

ONYX POWER Standard Purchase Order Terms and Conditions

1. **ORDER:** These Terms and Conditions shall be part of each Order Buyer may issue Seller. **EACH ORDER SHALL NOT BE VALID UNLESS EXECUTED BY BUYER'S AUTHORIZED REPRESENTATIVE.** If the parties enter into a separate written agreement governing the sale and purchase of the Goods and the terms of the Purchase Order conflicts with the terms of said agreement, such terms shall supersede the terms of the Purchase Order.

2. **ACCEPTANCE:** Seller has read and understands the Purchase Order and agrees that Seller's written acceptance or commencement of any work defined by the Purchase Order shall constitute Seller's acceptance of these terms and conditions only. Any of the Sellers terms and conditions that may appear in Seller's quotations, acknowledgement, invoices, or in any other communication from Seller, which are in addition to or inconsistent with these Terms and Conditions will be construed as proposals for addition to the Purchase Order and will not be binding unless expressly agreed to in writing by the Buyer. Upon acceptance, the terms contained in the Purchase Order shall constitute the entire agreement between Seller and Buyer with respect to the subject in this agreement (hereinafter referred to as the "Agreement") and may not be modified, added to, or rescinded except in writing signed by the Seller and Buyer.

3. **PRICE:** Seller shall furnish the supplies and services called for in the Purchase Order at the price or prices stated on the Purchase Order. Any increases in any stated price will only be reflected through an amendment to the Purchase Order. If the price is omitted on order, it is agreed that Seller's price will be lower than the lowest prevailing market price or the price last quoted or charged to Buyer. It is also agreed that Seller will not charge without the Buyer's consent, a higher price for the goods called for by the Purchase Order than was last quoted or charged to the Buyer. Price is not subject to change without Buyer's written consent.

4. **SHIPMENT:** Seller warrants that he will fill the Purchase Order in each particular line item according to specifications. In the event the Purchase Order is not filled in each particular line item as specified, Buyer shall have the right, in addition to any other right to which Buyer is entitled by law, to cancel the Purchase Order at no cost to Buyer. The time and rate of delivery of all materials to be delivered under the Purchase Order shall be as specified in the acknowledgment copy, which Seller completes and sends to Buyer. If such time and rate are not specified in the acknowledgment copy, the governing time and rate of delivery shall be that stated on the face of the Purchase Order. Buyer reserves the right to defer the time and rate of delivery specified in the Purchase Order by written notice to Seller, such change to be without additional cost. Buyer shall not be liable for material commitments or production arrangements made in advance of the time necessary to meet the delivery schedule. Buyer reserves the right to return, shipping charges collect, all goods received in advance of the delivery schedule. If Seller fails to deliver the goods within the time specified, Buyer may at its option: (1) decline to accept the goods; or (2) decline to accept the goods and terminate the Purchase Order.

(A) All items must be suitably packaged and prepared for shipment to withstand normal transportation and stocking functions.

(B) Test reports, certificates and other supporting documents must accompany each shipment when required by the Purchase Order.

(C) No charges shall be allowed for boxing, crating or cartage unless previously agreed.

(D) Seller shall package all items in suitable containers to permit safe transportation and handling. Each delivered container must be labeled and marked to identify its contents without having to be opened, and all boxes and packages must contain packing sheets listing the contents. Buyer's purchase order number as well as part number must appear on all shipping containers, packing sheets, delivery tickets and bills of lading. Containers must be individually marked, all showing clearly: (1)

Supplier's name, (2) Buyer's part number, (3) quantity shipped, (4) Purchase Order number including line number and release number where applicable.

(E) Premium transportation will be paid by Buyer only when specifically authorized. Seller shall not insure or declare value of any shipment made F.O.B. shipping point. Seller is liable for charges incurred as a consequence of not observing this instruction.

(F) Seller must observe the "ship via" instruction on the face of the Purchase Order or is liable for extra charges over what would have been incurred if specified routing had been followed.

(G) Time and rate of delivery of all materials are considered to be the essence of the Purchase Order. Should Seller experience or anticipate any delay in performing the Purchase Order, Seller shall immediately notify Buyer in writing of such delay, its expected duration and the reasons thereof. Such notification and acknowledgement by Buyer shall not constitute a waiver of the Purchase Order's delivery schedule.

