

Tempest Lighting, Inc. Standard Terms And Conditions



Tempest Lighting, Inc. terms and conditions of sale are expressed herein and are not subject to modification by acceptance of a purchase order with other terms and conditions.

1. OFFER, ACCEPTANCE AND TERMS OF SALE. The following terms and conditions of sale (collectively, these "Terms") exclusively govern the sale of products, parts accessories and/or services (collectively, the "Goods") sold by Tempest Lighting Inc. ("Seller") to its customer ("Customer").

Whether or not this document is deemed an offer, an acceptance or a confirmation, any terms and conditions of sale proposed by Customer, whether orally or in writing, in connection with the purchase of Goods which add to, vary from, or conflict with, these Terms are hereby objected to, and Seller expressly conditions its sale of Goods on Customer's assent to these Terms notwithstanding any differences or additions in the Terms proposed by Customer. Customer shall be deemed conclusively to have unconditionally accepted these Terms by (i) the opening of a letter of credit or other facility to pay for Goods, (ii) the tender of payment or partial payment for Goods, (iii) the acceptance of any Goods by Customer, whether conforming or non-conforming, or (iv) by any conduct of Customer which recognizes formation of a contract under these Terms. Any shipment of Goods to Customer in whole or partial fulfillment of Customer's purchase order will not be deemed to constitute an acceptance by Seller of any of the terms and conditions of such purchase order, except as to identification of Goods and the quantity of such Goods. As used in these Terms, the word "Contract" shall mean the agreement between Customer and Seller to purchase Goods, as governed by these Terms.

2. PRICES.

A. Prices shall be set forth in the Contract. Unless specifically restricted, the price or prices set forth in the Contract are subject to increase based on Seller's prices in effect at the time of shipment and are subject to change or withdrawal without notice.

B. Unless otherwise specifically provided in writing, the prices set forth in the Contract are based upon manufacture of the quantity and types of Goods specified in the Contract. Accessories, including, without limitation, mounting hardware and spare parts, are not included in the price unless otherwise specified in the Contract. Prices are subject to revision when interruptions or changes in production, quantity, scheduled shipment or engineering are caused or requested by Customer.

C. Prices are exclusive of taxes (except taxes on Seller's net income) of any nature (including, without limitation, sales, use or similar taxes upon the manufacture of Goods, or upon the contract resulting here from or its gross receipts) imposed by any governmental authority. All such taxes shall be for Customer's account, whether or not collected, advanced or paid by Seller, and shall be paid by Customer upon Seller's invoice unless Customer timely provides tax exemption certificates in form satisfactory to Seller.

3. QUANTITY. The quantity of Goods sold shall be as set forth in the Contract. Overruns or underruns of custom, special order, or non-catalog Goods, not to exceed 10% of the amount ordered, shall constitute an acceptable completion of Customer's order and shall be invoiced and paid accordingly.

4. ORDERING AND ACCEPTANCE.

A. All purchase orders must be submitted by Customer to Seller in writing. All of Customer's orders, as modified by paragraph 1 hereof, are subject to acceptance in writing at Seller's principal place of business in North Hollywood, California, USA. Seller reserves the right to accept or reject orders in whole or in part in its sole, absolute discretion. Minimum order amount is \$100.00 (US Dollars) net.

B. Seller will have the right in its sole, absolute discretion either (i) to cancel any back orders over 120 days old even if such orders have been accepted previously by acknowledgment, partial shipment or otherwise, or (ii) to increase the price at the rate of one percent (1%) per month for such back orders beginning on the 121st day after receipt of such back order. On Customer's request and at Seller's sole, absolute discretion, Orders may be scheduled for shipment no later than 120 days from date of Seller's receipt of Customer's purchase order. Orders not released for manufacture and shipment within 120 days from the date of Seller's receipt of Customer's purchase order are subject to a one percent (1%) per month increase in price.

