

## API HEAT TRANSFER TERMS AND CONDITIONS OF SALE

The terms and conditions stated below are incorporated into and shall constitute part of the Order Acknowledgment (“Order Acknowledgment”) between you (“Buyer”) and API Heat Transfer Inc., its subsidiaries and its authorized distributors (“Seller”). These terms and conditions shall be binding upon Buyer unless otherwise stated in writing on the Order Acknowledgment.

**1. Acceptance and Binding.** All purchase orders are subject to acceptance at Seller’s factory, and Seller shall have no liability until and unless they are so accepted. Sales representatives are not authorized to bind Seller. Clerical errors are subject to correction. Seller shall not be bound by any representations or warranties which are not expressly set forth in writing and signed by an authorized employee of Seller.

**2. Prices and Taxes.** Unless otherwise acknowledged by Seller in writing: (i) all prices are subject to change without notice; (ii) goods will be billed at the prices in effect at the time of shipment; (iii) prices are quoted F.O.B. Seller’s factory; (iv) prices on the items set forth in the Order Acknowledgment are exclusive of all city, state, provincial and federal excise taxes, including, without limitation, taxes on manufacture, sales, receipts, occupation, use and similar taxes. Whenever applicable, any taxes will be added to the Order Acknowledgment as a separate charge to be paid by Buyer.

**3. Terms of Payment.** Terms of payment shall be as stated in the Order Acknowledgment. In the event payment is not made promptly when due, Buyer agrees to pay a penalty at the rate of 1½% per month, or as limited by state, federal or other applicable laws, from the due date. Partial shipments on quantity orders shall be deemed a separate and independent contract for billing. The Buyer is responsible for all costs incurred by the Seller to obtain payment, including collection agency fees, attorney fees and court costs.

**4. Credit Approval.** Shipment of the items set forth in the Order Acknowledgment shall at all times be subject to the approval of Seller’s credit department. Seller may at any time decline to make any shipment except upon receipt of payment or security or upon terms and conditions satisfactory to Seller.

**5. Shipment.** Shipping dates are approximate and may be contingent upon the prompt receipt from Buyer of drawing and data approval, or written release for procurement and fabrication. Seller shall have no liability for delays in delivery. All shipments are made at Buyer’s risk. Method and route of shipment are at Seller’s discretion, unless Buyer supplies explicit instructions that are accepted by Seller in writing. Regardless of the method of delivery, however, risk of loss shall pass to Buyer upon Seller’s delivery to a carrier. If Seller is prepared to make shipment, and Buyer delays delivery, terms of payment shall apply as though delivery had been effected as of the date that Seller was prepared to make shipment. All costs associated with handling, care and custody of the material shall be to the account of Buyer. The acceptance of the material by Buyer shall constitute a waiver of all claims for delay.

**6. Cancellation and Changes.** Orders shall not be subject to cancellation unless cancellation charges (including recovery of lost profit) are borne by Buyer for all work done by Seller and for any obligations incurred by Seller in connection with the order. Acceptance of change orders is contingent upon price renegotiation. Scheduling changes requested by Buyer are subject to renegotiation of price and terms of payment.

**7. Indemnity.** Buyer agrees to hold Seller harmless from any and all liability, and to pay all costs and attorney’s fees, for injury or damage to persons or property caused in any manner by material covered by the Order Acknowledgment while in possession or under the control of Buyer or Buyer’s successor in interest.

**8. Indemnity for Infringement of Intellectual Property Rights.** Seller shall have no liability for infringement of any patents, trademarks, copyrights, trade dress, trade secrets or similar rights except as provided in this paragraph 8. Seller will defend and indemnify Buyer against allegations of infringement of U.S. patents, U.S. trademarks,

copyrights, trade dress and trade secrets (hereinafter collectively referred to as the “Intellectual Property Rights”). Seller will defend at its expense and will pay the cost of any settlement or damages awarded in any action brought against Buyer based on an allegation that an item sold to Buyer that is listed in the Order Acknowledgment (“Item”) infringes the Intellectual Property Rights of a third party. Seller’s obligation to defend and indemnify Buyer is contingent on Buyer notifying Seller within ten (10) days after Buyer becomes aware of such allegations of infringement, and Seller having sole control over the defense of any allegations or actions including all negotiations for settlement or compromise. If an Item is subject to a claim that it infringes the Intellectual Property Rights of a third party, Seller may, in its sole discretion, procure for Buyer the right to continue using the Item, replace or modify the Item so as to make it noninfringing, or offer to accept return of the Item and return the purchase price less a reasonable allowance for depreciation. Notwithstanding the foregoing, Seller shall have no liability for claims of infringement based on information provided by Buyer, or directed to Items for which the designs are specified in whole or in part by Buyer, or infringements resulting from the modification, combination or use in a system of the Items. The foregoing provisions of this paragraph 8 shall constitute Seller’s sole and exclusive liability and Buyer’s sole and exclusive remedy for infringement of Intellectual Property Rights.

