
TERMS AND CONDITIONS OF SALE

The following terms and conditions (these "Terms and Conditions") shall govern the sale by XC Associates, Inc. ("XCA") of all goods (the "Products") to the buyer ("Buyer") identified in the document to which these Terms and Conditions are attached or referenced (such document, together with these

Terms and Conditions are collectively referred to as this "Contract"). To the extent any terms in the document to which these Terms and Conditions are attached or referenced are inconsistent with these Terms and Conditions; the terms set forth in this Terms and Conditions shall govern and control this Contract.

BUYER'S ACCEPTANCE OF THIS CONTRACT IS LIMITED TO ACCEPTANCE OF THE EXPRESS TERMS OF THIS CONTRACT. ANY PROPOSAL FOR ADDITIONAL OR DIFFERENT TERMS OR ANY ATTEMPT BY BUYER TO VARY IN ANY DEGREE ANY OF THE TERMS OF THIS CONTRACT IN BUYER'S ACCEPTANCE IS HEREBY OBJECTED TO AND REJECTED BY XCA. XCA HEREBY OBJECTS TO ANY TERMS PROPOSED BY BUYER IN BUYER'S ORDER, ACCEPTANCE OR ACKNOWLEDGMENT OF THAT ADD TO, VARY FROM, OR CONFLICT WITH THESE TERMS AND CONDITIONS. THIS CONTRACT CONSTITUTES THE FINAL, ENTIRE AGREEMENT PERTAINING TO THE SALE TO BUYER OF THE PRODUCTS DESCRIBED IN THIS CONTRACT AND ANY AND ALL PRIOR UNDERSTANDINGS, AGREEMENTS AND REPRESENTATIONS, ORAL OR WRITTEN, SHALL BE DEEMED SUPERSEDED BY AND MERGED INTO THIS CONTRACT. AGENTS AND SALESMEN OF XCA HAVE NO AUTHORITY TO MAKE ANY REPRESENTATIONS, WARRANTIES OR AGREEMENTS NOT INCLUDED IN THIS CONTRACT.

I. PRICES AND QUOTATIONS

The price for all Products sold by XCA to Buyer is subject to agreement between XCA and Buyer.

II. ORDER PROCEDURE

All orders are subject to written acceptance by XCA unless the order is submitted in response to a firm written offer from XCA. A Sales Order Acknowledgment executed by a duly authorized officer of XCA shall be deemed to be a firm written offer from XCA.

III. STANDARD CONDITIONS OF SALE APPLYING TO PRODUCTS

1. **GOVERNING LAW:** This Contract is deemed made in the [State of New York] and shall be interpreted under the Uniform Commercial Code and other laws of the [State of New York] in force at the date of such document, without regard to the conflicts of laws principles of such State and specifically excluding the provisions of the 1980 U.N Convention on Contracts for the International Sale of Goods.

2. **PRICE; TAXES:** The Products covered by this Contract shall be sold and invoiced at XCA's prices



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and charges as agreed to in this Contract or otherwise agreed to in writing by XCA and Buyer.

Prices

do not include sales, excise, use or other similar taxes now in effect or hereafter levied by reason of this

Contract or the transactions contemplated thereby, all of which shall be paid by Buyer. Such taxes shall be assessed by XCA against Buyer at the time of invoice unless XCA has received an exemption

certificate or other similar evidence in form satisfactory to XCA. XCA reserves the right to invoice such taxes at a later time if such exemption was or is asserted to be inapplicable or invalid.

3. PAYMENT TERMS; NO SETOFF:

A. Payment terms subject to credit approval are net 30 days from date of invoice, unless a different period is stated elsewhere in this Contract. Buyer shall be liable for the price of all Products substantially conforming to this Contract, notwithstanding that Buyer may not have accepted, or may have revoked acceptance of same. Buyer shall not be entitled to deduct, counterclaim or set off against the price of such Products or any other amount owing under this Contract any claim or alleged claim arising out of this Contract or any other transaction with XCA.

B. If payment is not received by the due date; a service charge will be added at the rate of one and one half percent (1 1/2%) per month (eighteen percent [18%] per year) or the maximum legal rate of interest, whichever is less, to unpaid invoices and other unpaid amounts from the due date thereof.

C. Any remittances received by a bank or other depository of XCA in connection with this Contract will be received by such bank or other depository solely as a clearing agency. Such receiving bank or depository has no authority to determine whether or not the amount remitted constitutes payment in full. Remittances marked to indicate "payment in full" or other similar expressions may be deposited by such bank or depository notwithstanding such markings and such deposit shall not indicate XCA's acceptance of the remittance as payment in full and shall not otherwise be treated as an election by or an impairment of any of the rights of, XCA unless expressly agreed in writing by XCA.

