**PURCHASE ORDER**

**TERMS AND CONDITIONS**

1. **Terms and Conditions:** The terms and conditions set forth in this Order, exhibits and accompanying documents (collectively, the “Purchase Order”) are the exclusive terms and conditions for the delivery of the specified goods and/or performance of the specified services and/or work by Vendor for the benefit of the Whitney Museum of American Art (“Whitney” or “Buyer”). Performance by Vendor under the Purchase Order must be in accordance with all of the stated terms and conditions, and no change or alteration may be made to any of them without the prior written approval of a duly authorized representative of Whitney.
2. **Changes/Amendments:** Whitney shall have the right at any time, by written notice, to make any changes it deems necessary, including, but not limited to, changes in specifications, design, delivery, testing methods, packing or destination. If any such required changes cause an increase or decrease in the cost of or the time required for performance, an equitable adjustment shall be made in the contract price or delivery schedule, or both. Any claim by the Vendor for adjustment under this clause shall be deemed waived unless asserted in writing within seven (7) days from receipt by the Vendor of notice of change. Price increases, extensions of time for delivery and change in quantity shall not be binding on Whitney unless evidenced in writing by Whitney. In addition to the foregoing, this Purchase Order may be changed or modified only by a written instrument signed by Whitney's authorized duly representative. The failure of Whitney to insist, in any one or more instances, upon performance of any of the terms, covenants or conditions of this Purchase Order, or to otherwise exercise any right or remedy under this Purchase Order or otherwise, will not be construed as a waiver or relinquishment of the future performance of any such term, covenant or condition, or of the future exercise of such right or remedy, but the obligation of Vendor with respect to that future performance will continue in full force and effect.
3. **Cancellation:** In addition to all of Whitney’s other legal rights and remedies, Whitney will have the right, at its sole option, to cancel this Purchase Order and/or to return at Vendor's expense and risk, all or any part of the goods covered by this Purchase Order, in the event that any of the specified goods, materials, services orwork (a) are defective or not marketable or merchantable; (b) are not fit for the purpose for which purchased; (c) do not conform to (i) the sample, if any, from which such goods are ordered, or (ii) the specifications contained in this Purchase Order; (d) if no sample was utilized, do not conform to goods, materials, service or work previously supplied to and accepted by Whitney; (e) are in excess of the quantity specified in this Purchase Order; or (f) otherwise fail to comply with (i) Whitney's shipping or billing instructions, or (ii) any of the other terms or provisions of this Purchase Order. Cure of any non-conforming tender by Vendor may only be made with the prior written consent of Whitney. Acceptance of any part of the specified goods, materials, services or work will not bind Owner to accept future shipments or performance, nor deprive it of the right to return any goods previously accepted by Whitney. Whitney will have the right to cancel all or any part of the undelivered or unperformed portion of this Vendor Purchase Order if Vendor does not make deliveries or otherwise perform as specified in the delivery schedule or if Vendor breaches any of the other terms of this Purchase Order, including (without limitation) any express or implied warranties of Vendor, or if Vendor becomes insolvent or a petition in bankruptcy is filed by or against Vendor. Whitney may also cancel this Purchase Order in whole or in part at any time before it is accepted (or deemed accepted) by Vendor. This right of cancellation is in addition to and not in place of any other rights or remedies that Whitney may have in law or equity. The performance of any services or work under this Purchase Order may also be terminated, in whole or in part, from time to time, by Whitney in accordance with this section. This right of termination is in addition to and not in place of other or additional rights and remedies of Whitney set forth in this Purchase Order or otherwise.
4. **Packing and Shipping:** The goods purchased hereunder must be suitably packed and prepared for shipment to secure the lowest transportation rates or appropriately packed to comply with any specific transportation specification of Whitney, and in all cases, to comply with carriers’ regulations. Unless the Purchase Order states otherwise, all goods shall be shipped FOB the “Ship to” location designated on the Purchase Order. All charges for packing, crating, and transportation are included in the price for the goods set forth herein and will be paid by Vendor except as otherwise specifically stated on this Purchase Order. Whitney shall not be obligated to accept any shipment in excess of the ordered quantity and any excess or advance shipments may be returned to Vendor at Vendor’s expense.
