

**1. Definitions**

- 1.1 “MSBE” shall mean Murphys Spray and Blast Equipment, its successors and assigns or any person acting on behalf of and with the authority of Murphys Spray and Blast Equipment.
- 1.2 “Customer” shall mean the Customer (or any person acting on behalf of and with the authority of the Customer) as described on any quotation, work authorisation or other form as provided by MSBE to the Customer.
- 1.3 “Guarantor” means that person (or persons) who agrees to be liable for the debts of the Customer on a principal debtor basis.
- 1.4 “Goods” shall mean all Goods supplied by MSBE to the Customer (and where the context so permits shall include any supply of Services and Equipment as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by MSBE to the Customer.
- 1.5 “Services” shall mean all Services supplied by MSBE to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.6 “Equipment” shall mean all Equipment including any accessories supplied on hire by MSBE to the Customer (and where the context so permits shall include any supply of services).
- 1.7 “Price” shall mean the Price payable for the Goods as agreed between MSBE and the Customer in accordance with clause 4 of this contract.

**2. The Competition and Consumer Act 2010 (“CCA”) and Fair Trading Acts (“FTA”)**

- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the CCA or the FTA in each of the States and Territories of Australia (including any substitute to those Acts or re-enactment thereof), except to the extent permitted by those Acts where applicable.
- 2.2 Where the Customer buys Goods as a consumer these terms and conditions shall be subject to any laws or legislation governing the rights of consumers and shall not affect the consumer’s statutory rights.

**3. Acceptance**

- 3.1 Any instructions received by MSBE from the Customer for the supply of Goods and/or the Customer’s acceptance of Goods supplied by MSBE shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Customer the terms and conditions are binding and can only be amended with the written consent of MSBE.
- 3.4 The Customer shall give MSBE not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer or any change in the Customer’s name and/or any other change in the Customer’s details (including but not limited to, changes in the Customer’s address, facsimile number, or business practice). The Customer shall be liable for any loss incurred by MSBE as a result of the Customer’s failure to comply with this clause.
- 3.5 Goods are supplied by MSBE only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Customer’s order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.

**4. Price and Payment**

- 4.1 At MSBE’s sole discretion the Price shall be either:
  - (a) as indicated on invoices provided by MSBE to the Customer in respect of Goods supplied; or
  - (b) MSBE’s current price at the date of delivery of the Goods according to MSBE’s current Price Schedule; or
  - (c) MSBE’s quoted Price (subject to clause 4.2) which shall be binding upon MSBE provided that the Customer shall accept MSBE’s quotation in writing within thirty (30) days.
- 4.2 MSBE reserves the right to change the Price in the event of a variation to MSBE’s quotation. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation as a result of additional works required due to unforeseen circumstances or as a result of increases to MSBE in the cost of materials and labour) will be charged for on the basis of MSBE’s quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 4.3 At MSBE’s sole discretion a non refundable deposit may be required.
- 4.4 At MSBE’s sole discretion:
  - (a) payment shall be due on delivery of the Goods; or
  - (b) payment for approved Customers shall be made by instalments in accordance with MSBE’s payment schedule; or
  - (c) payment for approved Customers shall be due thirty (30) days following the end of the month in which the invoice is raised.
- 4.5 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 4.6 Payment will be made by cash, or by cheque, or by bank cheque, or by credit card (plus a surcharge of up to three percent (3%) of the Price), or by direct credit, or by any other method as agreed to between the Customer and MSBE.
- 4.7 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

**5. Delivery of Goods**

- 5.1 At MSBE's sole discretion delivery of the Goods shall take place when:
- (a) the Customer takes possession of the Goods at MSBE's address; or
  - (b) the Customer takes possession of the Goods at the Customer's nominated address (in the event that the Goods are delivered by MSBE or MSBE's nominated carrier); or
  - (c) the Customer's nominated carrier takes possession of the Goods in which event the carrier shall be deemed to be the Customer's agent; or
  - (d) as otherwise quoted by MSBE.
- 5.2 At MSBE's sole discretion the costs of delivery may be in addition to the Price.
- 5.3 The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Customer is unable to take delivery of the Goods as arranged then MSBE shall be entitled to charge a reasonable fee for redelivery.
- 5.4 Delivery of the Goods to a third party nominated by the Customer is deemed to be delivery to the Customer for the purposes of this agreement.
- 5.5 MSBE may deliver the Goods by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 5.6 The failure of MSBE to deliver shall not entitle either party to treat this contract as repudiated.
- 5.7 MSBE shall not be liable for any loss or damage whatsoever due to failure by MSBE to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of MSBE.