4. CREDIT: XCA may, at any time and in its sole discretion, limit or cancel the credit of Buyer as to time and amounts, and as a consequence, may demand payment in cash before delivery of any unfilled portion of this Contract, and may demand assurance of Buyer's due performance including without limitation demanding that one or more deposits, letters of credit or other assurance be provided by Buyer. Upon making such demand, XCA may suspend production, shipment and/or deliveries until Buyer has provided such assurance. If, within the period stated in such demand, but in no



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event longer than 30 days, Buyer fails to agree and comply with such different terms of payment, and/or fails to give adequate assurance of due performance, XCA may, in its sole discretion and without any requirement to do so, (1) by notice to Buyer, treat such failure or refusal as a repudiation by Buyer of the portion of this Contract not then fully performed, whereupon XCA may cancel all further deliveries and any amounts unpaid hereunder shall immediately become due and payable, or (2) make shipment under reservation of a security interest and demand payment against tender of documents of title. If XCA retains a collection agency and/or attorney to collect overdue amounts, all collection costs, including attorneys' fees, shall be payable by Buyer upon demand by XCA. Buyer hereby represents to XCA that Buyer is now solvent, that it has all requisite power and authority to enter into this Contract, that the execution, delivery and performance of this Contract does and will not conflict with or result in a breach of any contract to which it is a party or by which its assets may be bound, and that no other person other than XCA has or will have a security interest in the Products covered by this Contract until performance in full by Buyer of its obligations under this Contract. Buyer further agrees that each acceptance of delivery of the Products sold under this Contract shall constitute the remaking of each of these representations at such time.

5. DELAY; CHANGE: Any change in delivery schedule and/or quantity which is made at Buyer's request shall be cause for price redetermination. Delivery reschedules are also subject to an additional charge of one and one half percent (1 1/2%) of the selling price per month if rescheduled within the 60 days immediately preceding the current schedule date. The applicable reschedule charge will be invoiced at the time such rescheduling is agreed to by XCA.

6. CANCELLATION: Buyer may cancel an order at any time prior to shipment by XCA by delivering written notice to XCA; provided, however, that Buyer will be responsible for a cancellation charge of 20% of the price of the canceled Products, plus the amount of all direct and indirect costs incurred by XCA with respect to the canceled order, including without limitation those incurred after receipt of any written cancellation notice.

7. SEVERAL SHIPMENTS: XCA may make delivery in installments and may render a separate invoice for each installment, which invoice shall be paid when due, without regard to subsequent deliveries. Each installment shall be deemed a separate sale. Delay in delivery of any installment shall not relieve Buyer of its obligation to accept delivery of remaining installments. Each delivery shall be paid for on the due date, as provided in this Contract, without offset, defense or counterclaim and regardless of controversies relating to any delivered or undelivered Products.

8. TITLE; RISK OF LOSS; INSURANCE: Title to each shipment of the Products sold hereunder and risk of

loss thereon shall pass to Buyer when XCA or its agent delivers such shipment to a common carrier or

licensed trucker consigned to Buyer or his agent, but such shipment shall remain subject to XCA's rights of stoppage in transit, rights of reclamation and other legal rights of XCA. If a strike, embargo, governmental action or any other cause beyond XCA's control prevents shipment or delivery to Buyer

or his agent, or if shipping instructions for any shipment are not received before any shipment date, or if

payment is to be made on or before delivery, title and risk of loss shall pass to Buyer as soon as the

shipment has been set aside by XCA and invoiced to Buyer (subject to XCA's rights as an unpaid XCA) and payment shall be made in accordance with invoice as though the Products had been shipped

and accepted by Buyer and XCA shall be under no duty to carry insurance thereafter.

9. CONSIGNMENT: If any Products provided by XCA hereunder are supplied on a consignment

basis, then such consignment shall also be subject to a separate Consignment Agreement among XCA,

Buyer and its consignee, in form and substance satisfactory to XCA.

