

# TERMS AND CONDITIONS OF SALE.

These Terms and Conditions apply to every sale of Products by Black Diamond Products Inc. (**Seller**) to any person purchasing Products (**Buyer**) from Seller.

## 1. Definitions.

The following defined terms have the following meanings herein:

**Applicable Laws** means all applicable statutes, regulations, codes, orders, and other legally binding requirements of governmental authorities in place from time to time;

**Improvements** means any improvements, additions, customizations, or other changes made by Seller to a Product originally manufactured by a third party original manufacturer, whether such Improvements are initiated and offered by Seller or made at the request of Buyer;

**Invoice** means Seller's standard form Invoice provided by Seller to Buyer for each full or partial shipment of the Products, which Invoice shall be dated concurrently with the date of each such shipment (the "**Invoice Date**"), or any email or other electronic invoice between Seller and Buyer containing comparable details to those otherwise set out in the standard form;

**Products** means the parts, components, devices or materials identified in the Sales Order;

**Quotation** means Seller's standard form written Quotation which provides an estimate of the cost of the Products contemplated for sale, and in the absence of the written document includes the amount quoted by Seller to Buyer by telephone or email with respect to a specific quantity of a Product; and

**Sales Order** means Seller's standard form Sales Order/Confirmation provided by Seller to Buyer, or any email or other electronic sales order confirmation between Seller and Buyer containing comparable details to those otherwise set out in the standard form.

**2. Terms and Conditions Apply and Prevail.** By placing an order for Products pursuant to a Sales Order, Buyer acknowledges and agrees that these Terms and Conditions apply and prevail over any terms or conditions of Buyer or any other written requests, variations, or requirements of Buyer, regardless of when such Buyer terms are dated or delivered to Seller. To the extent of any inconsistency or conflict with any Buyer terms, set out in a purchaser order or otherwise, or the terms of any Quotation or Sales Order, these Terms and Conditions prevail. The Sales Order and these Terms and Conditions constitute the entire agreement between Seller and Buyer and there are no understandings, agreements, or representations, express or implied, other than what is contained in these documents. These Terms and Conditions may only be modified in writing signed by authorized representatives of Seller and Buyer. These Terms and Conditions apply to any substituted, replaced, or repaired Products provided by Seller hereunder. No act or omission by Seller shall be interpreted or construed as acceptance by Seller of any Buyer terms. Notwithstanding this paragraph, if any Buyer terms are found at law to constitute all or part of the agreement between Buyer and Seller, the parties agree that, to the extent not directly contrary to specific applicable Buyer terms, the Terms herein shall apply and prevail to the fullest extent specifically and generally not directly contradictory.

**3. Confirmations.** All estimates and orders are subject to confirmation by Seller. Seller may provide estimates by issuing a Quotation to Buyer. Seller will confirm orders by issuing a completed Sales Order to Buyer. A Quotation is not a legally binding agreement. Orders may not be cancelled, rescheduled, changed or substituted without Seller's consent in writing, in which case a new Sales Order will be issued to Buyer. Buyer requests for cancellation of an order must be in writing, and shall be determined at the sole discretion of Seller, and may be subject to a re-stocking fee and any reasonable costs incurred by Seller (which includes administrative costs). Seller agrees to use commercially reasonable efforts to accommodate any order cancellation request. Notwithstanding anything else contained herein, Products identified as "Non-Cancellable-Non-Returnable" or "NCNR" or similar language in the Sales Order shall not be cancelled or returned in any circumstances.

**4. Pricing.** Unless Seller otherwise specified in writing, the Quotation price will remain in effect until the earlier of 30 days from the date of the Quotation, or the sale or depletion of Seller's inventory of that Product which was in stock at date of the Quotation. If a Sales Order for the same or substantially the same Products quoted in the Quotation is dated within 30 days of the Quotation, and if such inventory is not depleted sooner, the Sales Order price will be the same as the Quotation price and will be the price due and payable. All Products will be charged to Buyer at, and Buyer agrees to pay, the price set out in the Sales Order. Unless specifically indicated in the Sales Order, prices set out in the Quotation and the Sales Order do not include harmonized sales tax (HST), any other goods or services tax, sales tax, or value added tax, storage, insurance, transportation, shipping, handling, demurrage, installation, start-up, operation or maintenance costs, customs broker fees, duties, or export or import fees. Prices set out in the Quotation and the Sales Order are conditional on the timing and Product quantity set out in such documents, and are subject to change if Buyer subsequently requires different timing or a different type or quantity of Product. To the extent a Product was originally manufactured outside Canada, Seller is responsible for, and the price includes, all import into Canada fees paid by Seller.

