

EPC Power Corp. - Standard Terms and Conditions

These terms and conditions of sale are the only terms which govern the sale of EPC Power Corp.'s ("**EPC**") Products by EPC to the buyer (the "**Customer**") of EPC's Products named on a quote, Purchase Order, order confirmation, or invoice (each, a "**Sales Document**"). The Sales Document collectively and with these terms and conditions, comprise the entire agreement between the parties (the "**Agreement**"), and supersede all prior or contemporaneous understandings, agreements, negotiations, representations and warranties, and communications, both written and oral. These terms and conditions prevail over any of Customer's general terms and conditions of purchase, regardless of whether or when Customer has submitted its Purchase Order or such terms. Fulfillment of the Customer's Purchase Order, in whole or in part, does not constitute acceptance of any of Customer's terms and conditions and does not serve to modify or amend these terms and conditions.

1. DEFINITIONS.

"**Agreement**" has the meaning set forth in the Preamble.

"**Confidential Information**" has the meaning set forth in Section 20.

"**Customer**" has the meaning set forth in the Preamble.

"**EPC**" has the meaning set forth in the Preamble.

"**Indemnified party**" has the meaning set forth in Section 17.

"**Intellectual Property**" means all industrial and other intellectual property rights comprising or relating to: means all of the following worldwide intangible legal rights, whether or not filed, perfected, registered or recorded and whether now or hereafter existing, filed, issued or acquired: (i) patents, patent applications and patent rights, with respect to both utility patents and design patents, including any and all continuations, divisionals, reissues, reexaminations or extensions thereof; (ii) mask rights and rights associated with works of authorship, including but not limited to copyrights, copyright applications, copyright registrations and Moral Rights; (iii) rights relating to the protection of trade secrets and confidential information, including but not limited to rights in know-how, technical data, specifications, techniques, industrial property, customer, vendor and prospect lists and all associated information or databases and other confidential or proprietary information, including without limitation any Confidential Information disclosed by one party to the other; (iv) industrial design rights; (v) trademark rights and all related goodwill; and (vi) any rights analogous to those set forth in the preceding clauses and any other proprietary rights relating to intangible property.

"**Limited Product Warranty**" has the meaning set forth in Section 14.2.

"**Monitored Products**" has the meaning set forth in Section 7.

"**Moral Rights**" means any right to claim authorship of a work, any right to object to any distortion or other modification of a work, and any similar right, existing under the law of any country, or under any treaty.

"**Notice**" has the meaning set forth in Section 22.3.

"**Prices**" has the meaning set forth in Section 10.

"**Products**" has the meaning set forth in Section 3.

"**Purchase Order**" means a purchase order or other ordering document issued by the Customer for the purchase of EPC's products and services.

“**Regulated Products**” has the meaning set forth in Section 21.

“**Sales Document**” has the meaning set forth in the Preamble.

“**Third Party Product**” has the meaning set forth in Section 14.4.

2. **QUOTES.** EPC’s quote, including the price, expected timing, and deliverables is valid for a period of ninety (90) days from the issuance date of the quote unless otherwise stated.
3. **SALE OF PRODUCTS.** EPC has the right, in its sole discretion, to accept or reject any Purchase Order. EPC may accept any Purchase Order by confirming the order (whether by written confirmation, invoice, or otherwise) or by delivering the Products, whichever occurs first. No Purchase Order is binding on EPC unless accepted by EPC as provided in this Agreement. Once a Purchase Order is accepted, EPC shall sell to Customer and Customer shall purchase from EPC the products and services set forth on a Purchase Order executed between the parties (the “**Products**”) in the quantities, configurations, and at the Prices (as defined in Section 10) and upon the terms and conditions set forth in this Agreement. Each accepted Purchase Order, together with these terms and conditions, constitutes a separate agreement for the purchase and sale of the Products and services specified on the Purchase Order.
4. **PROHIBITED ACTS.** Except as this Agreement expressly permits, Customer shall not, and shall not permit any third party to analyze, decompile, disassemble, decode, adapt, reverse engineer, or otherwise attempt to gain access to the source code, techniques, processes, algorithms, or know-how used in or with the Products.
5. **CANCELLATION BY CUSTOMER.** Customer’s default or cancellation of this Agreement entitles EPC to recover from Customer the costs and expenses incurred by EPC including, but not limited to, any committed or irreversible costs and/or expenses at the time of termination. All deposits are non-refundable.
6. **PRODUCT CHANGES; SOURCE OF PRODUCTION AND SERVICES.** EPC reserves the right under this Agreement to change the Product, or any component thereof, and/or provide services from any source (including subcontractors) located anywhere in the world. EPC reserves the right to improve its Products and services and may modify, update, or replace the design and/or models of the Product or the services at any time in our sole discretion and without any liability whatsoever.
7. **MONITORING SERVICES.** Some Products may support performance and error monitoring by EPC through communication interfaces provided by third parties, including through Third Party Products (“**Monitored Products**”). EPC takes no responsibility for inability to monitor such Monitored Products if such inability is due to: (i) Customer’s acts or omissions; (ii) Customer’s communications connectivity; (iii) communication outages, delays, or problems not under EPC’s reasonable control; (iv) Customer’s failure to meet the minimum hardware and/or software requirements of the Products; (v) Customer’s hardware, software, or other equipment (including the fault or failure of any Third Party Products); or (vi) discontinuation of communications services support by the third party or the Third Party Products.
8. **DELIVERY.**
 - 8.1. The Products will be delivered within a reasonable time after the date of this Agreement, subject to availability of finished Products. EPC shall not be liable for any delays, loss or damage in transit. All time quoted by EPC

