

**KGPCO CANADA, ULC**  
**TERMS & CONDITIONS OF SALE**

**1. Scope**

The following Terms & Conditions of Sale (the "Agreement") cover any sale of equipment or materials ("Products") by KGPCo Canada, ULC ("KGP") to Purchaser (the "Customer").

**2. Definitions**

**"Force Majeure"** means any delay, interruption or other failure to perform under this Agreement due to acts beyond the control of KGP, including without limitation: acts of God (e.g., natural disasters, lightning); wars, riots, terrorist activities, and civil commotions; inability to obtain Product from Vendors, cable cuts by third parties, other acts of third parties; explosions and fires; embargoes, strikes, and labor disputes; and laws: orders, rules, regulations, directions, or action of any governmental authority.

**"International Shipments"** means a shipment whose destination is other than the continental United States, Alaska or Hawaii (regardless of the country where shipment originated).

**"KGP Affiliate"** means any entity, directly or indirectly, Controlling, Controlled by or under common Control with KGP. The term "Control" means (i) the power to vote 20% or more of the voting interests of an entity or (ii) ownership of 20% or more of the beneficial interests in income or capital of an entity.

**"Order"** means a document, in written or electronic format, submitted by Customer for purchase of Products.

**"Products"** includes the equipment, hardware, software, cabling, or other materials as offered for sale by KGP.

**"Software"** means any program stored on any media, including but not limited to, magnetic tape, semiconductor device, disk, or other memory device which is included as part of a Product.

**"Vendor"** means KGP's supplier of the Product.

**3. Credit Approval**

KGP's sale of Products is subject to KGP's credit approval of Customer, and KGP may require credit history, trade references, financial statements and other business information to facilitate its credit review. Customer hereby authorizes all banks and suppliers listed in the credit application to release information necessary to assist KGP in the establishment of a line of credit for Customer. Consideration for an increase or establishment of an open line of credit will be given upon the receipt of the completed and signed credit application, accompanied by a current financial statement. KGP's credit review will commence upon receipt of an initial Order. For new, non-rated or high risk accounts, KGP may require pre-payment, deposit or other form of security. KGP reserves the right to lower or revoke Customer's line of credit based on persistent late payments or other changes to Customer's creditworthiness.

**4. Orders**

The submission of an Order by the Customer and its acceptance by KGP is KGP's agreement to provide, and Customer's agreement to accept and pay for, Products in accordance with this Agreement, as amended. All Orders are subject to acceptance by KGP at its principal place of business, identified on the first page of the credit application.

**5. Order Cancellation**

Order cancellations for stocked Products where the Order has been released or submitted to the Vendor are permitted only if KGP obtains Vendor approval for cancellation. If the Vendor will not approve cancellation and the quantity ordered is above normal KGP stocking levels, the Order is not cancellable and will be shipped. Order cancellations for stocked Products where the Order has not released to the distribution center for shipment can be cancelled without penalty. Order cancellations for non-stocked Products received before KGP submits the Order to Vendor can be cancelled without penalty. Order cancellations for non-stocked Product where the Order has been released or submitted to Vendor are permitted only if KGP obtains Vendor approval for cancellation. If the Vendor will not approve cancellation, the Order is not cancellable and will be shipped.

**6. Taxes**

All prices are exclusive of taxes. Except for KGP's income and employment taxes, Customer will pay all domestic and international taxes, including, but not limited to sales, use, property, gross receipts, excise, VAT, bypass or other local, provincial, state, or federal taxes or charges imposed on the sale or use of Products, including any international freight, duties or custom fees applicable to Vendor drop shipments. If applicable, Customer will provide KGP with a tax exemption certificate acceptable to the pertinent domestic or international taxing authorities. A valid tax exemption, resale, or tax nexus must be provided for tax exemption based on the tax requirements of the ship-to destination. In the absence of a tax exemption certificate, domestic and/or international taxes will be charged to and payable by Customer until a valid tax exemption certificate is on file.

**7. Payment Terms**

Payment is due upon receipt of KGP's invoice. If Customer fails to pay undisputed charges for Products within 30 calendar days of the invoice date, Customer will pay interest on those charges equal to the lesser of 1.5% per month or the maximum rate allowed by law. Failure to make payment of amounts past due within 10 calendar days of receiving KGP's written notice of non-payment may also result in KGP's termination or suspension of shipment of the Order and/or termination of this Agreement. Delinquent account balances are subject to placement for collection, and Customer will pay any reasonable expenses incurred by KGP for such collection activities including attorneys' fees, collection agency fees and fees for returned NSF checks. Pre-payment may be required for specially ordered or custom Products.

**8. Delivery**

Deliveries are subject to and contingent on timely receipt of an Order by KGP. KGP is not liable for failure to meet a required delivery date due to credit clearance requirements or an event of Force Majeure, or in the event of a drop shipment from the Vendor. Early order completions or deliveries are considered to have met the delivery date unless contracted terms state otherwise.