**5. Currency.** All prices set out in the Quotation, Sales Order, and any Invoice are in the currency indicated therein. CDN means Canadian dollars and USD means United States of America dollars.

**6. Payment Terms.** Unless Seller otherwise specifies in writing, Buyer is required to pay Seller the net amount on each Invoice without set-off or deduction within 30 days of the Invoice Date. Buyer shall pay all applicable taxes, fees, duties, etc. with respect to such Products, which taxes, fees, duties and other charges shall be due and payable concurrently with the payment obligations set out in the preceding sentence. If Buyer disputes any amounts due, Buyer must notify Seller with particulars of the disputed charge within 10 days of delivery, failing which Buyer shall be irrevocably deemed to have accepted the Product and payment obligation. Notwithstanding any dispute, Buyer shall pay Seller all undisputed amounts in accordance with the payment terms applicable thereto. Payment may be made by cheque made out to Black Diamond Engineered Products Inc. as payee, credit card, wire transfer or other method confirmed by Seller

to be appropriate, provided that any fees in connection with a method of payment shall be the responsibility of Buyer. All overdue payments bear interest, starting on the day the payment is due, at a rate of 2% per month (24% per annum). Any failure by Buyer to make payment when due, which is uncured for a period of five (5) business days following notice from Seller to Buyer, shall be an event of default hereunder entitling Seller to change its credit or payment requirements, suspend or cancel performance of any of Seller's obligations to Buyer, including cancelling or suspending shipment of any Products. If an event of default by Buyer is not cured within 30 days, Buyer shall be responsible to pay Seller's reasonable expenses, including but not limited to reasonable legal fees, to collect such amounts. Seller may at any time request financial information regarding Buyer, a deposit, or a guarantee from a suitable guarantor, in order to satisfy Seller's credit and risk management requirements, and Buyer hereby covenants and agrees to furnish to Seller such information or assurances, execute and deliver such additional documents, and take such other actions and do such other things as may be necessary to fulfill such a request from Seller.