C. Seller will not be responsible for conforming to Customer's plans, specifications or drawings unless such plans, specifications or drawings are approved in advance by Seller and are specifically incorporated by reference in the Contract. Plans,

specifications, or drawings which deviate from Seller's standard catalog items must be approved in writing by Customer.

5. ORDER CANCELLATION AND CHANGE. An order once placed with Seller cannot be revoked or canceled or delayed by Customer, in whole or in part, except with Seller's written consent and then only upon terms that will reimburse Seller for its out-of-pocket costs and indemnify Seller against its other losses, including, without limitation, lost profits. In the event drawings have been started by Seller, or Seller has purchased materials to fulfill, in part or in whole, the Customer's order, or Seller has begun manufacture of Customer's order, a cancellation charge of no less than 25% of the price will be assessed.

6. DELIVERY, TRANSPORTATION, AND RISK OF LOSS.

A. Dates for delivery of Goods are estimates only. Seller assumes no liability for any loss or damage of any kind resulting from delay or inability to deliver the Goods or from failure to deliver Goods that is caused directly or indirectly by acts of God or the public enemy, riots, accidents, strikes or differences with labor, labor shortage, inability to obtain material, equipment or transportation, governmental or court regulation, directive or order of any government, or any other thing or event, whether similar or dissimilar, beyond Seller's absolute, exclusive and unconditional control. Seller may defer delivery of Goods and performance, including, without limitation, fabrication, shipment, delivery, assembly, installation, testing and warranty repair or replacement, for a period co-extensive with the period of delay created by such cause(s). Seller is not required to use overtime labor or expend monies to cure delay or failure to deliver. In the event of delivery shortages, Seller reserves the right to allocate shipment of orders and back orders in its sole, absolute discretion among itself and all customers. Seller reserves the right to make deliveries in installments; in the event of any partial failure to deliver, Seller will have the right to receive payment pro rata for Goods in fact delivered, whether or not delivery may have been delayed.

B. Unless otherwise specified in the Contract, delivery of the Goods will be F.O.B. Seller's dock. Customer will bear all costs, insurance premiums, freight and other expenses incurred after Seller has placed Goods in the custody of the carrier and shall hold Seller harmless therefrom, provided that, if Seller, in its sole, absolute discretion makes any such payment, Customer will reimburse Seller immediately upon invoice by Seller. Shipments made directly to Customer's job site location will be prepaid and the charge added to the invoice. "Delivery" shall occur, and title and risk of loss shall pass to Customer upon placement of Goods with carrier for shipment to Customer. Shipment will be made by the method specified by Customer if practicable; if not practicable or if no shipping instructions are specified, Seller will select a transportation method and carrier, in its sole and absolute discretion. Customer will file any claims for loss or damage occurring from and after delivery of the Goods to the carrier directly with the transportation carrier.

C. Seller reserves the right to make complete or partial shipment of Goods. Each shipment of Goods constitutes a Tempest Lighting Inc. separate sale, whether the shipment is in whole or partial fulfillment of Customer's order or confirmation for Goods. If Customer defaults in payment for Goods as required by these Terms, Seller may, without incurring liability to Customer, suspend further shipments under any and/or all orders for Goods. If Seller elects to continue shipments, such continuation will not constitute a waiver of such default or Seller's right to discontinue shipment at a later time, nor will such continuation in any way limit Seller's legal remedies for such default.

7. INSPECTION/WARRANTY/RETURNS.

A. Customer, at its sole expense, shall inspect all Goods promptly upon receipt and accept all Goods that conform to the specifications or catalog. All claims for any alleged defect in or failure of the Goods or Seller's performance to conform to the Contract, capable of discovery upon reasonable inspection, must be set forth in a written rejection notice detailing the alleged non-conformity, and be received by Seller within thirty (30) calendar days of Customer's receipt of the Goods. Failure by Customer to notify Seller of the alleged non-conformity within thirty (30) days will be conclusive proof that the Goods have been received by Customer without defects or damage, and in the quantities specified on the bill of lading and shall constitute an irrevocable acceptance of the Goods and a waiver of any such claim in connection with the Goods.

