchandise;
- (m) **Personal Information** has the meaning given to that term in the Privacy Act 1993 (New Zealand) and which is received or learnt from any source as a consequence of or in the performance of this Agreement;
- (n) **PPSA** means the *Personal Property Securities Act 1999* (New Zealand);
- (o) **Price** means the price payable by the Purchaser to the Supplier as shown on the Purchase Order;
- (p) **Purchase Order** means the form accompanying these Conditions and setting out particulars of the Goods and/or Services;
- (q) **Purchaser** means such of **PENSKE POWER SYSTEMS NZ (5685957)** or **PENSKE COMMERCIAL VEHICLES NZ (107518)** or **PENSKE POWER SYSTEMS PTY LTD (2151888)** or any related company (within the meaning of section 2(3) of the *Companies Act 1993*) as is specified in the Purchase Order;
- (r) **Representative** of a party means that party's director, or authorised officer, employee, agent or sub-contractor;
- (s) **Retail Customer** means the end user of the Part and may either be the Purchaser, an Authorised Dealer or a customer of an Authorised Dealer;
- (t) **Services** means the services described in the Purchase Order;
- (u) **Specifications** means any technical or other specification relating to the Goods and/or Services referred to in the Purchase Order and details of which have been supplied by the Purchaser or its Representative to the Supplier;

- (v) **Supplier** means the person who sells the Goods or provides the Services to the Purchaser;
- (w) **Supplier's Personal Information** means the Personal Information of the Supplier's employees, officers, representatives, agents or contractors.
- (x) **User Error** means a Retail Customer using or installing the Part in a manner which is inconsistent with the:
 - a. instruction or operator's manual for the Part;
 - b. safety or warning signs or guidelines accompanying the Part; or
 - c. way in which goods of the same or similar kind are ordinarily used or installed.

1.2 Interpretation

In the interpretation of these Conditions, unless the context or subject matter otherwise requires:

- (a) the singular includes plural and vice versa;
- (b) a reference to a party includes that party's executors, administrators, substitutes, successors and permitted assigns;
- (c) if a party consists of more than 1 person, the Agreement binds each of them separately and any 2 or more of them jointly;
- (d) an obligation, representation or warranty in favour of more than 1 person is for the benefit of them separately and jointly; and
- (e) time is of the essence in respect of all of the Supplier's obligations to the Purchaser.

2. AGREEMENT

2.1 Consideration

The Supplier agrees to supply the Goods and/or Services to the Purchaser in accordance with the Agreement, and in consideration for this the Purchaser agrees to pay the Price to the Supplier.

2.2 Application

These Conditions apply to all orders made by the Purchaser in reference to the Purchase Order, and:

- (a) to the extent the Supplier's terms and conditions are supplied with the Goods and/or Services (including as printed on consignment notes or other documents), those terms and conditions will be of no legal effect; and
- (b) any terms and conditions implied by statute or otherwise are excluded to the extent it is lawful to do so.

2.3 Review

These Conditions are subject to periodic review by the Purchaser.

3. BINDING TERMS AND CONDITIONS

3.1 Entire Agreement

The entire Agreement between the Purchaser and the Supplier for the purchase of the Goods and/or Services by the Purchaser from the Supplier is constituted by:

- (a) these Conditions;
- (b) any other terms and conditions (including Specifications) incorporated in the Purchase Order;
- (c) any other terms and conditions (including Specifications) incorporated in an order for Goods and/or Services (where the order makes reference to the Purchase Order);
- (d) any other terms and conditions which are imposed by law and which cannot be excluded; and
- (e) any agreed written variation.

3.2 Precedence

These Conditions shall apply to all contracts for the purchase of Goods and/or Services by the Purchaser from the Supplier to the exclusion of any other terms and conditions or any other materials which the Supplier may purport to apply or which are endorsed upon any correspondence or documents issued by the Supplier, irrespective of their date of communication to the Purchaser. The Supplier may not rely on any representations by the Purchaser that are not included in the Agreement.

3.3 Acceptance

Acceptance of an order for Goods and/or Services made by the Purchaser by reference to the Purchase Order will occur on the earlier of:

- (a) the Supplier's written acceptance being received by the Purchaser; or
- (b) 2 business days after the Purchase Order is sent by the Purchaser to the Supplier,

and will constitute acceptance of these Conditions by the Supplier.

4. PRICE

4.1 Price of Goods and/or Services supplied

The Price specified in the Purchase Order is fixed, and is not subject to increase. The price includes all costs of testing, inspection, labelling, packing and freight and delivery to and off-loading at the Delivery Point as specified in the Purchase Order.

