

SELLER Terms and Conditions of Sale

1. Acceptance. Nem-Pak LLC dba M5 Supply is herein referred to as ("SELLER") and the customer purchasing products ("Products") or services ("Services") is herein referred to as ("BUYER"). These terms and conditions of sale ("Terms"), any SELLER quotation, acknowledgment or invoice and all documents incorporated by specific reference herein or therein ("SELLER Documents" and together with these Terms, the "Agreement"), constitute the complete terms governing the sale of Products and Services. SELLER HEREBY REJECTS ANY ADDITIONAL OR DIFFERENT TERMS OR CONDITIONS PROPOSED BY BUYER, WHETHER OR NOT CONTAINED IN ANY OF BUYER'S BUSINESS FORMS OR IN BUYER'S WEBSITE, AND SUCH ADDITIONAL OR DIFFERENT TERMS WILL BE OF NO EFFECT. No site usage agreement or any other click through agreement on a website will have any binding effect whether or not SELLER clicks on an "ok," "I accept," or similar acknowledgment. Commencement of any work by SELLER or BUYER's acceptance of delivery of the Products or Services will manifest BUYER's assent to the Agreement. Additional or different terms applicable to a particular sale may be specified in the body of a SELLER Document or agreed to in writing by the parties. In the event of a conflict, the following order of precedence will apply: (a) terms agreed to in writing and executed by an authorized officer of SELLER; (b) SELLER Document terms; (c) these Terms.
2. Quotations. Quotations are only valid in writing and for 30 days from the date of the quotation. All quotations are subject to change or withdrawal without prior notice to BUYER. Quotations are made subject to approval of BUYER's credit. SELLER may refuse orders and has no obligation to supply Products or Services unless SELLER issues an order acknowledgement or upon the shipment of Products or commencement of Services.
3. Prices and Payment Terms. Prices are in U.S. Dollars and are subject to change without notice. All orders are accepted subject to SELLER's price in effect at time of shipment. Prices do not include any sales, use, value-added or other taxes, import duties, license fees or like charges ("Fees") related to the sale, importation or use of Products or Services, and BUYER is responsible for those Fees. If SELLER is subsequently required to pay any Fees, BUYER shall fully defend and indemnify SELLER therefor. Payment shall be due upon delivery or as otherwise provided by the Proposal, SELLER's order acknowledgment, invoice or other writing. Overdue invoices will incur interest at the rate of 1.5% per month, or at the maximum rate allowable by governing law. BUYER's inspection rights herein will not affect the payment terms. Under no circumstances will BUYER have a right of set-off. If BUYER fails to make any payment as required, BUYER agrees to indemnify SELLER for all associated costs incurred by SELLER, including reasonable attorney fees and court costs.
4. Credit Approval. All shipments are subject to approval by SELLER's credit department. SELLER may invoice BUYER and recover for each shipment as a separate transaction. If, in SELLER's sole judgment, BUYER's financial condition is or becomes unsatisfactory, then SELLER may, without prejudice to any of its other remedies: (a) defer or decline to make any shipments except upon receipt of satisfactory security or cash payments in advance; and/or (b) terminate any or all of BUYER's purchase orders.
5. Cancellation or Modification. SELLER may cancel any purchase order or release thereunder, or terminate any agreement relating to the purchase of SELLER's Products or Services upon reasonable prior written notice to BUYER. Once SELLER has accepted a purchase order or begun taking actions with respect to a purchase order, BUYER cannot cancel or modify that purchase order except with SELLER's written consent. In such event, BUYER will be liable for cancellation or modification charges and all costs incurred and committed for the order or in connection with the cancellation or modification, as applicable, together with a reasonable allowance for prorated expenses and anticipated profits.
6. Inspection / Non-Conforming Shipments. BUYER may inspect Products for a period of 5 business days after delivery ("Inspection Period"). BUYER must notify SELLER in writing of any Products that do not conform to the specifications applicable to their sale within the Inspection Period and afford SELLER a reasonable opportunity to inspect such Products and cure any nonconformity. If BUYER fails to provide SELLER such written notice within the Inspection Period, BUYER will be deemed to have accepted the Products. BUYER may not return any Product without SELLER's prior written authorization. Any return authorized by SELLER must be made in accordance with SELLER's return policies. BUYER will be responsible for all costs associated with returns of Products and will bear the risk of loss, unless SELLER agrees otherwise in writing or determines that the Products do not conform to the applicable terms of sale. Any variation in quantities shipped over or under those ordered (not to exceed 10%) will constitute compliance with BUYER's order, and the stated price per item will continue to apply.