**6. Risk**

- 6.1 If MSBE retains ownership of the Goods nonetheless, all risk for the Goods passes to the Customer on delivery.
- 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, MSBE is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by MSBE is sufficient evidence of MSBE's rights to receive the insurance proceeds without the need for any person dealing with MSBE to make further enquiries.
- 6.3 Where the Customer expressly requests MSBE to leave Goods outside MSBE's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Customer's sole risk and it shall be the Customer's responsibility to ensure the Goods are insured adequately or at all.
- 6.4 The Customer shall be responsible for the safe and proper operation of the Goods and/or Equipment, and agrees to indemnify MSBE against any loss, damage, injury or damage that may arise as a result of operating the Goods and/or Equipment.

**7. Title**

- 7.1 MSBE and the Customer agree that ownership of the Goods shall not pass until:
- (a) the Customer has paid MSBE all amounts owing for the particular Goods; and
  - (b) the Customer has met all other obligations due by the Customer to MSBE in respect of all contracts between MSBE and the Customer.
- 7.2 Receipt by MSBE of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then MSBE's ownership or rights in respect of the Goods shall continue.
- 7.3 It is further agreed that:
- (a) where practicable the Goods shall be kept separate and identifiable until MSBE shall have received payment and all other obligations of the Customer are met; and
  - (b) until such time as ownership of the Goods shall pass from MSBE to the Customer MSBE may give notice in writing to the Customer to return the Goods or any of them to MSBE. Upon such notice the rights of the Customer to obtain ownership or any other interest in the Goods shall cease; and
  - (c) MSBE shall have the right of stopping the Goods in transit whether or not delivery has been made; and
  - (d) if the Customer fails to return the Goods to MSBE then MSBE or MSBE's agent may (as the invitee of the Customer) enter upon and into land and premises owned, occupied or used by the Customer, or any premises where the Goods are situated and take possession of the Goods; and
  - (e) the Customer is only a bailee of the Goods and until such time as MSBE has received payment in full for the Goods then the Customer shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Customer owes to MSBE for the Goods, on trust for MSBE; and
  - (f) the Customer shall not deal with the money of MSBE in any way which may be adverse to MSBE; and
  - (g) the Customer shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of MSBE; and
  - (h) MSBE can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Customer; and
  - (i) until such time that ownership in the Goods passes to the Customer, if the Goods are converted into other products, the parties agree that MSBE will be the owner of the end products.

**8. Equipment Hire**

- 8.1 The Equipment shall at all times remain the property of MSBE and is returnable on demand by MSBE. In the event that the Equipment is not returned to MSBE in the condition in which it was delivered MSBE retains the right to charge the Customer the full cost of repairing the Equipment. In the event Equipment is not returned at all MSBE shall have right to charge the Customer the full cost of replacing the Equipment.

- 8.2 The Customer shall;
- (a) keep the Equipment in their own possession and control and shall not assign the benefit of the Equipment nor be entitled to lien over the Equipment.
  - (b) not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment.
  - (c) keep the Equipment, complete with all parts and accessories, clean and in good order as delivered, and shall comply with any maintenance schedule as advised by MSBE to the Customer.
- 8.3 The Customer accepts full responsibility for the safekeeping of the Equipment and the Customer agrees to insure, or self insure, MSBE's interest in the Equipment and agrees to indemnify MSBE against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property or persons arising out of the use of the Equipment. Further the Customer will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.