10. ACCEPTANCE: Buyer or Buyer's agent may, at its expense, inspect the Products at the place of

manufacture. Buyer shall accept any tender of Products that substantially conform to the description of the Products delivered by XCA to Buyer. Buyer shall be deemed to have accepted the Products tendered

by XCA unless Buyer gives XCA notice in writing specifying the particular deficiencies in the Products: (a) in the case of defects discoverable through inspection, 7 days after arrival of the shipment or (b) in the case of defects not discoverable through inspection, 30 days after arrival of the shipment. In the case of Buyer acceptance of non-conforming Products, Buyer shall immediately notify XCA whether or not Buyer will continue to accept similarly non-conforming Products and failure to do so shall constitute a waiver by Buyer of specification requirements for said Products. In any event, when any Products shall have been altered from its original state, Buyer shall be deemed to have accepted such Products. Buyer's acceptance of Products tendered under this Contract shall be final and irrevocable.

11. DELIVERY: Unless otherwise agreed by XCA and Buyer, the Products are sold EXW Stephentown, New York in accordance with INCOTERMS as republished in 2000, and shipped collect by certified carrier. In the event that any Products are received by Buyer in a damaged condition, Buyer should cease unpacking such Products, request an immediate inspection by the common carrier responsible for delivery, and furnish the carrier's written report to Buyer's insurer and to XCA.

12. DELIVERY: Where a delivery date is specified by XCA, that date reflects XCA's best estimate for the probable time required for completion of Buyer's order. XCA will use reasonable and diligent

efforts to effect shipment on or before the date indicated. XCA shall not be liable, directly or indirectly, for any delay or failure in performance or delivery or inability to perform or deliver, including without limitation where such delay, failure or inability arise or results from any cause beyond XCA's control or beyond the control of XCA's suppliers or contractor, including, but not limited to, strike, boycott or other labor disputes, embargo, governmental regulation, inability or delay in obtaining materials.

IN NO EVENT SHALL XCA, IN THE EVENT OF DELAYS OR IN ANY OTHER CIRCUMSTANCES, BE LIABLE TO BUYER OR ANY THIRD PARTIES FOR ANY CONSEQUENTIAL, SPECIAL, PUNITIVE OR CONTINGENT DAMAGES, EVEN IF XCA SHALL BE ADVISED BY BUYER OF THE POSSIBILITY THEREOF. In the event of any such delay or failure in performance, XCA shall have such additional time within which to perform its obligations under this Contract as may reasonably be necessary under the circumstances; and XCA shall also have the right, to the extent necessary in XCA's reasonable judgment, to apportion fairly among its various customers in such manner as XCA may consider equitable Products then available for delivery. If, as a result of any such contingency, XCA is unable to perform under this Contract in whole or in part, then, to the extent that it is unable to perform, this Contract shall be deemed terminated without liability to either party, but shall remain in effect as to the unaffected portion of this Contract, if any.

13. START UP: If the sale price includes assistance by XCA in installation or training Buyer's personnel,

Buyer is responsible for adequate and timely site preparation (including the maintenance of appropriate

insurance) and the availability of its personnel. Installation or training time incurred by XCA in excess

of the amounts expressly included in the sales price will be charged to Buyer at then prevailing rates.

14. WARRANTY:

A. DURATION. Commencing on date on which title to the Products passes to Buyer pursuant to Section 8 above, and subject to paragraph B below, XCA warrants that for a period of [twelve (12) months] (the "Warranty Period") the Products, under normal use and service, will be free in all material respects from defective design, material and faulty workmanship and shall operate in all material respects in compliance with the applicable Specifications. XCA shall deliver Products free and clear of any third party liens or encumbrances.

B. REMEDIES. If the Products do not meet XCA's warranty during the Warranty Period, XCA will, as Buyer's sole and exclusive remedy, (a) repair, replace or modify the Products so that they comply with the applicable warranty, or (b) refund the purchase price of such Products, as XCA may elect, and ship the Products within thirty (30) calendar days after receipt by XCA of the returned Product. XCA will provide Buyer with shipping and packing instructions along with the



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address where the Products are to be returned. Buyer is responsible for packaging the Products according to the instructions and shipping it to XCA's designated service facility. The warranty service shall be performed at the installation site or XCA's designated service facility as determined by XCA. All Products returned to XCA shall be shipped freight prepaid and Buyer shall bear all costs and the risk of loss of, or damage to, the Products until their arrival at XCA's designated service facility. Freight collect shipments will not be accepted. XCA will prepay return freight charges only on repaired and replaced Products found to be defective, and if outside of the United States, to the designated port of destination in the Buyer's country. Buyer shall be responsible for any premium transportation expenses, clearance of customs, unloading and warehousing, and for all inland transportation expenses related to the return of repaired or replaced Products. XCA may charge Buyer its standard rates for any repair or replacement work performed on returned Products that were not in breach of XCA's warranties. Expenses such as personnel travel are not covered by this warranty. XCA is not responsible for delays due to governmental/administrative restrictions on the importation or exportation of Products to countries outside of the United States.

