



## KICKHAEFER MANUFACTURING COMPANY TERMS AND CONDITIONS OF SALE

**ALL PROPOSALS AND QUOTATIONS ARE OFFERED, AND ALL PURCHASE ORDERS ARE ACCEPTED, BY SELLER SUBJECT ONLY TO THESE TERMS AND CONDITIONS OF SALE. ANY DIFFERENT OR ADDITIONAL TERMS OF BUYER ARE HEREBY OBJECTED TO AND DISALLOWED.**

### 1. Entire Agreement

These Terms and Conditions of Sale ("Terms and Conditions") of Kickhaefer Manufacturing Company, LLC ("Seller"), together with any proposal or quotation, purchase order acknowledgement, and invoice issued by Seller and any purchase order submitted by Buyer (except to the extent such purchase order conflicts with these Terms and Conditions) (collectively, the "Agreement"), constitute the entire agreement between Buyer and Seller with respect to the sale of the goods described in such proposal, quotation and/or purchase order (the "Products"). This Agreement supersedes any prior or contemporaneous agreements, correspondence, discussions or understandings, whether oral or written, relating to the subject matter of this Agreement. In the event of any conflict between these Terms and Conditions and any provision contained in or incorporated by reference into any proposal, quotation, purchase order acknowledgement, purchase order or similar document constituting a part of this Agreement, these Terms and Conditions shall govern. **These Terms and Conditions shall govern in the event of any conflict between any provision contained in or incorporated by reference into any contemporaneous or subsequent purchase order or similar document submitted by Buyer, the terms of which, whether conflicting, supplemental or otherwise, are expressly rejected.**

### 2. Shipment, Title and Risk of Loss

Shipment shall be FOB Shipping Point. Title and risk of loss with respect to Products shall pass from Seller to Buyer upon delivery to a carrier at the shipping dock of Seller's facility. Delivery to such carrier shall constitute delivery to Buyer.

### 3. Payment

Payment is due net 30 days following the date of Seller's invoice. Interest will be charged at the rate of 18% per year (or such lesser sum as is the highest rate permitted by applicable law) on accounts past due. Buyer shall have no right of set-off or withholding, and no deduction of any amounts due from Buyer to Seller shall be made without Seller's prior, express written approval.

### 4. Taxes and Other Charges

In addition to the sales price of the Products, Buyer shall be responsible for any tax, fee or other charge imposed upon the sale and/or shipment of the Products sold under this Agreement by any federal, state, municipal or other governmental authority (other than taxes on Seller's gross or net income).

## 5. Cancellation; Default by Buyer

This Agreement may not be cancelled or rescheduled, in whole or in part, by Buyer except with Seller's prior written consent. If at any time, in Seller's opinion, Buyer's credit is impaired, or if Buyer shall fail to pay to Seller any amount when due, under this Agreement or any other agreement, or if at any time Buyer shall indicate an intention to refuse to perform its obligations under this Agreement, Seller may, at its option, require full or partial payment in advance of shipment or production, demand adequate assurance of payment, deem itself insecure, or terminate this Agreement and require that all amounts outstanding as of the effective date of termination become immediately due and payable. Buyer shall pay all of Seller's costs and expenses, including reasonable attorneys' fees, incurred by Seller to enforce this Agreement.

## 6. Force Majeure

Seller shall not be liable for any loss, damage or penalty as a result of any delay in or failure to manufacture, deliver or perform due to any cause beyond Seller's reasonable control, including, without limitation, accident, fire, actual or threatened strike or riot, explosion, mechanical breakdown (including technological or information systems), plant shutdown, unavailability of or interference with necessary transportation, raw material or power shortage, pandemic or epidemic, compliance with any applicable law, regulation or order, acts of God or public enemy, or any other cause or contingency beyond Seller's control. The time for performance shall be extended for a period equivalent to the delay, if any. If, by reason of any of the foregoing events, Seller's supply of Products shall be insufficient to meet all requirements, Seller shall have the right, at its sole option, and without liability, to allocate its available supply among its present and future customers and/or its own departments, divisions and affiliates in such a manner as Seller deems proper in Seller's sole discretion. If by reason of any of the foregoing events, the cost of the Products exceeds the sales price of the Products, Seller shall have the right, at its option, to terminate this Agreement.