## 9. Personal Property Securities Act 2009 ("PPSA")

- 9.1 In this clause:
- (a) financing statement has the meaning given to it by the PPSA;
  - (b) financing change statement has the meaning given to it by the PPSA;
  - (c) security agreement means the security agreement under the PPSA created between the Customer and MSBE by these terms and conditions; and
  - (d) security interest has the meaning given to it by the PPSA.
- 9.2 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that these terms and conditions:
- (a) constitute a security agreement for the purposes of the PPSA; and
  - (b) create a security interest in:
    - (i) all Goods previously supplied by MSBE to the Customer (if any);
    - (ii) all Goods that will be supplied in the future by MSBE to the Customer.
- 9.3 The Customer undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which MSBE may reasonably require to:
    - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
    - (ii) register any other document required to be registered by the PPSA; or
    - (iii) correct a defect in a statement referred to in clause 9.3(a)(i) or 9.3(a)(ii);
  - (b) indemnify, and upon demand reimburse, MSBE for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
  - (c) not register a financing change statement in respect of a security interest without the prior written consent of MSBE;
  - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods in favour of a third party without the prior written consent of MSBE; and
  - (e) immediately advise MSBE of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 9.4 MSBE and the Customer agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 9.5 The Customer hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 9.6 The Customer waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 9.7 Unless otherwise agreed to in writing by MSBE, the Customer waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 9.8 The Customer shall unconditionally ratify any actions taken by MSBE under clauses 9.3 to 9.5.

## 10. Security and Charge

- 10.1 Despite anything to the contrary contained herein or any other rights which MSBE may have howsoever:
- (a) where the Customer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Customer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to MSBE or MSBE's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Customer and/or the Guarantor acknowledge and agree that MSBE (or MSBE's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
  - (b) should MSBE elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify MSBE from and against all MSBE's costs and disbursements including legal costs on a solicitor and own client basis.

(c) the Customer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint MSBE or MSBE's nominee as the Customer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 10.1.

## 11. Defects

11.1 The Customer shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify MSBE of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford MSBE an opportunity to inspect the Goods within a reasonable time following delivery if the Customer believes the Goods are defective in any way. If the Customer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which MSBE has agreed in writing that the Customer is entitled to reject, MSBE's liability is limited to either (at MSBE's discretion) replacing the Goods or repairing the Goods except where the Customer has acquired Goods as a consumer within the meaning of the Competition and Consumer Act 2010 (Cwlth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Goods, or repair of the Goods, or replacement of the Goods.

## 12. Returns

12.1 Returns will only be accepted provided that:

- (a) the Customer has complied with the provisions of clause 11.1; and
- (b) MSBE has agreed in writing to accept the return of the Goods; and
- (c) the Goods are returned at the Customer's cost within seven (7) days of the delivery date; and
- (d) MSBE will not be liable for Goods which have not been stored or used in a proper manner; and
- (e) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.

12.2 MSBE may (at their sole discretion) accept the return of Goods for credit but this may incur a restocking fee of up to twenty percent (20%) of the value of the returned Goods plus any freight costs.

12.3 Goods ordered/procured from a third party supplier by MSBE specifically for the Customer shall, under no circumstances, be accepted for credit or return.

## 13. Warranty

13.1 For Goods not manufactured by MSBE, the warranty shall be the current warranty provided by the manufacturer of the Goods. MSBE shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.

13.2 To the extent permitted by statute, no warranty is given by MSBE as to the quality or suitability of the Goods for any purpose and any implied warranty, is expressly excluded. MSBE shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

13.3 In the case of second hand Goods, the Customer acknowledges that he has had full opportunity to inspect the same and that he accepts the same with all faults and that no warranty is given by MSBE as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. MSBE shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

## 14. Default and Consequences of Default

14.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at MSBE's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

14.2 In the event that the Customer's payment is dishonoured for any reason the Customer shall be liable for any dishonour fees incurred by MSBE.

14.3 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify MSBE from and against all costs and disbursements incurred by MSBE in pursuing the debt including legal costs on a solicitor and own client basis and MSBE's collection agency costs.

14.4 Without prejudice to any other remedies MSBE may have, if at any time the Customer is in breach of any obligation (including those relating to payment) MSBE may suspend or terminate the supply of Goods to the Customer and any of its other obligations under the terms and conditions. MSBE will not be liable to the Customer for any loss or damage the Customer suffers because MSBE has exercised its rights under this clause.

14.5 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.