5. **Time; Delivery; Acceptance:** Time of delivery and/or performance by Vendor is of the essence under this Purchase Order. Delivery and performance will be strictly in accordance with Whitney’s delivery or performance schedule. Whitney reserves the right to refuse any goods or services and to cancel all or ay part thereof if Vendor fails to deliver all or any part of any goods or perform all or any part of any services in accordance with the terms specified herein. If Vendor's deliveries or performance fail to meet the delivery schedule, Whitney, without limiting any of its other rights or remedies, may direct expedited routing or performance by one or more third parties and the difference between the cost of that expedited routing or performance and this Purchase Order's routing or performance costs will be paid by Vendor upon Whitney’s demand. No deliveries may be made in advance of Whitney's delivery schedule as provided in this Purchase Order. Acceptance of any part of the order shall not bind Whitney to accept future shipments or performance of services, nor deprive it of the right to return goods already accepted and shall not be deemed to be a waiver of Whitney’s right to cancel or return all or any part of the goods because of failure to conform to the order or by reason of defects, latent or patent, or other breach of warranty, or to make any claim for damages, including manufacturing cost or loss of profits, injury to reputation or other special, consequential and incidental damages. Such rights shall be in addition to any other remedies provided hereunder or provided by law or otherwise. Delivery shall not be deemed complete until goods have been actually received and accepted by Whitney, notwithstanding delivery to any carrier, or until any services have been performed, received and accepted.
6. **Prices:** Prices include all amounts payable by Whitney and no additional charges of any kind (including, without limitation, charges for transportation, delivery, boxing, packing or other extras) will be payable by Whitney unless specifically set forth in this Purchase Order. Vendor will submit all invoice(s) to Owner in accordance with this Purchase Order or as may be designated by Whitney.
7. **Payment; Inspection; Acceptance:** Shipments of any goods by Vendor will not be accepted by Whitney, nor will any invoices for any of them be paid, if they are not covered by a duly authorized and acknowledged Purchase Order invoice. Discounts will be counted from the date of receipt of Vendor’s shipment or the date of invoice, whichever is later. Payment of such invoice shall be subject to a pro rata adjustment by Whitney for any shortage in the goods shipped or defective goods rejected by Whitney or for failure to perform services or defective performance thereof. Delivery of any specified goods will not be deemed to be complete until those goods have actually been received, and accepted in writing by Whitney, and Vendor will bear exclusively all risk of loss or damage to those goods while in transit to and until accepted by Whitney in writing. Acceptance of goods received after the specified delivery date will not constitute a waiver of Whitney's right to recover damages for late delivery. Any and all goods delivered by Vendor under this Purchase Order must be free of all liens, claims and encumbrances of any nature and Vendor agrees that no mechanic’s lien or other claim shall be filed or maintained by Seller, or by any subcontractor, materialman, laborer or any other person, whatsoever, for or on account of any work done or goods furnished under this Purchase Order. All goods, services and work will be subject to Whitney’s right of inspection and rejection before or following delivery and/or performance by Vendor. Payment for goods, services or work under this Purchase Order prior to inspection by Whitney will not constitute acceptance by Whitney and will be without limitation of any claims Whitney may have against Vendor. Acceptance of all or any part of the goods, services or work by Vendor will not be deemed to be a waiver of Whitney’s right to cancel or to return all or any portion of the goods or to reject any services or work, or the right of Whitney to make a claim for any damages, by reason of any defects, breach of warranty, or breach or non-compliance with any of the terms or provisions of this Purchase Order. The prices stated in this Purchase Order will be effective until full completion of (a) the delivery and acceptance of the specified goods, services, and work and/or (b) performance of the specified services and/or work. Vendor agrees to give Whitney the benefit of any reduction in the price of any work, service or goods covered by this Purchase Order.
