

# KURT ORBAN PARTNERS

111 ANZA BLVD., SUITE 350, BURLINGAME, CA. 94010-1932 Tel: (650) 579-3959 Fax: (650) 579-3965 IRS: 94-306215400

## **Terms and Conditions Applicable to the Purchase of Goods:**

**1. Acceptance/Agreement:** Seller's commencement of work on the goods subject to any purchase order or shipment of such goods, whichever occurs first, shall be deemed acceptance of any purchase order and the terms herein. The acceptance of any purchase order is limited to acceptance of the express terms contained within the four corners of any purchase order submitted by Kurt Orban Partners ("KOP") and all terms herein. Any proposal for additional and/or different terms, or any attempt by Seller to vary any of the terms of any purchase order or the terms contained herein is hereby rejected, but such proposals shall not operate as a rejection of this offer and this offer shall be deemed accepted by Seller without said additional or different terms. If, however, such variances are in the terms of price, such variance shall be deemed a material alteration, and KOP's purchase order will thereby be revoked.

**2. Termination:** In the event of any default by Seller, or if Seller fails to comply with the terms herein or of any purchase order, KOP may terminate any part or the whole of any purchase order. Late deliveries, deliveries of products which are defective or which do not conform to any purchase order, and failure to provide KOP reasonable assurances of future performance shall be deemed a default by Seller and KOP may terminate any purchase order. In the event of termination, KOP shall not be liable to Seller for any amount, and Seller shall be liable to KOP for all damages sustained by reason of default.

**3. Warranty:** Seller expressly warrants that all goods furnished under this agreement shall conform to all specifications and applicable standards and will be free from defects in material or workmanship. Seller warrants that all such goods will conform to any statements made on the containers, labels or advertisements for such goods, and that any goods will be adequately contained, packaged, marked and labeled in accordance with industry standards and other such governing customs and applicable state and federal laws. Seller warrants that all goods or services furnished hereunder will be merchantable, and will be safe and appropriate for the purpose for which the goods or services of that kind are normally used. If Seller knows or has reason to know the particular purpose for which the goods are intended, Seller warrants that such goods will be fit for such particular purpose. Inspection, test, acceptance or use of the goods or services shall not affect Seller's obligation under this warranty, and such warranties shall survive any inspection, test, acceptance and use. Seller's warranty shall run to KOP, its customers and users of products as described in any purchase order.

**4. Risk of Loss:** Seller shall bear all risk of damage or loss with respect to all goods or services until KOP receives and accepts the goods.

**5. Force Majeure:** KOP may delay acceptance occasioned by causes beyond its control, including, but not limited to, (a) governmental interference, action or inaction, restrictions, or

regulations, war or civil unrest, acts of God, strike or other labor delay, fire or other casualty, market instability (including, but not limited to, fluctuations in prices or supply), or the arrest of a vessel or other delays in shipping or transport during which KOP's performance is excused. If directed by KOP, Seller shall hold such goods and shall deliver them when the cause affecting the delay has been removed or is otherwise terminated. KOP shall be responsible only for Seller's direct additional costs in holding the goods. If any delay continues for more than thirty (30) days, KOP may cancel the purchase order without any liability whatsoever.

**6. Duty to Defend/Indemnify:** Seller shall defend, indemnify and hold harmless KOP against all damages, claims or liabilities and expenses, including court costs and attorneys' fees, arising from or relating to (a) Seller's performance or non-performance, and (b) the goods or services.

**7. Changes:** KOP shall have the right at any time to make changes in drawings, designs, specifications, materials, packaging, time and place of delivery and method of transportation.

**8. Inspection/Testing/Nonconforming Goods:** Seller's delivery and KOP's acceptance of goods is subject to § 2-601 of the Uniform Commercial Code. If the goods or the tender of delivery, including time specified for delivery, fail in any respect to conform to the corresponding purchase order and the terms herein, KOP may (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest. Payment for any goods or services shall not constitute KOP's acceptance thereof. Within a reasonable time after delivery, KOP shall have the right to inspect any goods and to thereafter reject the whole, accept the whole, or accept any part of and reject the rest of any goods that are, in KOP's judgment, defective, nonconforming, or fail in any respect to conform to the terms herein and any purchase order. Upon KOP's election, Seller agrees to replace or correct defects of any nonconforming or defective goods or services, without expense to KOP. KOP may elect to require Seller to replace or correct any defect and at the same time expressly reserve its right to pursue all other remedies available to it against Seller for such defects. In the event Seller fails to correct defects in or replace nonconforming goods or services promptly, KOP may, after notice to Seller, make such corrections or replace such goods and services and Seller shall be responsible for KOP's cost of cover. Seller understands that because time is of the essence, KOP will not be required to replace or correct the nonconforming goods at the lowest possible price. Rather, Seller expressly agrees that any method employed by KOP and amount spent by KOP to replace or correct defective or nonconforming goods or services is reasonable and chargeable to Seller. Goods rejected and goods supplied in excess of quantities called for herein may be returned to Seller at its expense and, in addition to KOP's other rights, KOP may charge Seller all expenses of unpacking, examining, repacking, and reshipping such goods. In the event that any goods accepted by KOP are subsequently found to be nonconforming, KOP may revoke acceptance of any or all of the goods in any purchase order, without regard to what constitutes a commercial unit or the feasibility of segregating conforming from nonconforming items. Nothing contained in any purchase order shall relieve Seller in any way from the obligation of testing, inspection and quality control, and KOP shall have the right to audit product quality at Seller's premises and inspect all traceability documentation related to KOP's supply chain.