7. Delivery. SELLER anticipates use of SELLER trucks for shipment of Products. All Products will be shipped Ex Works SELLER 1117 Cedar Ave. Croydon, Pa (Incoterms 2020). Shipping dates are approximate and are based upon prompt receipt of all necessary information from BUYER. SELLER may ship items in a single or multiple shipments. Title to the Products and risk of loss shall pass to BUYER upon delivery in accordance with the applicable shipping term. BUYER assumes all risk and liability for loss and use or misuse by third parties who acquire or use the Products illicitly after delivery. BUYER must notify SELLER within 5 business days from date of receipt of Products, of any damage or shortage, and afford SELLER a reasonable opportunity to inspect the Products. Any loss occasioned by damage or shrinkage in transit will be for BUYER's account and claims for such loss must be made solely against the carrier.
8. Limited Warranty. SELLER warrants that it will convey the Products free and clear of all liens, security interests and encumbrances created by, through or under SELLER. SELLER further warrants that for a period of 30 days from the date of delivery to the common carrier (the "Warranty Period"), under normal use and given proper installation and maintenance as determined by SELLER, the Products: (a) will conform to mutually agreed upon written specifications or other descriptions; and (b) will be free from substantial defects in material and workmanship.

In the event of a breach of the warranties set forth above (the "Warranties"), SELLER will, at SELLER's option and as SELLER's sole liability and BUYER's sole remedy, repair, replace or credit BUYER's account for, any Product that fails to conform to the Warranties, provided that (i) during the Warranty Period SELLER is promptly notified in writing upon discovery of such failure with a detailed explanation of any alleged deficiencies; (ii) SELLER is given a reasonable opportunity to investigate all claims; and (iii) SELLER's examination of such Product confirms the alleged deficiencies and that the deficiencies were not caused by accident, misuse, neglect, normal wear and tear, improper installation, unauthorized alteration or repair or improper testing. No Products may be returned to SELLER until inspection and approval by SELLER.

The Warranty against defects does not apply to: (1) consumable components or ordinary wear items; or (2) use of the Products with equipment, components or parts not specified or supplied by SELLER or contemplated under the Product documentation.

EXCEPT AS SET FORTH HEREIN, SELLER MAKES NO WARRANTY OR REPRESENTATION OF ANY KIND, EXPRESS OR IMPLIED (INCLUDING NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE).
9. Service Warranty. SELLER warrants that (a) it will perform Services in a timely, competent and professional manner and in accordance with industry standards; and (b) the Services shall conform to any mutually agreed upon specifications or statements of work. BUYER's sole remedy, and SELLER's sole liability, for a breach of the foregoing warranty is for SELLER, at its option, to re-perform the Services or credit BUYER's account for such Services.
10. Limitation of Liability and Remedies. SELLER WILL NOT BE LIABLE, AND BUYER WAIVES ALL CLAIMS AGAINST SELLER, FOR INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, DOWN TIME, LOST PROFITS OR COMMERCIAL LOSSES, WHETHER OR NOT BASED UPON SELLER'S NEGLIGENCE OR BREACH OF WARRANTY OR STRICT LIABILITY IN TORT OR ANY OTHER CAUSE OF ACTION. IN NO EVENT WILL SELLER'S LIABILITY IN CONNECTION WITH THE AGREEMENT OR SALE OF SELLER'S PRODUCTS OR SERVICES EXCEED THE PURCHASE PRICE OF THE SPECIFIC PRODUCTS OR SERVICES AS TO WHICH THE CLAIM IS MADE.
11. Product Use. BUYER is solely responsible for determining if a Product is fit for a particular purpose and suitable for BUYER's method of application. Accordingly, and due to the nature and manner of use of SELLER's Products, SELLER is not responsible for the results or consequences of use, misuse or application of its Products. All physical properties, statements and recommendations are either based on the tests or experience that SELLER believes to be reliable, but they are not guaranteed.
12. Tooling/Molds/Dies. All material, equipment, facilities and special tooling (including tools, jigs, dies, fixtures, molds, patterns, special taps, special gauges, special test equipment and manufacturing aids and replacements thereof) used in the manufacture of the Products will remain the property of SELLER. Any material, tooling or equipment furnished to SELLER by BUYER will become the property of SELLER with title to and right of possession in SELLER unless mutually agreed to in writing.
13. Consignment. If Products are sold on a consignment basis, title in such Products will not pass to BUYER until the earlier of: (a) the time the Product is removed from inventory for use; or (b) the date that is 30 days from the Product's shipment date. SELLER will have a purchase money security interest in consigned Products and may file a financing statement in accordance with the Uniform Commercial Code. BUYER agrees to store consigned Products in a segregated area and will install and/or maintain any signs or other devices to clearly identify the Products as SELLER Products. BUYER assumes the risk of loss of all consigned Products. BUYER shall insure consigned Products at BUYER's expense in amounts at least equal to the replacement value.