**7. Shipment and Delivery Risk.** The "Due Date" indicated on the Sales Order is an approximate date on or about which Buyer has requested delivery of the Product to the "Ship To" location and which Seller agrees, conditional on Buyer having provided all necessary information, to use reasonable efforts to meet. Seller cannot guarantee that the Product will be delivered on such date. Unless other arrangements have been agreed to by Buyer and Seller in writing signed by authorized representatives of each of the parties, Buyer agrees to accept delivery when the Products are ready to ship. Unless the Parties expressly agree otherwise, if Buyer fails to accept delivery of the Products at the Dock (as that term is defined below) upon being notified by Seller that the Products are ready to Ship, then Seller may, without limitation or exclusion and at its election, (i) relocate the Products to an alternate location (which location shall be included in the meaning of "Dock" herein) and Buyer shall be solely responsible for any transportation, storage, insurance, or other charges incurred by Seller as a result; or, immediately or after first electing to proceed under the preceding clause, (ii) cancel the Sales Order, in which case Buyer shall be solely responsible for any re-stocking or other fee incurred by Seller (including administrative fees) as determined by Seller in its sole discretion; or (iii) if the Products are NCNR, require that Buyer pay an amount equal to the net value of the Sales Order (including taxes, fees, and duties related thereto) as liquidated damages, which amount is acknowledged by the Parties to be compensation and not a penalty and to be a reasonable estimate of the harm or actual damages caused to Seller. All Products are provided on the basis of FOB Bath or Burnsville from Seller's shipping dock located at Bath, Ontario, Canada or Burnsville, Minnesota, USA (the "Dock"). Buyer or its carrier shall take delivery from the Dock and shall accept all responsibility and liability, including shipping charges, delivery risk, and delays incurred during shipping, with respect to the Products from the Dock. All rights, title and interest to and in the Product and all risk of loss and damage associated with the Products will transfer to Buyer at the Dock at the moment shipment is accepted at the Dock by Buyer or its carrier. Seller shall have no responsibility or liability whatsoever for the Product after it leaves the Dock, and it is Buyer's responsibility to insure Products from the Dock. Buyer shall have no claim against Seller for any loss, damage, or other adverse impact affecting any Product in transit, and Buyer agrees to indemnify and hold harmless Seller against any claims, damages, or other losses whatsoever incurred as a result of any loss, damage, or other adverse impact affecting any Product in transit, including any third-party claim, subrogated claim, or claim related to the packaging of any Product accepted by Buyer or its carrier at the Dock. Any documentation provided by Seller to Buyer or its carrier at the Dock indicating the quantity of Products provided to Buyer or its carrier at the Dock shall be conclusive evidence of the quantity of Products that arrives at the "Ship To" location, unless Buyer can provide conclusive evidence to the contrary. Unless otherwise indicated on the Sales Order or agreed in writing signed by authorized representatives of each of the parties, shipping arrangements will be made by Buyer at the sole cost of Buyer except only that the timing of the acceptance of the Products by Buyer or its carrier at the Dock shall be subject in all respects to the operational requirements and schedule of loading/logistics/deliveries similarly occurring at the Dock established by Seller in its sole and absolute discretion, and Seller shall have no liability of any kind arising out of such timing, including for losses of Buyer related to any standby of Buyer or its carrier.

**8. Seller Representations and Limited Warranty.** Seller represents and warrants that it is a corporation validly incorporated and existing under the laws of the State of Delaware, and has the corporate power and authority to enter into this transaction to provide the Products on the terms and conditions set out herein. Seller represents and warrants that Improvements, when used under proper and normal conditions, shall, (i) for a period of thirty (30) days from the date of delivery of the relevant Products, be free from patent defects in materials and workmanship; and (ii) for a period of one (1) year from the date of delivery of the relevant Products, be free from latent defects in materials and workmanship (in either case, the "**Warranty Period**", as applicable). Seller shall have no liability for Improvements or Products which have been the subject of damage (including accidental damage), misuse, improper installation, use of unauthorized parts or components, unauthorized conditions or power sources, neglect, corrosion, or inadequate or improper maintenance (which includes preventative maintenance) or technology. Buyer acknowledges and agrees that, unless indicated otherwise in writing by Seller, Seller is not the original manufacturer of the Products and, subject to section 13, this warranty does not apply to the Products, materials, parts or components thereof, to the extent manufactured by any person other than Seller. Seller expressly disclaims and makes no representation, warranty, or guarantee and shall have no liability with respect to defects in materials or workmanship of, or intellectual property rights associated with, any Product by or from an original manufacturer, or the suitability or performance of a Product for the use promoted by the original manufacturer. For Products with an original manufacturer's warranty, Seller will provide such manufacturer's warranty to Buyer if such warranty has been provided to Seller and is assignable on its terms, and will use commercially reasonable efforts to assist with any claim by Buyer pursuant to the manufacturer's warranty. Notwithstanding that Seller (or entities or representatives with whom Seller may have a business relationship) may have discussions with Buyer with respect to use or application or installation of the Product, Seller does not warrant and shall have no liability for Products installed or used in actual operating conditions which differ from the manufacturers' specified or recommended conditions.