8. **Warranties; Indemnification:** In addition to and without limiting any of Vendor’s other warranties, express or implied, Vendor expressly warrants to Whitney that: (a) all goods delivered pursuant to this Purchase Order will be new, unless otherwise specified, and that all goods, services and work covered by this Purchase Order conform and will conform to the specified description(s) and to the sample(s) from which, or specifications for which, this Purchase Order was placed; (b) the goods, services and work are and will be fit for the purposes for which purchased, free from defects in materials and workmanship, and safe for their intended use; (c) no goods delivered, or services or work performed, under this Purchase Order infringe or will infringe upon any patent, copyright, trade secret or other proprietary right of any third party; (d) all goods, services and work covered by this Purchase Order will have been produced or manufactured in accordance with the requirements of the Fair Labor Standards Act, as amended, and all other applicable federal, state and municipal laws, rules and regulations. All of Vendor's warranties, both express and implied, also constitute conditions of this Purchase Order and will survive inspection, acceptance and payment by Whitney. Vendor will indemnify, defend and hold Whitney harmless from and against any and all claims, including without limitation special, consequential, and incidental damages and defense costs, by reason of: (i) any breach or claimed breach of any express or implied warranty of Vendor; (ii) any other breach by Vendor of any term or provision of this Purchase Order; (iii) any claims for losses, damages or injuries (including death resulting therefrom) to all persons, whether employees of Vendor or Whitney or otherwise, and to all property, including, without limitation, property of Whitney or loss of use thereof, caused by, resulting from, arising out of or occurring in connection with the performance of this Purchase Order; (iv) any claims, suits, actions and proceedings of actual or alleged infringements of any letter, patent, registered or industrial design, trademark or trade name, trade secret, copyright or other protected right in any country resulting from any sale, use or manufacture of any goods delivered hereunder, or (iv) in connection with Whitney's enforcement of any right or remedy under this Purchase Order or applicable law. Vendor shall pay and discharge all judgments, decrees, and awards rendered with respect to the foregoing or by reason thereof and bear all expenses and legal fees, including Whitney’s, associated herewith. Whitney reserves the right to be represented in any such action by its own counsel.
9. **Quality of Work; Compliance with Law; Insurance:** Vendor shall, at its own cost and expense, perform the Work covered by this Purchase Order in a first class and workmanlike manner by qualified and efficient workers who shall not cause labor conflicts with any workers employed by Whitney or others working at Whitney’s facilities. The work shall be performed in strict conformity with the strictest quality standards mandated and/or recommended by all generally recognized organizations establishing quality standards for work of the type to be performed hereunder. Vendor will, at its sole cost and expense, conduct all of the transactions covered by this Purchase Order in accordance with all applicable federal, state and local laws, rules and regulations; will obtain and furnish to Whitney any and all permits, licenses, approvals, certificates and other documents required by Whitney or otherwise required by applicable law; and will comply with any and all standards, statues, rules, ordinances, laws, regulations, codes in effect or to be enacted by the federal, state or local authorities in all respects with regard to this Purchase Order. In addition, Vendor shall comply, and shall cause its directors, officers, employees, agents and subcontractors to comply, with all pertinent rules and regulations of Whitney that are brought to Vendor's attention and with the directions and instructions given by Whitney's authorized personnel. Vendor will maintain the following insurance and submit certificates to Whitney evidencing same prior to commencing any services or work: (a) Commercial General Liability on an occurrence basis, for bodily injury, property damage, personal injury and advertising injury for Products Liability, Completed Operations, Contractual Liability and Explosion, Collapse and Underground Hazards Coverage with limits of $1 million for each occurrence; Property Insurance on Vendor’s property, including a waiver of the insurer’s right of subrogation in favor of Whitney; Automobile Liability in the amount of $1 million combined single limit per accident for bodily injury and property damage; Workers’ Compensation as required by law, including Employer’s Liability coverage with sufficient limits to meet Umbrella Liability underlying insurance requirements; Disability Benefits Insurance in accordance with statutory limit; Umbrella Liability in the amount of $10 million each occurrence, $10 million in the aggregate. Vendor shall file with Whitney certificates of insurance evidencing such insurance, signed by an authorized representative of its insurance companies naming Whitney as an additional insured and stating that in the event of any change in or cancellation of the coverage, at least 10 days prior written notice will be given to Whitney. All such insurance shall be primary to any insurance carried by Whitney.