C. LIMITATION ON WARRANTY. XCA warranties are void if: (a) the Product is integrated or assembled by Buyer with other products; (b) the Product is repaired or altered by anyone other than XCA or an authorized representative of XCA, unless expressly authorized in writing by XCA and in strict accordance with the applicable Specifications; (c) the Product is improperly handled, stored, installed or maintained by anyone other than XCA; (d) any person, other than XCA certified technicians, removes the housing of the Products or disassembles the Products; or (e) the Product is used in violation of the applicable specifications or XCA's instructions or subjected to misuse, neglect, accident or abuse.

THE FOREGOING WARRANTIES ARE IN LIEU OF AND EXCLUDE ALL OTHER STATUTORY, EXPRESS AND IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, FITNESS FOR A PARTICULAR PURPOSE, OR ERROR-FREE OPERATION, WHICH ARE ALL EXPRESSLY DISCLAIMED EXCEPT AS OTHERWISE PROVIDED HEREIN.

15. PATENTS; OTHER INTELLECTUAL PROPERTY RIGHTS: Buyer will promptly notify XCA in writing of any claim asserted and suit or action brought against Buyer alleging that the Products purchased under this Contract infringe one or more United States or foreign patents or other intellectual property or similar rights. XCA will indemnify Buyer against and defend all suits and pay all damages and costs awarded against Buyer for infringement by said Products of United States patents or other intellectual property or similar rights; provided that the indemnity of XCA under this Contract shall not extend to claims, suits or actions for infringement based upon the use of any Products in combination with apparatuses, circuits or devices not furnished by XCA or upon the use of any such combination, or based upon the application or use to which such Products are put, including any application or process performed or facilitated by such Products ("Excluded Claims"). Buyer shall not be entitled to indemnification or contribution from XCA with respect to any Excluded Claims, and Buyer will indemnify XCA against and defend all suits and pay all damages and costs asserted against XCA arising out of any such Excluded Claims. In addition, Buyer will indemnify XCA against and defend all suits and pay all damages



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and costs awarded against Buyer with respect to claims of infringement for Products manufactured wholly or partially to Buyer's design or specifications. Notwithstanding the foregoing, XCA shall have the right, in its sole discretion and at its expense, either (a) to procure for Buyer the right to continue using such Products, (b) to replace such Products with non-infringing products of at least equal function and quality, (c) to modify such Products so that they become non-infringing, or (d) request the return of such Products and refund the purchase price thereof.

THE FOREGOING EXPRESSES THE ENTIRE OBLIGATION AND LIABILITY OF XCA WITH RESPECT TO INFRINGEMENT OF PATENTS BY SAID PRODUCTS. XCA MAKES NO WARRANTY THAT THE GOODS SOLD UNDER THIS AGREEMENT ARE DELIVERED FREE OF THE RIGHTFUL CLAIMS OF ANY THIRD PARTY BY WAY OF PATENT INFRINGEMENT OR THE LIKE. BUYER'S RECOURSE AGAINST XCA IN SUCH CIRCUMSTANCES SHALL BE LIMITED TO THE PROVISIONS OF THIS PARAGRAPH 15.

16. CONFIDENTIALITY: Any drawings, data, designs, technical information, trade secrets or other proprietary or non-public information supplied by XCA to Buyer in connection with the sale of any Products shall remain XCA's property and be held in confidence by Purchaser. Such information shall not be reproduced or disclosed to others without XCA's prior written consent. Notwithstanding the provisions of Paragraph 20 hereof, Buyer acknowledges that XCA would be irreparably harmed by the disclosure of such information in violation of this Contract and XCA shall be entitled to specific performance in the event of any breach or threatened breach of this Paragraph 16 by Buyer.

17. LIMITATION OF XCA'S LIABILITY:

A. NO CONSEQUENTIAL DAMAGES. NOTWITHSTANDING ANYTHING SET FORTH IN THIS CONTRACT (INCLUDING ITS ATTACHMENTS) TO THE CONTRARY, IN NO EVENT SHALL XCA BE RESPONSIBLE OR LIABLE TO BUYER FOR ANY LOSS OF USE, REVENUE OR ANTICIPATED PROFITS, OR FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, SPECIAL, CONTINGENT OR PUNITIVE DAMAGES IN CONNECTION WITH ANY BREACH OF WARRANTY OR OTHER BREACH OF XCA'S OBLIGATIONS UNDER THIS CONTRACT (INCLUDING ANY ATTACHMENTS HERETO).