**9. Shipping Terms**

Products are shipped FOB shipping point with all shipping charges (transportation, accessorial and other shipping related costs) paid by Customer. Title and risk of loss pass to Customer upon KGP's delivery of the Products to the carrier at KGP's shipping dock or the Vendor's shipping dock for drop shipments. If International Shipments are requested by Customer, KGP Vendor's agreements will determine if KGP can ship to Customer's requested destination and, if approved, Customer hereby grants KGP the irrevocable right to list the Customer as the Importer of Record for such shipment. Ex-Works Incoterms (EXW) will be applicable for International Shipments with all shipping charges (transportation, accessorial and other shipping related costs) paid by Customer. Title and risk of loss pass to Customer upon Customer taking possession of the Products at KGP's shipping dock or the Vendor's shipping dock for drop shipments.

## **10. Delivery Claims**

All claims for damage or shortages will be made by Customer upon receipt of Product and filed with the carrier handling the shipment. Claims resulting from discrepancies between invoiced quantities and actual Product quantities received by Customer due to error by KGP must be made by Customer in writing within 10 days of receipt of Product. Any such claim not presented by Customer within 10 days of receipt of Product date will be waived and delivery of invoiced quantities will be conclusively presumed.

## **11. Disputed Invoices**

All disputes regarding invoices or invoiced items will be made by Customer in writing within 30 days of the invoice date or 10 days from receipt of Product, whichever occurs later. Any such dispute not presented by Customer within this timeframe is waived and payment of invoice shall be due in full.

## **12. Product Installation and Operation**

Customer assumes all responsibility for the proper selection, installation, operation, and maintenance of all Products purchased from KGP.

## **13. Returns**

Special orders, custom-configured Products, modified Products, cut-to-length Products, or Products previously placed in service are not returnable. Non-stocked Products may only be returned if Vendor approves. If Vendor approves, non-stocked Products may be returned for full credit or refund (at KGP's option), less cancellation or restock fees assessed by Vendor, provided that the return occurs within 30 days of Customer's receipt of the Products. Stocked Products may not be returned without prior approval and specific shipping instructions from KGP. If KGP issues approval, stocked Products may be returned for full credit or refund (at KGP's option), provided that the return occurs within 30 days of Customer's receipt of the Products. Stocked and non-stocked Products must be returned freight prepaid, in new condition including unmarked original packaging, packing materials, manuals, and all accessories. Returns requested more than 30 days from Customer's receipt of the Product are subject to the terms above plus a KGP restock fee of 20%, or a minimum of CAD\$15.00.

## **14. Right to Offset**

KGP may offset (i) any amount owed by Customer or Customer affiliate to KGP or a KGP Affiliate under this Agreement or any other agreement against (ii) any amount owed by KGP or any KGP Affiliate to Customer under this Agreement.

## **15. Limited Warranty and Disclaimer**

**EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, PRODUCTS ARE PROVIDED "AS IS" AND KGP DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED AND IN PARTICULAR DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND WARRANTIES RELATED TO INFRINGEMENT, EQUIPMENT, MATERIAL, SERVICES OR SOFTWARE.** KGP makes no warranties of its own with respect to the Products. To the extent legally permissible, KGP will pass through to Customer any Product warranties made available to KGP by the Vendor. In the event a Product fails to comply with a Vendor's warranty KGP will, upon Customer's request, use reasonable efforts to assist Customer in obtaining a return authorization and/or replacement Product. This section sets forth KGP's sole obligation, and Customer's exclusive remedy, related to the failure of a Product to comply with a Vendor warranty.

## **16. Damages**

KGP's maximum liability for damages caused by its failure(s) to perform its obligations under the Agreement is limited to: (i) proven direct damages for claims arising out of personal injury or death, or damage to real or personal property, caused by the gross negligence or willful misconduct of KGP; and (ii) proven direct damages for all other claims arising out of the Agreement, not to exceed in any 12 month period an amount equal to Customer's total net payments for the affected Products in the six months preceding the month in which the claim or injury occurred. **IN NO EVENT WILL KGP BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, OR INDIRECT DAMAGES FOR ANY CAUSE OF ACTION, WHETHER IN CONTRACT OR TORT. CONSEQUENTIAL, INCIDENTAL, AND INDIRECT DAMAGES INCLUDE, BUT ARE NOT LIMITED TO, LOST PROFITS, LOST REVENUES, AND LOSS OF BUSINESS OPPORTUNITY, WHETHER OR NOT THE OTHER PARTY WAS AWARE OR SHOULD HAVE BEEN AWARE OF THE POSSIBILITY OF THESE DAMAGES.**

## **17. Termination**

KGP may immediately terminate this Agreement or discontinue acceptance of Orders if Customer fails to cure its breach of the payment terms in Section 7 within 10 days after notice from KGP or fails to cure any other material breach of this Agreement within 30 days after notice from KGP.