**9. Exclusive Remedy and Limitation on Liability.** If Seller breaches a warranty hereunder during the Warranty Period Buyer's remedy is limited to, at Seller's option: (i) repair of Improvement or Product; (ii) replacement of Improvement or Product; or (iii) credit to Buyer's account for purchase price paid for Product. Buyer must provide notice of breach of warranty within 10 days of when Buyer discovered or ought to have discovered such breach or on the last day of the Warranty Period (whichever is earlier), and acknowledges that time is of the essence. Buyer's failure to provide notice to Seller in accordance with this section shall release Seller from any obligation or liability with respect to such breach. SELLER'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, INCLUDING ANY BREACH OR DEFAULT HEREUNDER, SHALL NOT IN ANY CASE EXCEED THE PRICE PAID BY BUYER FOR THE PRODUCTS. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IN NO CASE SHALL SELLER OR ITS SHAREHOLDERS,

DIRECTORS, OFFICER, EMPLOYEES, AGENTS AND REPRESENTATIVES BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, OR PUNITIVE DAMAGES, INCLUDING WITHOUT LIMITATION, ECONOMIC LOSS, LOSS OF BUSINESS, LOSS OF OTHER EQUIPMENT OR PRODUCTS, INCIDENTAL LOSS, ANTICIPATED PROFITS, REVENUE OR USE, OR COSTS OR CLAIMS OF ANY THIRD PERSON OF ANY NATURE. IN NO CASE SHALL SELLER BE LIABLE TO ANY PERSON SEEKING TO ENFORCE A WARRANTY THROUGH A BUYER. THE WARRANTIES AND REMEDIES SET OUT HEREIN ARE EXCLUSIVE AND EXHAUSTIVE, AND THERE ARE NO OTHER REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, STATUTORY, BY OPERATION OF LAW, OR OTHERWISE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, AS TO MERCHANTABILITY, SUITABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR ANY OTHER MATTER WITH RESPECT TO ANY PRODUCT, INCLUDING AGAINST LATENT DEFECTS, MADE OR GIVEN HEREIN OR ELSEWHERE BY SELLER.

**10. Indemnity.** Buyer agrees to indemnify and hold harmless Seller and its shareholders, directors, officer, employees, agents and representatives for and against any claims, actions, proceedings, complaints, investigations, losses, damages, fines, penalties (including reasonable legal fees) brought against or incurred by Seller as a direct or indirect result of any breach or default of Buyer's obligations hereunder, including any non-compliance with Applicable Laws, and any failure to meet all tax liability, including penalties and interest thereon.

**11. Force Majeure.** Seller will be relieved of its obligations hereunder to the extent that its performance is delayed or prevented by any cause beyond the reasonable control of Seller (an event of "**Force Majeure**"), including without limitation, an act of God, war, riot, insurrection, terrorism, civil disobedience, pandemic, endemic, fire, explosion, accident, natural disaster, labour unrest, inability to obtain materials or components, orders or requests or investigations of any governmental authority, change of law or regulation, or interruption of technical or telecommunication systems. If any event of Force Majeure continues for a period of more than 10 continuous days, or exists for more than 20 days in any month, Buyer may revise the shipping date or may cancel the Sales Order to the extent that the Products are not identified as "NCNR".

**12. Notice.** Any notice required to be provided to Seller shall be sent to the General Manager by email at [Sales@BDproduct.ca](mailto:Sales@BDproduct.ca) or by mail to the address provided for on the Sales Order.

**13. Export and Import Laws.** Buyer is solely responsible for compliance with all Applicable Laws governing the purchase and shipment of Products to the delivery location, including any import or export laws. If Seller is required by Applicable Laws to provide any document or information to Buyer or any governmental authority in connection with any import or export of Products, Seller shall direct commercially reasonable efforts to provide such document or information and shall be entitled to rely on any representation of, or information furnished by, Buyer in completing and providing such document or information. Buyer agrees to indemnify and hold harmless Seller for any costs (including reasonable legal fees) it incurs in complying with this paragraph and for any damages, fines, penalties, or other losses, direct or indirect, incurred by Seller in connection with this paragraph.

**14. Intellectual Property and Confidentiality.** All Improvements, designs, drawings, plans, specifications, systems, and business, proprietary, marketing, or financial information of Seller ("**Confidential Information**") shall remain the property of Seller and shall not be used for any purpose or disclosed by Buyer without the prior written consent of Seller. All intellectual property, including any potential patent rights, in any Improvements shall at all times remain exclusively with Seller and no intellectual property rights in any Improvements shall vest with Buyer in connection with the purchase.