B. LIMIT ON LIABILITY. THE MAXIMUM LIABILITY OF XCA, AND ITS RELATED PARTIES, TAKEN AS A WHOLE, FOR ANY AND ALL CLAIMS IN CONNECTION WITH THIS AGREEMENT AND THE PRODUCTS, INCLUDING BUT NOT LIMITED TO CLAIMS FOR BREACH OF WARRANTY, BREACH OF CONTRACT, TORT, STRICT LIABILITY, FAILURE OF ESSENTIAL PURPOSE OR OTHERWISE, SHALL IN NO CIRCUMSTANCE EXCEED THE PURCHASE PRICE OF SUCH PRODUCTS ACTUALLY PAID TO THE XCA.

C. TIME LIMITATION. ANY ACTION FOR BREACH OF THIS AGREEMENT OR TO ENFORCE ANY RIGHT HEREUNDER SHALL BE COMMENCED WITHIN SIX (6) MONTHS AFTER THE CAUSE OF ACTION ACCRUES, OR REASONABLY COULD HAVE BEEN DISCOVERED, OR IT SHALL BE DEEMED WAIVED AND BARRED.

18. XCA'S REMEDIES: If Buyer fails, with or without cause, to furnish XCA with specifications and/or instructions for, or refuses to accept deliveries of, any of the Products sold under this Contract, or is otherwise in default under or repudiates all or any part of this Contract or any other contract with XCA or fails to pay when due any invoice under this Contract or any other contract with XCA, then, in addition to any and all remedies allowed by law, XCA, without notice: (1) may bill and declare due and payable all undelivered products under this Contract and/or any other contract between XCA and Buyer and/or (2) may defer shipment under this Contract and/or any other contract between Buyer and XCA until such default, breach or repudiation is removed and/or (3) may cancel any undelivered portion of this Contract and/or any other contract in whole or in part. Buyer shall remain liable for all damages suffered or incurred by XCA in any such circumstances.

19. COMPLIANCE WITH LAWS: Buyer assumes responsibility for compliance with all U.S. federal, state and local laws relating to the sale and use of the Products covered by this Contract, including without limitation all U.S. federal, state and local laws governing exports from the United States and/or any subsequent re-export of products.

20. DISPUTE RESOLUTION: In the event of any dispute arising out of or relating to this Contract (other than a dispute arising out of Buyer's failure to pay for any Products in whole or in part), representatives of the parties shall meet promptly in a good faith effort to resolve the dispute without resort to court proceedings. If the dispute is not resolved by the parties within thirty (30) days after the representatives' first meeting or the dispute concerns the failure of Buyer to pay for any Products in whole or in part, then either party may commence an action to resolve the dispute in the courts of [Albany, NY] and each of the parties irrevocably submits to the exclusive jurisdiction of such courts, waives any objection it may now or hereafter have as to venue or as to convenience of forum, and agrees that all claims in respect of such dispute be heard and determined only in such courts. Process in any such dispute may be served on any party anywhere in the world. Buyer and XCA consent to service of process by personal delivery or by postage prepaid, certified U.S. mail, mailed to the address of such party set forth in this Contract.

21. ASSIGNMENT: This Contract and Buyer's rights and obligations hereunder may not be assigned, pledged, hypothecated or otherwise transferred by Buyer except with the prior written approval of XCA, which shall not be unreasonably withheld or delayed. Buyer may assign this Contract and its rights and obligations hereunder to a third party, without the approval of Buyer being required.

22. WAIVER: Waiver by XCA of any provision of this Contract or of a breach by Buyer of any provision of this Contract shall not be deemed a waiver of future compliance with this Contract and such provision, as well as all other provisions of this Contract, shall remain in full force and effect.

23. CLERICAL ERRORS: Stenographic and clerical errors contained in this Contract are subject to correction by XCA.

24. AMENDMENT OR MODIFICATION: This Contract may only be amended, modified, supplemented or canceled in a written document signed by XCA and Buyer. The signature of one party hereto shall be insufficient to modify the terms of this Contract.

25. HEADING AND DEFINITIONS: The heading and definitions in this Contract are inserted for convenience only and shall not constitute a part hereof.

26. SEVERABILITY: If any provision of this Contract shall be held to be unenforceable or invalid, such provision shall be ineffective to the extent of such prohibition or invalidity, and the balance of this Contract shall be interpreted as if such provision were so excluded.

27. INTERPRETATION: Any interpretation of this Contract shall be construed consistently by and against both parties, and shall not be construed against the draftsman hereof.