14. Ownership of Intellectual Property. All drawings, know-how, designs, specifications, inventions, devices, developments, processes, copyrights and other information or intellectual property disclosed or otherwise provided to BUYER by SELLER and all rights therein (collectively, "Intellectual Property") will remain the property of SELLER and will be kept confidential by BUYER in accordance with these Terms. BUYER has no claim to, nor ownership interest in, any Intellectual Property, and such information, in whatever form and any copies thereof, shall be promptly returned to SELLER upon request from SELLER. BUYER acknowledges that no license or rights of any sort are granted to BUYER hereunder in respect of any Intellectual Property, other than the limited right to use SELLER's Products or receive the Services purchased from SELLER.

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15. Use of Trademarks and Trade Names. BUYER shall not use, directly or indirectly, in whole or in part, SELLER's name, or any other trademark or trade name that is now or may hereafter be owned by SELLER (collectively the "Trademarks"), as part of BUYER's corporate or business name, or in any way in connection with BUYER's business, except in a manner and to the extent authorized herein or otherwise approved by SELLER in writing. BUYER hereby acknowledges SELLER's ownership of the Trademarks and the goodwill associated therewith. BUYER shall not infringe upon, harm or contest the validity of any Trademarks. BUYER shall be entitled to use the Trademarks only in connection with the promotion or sale of the Authorized Products pursuant to the terms of the Agreement. BUYER shall reproduce the Trademarks exactly as specified by SELLER. BUYER shall not use the Trademarks in combination with any other trademarks or names. BUYER agrees that it will not register or attempt to register any Trademark or any colorable imitation thereof (including any non-English language variation thereof), or use such Trademarks for any products or for any purposes other than those set forth in the Agreement. BUYER shall not at any time during or after termination of the Agreement use in its business any other trademark that is similar to or in any way resembles the Trademarks so as to be likely to cause deception or confusion with the Trademarks. BUYER shall provide reasonable cooperation to SELLER with respect to any efforts of SELLER to protect, defend or enforce its rights to the Trademarks. Should BUYER cease being an authorized customer of SELLER for any reason, BUYER shall immediately discontinue any formerly permitted use of SELLER's name or the Trademarks.
16. Confidential Information. All information furnished or made available by SELLER to BUYER in connection with the subject matter hereof shall be held in confidence by BUYER. BUYER agrees not to use (directly or indirectly), or disclose to others, such information without SELLER's prior written consent. The obligations in this section will not apply to any information that: (a) at the time of disclosure was or thereafter becomes generally available to the public by publication or otherwise through no breach by BUYER of any obligation herein; (b) BUYER can show by written records was in BUYER's possession prior to disclosure by SELLER; or (c) is legally made available to BUYER by or through a third party having no direct or indirect confidentiality obligation to SELLER with respect to such information.
17. Audit. Unless agreed to in writing by an officer of SELLER, neither BUYER nor any BUYER representative, may examine or audit SELLER's cost accounts, books or records of any kind or any matter, or any other data that SELLER, in its sole discretion, considers confidential or proprietary.
18. Infringement and Indemnification. Except as set forth below, SELLER agrees to defend and indemnify BUYER against any claims, costs, damages, liability and expenses resulting from actual patent, trademark or copyright infringement, misappropriation of confidential information, or violation of any other Intellectual Property right, domestic or foreign that may arise from the sale of SELLER's proprietary Product to BUYER as such pertains to the subject matter of the Agreement (each, a "Claim"); provided, however, (a) BUYER supplies SELLER written notice of such Claim immediately after the BUYER has notice of such Claim, (b) BUYER cooperates with SELLER in the defense and settlement of such Claim; and (c) BUYER allows SELLER the right to defend and settle such Claim at SELLER's expense. If a suit or claim results in any injunction or order that would prevent SELLER from supplying any part or Product falling under the Agreement, or if the result of such a suit or claim would, in the reasonable opinion of SELLER, otherwise cause SELLER to be unable to supply such parts or Products, SELLER may do one or more of the following: (i) secure an appropriate license to permit SELLER to continue supplying those parts or Products; (ii) modify the appropriate part or Product so that it becomes non-infringing; (iii) replace the appropriate part or Product with a non-infringing but practically equivalent part or Product; or (iv) if SELLER cannot reasonably accomplish the actions specified in subsections (i) – (iii), then in SELLER's sole discretion, SELLER may discontinue selling the part or Product without any further liability to BUYER. Notwithstanding the foregoing, SELLER shall have no liability or duty to defend and indemnify BUYER against any Claim relating to: (1) the use of any part or Product, (2) the combination of any part or Product with any other part or product not supplied by SELLER, or (3) any part or Product or process that is designed or specified by BUYER.