4.2 GST

The Price at which the Goods and/or Services are provided by the Supplier to the Purchaser includes (unless otherwise stated or agreed in writing) GST, if applicable.

4.3 Freight

Unless otherwise stated or agreed in writing, the Supplier is responsible for freight and delivery of the Goods and/or Services to the Delivery Point as specified in the Purchase Order.

5. PAYMENT

5.1 Payment Terms

Payment for Goods and/or Services supplied by the Supplier to the Purchaser will be tendered 30 days from last day of the month of the date of receipt by the Purchaser of a correctly rendered invoice or acceptance of the Goods and/or Services by the Purchaser, whichever is the later.

5.2 Invoices

The Supplier must provide the Purchaser with a GST compliant tax invoice for the Goods and/or Services provided under this Agreement. Each invoice must include:

- (a) a reference to the Purchase Order number;
- (b) a reference to the item number;
- (c) a detailed description of the delivered Goods or performed Services (including sizes, quantities, weight, unit and price);
- (d) the Price relating to the Goods and/or Services, broken down to reflect the same Price components on the Purchase Order; and
- (e) the amount of any applicable GST.

The Purchaser will accept no liability whatsoever for invoices which do not bear such information.

6. DELIVERY AND PERFORMANCE

6.1 Delivery of Goods

The Goods must be received on the Date for Delivery and at the Delivery Point specified in the Order. If the Supplier fails to meet any such delivery date, the Purchaser may, without limiting its other rights and remedies, cancel all or part of the Purchase Order. If the Purchaser has paid a deposit, the Supplier must refund the deposit in full to the Purchaser.

6.2 Performance of Services

- (a) The Supplier must ensure that the Services are performed at the Delivery Point on the Date for Delivery. Should any change in the Date for Delivery (or dates) be proposed by the Supplier for any reason, immediate written notice must be given to the Purchaser who may in its absolute discretion, accept or reject such proposal.
- (b) If the Purchaser rejects a proposal to change the Date for Delivery and the Supplier fails to deliver on the Date for Delivery, the Purchaser may by written notice to the Supplier, terminate this Agreement or the agreement to supply particular Services under a Purchase Order.

7. TITLE AND RISK

7.1 Title

Property in the Goods passes to the Purchaser on delivery of the Goods by the Supplier.

7.2 Risk

The Supplier bears all risks of loss and damage to the Goods until final acceptance by the Purchaser in accordance with clause 7.4.

7.3 Final inspection and acceptance

Notwithstanding any prior inspections, usage or payments, all Goods shall be subject to:

- (a) final inspection which may include measurement, testing or examination; and
- (b) acceptance at the Purchaser's facility within a reasonable time (but not more than 90 days) after receipt of the Goods.

7.4 Date of acceptance

Acceptance of the Goods by the Purchaser will occur on the date upon which the Purchaser notifies the Supplier in writing of acceptance.

7.5 Rejected Goods and/or Services

The Purchaser may, within 90 days of delivery of the Goods and/or Services at the Delivery Point or if applicable, an Authorised Dealer's premises (whichever is the later), reject any Goods which do not comply strictly with the Agreement. Once the Goods are rejected, the Purchaser, in its sole discretion, may require:

- (a) in the case of either Goods and/or Services, the Supplier to refund any payment within 7 days; or
- (b) in the case of Goods, replacement of the Goods to the Purchaser's satisfaction; or
- (c) in the case of Services, the re-supply of the Services.

Title and risk in the rejected Goods immediately re-vests in the Supplier. The Supplier is liable for all Loss incurred by the Purchaser due to the rejection of the Goods and/or Services. The Supplier must, at its cost, remove from the rejected Goods any of the Purchaser's intellectual property or any other distinguishing features such as name or symbols.

7.6 No Waiver

The Purchaser's acceptance does not waive rights. If the Purchaser accepts any Goods and/or Services, this does not extinguish any of the Purchaser's rights if the Goods and/or Services do not comply with a term of the Agreement.