B. Seller warrants to Customer only that the Goods will be free from defects in material and workmanship at the time of delivery and, subject to the exceptions and conditions set forth below, for the following period (the "Warranty Period"): twelve (12) months from the date of shipment by Seller. Seller may provide

additional years of warranty coverage beyond 12 month, at the rate of 2.5% of the net sale price per year, up to a total of four additional years' coverage beyond the standard 12 month warranty period. Seller will remedy a defect as set forth in paragraph 7 D, below, (the "Warranty"). The Warranty is subject to each of the following exceptions and conditions:

1. Customer must promptly (and in all events within the Warranty Period) notify Seller of any alleged defect in a written notice (the "Notice") which shall set forth the quantity, catalog number, finish, original purchase order number, Seller's invoice number on which Goods were originally billed and a statement of the alleged defect, along with digital photographs showing such defects where feasible.

2. The Warranty shall not apply: (i) to any claimed defect that was capable of discovery upon reasonable inspection and deemed to be waived under paragraph 7 A, above; (ii) to any Goods that have been subject to misuse, abnormal service or handling, or altered or modified in design or construction; (iii) to any Goods repaired or serviced by any person other than Seller's authorized service personnel or to Goods installed other than according to installation instructions, or (iv) with respect to normal wear and tear.

3. Seller makes no Warranty with respect to parts or components that are not the product of Seller, and specifically makes no warranty whatsoever for equipment housed inside enclosure products manufactured by Seller.

4. The Warranty is Seller's exclusive warranty with respect to the Goods. Seller makes no warranties, guarantees or representations, express or implied, to Customer except as set forth in this paragraph 7. ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR USE OR FOR A PARTICULAR PURPOSE, ARE HEREBY EXCLUDED AND DISCLAIMED.

C. Seller will accept the return of Goods properly rejected under paragraph 7 A, above, or as to which Notice of an alleged breach of Warranty has been timely given and such Goods may be returned to Seller, freight prepaid, but only upon Customer's receipt of Seller's written return material authorization ("RMA") and shipping instructions. The RMA shall be void if the Goods are not received within 45 days after issuance of the RMA. No deduction or credit in respect of any rejected or returned Goods shall be taken until Customer has received Seller's further written deduction or credit/authorization following Seller's inspection to confirm nonconformity or defect. Seller will charge to Customer any and all costs incurred by Seller in connection with the handling, shipping, inspection and disposition of any returned Goods that are determined by Seller not to have been nonconforming upon Delivery or as to which the warranty hereunder is not applicable.

D. UPON ANY PROPER RETURN PURSUANT TO PARAGRAPH 7C, ABOVE, WHETHER IN CONNECTION WITH A REJECTION OF GOODS OR AN ALLEGED BREACH OF WARRANTY AND BASED UPON THE CONDITIONS SET FORTH IN THIS PARAGRAPH 7, SELLER AGREES THAT IT WILL, AS THE SOLE AND EXCLUSIVE REMEDY UNDER THE CONTRACT OR OTHERWISE, FOR ANY NONCONFORMITY OR BREACH OF WARRANTY, AND AT SELLER'S SOLE ELECTION: (i) REPAIR SUCH GOODS; OR (ii) REPLACE SUCH GOODS.

8. LIMITATION OF DAMAGES.

A. EXCEPT AS PROVIDED IN THE FOLLOWING PARAGRAPH WITH RESPECT TO DIRECT DAMAGES ARISING OUT OF CLAIMS RELATED TO CUSTOMER'S ORDERS FOR GOODS, UNDER NO CIRCUMSTANCE WILL THE SELLER BE LIABLE FOR ANY DAMAGES, UNDER ANY LEGAL THEORY, INCLUDING, WITHOUT LIMITATION, DIRECT, INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES (EXCEPT FOR CONSEQUENTIAL DAMAGES RELATING TO PERSONAL INJURY IN JURISDICTIONS WHERE SUCH DAMAGES MAY NOT BE DISCLAIMED AS A MATTER OF LAW) OR LOSS OF PROFITS OR OTHER ECONOMIC LOSS, SUSTAINED BY CUSTOMER, OR BY ANY OTHER PERSON, IN CONNECTION WITH ANY CUSTOMER ORDER OR GOODS COVERED HEREBY.