## 7. Limited Warranty; DISCLAIMER

Seller warrants that the Products shall conform to the dimensions and specifications of Seller's standard parts as shown in Seller's catalog for standard parts, or to Buyer's print dimensions, tolerances and material specifications if provided by Buyer in writing and accepted by Seller in writing. THE FOREGOING WARRANTY IS EXCLUSIVE, AND SELLER MAKES NO OTHER WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WHETHER ARISING BY OPERATION OF LAW OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT, WHETHER OR NOT THE PURPOSE OR USE HAS BEEN DISCLOSED TO SELLER. NO WAIVER, ALTERATION, ADDITION OR MODIFICATION OF THE FOREGOING WARRANTY SHALL BE VALID, UNLESS MADE IN WRITING AND DULY SIGNED BY SELLER. IN THE EVENT THE PRODUCTS ARE NOT IN COMPLIANCE WITH THE FOREGOING WARRANTY, BUYER'S SOLE AND EXCLUSIVE REMEDY SHALL BE A CREDIT FOR THE PRICE OF THE NON-CONFORMING PRODUCTS OR, AT SELLER'S OPTION, REPLACEMENT OF THE PRODUCTS. BUYER ASSUMES ALL RISK WHATSOEVER AS TO THE RESULT OF THE USE OF PRODUCTS PURCHASED, WHETHER USED ALONE OR IN COMBINATION WITH OTHER PRODUCTS OR SUBSTANCES. Notwithstanding the foregoing, the foregoing warranty shall not be effective if Seller has determined, in its sole discretion, that Buyer has misused the Products in any manner, has failed to use the Products in accordance with industry standards and practices, has not properly stored or maintained the Products, or has failed to use the Products in accordance with instructions, if any, furnished by Seller.

## 8. Claims

All warranty claims must be brought within one (1) year of delivery, regardless of their nature. With the exception of warranty claims, any claim relating to quantity of Products must be made in writing within fifteen (15) days after delivery of the Products, and any claim relating to damage to Products must be made in writing within thirty (30) days after delivery of the Products. All Products subject to a warranty or other claim must be held available at Buyer's place of business for Seller's inspection, upon reasonable notice, during Buyer's regular business hours. Other than a warranty claim, no claim may be made after Products have in any way been used or processed by Buyer. Failure by Buyer to comply with this Section shall constitute a waiver by Buyer of all claims with respect to such Products.

## 9. Limitation of Liability

Buyer's remedies set forth in this Agreement are exclusive. UNDER NO CIRCUMSTANCES SHALL SELLER BE LIABLE TO BUYER OR ANY OTHER PARTY FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL, INDIRECT, STATUTORY, EXEMPLARY OR PUNITIVE DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, LOST REVENUES, LOSS OF USE, LOSS OF TIME, INCONVENIENCE, LOST BUSINESS OPPORTUNITIES, DAMAGE TO GOOD WILL OR REPUTATION, OR LOSS OF DATA, ARISING OUT OF, OR AS A RESULT OF, THE SALE, DELIVERY, SERVICING, USE OR LOSS OF THE PRODUCTS SOLD HEREUNDER, REGARDLESS OF WHETHER SUCH LIABILITY IS BASED ON BREACH OF CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE, AND EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR SUCH DAMAGES COULD HAVE BEEN REASONABLY FORESEEN. The total liability of Seller for damages with respect to this Agreement, or anything done in connection with this Agreement, including but not limited to claims for indemnification, whether as to quality or amount of product delivered or non-delivery, shall be limited to the purchase price of the Products with respect to which the damages are claimed.

## 10. Intellectual Property Ownership

Buyer shall retain ownership in and to any plans, designs and related materials that Buyer provides to Seller for the production of the Products. Notwithstanding the foregoing, all specifications, drawings, designs, models, schematics, prototypes, data, information, ideas, methods, product samples, tools, gages, dies, fixtures, patterns and inventions made, conceived or developed by Seller in connection with the production and supply of the Products shall inure to the benefit of, and be owned exclusively by, Seller, notwithstanding any charges therefor which may have been or may be imposed by Seller on Buyer.

## 11. Indemnification

- (a) Each of Buyer and Seller shall indemnify, defend and hold harmless the other party and its officers, directors, employees and agents from and against any and all damages, judgments, fines, penalties and costs (including reasonable attorneys' fees) (collectively, "Losses") resulting from or arising out of any third-party claim for bodily injury or death or damage to tangible property to the extent arising from, resulting from or caused by, in whole or in part, the negligence of the indemnifying party; provided, that in the event such injury, death or damage is caused by joint or concurrent negligence of Buyer and Seller, the Losses shall be borne by each party in proportion to its degree of causation.
- (b) Seller shall indemnify, defend and hold harmless Buyer and its officers, directors,