If a claim is based on information provided by Buyer or if the design for an Item is specified in whole or in part by Buyer, Buyer shall defend and indemnify Seller for all costs, expenses or judgments resulting from any claim that such Item infringes any patent, trademark, copyright, trade dress, trade secret or any similar right.

**9. Installation, Initial Operation and Service, Lifting Devices.** All material shall be installed by and at the expense of Buyer. Should Buyer request the services of Seller, such service shall be rendered and charged at the established rate at the time of performing said service, plus all other expenses including travel, hotel bills and living expenses. Seller assumes no liability for Buyer’s use or application of lifting devices attached to or installed on product or material provided by Seller. Lifting devices such as eye bolts, rings, loops, clips, etc. when permanently attached to component parts are intended to lift only those components to which they are attached.

**10. Tooling.** Any tooling designed or produced by Seller in the manufacture of any product or material sold to Buyer shall remain the sole and exclusive property of Seller, unless the cost of designing and producing the tooling is paid by Buyer in which case such tooling shall be the sole and exclusive property of Buyer and shall be provided to Buyer upon completion of the work.

**11. Corrosion and Vibration.** Seller shall have no responsibility, without any exceptions, for the determination of any corrosion allowance in any equipment which it builds or quotes. This decision is the responsibility of Buyer. Accordingly, Seller shall not be responsible for loss or damage resulting from any failure to provide corrosion allowance or anti-corrosive materials, or from deterioration of any part of the equipment due to corrosion, erosion, flow induced tube vibration, or any other causes regardless of when such deterioration occurs. In addition, Seller shall not be responsible for excessive fouling of the equipment by material such as coke, silt, scale or any foreign substance that may be deposited.

**12. Software Programs.** Computer software programs that may be included in material or products sold to Buyer have been designed to perform a given set of tasks as defined in the documentation provided and are offered AS IS. It is Buyer’s responsibility to determine if the features of the software programs are suitable for Buyer’s requirements and must confirm that the software programs operate correctly. Buyer understands that such software programs are of such complexity that they may have inherent defects and that Seller makes no warranty that all software features will perform correctly as supplied. For Seller’s software utilizing automation servers, improper reading and writing data to the automation server can cause the automation server software to malfunction and may cause the automation server and/or the program writing to the automation server to crash. Improperly reading and writing data to an automation server may cause the device controlled by that automation server to malfunction. Seller shall not be responsible for damage to any device or damage caused by any device due to the improper reading and/or writing of data to an automation server.

**13. Limited Warranty.** Seller warrants that upon shipment, the products or materials sold to Buyer shall be as described in the Order Acknowledgment and shall be free from defects in materials and workmanship for a period of 12 months from the date of shipment. The Seller shall warrant thermal and mechanical performance of a heat exchanger, when operated at the design condition specified by the Buyer in Buyer’s purchase order, or shown on the

exchanger specification sheet furnished by the Seller. THESE WARRANTIES COMPRISE THE SOLE AND ENTIRE WARRANTIES PERTAINING TO ITEMS SOLD TO BUYER BY SELLER. SELLER MAKES NO OTHER WARRANTY, GUARANTEE, OR REPRESENTATION OF ANY KIND WHATSOEVER. ALL OTHER WARRANTIES, INCLUDING BUT NOT LIMITED TO, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WHETHER EXPRESS, IMPLIED, OR ARISING BY OPERATION OF LAW, TRADE USAGE, OR COURSE OF DEALING ARE HEREBY DISCLAIMED.

NOTWITHSTANDING THE FOREGOING, THERE ARE NO WARRANTIES WHATSOEVER ON ITEMS BUILT OR ACQUIRED, WHOLLY OR PARTIALLY, TO BUYER'S DESIGNS OR SPECIFICATIONS.