B. THE LIABILITY OF SELLER, IF ANY, FOR DIRECT DAMAGES IN CONNECTION WITH FILLING CUSTOMER'S ORDERS OF GOODS IN ACCORDANCE WITH THE CONTRACT, REGARDLESS OF THE DELIVERY OR NON-DELIVERY OF SUCH GOODS, WILL NOT IN ANY

EVENT BE GREATER THAN THE ACTUAL PURCHASE PRICE OF GOODS WITH RESPECT TO WHICH SUCH CLAIM IS MADE.

9. TERMS OF PAYMENT/COLLECTION.

A. Unless otherwise specifically set forth in the Contract, terms of payment shall be 50% with Order and 50% prior to shipment from Seller's factory. In the event that Seller agrees to extend credit terms to Customer, Seller reserves the right to alter the payment terms upon any Event of Default by Customer hereunder or if Customer's creditworthiness changes.

B. Customer will pay Seller the full amount of the purchase price of Goods upon the due date set forth in the Contract.

C. Open accounts unpaid beyond their due dates shall bear interest on outstanding balances at a rate equal to the lesser of: (i) the highest rate legally permissible in the state of Customer's domicile or (ii) 1% per month from the date payment is due. Customer shall pay all costs in connection with Seller's collection efforts, including, without limitation, collection agents' and/or attorneys' fees of not less than 15% of the outstanding balance (which Customer hereby agrees is reasonable) and all other costs associated with collection proceedings initiated by Seller.

D. Unless Customer has received a credit memorandum from Seller specifically authorizing a deduction, Customer will make full payment of all outstanding invoices in accordance with these Terms and regardless of any claim, counterclaim or set-off Customer may have against Seller. All claims, counterclaims and setoffs must be asserted, if at all, by Customer in a separate proceeding. Nevertheless, Seller will have the right to recover payment for all unpaid invoices without being required to await adjudication of any such separate proceeding.

E. In the event payment for Goods becomes past due, Seller will have the option, in addition to any other rights it may have, in its sole, absolute discretion, to cancel or delay, in whole or in part, the Contract or shipment of orders of Customer thereunder or under other contracts with Customer, to declare all sums owing from Customer to be immediately due and payable, and/or to cancel any line of credit previously extended.

F. Customer hereby grants to Seller a continuing purchase money security interest in all Goods now owned and hereafter acquired by Customer and in all additions, accessions and replacements of such Goods now owned or hereafter acquired, and in all proceeds of the foregoing, to secure payment and performance of all Customer's obligations under these Terms. Customer consents to the filing by Seller of financing statements pursuant to the Uniform Commercial Code to evidence, create, maintain, renew or perfect Seller's security interest and Customer hereby authorizes Seller as Customer's attorney-in-fact to sign any such filing on Customer's behalf and in its name.

10. CHANGES IN DESIGN; ERRORS.

A. Seller reserves the right without liability to modify Goods prior to delivery and without notice. If such modifications materially affect published specifications, Seller shall give notice of such change to Customer, allowing Customer the right within ten (10) days from receipt of such notice to cancel orders for such Goods without liability. In no event will Seller be obligated to make any such modification in Goods previously supplied to Customer or to continue to supply Goods as made prior to such modification. Seller reserves the right in its sole, absolute discretion to reclassify or regroup Goods and to replace or discontinue Goods. Seller shall not have any liability of any nature as a result of any of the foregoing.

B. Seller reserves the right to correct clerical and typographical errors in any quotation, acknowledgment, invoice and/or any Goods publication or catalog.