in a Sales Document is an estimate only. EPC is not liable for any loss or damage arising from any failure to delivery or delay in delivery.

- 8.2. EPC shall deliver the Products to the location specified in the Purchase Order using EPC's standard methods for packaging and shipping such Products. Customer shall pay for all shipping charges and insurance costs from EPC's manufacturing facilities as specified in the Sales Document.
 - 8.3. In the event a Purchase Order specifies more than one Product, or specifies Products individually distinct from other Products on the Purchase Order, EPC may, in its sole discretion, without liability or penalty, make partial shipments of Products to Customer. Each shipment will constitute a separate sale, and Customer shall pay for the units shipped whether such shipment is in whole or partial fulfillment of the Products purchased under this Agreement.
- 9. TITLE AND RISK OF LOSS.** Title and risk of loss passes to Customer upon shipment of the Products from EPC's facilities. As collateral security for the payment of the purchase price of the Products, Customer hereby grants to EPC a lien on and security interest in and to all of the right, title and interest of Customer in, to and under the Products, wherever located, and whether now existing or hereafter arising or acquired from time to time, and in all accessions thereto and replacements or modifications thereof, as well as all proceeds (including insurance proceeds) of the foregoing. The security interest granted under this provision constitutes a purchase money security interest under the Delaware Uniform Commercial Code.
- 10. PRICE.** Customer shall purchase the Products from EPC at the prices (the "**Prices**") set forth in the applicable Sales Document. All Prices are exclusive of all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any governmental authority on any amounts payable by Customer. Customer shall be responsible for all such charges, costs and taxes; provided, however, that, Customer shall not be responsible for any taxes imposed on, or with respect to, EPC's income, revenues, gross receipts, personnel or real or personal property or other assets.
- 11. PAYMENT TERMS.** Customer shall pay all invoiced amounts due to EPC within fifteen (15) days from the date of EPC's invoice. Customer shall make all payments hereunder by check and in US dollars. Customer shall pay interest on all late payments at the lesser of the rate of 1.5% per month or the highest rate permissible under applicable law, calculated daily and compounded monthly. Customer shall reimburse EPC for all costs incurred in collecting any late payments, including, without limitation, attorneys' fees.
- 12. CREDIT STATUS.** Acceptance by EPC of a Purchase Order or other offer to purchase relating to a proposal is subject to credit approval by EPC and such acceptance may be withheld pending a credit investigation. Customer shall furnish EPC with statements evidencing Customer's financial condition as EPC may, from time to time, reasonable request, and shall notify EPC immediately of any and all events that may have a material adverse effect on Customer's business or financial condition. If EPC determines, in its sole discretion, that Customer's financial condition or creditworthiness is inadequate or unsatisfactory, then in addition to EPC's other rights, EPC may without liability or penalty take any or all of the following actions: (i) accelerate all amounts owed by Customer to EPC under this Agreement; or (ii) cancel any previously accepted Purchase Order and this Agreement.
- 13. NO SET-OFF.** Customer shall not, and acknowledges that it will have no right, under this Agreement, any other agreement, document or law, to withhold,

offset, recoup or debit any amounts owed (or to become due and owing) to EPC or any of its affiliates, whether under this Agreement or otherwise, against any other amount owed (or to become due and owing) to it by EPC's or its affiliates, whether relating to EPC's or its affiliates' breach or non-performance of this Agreement or any other agreement between Customer or any of its affiliates, and EPC or any of its affiliates, or otherwise.