employees and agents from and against any and all Losses resulting from or arising out of any claim by a third party asserting that the Products infringe any United States patent, trademark or copyright of such party, except for any claims arising under Section 11(c) below. In the event that any Products are held to infringe any valid United States patent, trademark or copyright, and their use is enjoined, or in the event of a settlement or compromise approved by Seller which shall preclude future use of such Products, Seller shall, at its own expense and at its sole option: (i) procure the right to continue using such Products; (ii) modify such Products to render them non-infringing but to provide substantially comparable form, fit and function; (iii) replace such Products with a non-infringing product that has substantially comparable form, fit and function; or (iv) if Seller determines, in its reasonable judgment, that none of the foregoing options (i), (ii) or (iii) are commercially reasonable, refund the purchase price paid by Buyer for the Products after return of the Products to Seller (less reasonable depreciation for any period of use). Notwithstanding the foregoing, Seller shall not be responsible for claims for infringement of any patents covering the use of the Products either alone or in combination with other goods or materials. The foregoing states the entire liability of Seller for intellectual property infringement.

- (c) Buyer shall indemnify, defend and hold harmless Seller and its officers, directors, employees and agents from and against any and all Losses resulting from or arising out of (i) any claim by a third party asserting that any Product furnished by Seller to Buyer that was manufactured in accordance with any plans, designs or other descriptions proposed or furnished by Buyer infringes any United States patent, trademark or copyright of such party, or (ii) any claim against Seller of contributory infringement resulting from the use or resale by Buyer of a Product.
- (d) The obligations of the party providing indemnification under Section 11(a), Section 11(b) or Section 11(c), as applicable (the "Indemnifying Party") are subject to the following: (i) the party receiving indemnification (the "Claiming Party") shall give the Indemnifying Party prompt notice in writing of any such claim and shall transmit to the Indemnifying Party, promptly upon receipt thereof, all processes and papers served upon the Claiming Party; (ii) the Claiming Party shall not take any position adverse to the Indemnifying Party in connection with the applicable claim; and (iii) the Claiming Party shall permit the Indemnifying Party, through the Indemnifying Party's counsel and at the Indemnifying Party's cost, to control the defense of, and settlement negotiations with respect to, the applicable claim and shall provide all information, assistance and authority reasonably necessary to enable the Indemnifying Party to do so. In addition, Seller's obligations under Section 11(b) are further subject to the following: (A) the alleged infringement must consist of the use of the applicable Products in Buyer's business; and (B) Buyer shall have made all payments for such Products when due hereunder. The Indemnifying Party shall have the right to settle and compromise the applicable claim only with the written consent of the Claiming Party (which consent shall not be unreasonably withheld), unless (I) such settlement provides the Claiming Party with a full release from such claim; and (II) the sole relief provided in such settlement is monetary damages that are paid in full by the Indemnifying Party.

12. Returns

No Products may be returned to Seller without Seller's prior written consent. Products returned without Seller's prior written consent will be refused.

13. Amendment

This Agreement (including, without limitation, the Terms and Conditions) may not be amended except by a writing duly signed by both Buyer and Seller and specifically referencing the agreed amendment.

14. Governing Law; Venue

This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin without application of choice of law or conflicts of law principles. ANY DISPUTE BETWEEN BUYER AND SELLER WHICH RESULTS IN EITHER PARTY INSTITUTING COURT PROCEEDINGS SHALL BE LITIGATED IN EITHER THE FEDERAL DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN OR THE OZAUKEE COUNTY CIRCUIT COURT, WHICH COURTS SHALL HAVE EXCLUSIVE JURISDICTION OVER ANY MATTER RELATED TO THIS AGREEMENT. Buyer's purchase of any product from Seller shall constitute acceptance of the terms and conditions herein, and any conflicting or additional terms in Buyer's purchase documentation shall be of no force or effect. In the event that Seller brings legal action to enforce the terms hereunder, it shall be entitled to its reasonable attorney's fees and other legal expenses. The UN Convention on Contracts for the International Sale of Goods shall not apply to this Agreement.

15. Severability

If any provision of this Agreement shall under any circumstances be deemed invalid or inoperative, this Agreement shall be construed with the invalid or inoperative provision deleted, and the rights and obligations of the parties shall be construed and enforced accordingly.

16. Notices

All notices or other communications required or permitted to be given under this Agreement shall be in writing and shall be considered to be given and received in all respects when hand delivered, when delivered by prepaid express or courier delivery service, or when sent by e-mail of a .pdf document (with confirmation of transmission), in each case addressed to Buyer's principal place of business or to Seller's address set forth below, as applicable, or to such other address as shall be designated by notice duly given:

Kickhaefer Manufacturing Company  
Sales Operations Department  
1221 S. Park Street  
P.O. Box 348  
Port Washington, WI 53074  
Phone Number: 262-377-5030  
E-mail: sales@kmc-mfg.com

## 17. Changes

Seller may at any time make such changes in design and construction of catalog products as Seller deems appropriate without obligation to Buyer. Seller shall revise the purchase price to cover any increased cost of custom Products arising from changes requested by Buyer.