11. TRADEMARKS.

Customer will not use Seller's name or any intellectual property rights of Seller without Seller's written consent, except that the name of Seller or an applicable Seller trademark may be used in connection with the sale of genuine Seller Goods, but only if due regard is given both to proper trademark use and to the ownership by Seller of its name and mark. Customer will not: (a) remove or alter a trademark or trade name, part number or other designation from any Goods; or (b) use any trademarks or trade names, other than Seller's, in connection with Goods; or (c) use Seller's trademarks or trade names in connection with trademarks or goods of others.

Customer acknowledges that, should it breach its covenants set forth in this paragraph 11, Seller will be irreparably harmed and will be entitled to an injunction preventing Customer from further breaching these Terms without any

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further or more particularized showing of irreparable injury. Such an injunction may be applied for before any Court having proper jurisdiction.

12. PATENT PROTECTION.

A. Seller's sole and exclusive obligation to Customer with respect to claims made against Customer for alleged infringement of any patent arising by virtue of the sale or normal use of unmodified Goods shall be: (i) to defend, at Seller's cost, any legal action brought against Customer in respect of any such claim for such patent infringement and pay all final judgments and costs entered by reason of such action (provided that, Seller has been given prompt notice and has been allowed to deal with and defend any such action from the beginning); and (ii) at Seller's sole option to do any one or more of the following: (a) settle the claim of infringement; (b) procure for Customer the right to use or sell the allegedly infringing Goods; (c) replace or modify the allegedly infringing Goods so as to avoid the alleged infringement; or (iv) refund the price actually paid by Customer to Seller for the allegedly infringing Goods. Customer shall be afforded the opportunity, at its own cost and expense, to retain counsel of its own choice to communicate Customer's interests to Seller's counsel who shall control the defense of any such patent infringement claim brought against Customer.

B. The preceding provision of this paragraph 12 shall apply only to Goods or parts of Goods manufactured by Seller and shall not be effective with respect to any infringement which arose from Seller's use of design, specifications, drawings or manufacturing or process information furnished by Customer ("Customer's Information").

C. When Goods are made using Customer's Information, Customer will indemnify, and will defend and save Seller harmless from and against any and all liability, including, without limitation, patent infringement, personal injury, death and property damage, costs, damage and expense (including, without limitation, reasonable attorneys' fees), of any nature whatsoever and claims therefor, arising out of or in connection with said Customer's Information. Customer will be given adequate notice of any such claim and will conduct the defense of such claim at its own cost and expense. Seller shall be afforded the opportunity, at its own cost and expense, to retain counsel of its own choice to aid in such defense.

13. EVENTS OF DEFAULT.

A. An Event of Default shall occur under the Contract if: (i) Customer shall become insolvent or make a general assignment for the benefit of a creditor or undergo a material adverse change in its financial condition; (ii) a petition under the Bankruptcy Code is filed by or against Customer; (iii) Customer causes a unilateral cancellation, repudiation, or rescheduling under the Contract or is in material default under the Contract; or (iv) Customer shall fail to pay any amount payable under the Contract by the date when due or shall fail to accept and pay for any Goods delivered C.O.D. in accordance with the terms of the Contract.

B. Upon the occurrence of an Event of Default, Seller shall have any one or more of the rights as set forth in paragraph 9, above, or as otherwise provided in these Terms. In the event of termination of the Contract, in whole or in part, Customer shall indemnify and hold Seller harmless from and against all damages of any kind or nature as if the Contract had been fully performed in accordance with these Terms.

14. INTERNATIONAL CONTRACTS.

If the Contract indicates that the sale of Goods involves an exportation of Goods to a Customer which has its place of business in a State, other than the United States, governed by the United Nations Convention of Contracts for the International Sale of Goods (1980) (the "CISG"), then subparagraphs A through D, below, shall govern. If there exists a conflict between the provisions of this paragraph 14 and other provisions of these Terms, this paragraph 14 shall prevail to the extent that the construction is necessary to avoid an irreconcilable conflict.