10. **Title:** Whitney shall have title to all drawings, manuscripts and specifications furnished by it to Vendor and intended for use in connection with this Purchase Order. Vendor shall use such drawings, manuscripts and specification only in connection with this Purchase Order, and shall not disclose such drawings, manuscripts and specifications to any person, firm or corporation other than Whitney’s or Vendor’s employees and subcontractors. Vendor shall, upon Whitney’s request, or upon completion of this Purchase Order, promptly return all drawings, manuscripts and specifications to Whitney. All material, including tools, furnished or specifically paid for by Whitney, shall be the property of Whitney, shall be subject to removal at any time without additional cost upon demand by Whitney, shall be sued only in filling orders from Whitney, shall be kept separate from other materials or tools and shall be clearly identified as the property of Whitney. Vendor assumes all liability for loss or damage, with the exception of normal wear or tear, and agrees to supply detailed statements of inventory at monthly intervals or as otherwise agreed upon.
11. **Taxes:** Whitney is tax exempt. Vendor shall not invoice, and Whitney shall not pay, any federal, state or local taxes. Any taxes, tolls, import charges, and other governmental assessments shall be deemed included in the purchase price of the goods, and Whitney shall have no liability to pay Vendor any amount in excess of the purchase price specified herein.
12. **Governing Law; Jurisdiction; Venue:** **THIS PURCHASE ORDER WILL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAWS OF THE STATE OF NEW YORK WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW OR CHOICE OF LAW**. Any and all actions or proceedings relating to the subject matter of this Purchase Order will be maintained by the courts of New York or the federal district court sitting in New York City, which courts will have exclusive jurisdiction for such purposes. Whitney may serve any summons or process in any such proceeding on Vendor in the manner for giving notices described below. **VENDOR AND Whitney WAIVE THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING RELATING TO THE PURCHASE ORDER.**
13. **Assignment:** This Purchase Order will inure to the benefit of Whitney’s successors and assigns. None of the goods, services or work to be performed under this Purchase Order may be assigned by Vendor, nor may Vendor subcontract for any goods, services or work required by this Purchase Order without Whitney's express prior written consent. Any such attempted assignment or subcontracting without Whitney's prior written consent will be void and ineffective for all purposes. In the event Whitney consents to such assignment or subcontracting, Vendor will remain primarily responsible for any and all services or work performed, or goods delivered, by such assignee or subcontractor, as if performed or delivered by Vendor.
14. **Confidentiality:** Vendor covenants on behalf of itself and its directors, officers, employees, agents and subcontractors to hold in confidence and not disclose, distribute, sell, copy, share or otherwise use any information obtained by Vendor during performance of this Purchase Order, except as may be authorized by Whitney in writing. Upon performance of this Purchase Order, Vendor shall return to Whitney all confidential information and all records or documents received from Whitney, including any copies of such records or documents.
15. **Promotion:** Vendor shall not use Whitney’s name or any of its personnel in advertising or other promotional materials without the prior written consent of Whitney.
16. **Validity:** If any one or more provisions of this Purchase Order are held to be invalid for any reason, the remaining provisions of this Purchase Order will remain in full force and effect.
17. **Survival:** The provisions of Paragraphs 8, 14, 15 and 16 shall continue survive the performance by Vendor of this Purchase Order.
18. **Notices:** All notices to be given hereunder shall be in writing and shall be delivered by facsimile, overnight carrier or by United States mails to the address designated on the face of this Purchase Order.
19. **Entire Agreement:** This Purchase Order constitutes the entire agreement between Vendor and Whitney regarding the subject matter of this Purchase Order and supersedes any writing signed by Whitney's authorized representative, all other representations, agreements, proposals, promises, trade customs and practices and understandings, oral or otherwise, between Vendor and Whitney with respect to the matters contained herein, as well as any prior or subsequent price quotation, invoice, confirmation or other document furnished by Vendor. In the event of any inconsistency among or between the provisions of this Purchase Order, that provision which requires of the Vendor the greater duty, the greater standard of care or the greater quantity shall govern or, if said inconsistency relates to restrictive clauses, the more restrictive of these clauses, as applied to the Vendor, shall govern; provided that any difference between the requirements of the Drawings or Specifications or difference within the Drawings or the Specifications themselves shall be submitted to the Whitney for decision as to which of the conflicting requirements shall govern and the Vendor shall perform the work in accordance with such decision by the Whitney and without any change in the price.