## 18. Delivery

Time is of the essence as to all time periods stated herein, except delivery dates which are estimates only and may be changed at Seller's sole discretion. Seller will use commercially reasonable efforts to avoid any delay in delivery and to deliver Products on specified delivery dates; provided, that failure to deliver by a specified delivery date will not constitute sufficient cause for cancellation by Buyer, nor will Seller be liable for late delivery arising out of any cause whatsoever or for any loss arising therefrom. Where delivery is to be made by installments, delay in delivering one installment shall not entitle Buyer to refuse to accept the remaining installments.

## 19. Assignment

This contract between Buyer and Seller is not transferable by either party without the prior written consent of the other party, except that Seller may assign this Agreement without Buyer's consent if the assignment is to an affiliate or if the assignment is carried out as part of a merger, restructuring, or reorganization, or sale or transfer of all or substantially all of Seller's assets.

## 20. Remedies

The rights and remedies reserved to Seller shall be cumulative and additional to all other remedies provided by law or in equity. Seller shall be entitled to recover costs and attorneys' fees in the enforcement or defense of any rights hereunder. Buyer expressly agrees that Seller may, upon prior notice and at its expense, audit the books and records of Customer referring or relating to the Work (including, but not limited to, any documents relating to (i) payment for the Products; (ii) Buyer's current financial condition; and (iii) any disposition or subsequent transfer, by resale or otherwise, of any goods furnished by Seller).

## 21. Miscellaneous

Seller and Buyer further expressly agree as follows. Seller is not responsible for ascertaining the particular use, suitability, application, intended use, or the like, regarding the Products furnished by Seller to Buyer, NOR SHALL SELLER HAVE ANY LIABILITY WHATSOEVER IN CONNECTION WITH (WITHOUT LIMITATION) THE DESIGN, CONDITION, DURABILITY, PERFORMANCE, APPLICATION, OR ACTUAL OR INTENDED USE OF SUCH PRODUCTS, IT BEING SELLER'S SOLE OBLIGATION TO FURNISH THE SAME IN ACCORDANCE WITH BUYER'S WRITTEN SPECIFICATIONS OR DESCRIPTIONS. All captions are for convenience only and do not constitute a part of these conditions. In the event of any breach or default of these conditions by Buyer, Seller may employ a representative or attorney to remedy such breach or default, and Buyer shall pay to Seller all costs, expenses and fees, including reasonable attorneys' fees, incurred by Seller in the enforcement hereof and the obtaining of such remedy. Buyer represents and warrants to Seller that Buyer has not ceased to pay its debts in the ordinary course of business, that it can pay its debts as they become due, and that it is and continues to be solvent within the meaning of the Federal Bankruptcy Act. Seller and Buyer shall perform hereunder strictly in conformance with and subject to (in their present form or as hereafter amended) all applicable laws and governmental orders,

rules and regulations of the United States of America and of any State or municipality thereof, including, but not limited to, all United States export control laws and regulations.


#### **Buyer's Responsibility to Comply with California Proposition 65**

Seller does not label the packaging of products it sells with a California Proposition 65 warning, Seller expressly disclaims any liability for ensuring that Proposition 65 warnings are provided for its products that Buyer resells, distributes, or incorporates into other products that it sells in California. Buyer assumes the sole and exclusive responsibility for providing any Proposition 65 warnings for products Buyer purchases from Seller that it resells and/or distributes in California whether in their original Seller packaging, broken down into smaller units that are individually resold, repackaged in Buyer's own packaging, or incorporated into other products Buyer sells in California.

The Proposition 65 warning regulations can be found at the following link:  
<https://oehha.ca.gov/media/downloads/cnr/art6regtextclean090116.pdf>

Notwithstanding any other provision of these terms and conditions, Buyer hereby warrants that it will comply with Proposition 65 for its resale or distribution of Seller's products in California, or as components of other products sold in California. Buyer also agrees to protect, defend, and hold harmless Seller, by counsel of Seller's choice, from and against all claims, actions, liabilities, losses, costs, and expenses, arising out of any actual or alleged violation of Proposition 65 related to Buyer's resale or use of Seller's products in other Buyer products sold in California. These obligations of Buyer shall not be affected in any way by Buyer's extension of express or implied warranties to its customers.

To the extent Buyer is located in California, Seller provides Buyer with the following Proposition 65 warning related to the Seller products that it is purchasing:

 California Proposition 65 **WARNING:** This product can expose you to chemicals including lead, which are known to the State of California to cause cancer, birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).