14. **WARRANTIES.**

- 14.1. Each party represents and warrants to the other party that: (i) it has the full right, power, and authority to enter into this Agreement and to perform its obligations under this Agreement; (ii) when a Sales Document is executed and delivered by each of EPC and Customer, this Agreement will constitute the legal, valid, and binding obligations of each party enforceable against the party in accordance with its terms; and (iii) the execution, delivery, and performance of this Agreement does not and will not conflict with or constitute a default under any of the parties' contractual obligations under any other contract.
- 14.2. All representations and warranties for the Products are limited to the terms and conditions set forth in EPC's Limited Warranty Coverage for each Product at www.epcpower.com/warranty (the "**Limited Product Warranty**").
- 14.3. EXCEPT FOR THE WARRANTY SET FORTH IN SECTION 14.2, EPC MAKES NO WARRANTY WHATSOEVER WITH RESPECT TO THE PRODUCTS, INCLUDING ANY (I) WARRANTY OF MERCHANTABILITY; (II) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; (III) WARRANTY OF TITLE; (IV) WARRANTY AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF ANY THIRD PARTY; WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE, OR OTHERWISE.
- 14.4. PRODUCTS MANUFACTURED BY A THIRD PARTY ("**THIRD PARTY PRODUCT**") MAY CONSTITUTE, CONTAIN, BE CONTAINED IN, INCORPORATED INTO, ATTACHED TO OR PACKAGED TOGETHER WITH, THE PRODUCTS. THIRD PARTY PRODUCTS ARE NOT COVERED BY THE WARRANTY IN SECTION 14.2. FOR THE AVOIDANCE OF DOUBT, EPC MAKES NO REPRESENTATIONS OR WARRANTIES WITH RESPECT TO ANY THIRD PARTY PRODUCT, INCLUDING ANY (I) WARRANTY OF MERCHANTABILITY; (II) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; (III) WARRANTY OF TITLE OR (IV) WARRANTY AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY; WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, OR COURSE OF PERFORMANCE, USAGE OF TRADE, OR OTHERWISE. TO THE EXTENT PERMITTED BY THE APPLICABLE THIRD PARTY, EPC WILL PASS THROUGH ALL REPRESENTATIONS AND WARRANTIES PROVIDED BY THE THIRD PARTIES FOR THE THIRD PARTY PRODUCTS.

15. **LIMITATION OF LIABILITY.**

- 15.1. IN NO EVENT SHALL EPC BE LIABLE FOR ANY CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE, OR ENHANCED DAMAGES, LOST PROFITS OR REVENUES, OR DIMINUTION OF VALUE, ARISING OUT OF, OR RELATING TO, AND/OR IN CONNECTION WITH, ANY BREACH OF THIS AGREEMENT, REGARDLESS OF (I) WHETHER OR NOT SUCH DAMAGES WERE FORESEEABLE; (II) WHETHER OR NOT EPC WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES; (III) THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT, OR OTHERWISE) UPON WHICH

THE CLAIM IS BASED, AND (IV) THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.