**9. Setoff:** All claims for money due or to become due from KOP shall be subject to deduction or set-off by KOP by reason of any claim, demand or counterclaim arising out of any purchase

order, the terms herein, or any other transaction with Seller.

**10. Shipment:** If in order to comply with KOP's required delivery date it becomes necessary for Seller to ship the goods in a more costly manner than specified in any purchase order, any increased transportation costs shall be paid for by Seller unless the necessity for such rerouting or expedited handling is caused solely by KOP. Time is of the essence of this contract. If delivery of items or rendering of services is not completed by the time contemplated by any purchase order, KOP reserves the right, without liability, and in addition to its other remedies, to terminate this contract. Seller will be responsible for KOP's cost of cover.

**11. Rights and Remedies Cumulative/Waiver:** The rights and remedies provided by this agreement are cumulative and are given in addition to any other rights KOP may have by law, statute, ordinance, or otherwise. KOP's exercise of any right or remedy will not preclude or waive its right to exercise any other right or remedy nor will its failure to insist on performance of any of the terms herein or to exercise any right hereunder shall waive any other rights whether of the same or similar type. No waiver by KOP of a breach of the terms herein or any purchase order may be construed as a waiver of any succeeding or preceding breach.

**12. Limit on KOP's Liability/Statute of Limitations:** In no event shall KOP be liable for anticipated profits, lost profits, incidental damages, consequential damages or penalties of any description. KOP's liability on any claim for any loss shall not exceed the price allocable to the goods or services, which give rise to the claim. Any lawsuit against KOP arising out of the terms herein or any purchase order must be filed within one year after the cause of action has accrued.

**13. Choice of Law/Service of Suit:** Any dispute relating to any purchase order or any contract formed hereunder or the validity of any such contract shall be subject to the exclusive jurisdiction of the courts of California and Texas and governed by and interpreted according to those states' respective laws, without regard to principles of conflict of law. Seller agrees to submit itself to the jurisdiction of the courts of California and Texas and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court. Notwithstanding the foregoing, in the event a legal proceeding is commenced against KOP which relates to the goods or services of Seller, then Seller agrees to participate in such legal proceeding. The aforementioned choices of venue are intended by the parties to be mandatory and not permissive in nature, thereby precluding the possibility of litigation between the parties with respect to or arising out of this purchase order in any jurisdiction other than those specified in this paragraph. Seller hereby waives any right it may have to assert the doctrine of forum non conveniens or similar doctrine or to object to venue with respect to any proceeding brought in accordance with this paragraph, and stipulates that the courts shall have in personam jurisdiction and venue over Seller for the purpose of litigating any dispute, controversy, or proceeding arising out of or related to this purchase order.

**14. Attorneys' Fees and Costs:** If KOP employs an attorney to enforce its rights under this agreement or any purchase order, Seller agrees to pay KOP's reasonable attorneys' fees and costs.

**15. Severability:** Any provision found to be invalid by a competent court of law shall be

severable and shall have no effect on the validity of the remaining terms and conditions.

**THIS FORM CONSTITUTES THE ENTIRE AGREEMENT AND SUPERSEDES ALL PRIOR AGREEMENTS, EITHER WRITTEN OR ORAL. KOP'S OFFER IS EXPRESSLY MADE CONDITIONAL ON SELLER'S ASSENT TO THE TERMS HEREIN AND IN ANY PURCHASE ORDER ("THE TERMS"), AND KOP AGREES TO PURCHASE THE GOODS ONLY UPON THE TERMS, AND NO OTHERS. SELLER'S ASSENT TO THE TERMS SHALL BE DEEMED GIVEN UNLESS SELLER NOTIFIES KOP IN WRITING OF SELLER'S SPECIFIC OBJECTIONS TO CERTAIN TERMS WITHIN TEN (10) DAYS AFTER THIS FORM OR ANY PURCHASE ORDER IS ISSUED, WHICHEVER IS SOONER. IN ALL INSTANCES, SELLER'S COMMENCEMENT OF WORK ON THE GOODS SUBJECT TO ANY PURCHASE ORDER OR SHIPMENT OF SUCH GOODS WILL BE DEEMED SELLER'S ASSENT TO THE TERMS. THE MERE TENDER BY SELLER OF ITS OWN TERMS AND CONDITIONS OR OTHER SUCH FORM SHALL NOT BE DEEMED A SPECIFIC OBJECTION.**

Please address all mail post office box 2010. Couriers please use street address (zip 94005).