5. QUALITY / INSPECTION: Goods are subject to inspection by Buyer notwithstanding prior payment to obtain cash discount. Goods may be rejected and returned if inspection shows they are not strictly in accordance with specifications. If impractical to make inspection at time of receipt of goods, this clause will apply whenever goods are inspected. Rejected goods and materials shall be held for Seller's instructions and at Seller's risk and after ten (10) days can be returned to the Seller at his expense. Should production lead time not permit replacement or correction of rejected goods by the Seller, it is agreed that the Buyer may at the expense of the Seller correct the rejected goods to conform with the specification requirements. To the extent Buyer rejects goods as nonconforming, the quantities under the Purchase Order will automatically be reduced unless Buyer otherwise notifies Seller. Seller will not replace quantities so reduced without a new order or schedule from Buyer. Seller's failure to provide written instructions within ten (10) days or such shorter period as may be commercially reasonable under the circumstances, after notice of nonconformity shall entitle Buyer, at Buyer's option, to charge Seller for storage and handling or to dispose of the goods without liability to Seller. Payment for nonconforming goods shall not constitute an acceptance thereof, limit or impair Buyer's right to assert any legal or equitable remedy, or relieve Seller's responsibility for latent defects.

6. OVERSHIPMENTS: Seller is instructed to ship only the quantity(ies) specified in the Purchase Order. However, any deviation caused by conditions of loading, shipping, packing, or allowances in the manufacturing processes may be accepted by the Buyer according to the overshipment allowance indicated on the face of the Purchase order. If no allowance is shown, it shall be 0% (zero percent). Buyer reserves the right to return any overshipment in excess of the allowance at the Seller's expense.

7. INDEMNITY: Indemnification of the goods ordered herein shall occur at the moment the Purchase Order is accepted by Seller. Risk of Loss shall pass to the Buyer at the time that conforming goods to the Agreement are actually received and accepted by the Buyer. To the fullest extent permitted by law, the Seller shall indemnify, hold harmless, and at Buyer's request, defend Buyer, its officers, directors, customers, agents and employees, against all claims, liabilities, damages, losses and expenses, including attorneys' fees and cost of suit arising out of or in any way connected with the goods provided under the Purchase Order, including, without limitation, any claim based on (1) the death or bodily injury to any person, destruction or damage to property, (2) the negligence, omissions, or willful misconduct of Seller or Seller's agents, and (3) alleged infringement by the goods of a patent, copyright, trademark, trade secret, or other proprietary right of a third party. Seller shall not settle any such suit or claim without Buyer's prior written approval. Seller agrees to pay or reimburse all reasonable costs that may be incurred by Buyer in enforcing this indemnity, including attorneys' fees. (B) Should Buyer's use, or use by its distributors, subcontractors, or customers, of any goods purchased from Seller be enjoined, be threatened by injunction, or

be the subject of any legal proceeding for alleged infringement, Seller shall, at its sole cost and expense, either (1) substitute fully equivalent non-infringing goods; (2) modify the goods so that they no longer infringe but remain fully equivalent in functionality; (3) obtain for Buyer, its distributors, subcontractors, and customers the right to continue using the goods; or (4) if none of the foregoing is possible, refund all amounts paid for the infringing goods upon return of such goods to Seller freight collect.

8. RISK OF LOSS / DESTRUCTION OF GOODS: Seller assumes all risk of loss to the Goods until they are delivered to the place specified in the Purchase Order. Title to the goods shall pass to Buyer upon receipt and acceptance at the designated destination. If the goods are destroyed prior to title passing to Buyer, Buyer has the option to either cancel the Purchase Order or require Seller to deliver substitute goods of equal quantity and quality. Such substitute delivery shall be made as soon as commercially practicable. If loss of goods is partial, Buyer shall have the option to require Seller to deliver goods not destroyed upon the terms of the Purchase Order.

9. OWNERSHIP OF WORK PRODUCT: All Work Product shall at all times be and remain the sole and exclusive property of Buyer. Any services performed pursuant to the Purchase Order shall be a "work for hire". Seller hereby assigns and transfers to Buyer all of its worldwide right, title and interest in the Work Product including all associated intellectual property rights. Seller agrees: (a) to disclose promptly in writing to Buyer all Work Product in its possession upon request from Buyer; (b) to assist Buyer in every reasonable way, at Buyer's expense, to secure, perfect, register, apply for, maintain and defend for Buyer's benefit all copyrights, patent rights, mask work rights, trade secret rights, and all other proprietary rights or statutory protections in and to the Work Product in Buyer's name as it deems appropriate; and (c) to otherwise treat all Work Product as Buyer's confidential information.