8. SUPPLIER WARRANTIES

8.1 Warranties relating to Goods

The Supplier warrants that the Goods:

- (a) are safe and free from risk to health and safety and compliant with all relevant laws;
- (b) are and will remain free from any Security Interest (as that term is defined in the PPSA), or any other security, charge or encumbrance;
- (c) are free from all defects or faults;
- (d) are of acceptable quality;
- (e) are clearly and durably labelled identifying the Goods and including any appropriate and correct warning and instructions;
- (f) are fit for the purpose for which purchased (as communicated by the Purchaser before the Purchase Order or as should be reasonably understood by the Supplier of the Goods who is experienced in such technical and specific matters relating to the Goods and the purpose they are intended for);
- (g) match the description and the Specifications referred to in the Purchase Order;
- (h) comply with any representations, descriptions, samples or other specifications (including the Specifications) including quality, function, performance or design;
- (i) comply with all legislation, regulations and other governmental requirements in New Zealand relating to the Goods including those relating to manufacturing, packaging, labelling and transportation; and
- (j) include any applicable Supplier's warranty that passes to the consumer from the Purchaser without liability to the Purchaser.

8.2 Warranties relating to Services

The Supplier warrants that the Services: are provided with due care and skill, with the same or higher level of care and skill as would reasonably be expected of a person qualified and experienced in the supply of the same or similar Services, taking all necessary care to avoid Loss or damage.

8.3 Supplier's Indemnities

The Supplier must indemnify the Purchaser against any Loss incurred by the Purchaser concerning a breach of warranty, representation or term of the Agreement.

9. DEFECTIVE PARTS

Notwithstanding any other clause in these Conditions, all Parts supplied by the Supplier to the Purchaser are accompanied by an express product warranty which is valid for at least 12 months from the date the Part is first sold to a Retail Customer. The product warranty will be available if the Part is Defective. The product warranty on a Part provides that the Purchaser will be entitled to reimbursement of the following from the Supplier:

- (a) cost of the replacement Part;
- (b) handling charges equivalent to 25% of the cost of the replacement Part; and
- (c) actual labour costs associated with the diagnosis, removal and testing of the Defective Part and fitment of the replacement Part.

If requested by the Supplier, the Purchaser must provide to the Supplier reasonable documentation in support of the replacement cost and labour costs claimed by the Purchaser.

If User Error of the Part has occurred, the product warranty will not be available to the Purchaser but the Supplier must provide prompt notice of rejection to the Purchaser's product warranty claim and detail the reasons for such rejection.

10. LIQUIDATED DAMAGES

The Supplier acknowledges that time is of the essence in effecting delivery of the Goods and in performing the Services.

If delivery of the Goods or performance of the Services is delayed for more than 7 days, the Purchaser may, in addition to any other rights it has under this Agreement, with immediate effect by notifying the Supplier, deduct from the Price or recover from the Supplier as liquidated damages and not as a penalty an amount that is 0.15% of the Price per day of delay, until the earlier of:

- (a) the date of delivery of the Goods or performance of the Services; or
- (b) the date that the Agreement is terminated.

The parties acknowledge that the damages referred to in the clause above represent a genuine pre-estimate of the loss and damage reasonably expected that the Purchaser would suffer as a result of such delivery delays.

11. INTELLECTUAL PROPERTY RIGHTS

- (a) The Supplier warrants that the Goods and Services, and the Purchaser's reasonably foreseeable use of them will not infringe the Intellectual Property Rights of any person. The Supplier indemnifies the Purchaser against breach of this warranty.
- (b) The Purchaser will own all Intellectual Property Rights arising from performance of the Services. The Supplier assigns such rights to the Purchaser and agrees to execute any document reasonably required by the Purchaser to evidence or perfect such ownership.
- (c) The Supplier grants the Purchaser a licence of all intellectual property rights owned by the Supplier and not assigned under clause 11(b) to enable it to use, modify, maintain and repair the Goods and/or enjoy the benefit of the Services.

12. CONFIDENTIALITY

The Supplier must ensure that its Representatives keep confidential all information supplied by the Purchaser or relating to this Agreement (**Information**), and not use or disclose that information except to fulfill its obligations under this Agreement. The Information supplied remains the property of the Purchaser and the Supplier must not disclose the Information without prior written consent of the Purchaser.

This clause does not apply to Information which is lawfully obtained from a third party, is public knowledge, is already known or is otherwise independently developed by Representatives of the Supplier who have not been exposed to the Information.

13. WORK ON THE PURCHASER'S PREMISES

If any Services are to be performed on the Purchaser's premises, the Supplier must comply with all applicable Laws and all of the Purchaser's then current policies and procedures including, without limitation, the Purchaser's then current safety and other applicable policies. The Supplier shall provide the Purchaser with a complete list of all chemicals, hazardous materials, and ingredients in the composition of goods used in the performance of the Services and a copy of the material safety data sheet for such chemicals and hazardous materials. The submission of such list by the Supplier shall not relieve the Supplier of exclusive responsibility for the safe transportation, use, storage and disposal of such materials prior to acceptance by the Purchaser. All chemicals and hazardous materials brought by the Supplier to the Purchaser's premises shall bear a label stating the identity of the chemical of material and the hazards associated therewith.