**14. Limitation of Remedy.** SELLER'S LIABILITY ARISING FROM OR IN ANY WAY CONNECTED WITH THE ITEMS SOLD TO BUYER BY SELLER SHALL BE LIMITED EXCLUSIVELY TO REPAIR OR REPLACEMENT OF THE ITEMS SOLD OR REFUND OF THE PURCHASE PRICE PAID BY BUYER, AT SELLER'S SOLE OPTION. IN NO EVENT SHALL SELLER BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES OF ANY KIND OR NATURE WHATSOEVER, INCLUDING BUT NOT LIMITED TO LOST PROFITS ARISING FROM OR IN ANY WAY CONNECTED WITH ITEMS SOLD TO BUYER BY SELLER, WHETHER ALLEGED TO ARISE FROM BREACH OF CONTRACT, EXPRESS OR IMPLIED WARRANTY, OR IN TORT, INCLUDING WITHOUT LIMITATION, NEGLIGENCE, FAILURE TO WARN OR STRICT LIABILITY.

**15. Seller's Right of Possession.** Seller shall have the right, in addition to all others it may possess, at any time, for credit reasons or because of Buyer's default, to withhold shipments, in whole or in part, and to recall goods in transit, retake same, and repossess all goods which may be stored with Seller for Buyer's account, without the necessity of taking any other proceedings, and Buyer consents that all goods so withheld, recalled, retaken or repossessed shall become Seller's absolute property, provided that Buyer is given full credit therefor. The foregoing shall not be construed as limiting, in any manner, any of the rights or remedies available to Seller because of any default by Buyer.

**16. Controlling Provisions.** If the Order Acknowledgment is accepted and Buyer's purchase order is used for any purpose, it is expressly understood and agreed that the terms and conditions set forth in the Order Acknowledgment and these Terms and Conditions of Sale shall prevail insofar as the same may in any way conflict with the terms and conditions set forth in Buyer's order form, and the issuance of such order by Buyer shall be deemed to note Buyer's assent to the foregoing. Provisions in Buyer's purchase orders contrary to these terms and conditions are not binding upon Seller unless accepted in writing by an authorized agent or representative of Seller. The terms and conditions of the Order Acknowledgment and herein shall supersede any provisions, terms and conditions contained in any confirmation, order or other writing Buyer may give or receive and the parties shall be governed exclusively by the provisions, terms and conditions hereof. Seller makes no representations or warranties concerning the Order Acknowledgment except such as are expressly contained in the Order Acknowledgment and these Terms and Conditions of Sale, which may not be changed or modified orally.

**17. Force Majeure.** Seller shall not be liable for any delay in the performance of the Order Acknowledgment, or in the delivery or shipment of goods, or for any damages suffered by Buyer or its customers by reason of such delay, if such delay is, directly or indirectly, caused by, or in any manner arises from, fires, floods, accidents, civil unrest, acts of God, war, governmental interference or embargoes, strikes, labor difficulties, shortage of labor, fuel, power, materials, or supplies, transportation delays, or any other cause (whether or not similar in nature to any of those hereinbefore specified) beyond its control.

**18. Conditions.** The Order Acknowledgment is accepted with the understanding that it is subject to Seller's ability to obtain the necessary raw materials, and the Order Acknowledgment and all shipments applicable thereto are subject to Seller's current manufacturing schedules, and governmental regulations, orders, directives and restrictions that may be in effect from time to time.

**19. Assignment.** Buyer shall not assign, subcontract, delegate or transfer in any way the Order Acknowledgment, in whole or in part, without the prior written consent of Seller and any such assignment, subcontract, delegation or

transfer without Seller's prior written consent shall be void. Buyer shall not be relieved of any of its obligations under the Order Acknowledgment notwithstanding any such written consent by Seller.

20. **Non-Waiver by Seller.** Waiver by Seller of a breach of any of the terms and conditions of the Order Acknowledgment or these Terms and Conditions of Sale shall not be construed as a waiver of any other breach.

21. **Governing Law.** The Order Acknowledgment and these Terms and Conditions of Sale shall be governed by and construed in accordance with the internal laws of the State of New York, exclusive of such State's laws with respect to conflicts of law. This purchase order shall be enforced against either party only in courts located in Erie County or any New York State County contiguous to Erie County. The Convention on Contracts for the International Sale of Goods shall not be applicable to the Order Acknowledgment or these Terms and Conditions of Sale. No actions arising out of the sale of material or products covered by the Order Acknowledgment, other than an action by Seller to recover the purchase price of such material or products, may be brought by either party more than two (2) years after the cause of action accrues.

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