10. CANCELLATION: Buyer reserves the right at any time and from time to time, without cause, to cancel all or any part of the undelivered portion of the Purchase Order by telegraphic or other written notice to Seller. On the date of receipt of such written notice (the "Termination Date"), Seller shall immediately cease work, including, but not limited to, the manufacture and procurement of materials and subcontracted items for the fulfillment of the terminated portion of the Purchase Order. In event of such cancellation, Seller shall be entitled to its costs, if any, in connection with the cancelled items and a reasonable profit on such costs to be agreed upon by the parties, or, if the parties are unable to agree on profit, a profit at the rate of five percent on such costs, deduction to be made in such cancellation settlement for the value of any cancellation inventory retained by Seller or disposed of to any party other than Buyer, and Buyer shall not be liable to Seller for loss of anticipatory profits.

If the Purchase Order is for services, Seller shall mitigate its claim to the maximum extent and Seller shall be entitled to the actual cost incurred in preparation to perform said services. The amount of reimbursement shall not exceed the total price of the Purchase Order nor shall Seller be entitled to consequential or incidental damages due to cancellation of the Purchase Order.

The provisions of this paragraph shall not limit or affect the right of Buyer to terminate this purchase order for default of Seller.

11. APPLICABLE LAWS: Seller covenants and agrees to observe and comply with in the performance of the Purchase Order all applicable federal, state and local laws, rules and regulations, and to indemnify and save harmless the Buyer for and from any and all liabilities, expenses, costs and damages which Buyer may be put to or incur or suffer as a result of Seller's failure or omission to do so.

12. GOVERNING LAW: The terms and conditions of the Purchase Order shall be construed in accordance with, and disputes shall be governed by, the laws of the State of California.

13. ITEMS FURNISHED BY BUYER: All designs, patterns, drawings, other data, and Manufacturing Materials furnished or paid for by buyer to Seller ("Buyer-furnished Items") shall remain the sole property of Buyer. All Buyer-furnished Items shall be held at Seller's risk and shall be insured by Seller while in its custody or control in an amount equal to the replacement cost thereof with the proceeds of a loss to be paid to Buyer. Upon completion or cancellation of the Purchase Order, all Buyer-furnished Items not incorporated in the goods shall be returned to Buyer in good condition unless otherwise agreed to by Buyer.

14. ADVERTISING: Any advertising of this Purchase Order (including the supplies or services hereunder and pictures, descriptions, or samples thereof) by Seller is prohibited except with Buyer's written approval.

15. RELEASE OF INFORMATION: Neither party hereto shall, without the prior written consent of the other party (which shall not be unreasonably withheld), publicly announce or otherwise disclose, except to the US Government, when the Purchase Order references a US Government contract or subcontract number, the existence or the terms of this Agreement, or release any publicity regarding this Agreement. This provision shall survive the expiration, termination or cancellation of this Agreement.

Any knowledge or information which Seller may disclose to ONYX POWER shall not be deemed to be confidential or proprietary information and shall be acquired by ONYX POWER free from any restrictions as to use or disclosure thereof>

16. FORCE MAJEURE: Any delay or failure of either party to perform its obligations hereunder shall be excused if, and to the extent that it is caused by an event or occurrence beyond the reasonable control of the party and without its fault or negligence, such as, by way of example and not by way of limitation, act of God, actions by any government authority (whether valid or invalid), fires, floods, windstorms, explosions, riots, natural disasters, wars, sabotage, labor problems (including lockouts, strikes and slowdowns), inability to obtain power, material, labor, equipment or transportation, or court injunction or order, provided that written notice of such delay (including the anticipated duration of the delay) shall be given by the affected party to the other party within ten (10) days. During the period of such delay or failure to perform by Seller, Buyer, at its option, may purchase goods from other sources and reduce its schedules to Seller by such quantities, without liability to Seller, or have Seller provide the goods from other sources in quantities and at times requested by Buyer and at the price set forth in the Purchase Order. If requested by Buyer, Seller shall, within ten (10) days of such request, provide adequate assurances that the delay shall not exceed thirty (30) days. If the delay lasts more than thirty (30) days or Seller does not provide adequate assurance that the delay will cease within thirty (30) days, Buyer may immediately cancel the Purchase Order without liability.

17. CHANGES IN ORDER: At any time, Buyer may by written notice, make changes to the scope of the Purchase Order in any one or more of the following: (1) drawings, designs or specifications; (2) method of shipping or packaging; (3) place of inspection, delivery or acceptance; (4) amount of Buyer-furnished Manufacturing Materials, if applicable; and (5) quantity. Seller shall proceed immediately to perform the Purchase Order as changed. If any such change causes a material increase or decrease in the cost of, or the time required for the performance of any part of the work in the Purchase Order, Buyer and Seller will agree upon an equitable adjustment in the purchase price or delivery schedule or both. To qualify for adjustment consideration, Seller must send written notice to Buyer of Seller's intent to file a claim under this clause within 21 days from the date of receipt by Seller of such written notice of change. Seller shall proceed with the changed Order pending resolution of any claim for adjustment. Buyer may act upon any such claim at any time prior to final payment under the Purchase Order. Nothing in this clause shall excuse Seller from proceeding with the Purchase Order as changed.