14. INDEMNITY AND RELEASE

Notwithstanding clause 9, the Supplier indemnifies the Purchaser, its affiliated companies, and their Representatives, successors, and assigns and holds them harmless from and against any and all claims, suits, actions, liabilities, Loss, judgments or damages, whether ordinary, special or consequential arising directly or indirectly from or in connection with:

- (a) the acts, negligence, omissions or wilful misconduct of the Supplier;
- (b) the Goods or Services supplied;
- (c) a breach of any of the Supplier's warranties or any other term of the Agreement;
- (d) the Supplier's negligent, unauthorised or wrongful acts or omissions with regards to the use or installations of hazardous materials;
- (e) a claim that any Goods or Services supplied to the Purchaser infringe upon or misappropriate the Intellectual Property Rights of another person; or
- (f) a claim of any lien, security interest or other encumbrance made by a third party.

15. TERM AND TERMINATION

15.1 Term

This Agreement shall commence and end on the dates specified in the Purchase Order unless otherwise terminated earlier in accordance with the remainder of this clause 15. Clauses 8, 12, 14, 16, 17(c), 19 and 25 survive termination of the Agreement.

15.2 Without cause

The Purchaser may, at any time, terminate the Purchase Order, in whole or in part, without cause, upon written notice to the Supplier. Following receipt of such notice by the Supplier, the Supplier shall, to the extent specified by the Purchaser, stop all work on the Purchase Order, and cause its suppliers and subcontractors to stop work. Charges for any such termination of the Purchase Order will be limited to actual non-recoverable costs incurred by the Supplier which the Supplier can demonstrate were properly incurred prior to the date of termination. In no event shall such reimbursement include anticipated profits for undelivered Goods or unperformed Services.

15.3 With cause

The Purchaser may terminate the Purchase Order immediately, in whole or in part, if the Supplier:

- (a) fails to make delivery of the Goods or perform the Services within the time specified in that Purchase Order;
- (b) fails to replace defective Goods or Services in accordance with these Conditions;
- (c) fails to perform any other term specified in the Agreement; or
- (d) becomes insolvent; files or has filed against it a petition in bankruptcy or an application for winding up; has a receiver, receiver and manager, administrator or liquidator appointed; or makes an assignment for the benefit or creditors.

16. THE PURCHASER'S PROPERTY

All drawings, Specifications, artwork, data, material, supplies, equipment, tooling, dies, moulds, fixtures and patterns furnished or paid for by the Purchaser, shall be the Purchaser's exclusive property, and shall be used by the Supplier only in performance of the Purchase Order. Such property, while in the Supplier's custody and control, shall be held at the Supplier's sole risk and, upon the Purchaser's request, shall be returned to the Purchaser in good condition, normal wear and tear accepted.

17. SUBCONTRACTING, ASSIGNMENT AND ADVERTISING

The Supplier must obtain the Purchaser's written consent before it:

- (a) subcontracts any obligation under the Agreement; or
- (b) assigns, charges or encumbers this Agreement or any rights under this Agreement; or
- (c) advertises or publishes anything concerning the Agreement.

18. INSURANCE

During the period of the Agreement, through to and after the Purchaser takes delivery and risk (where applicable) of the Goods and/or Services, the Supplier must, at its own expense:

- (a) maintain appropriate insurance in relation to public liability and product liability with a reputable insurer for at least \$20,000,000;

- (b) maintain appropriate insurance in relation to professional indemnity with a reputable insurer for at least \$5,000,000;
- (c) maintain workers' compensation in accordance with applicable legislation; and
- (d) insure the Goods with a reputable insurer for their full replacement cost.

The Supplier must, upon the Purchaser's request, provide the Purchaser with certificates of currency with respect to these insurance policies and noting the interests of the Purchaser.

19. RECOVERY OF MONIES

Any debt due from or moneys payable by the Supplier to the Purchaser whether under this Agreement or otherwise may be deducted by the Purchaser from any moneys due or to become due to the Supplier under this Agreement. The Purchaser is entitled to recover from the Supplier any balance that remains owing after deduction.