14.6 Without prejudice to MSBE's other remedies at law MSBE shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to MSBE shall, whether or not due for payment, become immediately payable in the event that:

- (a) any money payable to MSBE becomes overdue, or in MSBE's opinion the Customer will be unable to meet its payments as they fall due; or
- (b) the Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

## 15. Cancellation

- 15.1 MSBE may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Customer. On giving such notice MSBE shall repay to the Customer any sums paid in respect of the Price. MSBE shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 15.2 In the event that the Customer cancels delivery of Goods the Customer shall be liable for any loss incurred by MSBE (including, but not limited to, any loss of profits) up to the time of cancellation. In the event of cancellation by the Customer MSBE may retain the Customer's non refundable deposit to cover the loss incurred by MSBE as a result of the cancellation.
- 15.3 Where the Customer has entered into a Special Order Contract, which requires MSBE to order Goods from a third party supplier specifically for the Customer, the Customer acknowledges and accepts that they may not cancel the contract. If for any reason the Customer does not accept delivery of the Goods under Special Order Contract, the Customer shall still be liable for the pull Price of the Goods under the contract.

## 16. Privacy Act 1988

- 16.1 The Customer and/or the Guarantor/s (herein referred to as the Customer) agree for MSBE to obtain from a credit reporting agency a credit report containing personal credit information about the Customer in relation to credit provided by MSBE.
- 16.2 The Customer agrees that MSBE may exchange information about the Customer with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by the Customer; and/or
  - (b) to notify other credit providers of a default by the Customer; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
  - (d) to assess the creditworthiness of the Customer.
- The Customer understands that the information exchanged can include anything about the Customer's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
- 16.3 The Customer consents to MSBE being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 16.4 The Customer agrees that personal credit information provided may be used and retained by MSBE for the following purposes (and for other purposes as shall be agreed between the Customer and MSBE or required by law from time to time):
- (a) the provision of Goods; and/or
  - (b) the marketing of Goods by MSBE, its agents or distributors; and/or
  - (c) analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to the provision of Goods; and/or
  - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
  - (e) enabling the daily operation of Customer's account and/or the collection of amounts outstanding in the Customer's account in relation to the Goods.
- 16.5 MSBE may give information about the Customer to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Customer;
  - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.
- 16.6 The information given to the credit reporting agency may include:
- (a) personal particulars (the Customer's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number;
  - (b) details concerning the Customer's application for credit or commercial credit and the amount requested;
  - (c) advice that MSBE is a current credit provider to the Customer;
  - (d) advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
  - (e) that the Customer's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
  - (f) information that, in the opinion of MSBE, the Customer has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Customers credit obligations);
  - (g) advice that cheques drawn by the Customer for one hundred dollars (\$100) or more, have been dishonoured more than once;
  - (h) that credit provided to the Customer by MSBE has been paid or otherwise discharged.

## 17. Unpaid MSBE's Rights

- 17.1 Where the Customer has left any item with MSBE for repair, modification, exchange or for MSBE to perform any other Service in relation to the item and MSBE has not received or been tendered the whole of the Price, or the payment has been dishonoured, MSBE shall have:
- (a) a lien on the item;
  - (b) the right to retain the item for the Price while MSBE is in possession of the item;
  - (c) a right to sell the item in accordance with the Disposal of Uncollected Goods Act 1970.
- 17.2 The lien of MSBE shall continue despite the commencement of proceedings, or judgment for the Price having been obtained.

**18. General**

- 18.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 18.2 If any provisions of these terms and conditions are inconsistent with the PPSA, the PPSA shall prevail to the extent of that inconsistency.
- 18.3 These terms and conditions and any contract to which they apply shall be governed by the laws of the State in which the sale is made and are subject to the jurisdiction of the courts of that State.
- 18.4 MSBE shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by MSBE of these terms and conditions.
- 18.5 In the event of any breach of this contract by MSBE the remedies of the Customer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 18.6 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by MSBE nor to withhold payment of any invoice because part of that invoice is in dispute.
- 18.7 MSBE may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 18.8 The Customer agrees that MSBE may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which MSBE notifies the Customer of such change. The Customer shall be under no obligation to accept such changes except where MSBE supplies further Goods to the Customer and the Customer accepts such Goods.
- 18.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 18.10 The failure by MSBE to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect MSBE's right to subsequently enforce that provision.