18. **FAIR LABOR STANDARDS ACT:** Seller certifies that materials furnished on the Purchase Order were produced in compliance with the "Fair Labor Standard Act" and all amendments thereto and Seller agrees to indemnify Buyer for any loss or damage which may be sustained by reason of failure to comply with said Act.

19. **WARRANTY:** If the Purchase Order is for goods, Seller warrants that all goods or equipment furnished hereunder will be free from defects in material and workmanship; that they will be in full conformity with the specification, drawing or sample, and, if they are to be installed, that they will function properly for the period provided in Seller's standard warranty covering the goods, which Seller shall furnish to Buyer, but in no case shall extend for less than one (1) year. This warranty shall survive acceptance and payment. Seller warrants that all goods furnished under the Purchase Order will:

- (A) be free from defects in materials and workmanship,
- (B) conform to the applicable specifications, drawings, samples of other descriptions,
- (C) be free from defects in design except to the degree such goods are manufactured to
- (D) Buyer's design,
- (E) be suitable for the intended purpose, if the purpose is made known to Seller and
- (F) Buyer relies on Seller's judgment and selection and
- (G) be free from defects in title.

All warranties shall be construed as conditions as well as warranties and shall not be deemed to be exclusive. The benefits of this warranty shall accrue to Buyer's customers and assigns to the same extent they shall accrue to Buyer.

Under circumstances of breach of warranty, buyer shall be entitled to avail itself cumulatively of all remedies provided in law or equity. Seller shall make timely Responses to Buyer's notifications of breach of warranty and shall respond with the understanding (and Seller agrees) that time will be of the essence in all circumstances.

If the Purchase Order is for services, Seller warrants that the services shall be completed in a professional, workmanlike manner, with the degree of skill and care that is required by current, good and sound professional procedures. Further, Seller warrants that said services shall be completed in accordance with applicable specifications and shall be correct and appropriate for the purposes contemplated in the Purchase Order.

20. **ASSIGNMENT:** Seller shall not delegate any duties, nor assign any rights or claims, under this Purchase Order, without the prior written consent of Buyer, and any such attempted delegation or assignment shall be void.

21. **INVOICES:** Individual invoices must be issued for each shipment applying against the Purchase Order. Freight and other charges must be shown if discount is not allowed or full amount of invoice. Delay in receiving an invoice, invoicing for goods shipped ahead of specified schedule or invoices rendered with error and omissions will be considered just cause for Buyer to withhold payment without losing discount privileges. Discount privileges will apply from date of scheduled delivery, the date of receipt of the supplies or services, or the date of invoice, whichever is later. Invoices to be acceptable must reference the Buyer's Order number. Foreign Sellers must supply in quintuple invoices complied and certified in accordance with Canadian Customs Regulations. All such invoices must be mailed directly to Buyer not later than the day shipment is made; otherwise the Seller will be responsible for storage or demurrage.

22. **NON-COMPLIANCE BY SELLER:** If the Purchase Order is not filled in each particular line item as specified, Buyer reserves the right to do one or more of the following:

- (A) Buyer may by notice in writing direct Seller to terminate the Purchase Order of work under the Purchase Order in whole or in part at any time;

- (B) In the event of Seller's default or potential inability to perform the Purchase Order, Seller agrees upon demand by Buyer to deliver to Buyer the raw materials and work in process acquired in order to perform under the Purchase Order and Buyer may then complete the work deducting the cost of such completion from the price, or in the alternative pay the Seller the cost of such raw materials and work in process. Subject to the provisions above, the Buyer may recover all loss, damage, and
- (C) expense caused by such failure.

23. **SETOFFS AND COUNTERCLAIMS:** All claims for money due or to become due from Buyer shall be subject to deduction by Buyer for any setoff or counterclaim arising out of this or any other of Buyer's Purchase Orders with Seller.

24. **REMEDIES:** In the event of a breach of the terms and conditions of the Purchase Order by Seller, Buyer shall have all remedies provided by law subject to Seller's right to collect the Price for goods accepted by Buyer. **IN NO EVENT SHALL BUYER BE LIABLE TO SELLER, SELLER'S AGENTS, SELLER'S EMPLOYEES OR ANY THIRD PARTIES FOR ANY INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF, OR IN CONNECTION WITH, THE PURCHASE ORDER, WHETHER OR NOT BUYER WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT SHALL BUYER'S LIABILITY EXCEED THE PURCHASE ORDER PRICE.**