20. DISPUTE

- (a) Without affecting the rights of the Purchaser or of the Supplier at law or under any relevant or applicable statute, any dispute in connection with this Agreement must be resolved, at first instance, by discussion between a Representative nominated by the Purchaser and a Representative nominated by the Supplier.
- (b) If the Representatives fail to resolve the dispute, the dispute shall be referred to mediation. The mediator and the process will be agreed upon by the Supplier and the Purchaser.
- (c) Notwithstanding the existence of a dispute, the Supplier must continue to perform its obligations under this Agreement.

21. RELATIONSHIP

The Supplier is an independent contractor of the Purchaser. Nothing in these Conditions constitute any other type of relationship between the parties.

22. WAIVER

A waiver by either party:

- (a) in respect of a breach of a provision of the Agreement by the other party will not constitute a waiver in respect of any other breach of that array other provision; and
- (b) is not effective unless it is in writing, and only relates to the specific purpose for which it is given.

23. NO LIMITATION OF STATUTORY RIGHTS AND SEVERANCE

Nothing in this Agreement has the effect of or is taken to have the effect of excluding, restricting or modifying the provisions of any relevant or applicable statute. If it is determined that a word, phrase, sentence, paragraph or clause is unenforceable, illegal or void, then it is severed and the other provisions of this Agreement remain operative.

24. VARIATIONS

24.1 Variation

The Purchaser may, prior to delivery of Goods or performance of the Services, direct the Supplier in writing to add, omit, amend, supplement or replace any Purchase Order Specification or these Conditions. The changes then apply to any Agreement as the Purchaser notifies after the date of change.

24.2 Price and Date for Delivery

Where a direction for a variation would result in variation to the Price or Date for Delivery, the Supplier must immediately advise the Purchaser in writing of the varied Price (which must be determined by the same method of pricing for the provision of the original Goods and/or Services) and varied Date for Delivery. A variation to the Price or a variation to the Date for Delivery is not effective unless it is communicated to the Purchaser in writing and signed by the Purchaser.

24.3 Agreement

If, in the opinion of the Supplier, a direction for a variation is likely to prevent the Supplier from meeting its obligations under the Agreement, it must immediately notify the Purchaser. The Purchaser will decide whether the variation will take effect and notify the Supplier of its decision in writing and may, in its discretion, modify the Agreement to the extent required to enable the Supplier to deliver the variation.

25. PRIVACY

The Purchaser collects Personal Information for the purposes of performing its obligations under this Agreement.

By executing this Agreement the Supplier consents to the Purchaser using the

Personal Information to perform its obligations under this Agreement. The Purchaser will use that Personal Information in accordance with its Privacy Policy available at <http://www.penskeps.co.nz/corporate/privacy-policy/> (**Purchaser's Privacy Policy**).

The Supplier may contact the Purchaser to gain access to and request correction or amendment to the Supplier's Personal Information.

The Purchaser may disclose the Supplier's Personal Information to:

- (a) third parties that are associated or connected with giving effect to the transaction contemplated under the Agreement and the performance of the Supplier's obligations under this Agreement; and
- (b) any Related Entity (within the meaning of section 2(3) of the Companies Act 1993) which may involve disclosure of Supplier's Personal Information outside of New Zealand.

Where the Purchaser has been requested to extend credit to the Supplier, the Supplier:

- (c) agrees that the Purchaser may disclose the Supplier's Personal Information to investigate the credit worthiness of the Supplier, including (without limitation), conducting a credit check at any time, making enquiries with persons nominated by the Supplier as trade references, its bankers or any other credit providers (**Information Sources**);
- (d) authorises the Information Sources to disclose to the Purchaser all information concerning the Supplier which is within the possession of the Information Sources, and which is requested by the Purchaser; and
- (e) consents to the Purchaser giving to, and obtaining from, the Information Sources, Personal Information about the Supplier and information about the commercial credit arrangements of the Supplier for the purpose of collecting overdue payments or for notifying other credit providers of default by the Supplier.

The Supplier must not collect, use or disclose Personal Information of the Purchaser's employees, officers, representatives, agents, contractors, dealers or customers in a manner inconsistent with the requirements of the *Privacy Act 1993 (New Zealand)* and must where possible adhere to the general principles as set out in the Purchaser's Privacy Policy. The Supplier must indemnify the Purchaser for the Supplier's failure to comply with the requirements in this clause.

26. GOVERNING LAW

The law of New Zealand governs this Agreement. The parties irrevocably submit to the non exclusive jurisdiction of the courts of New Zealand.

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