## **18. Trademarks**

Customer may not use the service marks, trademarks, trade secrets, name, or logos of KGP or any KGP Affiliates for any purpose, without KGP's prior written consent.

## **19. Indemnification**

**Third Party Indemnity.** Each party will indemnify and defend the other party, its directors, officers, agents, and employees from and against all claims, damages, losses, liabilities, costs, expenses, and reasonable attorney's fees, arising out of a claim by a third party resulting from (i) any breach of this Agreement; (ii) willful misconduct or gross negligence under this Agreement; or (iii) violations of applicable laws.

**Intellectual Property Indemnity.** To the extent Seller has been granted the right to do so by the Vendor, Seller will pass through to Customer any intellectual property indemnity related to the Products.

**Rights of Indemnified Party.** To be indemnified, the party seeking indemnification under this section must promptly notify the other party in writing of the claim (unless the other party already has notice of the claim) and give the indemnifying party full and complete authority, information and assistance for the claim's defense and settlement. The indemnifying party will retain the right, at its option, to settle or defend the claim, at its own expense and with its own counsel. The indemnified party will have the right, at its option, to participate in the settlement or defense of the claim, with its own counsel and at its own expense, but the indemnifying party will retain sole control of the claim's settlement or defense. To be indemnified under this section, the party seeking indemnification must not, by any act including but not limited to any admission or acknowledgement, materially prejudice the indemnifying party's ability to satisfactorily defend or settle the claim.

## **20. Waiver of Jury Trial**

Each party waives its right to a jury trial in any court action arising among the parties, whether under this Agreement or otherwise related to this Agreement, and whether made by claim, counterclaim, third-party claim or otherwise.

## **21. Arbitration**

Any dispute arising out of or relating to this Agreement or an Order may, at the option of the parties, be finally settled by binding arbitration conducted in accordance with the International Arbitration Rules of the American Arbitration Association, except where those rules conflict with this provision, in which case this provision controls. Arbitration shall be conducted before a single arbitrator unless the amount in dispute exceeds CAD\$250,000. If the amount in dispute exceeds CAD\$250,000, it shall be decided by three arbitrators, one to be selected by each party and the two party-appointed

arbitrators to agree upon the third. The arbitration shall be held within the Toronto, Ontario metropolitan area, or in another location if agreed by KGP and Customer. Absent agreement of the parties, or an order by the arbitrator(s) based upon compelling evidence of need, there shall be no discovery in the arbitration. The arbitrators shall be authorized to award costs and attorney's fees or to allocate them between the parties. Any court with jurisdiction shall enforce this clause and enter judgment on any award. All arbitration proceedings will be conducted in the English language.

**22. Governing Law**

This Agreement is governed by the laws of the Province of Ontario without regard to its choice of law principles.

**23. Presumption of Authority**

KGP assumes and is entitled to rely upon the apparent authority of all Customer's employees and agents in placing Orders under Customer's account.

**24. Change of Customer's Name or Address; Reorganization**

Customer agrees to notify KGP's Credit Department in writing of any changes of name or address, or of any corporate reorganization or change of ownership which results in a change of name or principle place of business of Customer.

**25. Software Agreement**

Customer agrees to comply with the requirements of any Software license accompanying the Products and will not reverse assemble, reverse compile or reverse engineer the Software. KGP does not sublicense any Software. Title to the Software will at all times remain with the Vendor.

**26. Notice**

Any notices shall be in writing and shall be deemed given (i) when received if delivered personally or by courier (with written confirmation of receipt), (ii) on the date of transmission if sent by facsimile (with written confirmation of receipt) or by email, or (iii) two business days after being deposited in the mail postage prepaid. Notices to KGP shall be delivered to 3305 Highway 60 West, Faribault, MN 55021, Attn: Legal and notices to Customer shall be delivered to the mailing address listed in the signature block.

**27. Survival**

The acknowledgements, covenants and obligations of the parties set forth in this Agreement shall survive the expiration or termination of this Agreement, unless inapplicable by their terms.

**28. Interpretation**

This Agreement has been prepared in English, and the English version shall be binding even though a French translation may also be prepared. In the event of any inconsistency, the parties agree that the English version shall prevail.

**29. Entire Agreement; Conflicts; Amendments**

This Agreement constitutes the entire agreement and understanding between the parties. It supersedes all prior or contemporaneous negotiations or agreements, whether oral or written, relating to its subject matter. Any preprinted terms contained on Customer's Order are void and will have no force and effect. KGP reserves the right to amend this Agreement, from time to time, upon written notice to Customer which such amendment shall be effective for all Orders received after the date notice of the amendment is provided to Customer.

**Customer Signed:**

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**Date:** insert date

**Name of Customer:** insert legal name of company

**Print Name:** insert name of signer

**Customer Address:** insert Customer principal address

**Please FAX ALL PAGES to 416-255-9179**

**Or mail original to:**

New Accounts

KGPCo Canada, ULC

5228 Everest Drive

Mississauga, Ontario Canada L4W 2R4