**15. Assignment.** Buyer shall not assign its rights or obligations under any Quotation or Sales Order or other agreement to purchase Products from Seller, without the prior written consent of Seller.

**16. Dispute Resolution.** All disputes relating to the performance of this contract will be resolved via mediation and then arbitration. No dispute will be resolved by litigation except that the parties may apply to the state court where the arbitration is conducted to confirm or challenge the arbitrator's award. Either party may initiate dispute resolution by serving a written Demand for Mediation and Arbitration (a "Demand") on the other party. The mediation, and arbitration if mediation fails, must take place in Minneapolis, Minnesota. The mediator shall be appointed pursuant to the process described in this paragraph, provided that Vendor and Buyer may appoint a mediator by mutual agreement at any time. Within 3 business days of service of the Demand, the initiating party will serve on the receiving party a list of mediators maintained by the United States district court located in Minneapolis, Minnesota. If the court also maintains biographies of the mediators, the biographies must be served with the mediator list. Within 2 business days of service of the mediator list, the receiving party will strike three names from the list (or such lesser number so that no less than 3 names remain) and inform the initiating party of the stricken names. Within 2 business days thereof, the initiating party will then strike three names from the list (or such lesser number so that no less than 3 names remain) and inform the receiving party of the stricken names. The parties will continue striking names in this manner, except that the time period for striking names will be 1 business day per round, until only three names remain (the "Remaining Mediators"). Within 1 business day thereafter, the initiating party will then contact any one of the Remaining Mediators, copying the receiving party, to request that that mediator agree to be engaged and to conduct the mediation within 10 business days of receiving the request. If that mediator is unavailable to conduct the mediation within 10 days, then the initiating party will immediately contact either of the other two Remaining Mediators in the same manner, and if that mediator is unavailable to conduct the mediation within 10 days then the initiating party will contact the final Remaining Mediator in the same manner. If none of the Remaining Mediators are available to conduct the mediation within 10 days, then the parties shall engage the Remaining Mediator who is available and agrees to conduct the mediation at the earliest date.

If the mediator determines that the mediation is unsuccessful, then within 5 business days of that determination, the mediator will become the arbitrator and conduct binding arbitration of the parties. If either party serves on the opposing party an objection to the mediator becoming the arbitrator, then the party that does not object will select any name from the mediator list to be the arbitrator and promptly contact that person.

The arbitrator will conduct an initial meeting of the attorneys for the parties within 5 business days of accepting the engagement as arbitrator. At the initial meeting the arbitrator will determine what, if any, discovery is permitted and will set a date for the conduct of the arbitration hearing and will issue any other rules/requirements that the arbitrator believes will facilitate a fair process and a speedy conclusion to the arbitration. The arbitrator will issue the award within 10 business days of the close of the arbitration hearing. The arbitrator may award legal fees and costs to the prevailing party.

The parties will split the mediator and arbitrator fees and expenses equally, except that the arbitrator is free to award these fees and expenses to either party as part of the arbitration award.

**17. Jurisdiction.** This Agreement shall be construed and performed in accordance with the laws of the State of Delaware and the laws of the United States of America applicable therein. Any suit, action, claim or other proceeding arising out of or in any way connected with these Terms and Conditions or any other arrangement between Seller and Buyer shall be brought in a court in Delaware. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods does not apply to the Order.

**18. General.** If any term or provision of this Order is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. No waiver by Buyer of any of the provisions of these Terms or the Order shall be effective unless explicitly set forth in writing and signed by Buyer. No failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from the Order shall operate or be construed as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. Provisions of this Order which by their nature should apply beyond their terms will remain in force after any termination or expiration of this Order. The word "including" herein means including without limitation, and "include" and "includes" shall have the similar meaning.

**19. Disclaimer.** Seller does not employ or control EMT Engineering Sales Ltd. ("EMT") or any employees, contractors, representatives or agent of EMT (each a "**EMT Representative**"), and hereby expressly disclaims any legal responsibility or liability for any representations, warranties, covenants, guarantees, or other comments or advice provided by any EMT Representative with respect to the Products.