19. SELLER Employees. SELLER sales and service employees do not have the training or authority to make legal representations or enter into any agreements or execute any BUYER documents affecting legal responsibilities or waiving legal rights, including those regarding the transfer of intellectual property rights or related to privacy laws. Any such representations, agreements or documents will not be binding on SELLER or such SELLER employees.
20. Service Terms. The following terms and conditions apply to any on-site Services provided by SELLER:
- A. Services will be provided at SELLER's then current service rates.
 - B. BUYER shall prepare the site for the Services. If the site is not prepared for the Services upon SELLER service personnel's arrival at the agreed upon time and date for Services, SELLER may charge BUYER for any delay and/or travel time at SELLER's regular service rates.
 - C. BUYER shall provide SELLER with advance notice of any rules, regulations, statutes and requirements applicable to the Services, including any required permits and licenses, that are applicable to BUYER's local jurisdiction.
 - D. SELLER may refuse, without any liability, to provide Services and to allow SELLER service personnel to suspend Services or vacate any site where, in SELLER's opinion, performance of Services would pose a risk to the safety of any person. In such event, BUYER is responsible for payment of any delay and/or travel time at SELLER's regular service rates.
 - E. BUYER is solely liable for all damages or injuries caused or contributed to by BUYER that may occur on the site, except to the extent damages or injuries are directly caused by the gross negligence or willful misconduct of SELLER service personnel.
 - F. BUYER must provide at least 24 hours' notice of cancellation of any Service order. If BUYER cancels with less than 24 hours' notice, BUYER is responsible for any costs incurred by SELLER caused by such cancellation.
21. Compliance. BUYER agrees to comply with all federal, state, local and foreign rules, regulations, ordinances and laws applicable to BUYER's obligations hereunder and BUYER's use of the Products and Services, including import/export laws, labor laws and anti-corruption laws.
22. Relationship of the Parties. Nothing in the Agreement or the course of dealing of the parties may be construed to constitute the parties hereto as partners, joint venturers or as agents for one another or as authorizing either party to obligate the other in any manner.
23. Force Majeure. SELLER will not be responsible for failure to perform in a timely manner under the Agreement when its failure results from events beyond its reasonable control (an event of "Force Majeure"), including acts of God, epidemics, acts of war whether declared or undeclared, actions by any governmental agency or authority (whether valid or invalid), blockades, labor disputes (whether of SELLER's employees or the employees of others), raw material shortages and material increases in costs of raw materials. In the event of Force Majeure, the time for performance will extend for such time as reasonably necessary to enable SELLER to perform.
24. Assignment; Binding Effect. No assignment of any rights or interest or delegation of any obligation of BUYER under the Agreement or BUYER's purchase order may be made without SELLER's prior written consent. Any attempted assignment will be void. SELLER may assign the Agreement or otherwise transfer its rights and/or obligations under the Agreement. The Agreement will inure to the benefit of and be binding upon the parties and their respective permitted successors and assigns.
25. Waiver. In the event of any default by BUYER, SELLER may decline to ship Products or provide Services. If SELLER elects to continue shipping or otherwise fails to insist upon strict compliance with the Agreement, SELLER's actions will not constitute a waiver of BUYER's default or any other existing or future default, or affect SELLER's legal remedies.
26. Bankruptcy. If either party becomes insolvent, is unable to pay its debts when due, files for or is the subject of involuntary bankruptcy, has a receiver appointed or has its assets assigned, the other party may cancel any unfulfilled obligations hereunder.
27. Limitation of Actions/Choice of Law. Any dispute arising out of or related to the Agreement will be governed by and construed according to the laws of the state of Illinois and litigated exclusively in a state or federal court located in [Cook County, Illinois]. The parties hereto expressly release and waive any and all rights to a jury trial and consent to have any dispute heard solely by a court of competent jurisdiction. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply to the Agreement.
28. Survival. Any provisions in the Agreement which, by their nature, extend beyond the termination or expiration of any sale of Products or Services, will remain in effect until fulfilled.
29. Severability. If any provision herein is held to be unlawful or unenforceable, the remaining provisions herein will remain in effect.
30. Integration and Modification. The Agreement constitutes the entire agreement between SELLER and BUYER with respect to the Products and Services, and supersedes any prior agreements, understandings, representations and quotations with respect thereto. SELLER reserves the right, in its sole discretion, with or without notice, to modify these Terms and Conditions at any time. BUYER shall be responsible for making sure BUYER has the most current version of these Terms and Conditions at any time. A current version can be obtained by checking SELLER's website (<https://www.m5supply.com>) or by requesting a current copy by mail from M5 Supply at 1117 Cedar Ave. Croydon, Pa. 19021.