- 15.2. IN NO EVENT SHALL EPC'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO ANY PRODUCT PURCHASED UNDER THE AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO A BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED THE TOTAL AMOUNT PAID TO EPC FOR SUCH PRODUCT.
- 16. COMPLIANCE WITH LAW.** Customer is in compliance with and shall comply with all applicable laws, regulations and ordinances. Customer has and shall maintain in effect all the licenses, permissions, authorizations, consents and permits that it needs to carry out its obligations under this Agreement.
- 17. INDEMNIFICATION.** Customer shall indemnify, defend and hold harmless EPC and its officers, directors, employees, agents, affiliates, successors and permitted assigns (collectively, "**Indemnified party**") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including attorneys' fees, fees and the costs of enforcing any right to indemnification under this Agreement and the cost of pursuing any insurance providers, incurred by Indemnified party, relating to/arising out of or resulting from any claim of a third party arising out of or occurring in connection with the products and services purchased from EPC or Customer's negligence, willful misconduct or breach of this Agreement. Customer shall not enter into any settlement without EPC's or Indemnified party's prior written consent.
- 18. TERMINATION.** In addition to any remedies that may be provided in this Agreement, EPC may terminate this Agreement and any Purchase Order with immediate effect upon written notice to Customer, if Customer: (i) fails to pay any amount when due under this Agreement; (ii) has not otherwise performed or complied with any of the terms of this Agreement, in whole or in part; or (iii) becomes insolvent, files a petition for bankruptcy or commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization or assignment for the benefit of creditors.
- 19. INTELLECTUAL PROPERTY.**
- 19.1. Ownership. Customer acknowledges and agrees that: (i) as between Customer and EPC, EPC owns all right, title, and interest in and to the Products and the Intellectual Property incorporated therein or that may arise as a result of this Agreement; (ii) Customer shall not acquire any ownership interest in EPC's Intellectual Property rights under this Agreement; (iii) any goodwill derived from the use by Customer of EPC's Intellectual Property rights inures to the benefit of EPC or its licensors, as the case may be.
- 19.2. Assignment. If Customer acquires any Intellectual Property right, rights in or relating to the Products (including any rights in trademarks, derivative works, or patent improvements related thereto) by operation of law, or otherwise, such rights are deemed and are hereby irrevocably assigned to EPC or its licensors, as the case may be, without further action by either of the parties.
- 19.3. License. EPC grants Customer a non-exclusive, non-sublicensable, non-transferable, revocable license to use EPC's Intellectual Property necessary to use the Products purchased by Customer solely for the purposes of using the Products and only in accordance with this Agreement and the instructions of EPC.

- 20. CONFIDENTIAL INFORMATION.** All non-public, confidential or proprietary information of EPC, including, but not limited to, specifications, hardware, software, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts, or rebates (“**Confidential Information**”), disclosed by EPC to Customer, whether disclosed orally or disclosed or accessed in written, electronic or other form or media, and whether or not marked, designated or otherwise identified as “confidential,” in connection with this Agreement is confidential, solely for the use of performing this Agreement and may not be disclosed or copied unless authorized by EPC in writing. Upon EPC's request, Customer shall promptly return all documents and other materials received from EPC. EPC shall be entitled to injunctive relief for any violation of this Section. This Section shall not apply to information that is: (a) in the public domain; (b) known to the Customer at the time of disclosure; or (c) rightfully obtained by the Customer on a non-confidential basis from a third party.
- 21. EXPORT REGULATION (EAR AND ITAR) COVENANT.** Customer acknowledges that the Products, including any software, documentation and any related technical data included with, or contained in, such Products, and any products utilizing any such Products, software, documentation, or technical data (collectively, “**Regulated Products**”) may be subject to US export control laws and regulations, including the Export Administration Regulations promulgated under the Export Administration Act of 1979, and the International Traffic in Arms Regulations administered by the US Department of State. Without limiting the generality of Section 16, Customer shall not, and shall not permit any third parties to, directly or indirectly, export, re-export or release any Regulated Products to any jurisdiction or country to which, or any party to whom, the export, re-export or release of any Regulated Products is prohibited by applicable federal or foreign law. Customer shall be responsible for any breach of this Section 21 by its, and its successors’ and permitted assigns’, parent, affiliates, employees, officers, directors, partners, customers, agents, distributors, resellers or vendors that are not Customer or Customer’s representatives. Without limiting the generality of Section 16, Customer shall comply with all applicable federal and foreign laws, and complete all required undertakings (including obtaining any necessary export license or other governmental approval), prior to exporting, re-exporting or releasing any Regulated Products. Customer shall provide prior written notice of the need to comply with such laws to any person, firm or entity which it has reason to believe is obtaining any such Regulated Products from the Customer with the intent to export.
- 22. MISCELLANEOUS.**
- 22.1. Force Majeure. Any delay or failure of EPC to perform its obligations under this Agreement will be excused to the extent that the delay or failure was caused directly by an event beyond EPC’s control, without EPC’s fault or negligence and that by its nature could not have been foreseen by EPC or, if it could have been foreseen, was unavoidable (which events may include natural disasters, embargoes, explosions, riots, wars, acts of terrorism, strikes, labor stoppages or slowdowns or other industrial disturbances, and shortage of adequate power or transportation facilities).
- 22.2. Forms. The use of Customer’s business forms for quotations of prices, to confirm or accept orders, or for any other purpose will be for administrative convenience only. Any preprinted or special terms contained in such forms will not be applicable to the purchase of any Products or provision of any services, and all such terms (whether additional or different, and whether or not such terms alter the above referenced terms and conditions) will be excluded from this Agreement

without need for any specific objection or rejection of such terms and conditions. Without limiting the foregoing, EPC hereby notifies Customer that EPC rejects to any additional or different terms contained in such forms. Neither silence nor any other conduct will constitute an assent to any additional or different terms proposed by Customer or a waiver of this provision.