Otherwise, the following provisions of this paragraph 14 and such other provisions are to be considered cumulative:

A. The law governing the Terms shall be as stated in paragraph 15 of the Terms. The CISG shall not apply to the formation of any contract of which the Terms form a part or to the interpretation or construction of Terms. However, if the CISG shall be deemed to apply, then Customer and Seller hereby agree to exclude the application of CISG;

B. (i) Customer shall be responsible for the timely obtaining of all required governmental authorizations, such as export licenses, import licenses, exchange permits and any other governmental authorization, even though any such

authorization may be applied for by Seller. Seller, in its sole discretion, may assist Customer in securing such authorizations as may be reasonably required and the expense of such assistance may be borne by Customer. Seller shall not be liable if any authorized delivery is delayed, denied, revoked, restricted or not renewed, and Customer shall not be relieved thereby of its obligations to pay Seller for goods hereunder. Seller shall have no liability to Customer or to any other person if any of the events listed in the preceding sentence occur, even if they occur through default of Seller; (ii) all sales hereunder shall, at all times, be subject to the export control laws and regulations, as amended, of the United States Government.

Customer warrants that it shall not make any disposition of the U.S. origin Goods purchased from Seller by way of trans-shipment, re-export, diversion or otherwise, except as said laws and regulations expressly permit; and (iii) Seller shall have no liability for any claim, by whomever asserted, with respect to the export of Goods or for Seller's services related to exportation, and Customer will indemnify, save harmless and will, at its expense, defend Seller from and against any and all liability, penalties, damages, costs, expenses (including, without limitation, reasonable attorneys' fees), and claims therefor arising out of or in connection with non-compliance with the aforesaid governmental authorizations and export control laws, rules and regulations;

C. Price and delivery terms are FCA (INCOTERMS 2000) Seller's dock in the United States.

D. Payment for Goods shall be made by Customer in U.S. Dollars through the medium of one or more wire transfers to be established at Customer's expense, to Seller's bank. Seller may, at Seller's sole discretion, agree to payment by letter of credit. All letters of credit shall be in favor of and in a form acceptable to Seller, shall be maintained in sufficient amounts and for the period necessary to meet all of Customer's payment obligations to Seller, shall be irrevocable and shall be issued or confirmed by a bank in the United States satisfactory to Seller within ten (10) days prior to each shipment date for Goods. Letters of credit shall permit partial deliveries against the letter of credit, and shall provide for full payment as provided in these Terms, pro rata payment and payment for any termination charges, if applicable, upon presentation of Seller's commercial invoices and Seller's certificate of delivery of Goods to Customers or into storage (with certification of cause therefor) or a clean dock or ship's receipt or received-for-shipment bill of lading, or other transportation receipt. All costs, including all bank confirmation charges, relating to such letters of credit shall be borne by Customer.

15. MISCELLANEOUS PROVISIONS.

A. Customer acknowledges that no representations or promises have been made with respect to Goods other than as specifically set forth in the Contract and that any information contained in any publication of Seller is merely for reference and for Customer's convenience in ordering Goods and is not intended to become a representation or part of the basis of any agreement between Seller and Customer. Prices, quotations, specifications and other terms and statements appearing in Seller's catalogs and advertisements or otherwise made by Seller are subject to change without notice.

B. These Terms represent and incorporate the entire understanding of the parties hereto with respect to the subject matter hereof and supersede all prior or contemporaneous agreements, both oral and written, between the parties with respect to such subject matter.

Each party acknowledges that there are no warranties, representations, covenants or understandings of any kind, nature or description whatsoever made by either party to the other except such as are expressly set forth herein.

C. In the event that any of these Terms are held by a court of competent jurisdiction to be unlawful, invalid, void or unenforceable, the remaining of these Terms will remain in full force and effect and will in no way be affected, impaired or invalidated. The rights and remedies of Seller under these Terms shall be deemed to be cumulative and shall be deemed to be cumulative with rights and remedies of Seller under applicable law.

D. The Contract shall be governed and interpreted under the laws of the State of California. Customer irrevocably submits exclusively to the jurisdiction of any federal or State Court, as the case may be, in any such action or proceeding and expressly and irrevocably waives any right to change such jurisdiction.