- 22.3. Notices. All notices, request, consents, claims, demands, waivers and other communications hereunder (each, a “**Notice**”) shall be in writing and addressed to the parties at the addresses set forth on the face of the Sales Document or to such other address that may be designated by the receiving party in writing. All Notices shall be delivered by personal delivery, nationally recognized overnight courier (with all fees pre-paid), facsimile (with confirmation of transmission) or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Agreement, a Notice is effective only (i) upon receipt of the receiving party, and (ii) if the party giving the Notice has complied with the requirements of this Section 22.3.
- 22.4. Severability. If any term or provision of this Agreement 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. Upon a determination that any term or provision is invalid, illegal or unenforceable, the parties shall negotiate in Product faith to modify this Agreement to effect the original intent of the parties as closely as possible in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.
- 22.5. Amendments. No amendment to or modification of or rescission, termination or discharge of this Agreement is effective unless it is in writing, identified as an amendment to or rescission, termination or discharge of this Agreement and signed by an authorized representative of each party.
- 22.6. Waiver. No waiver by any party of any of the provisions of this Agreement shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Agreement, no failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from this Agreement 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.
- 22.7. Cumulative Remedies. All rights and remedies provided in this Agreement are cumulative and not exclusive, and the exercise by either party of any right or remedy does not preclude the exercise of any other rights or remedies that may now or subsequently be available at law, in equity, by statute, in any other agreement between the parties or otherwise. Notwithstanding the previous sentence, the parties intend that Customer’s rights under Section 14 are Customer’s exclusive remedies for the events specified therein.
- 22.8. Assignment. Customer shall not assign, transfer, delegate or subcontract any of its rights or obligations under this Agreement without the prior written consent of EPC. Any purported assignment, transfer, delegation or subcontract in violation of this Section 22.8 shall be null and void. No assignment, transfer, delegation or subcontract shall relieve Customer of

any of its obligations hereunder. EPC may at any time assign, transfer, delegate or subcontract any or all of its rights or obligations under this Agreement without Customer's prior written consent.

- 22.9. Relationship of the parties. The relationship between the parties is that of independent contractors. Nothing contained in this Agreement shall be construed as creating any agency, partnership, franchise, business opportunity, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever. No relationship of exclusivity shall be construed from this Agreement.
- 22.10. Successors and Assigns. This Agreement is binding on and inures to the benefit of the parties to this Agreement and their respective permitted successors and permitted assigns.
- 22.11. No Third-party Beneficiaries. This Agreement benefits solely the parties to this Agreement and their respective permitted successors and assigns and nothing in this Agreement, express or implied, confers on any other person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.
- 22.12. Governing Law; Venue. This Agreement, including all exhibits, schedules, attachments and appendices attached to this Agreement and thereto, and all matters arising out of or relating to this Agreement, are governed by, and construed in accordance with, the laws of the State of Delaware, United States of America, without regard to the conflict of laws provisions thereof to the extent such principles or rules would require or permit the application of the laws of any jurisdiction other than those of the State of Delaware. Any legal suit, action, or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby or shall be instituted in any United States federal court or state court located in the state of California in the City of San Diego and County of San Diego, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding. Service of process, summons, notice, or other document by mail to such party's address set forth herein shall be effective service of process for any suit, action, or other proceeding brought in any such court. The parties irrevocably and unconditionally waive any objection to the laying of venue of any suit, action, or proceeding in such courts and irrevocably waive and agree not to plead or claim in any such court that any such suit, action, or proceeding brought in any such court has been brought in an inconvenient forum.
- 22.13. Survival. Provisions of this Agreement which by its nature should apply beyond their terms will remain in force after any termination or expiration of this Agreement including, but not limited to, the following provisions: Section 16, Section 20, Section 22.12 and this Section 22.13.

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