

# ABA Packaging Corporation

## TERMS AND CONDITIONS

**GOODS AND SERVICES COVERED BY THIS ORDER ARE BEING SOLD ONLY IN ACCORDANCE WITH THE TERMS AND CONDITIONS CONTAINED HEREIN, AND IN SELLER'S QUOTATION OR ACKNOWLEDGMENT IF ANY, INCLUDING THE TERMS AND CONDITIONS PRINTED ON THE REVERSE SIDE THEREOF. SELLER OFFERS TO SELL THE GOODS OR SERVICES DESCRIBED HEREIN ONLY UPON THE TERMS AND CONDITIONS CONTAINED HEREIN. THE OFFER SHALL BE DEEMED ACCEPTED AND SHALL BECOME A BINDING CONTRACT ON THE TERMS AND CONDITIONS CONTAINED HEREIN, (A) WHEN SIGNED AND RETURNED BY BUYER, OR (B) WHEN BUYER ISSUES ITS ORAL OR WRITTEN ACKNOWLEDGEMENT, OR (C) WHEN SELLER COMMENCES PERFORMANCE, OR (D) WHEN BUYER OTHERWISE ACCEPTS THIS OFFER. BY ACCEPTING THIS OFFER, BUYER WAIVES ALL TERMS AND CONDITIONS CONTAINED IN BUYER'S PURCHASE ORDER OR OTHER DOCUMENTS WHICH ARE DIFFERENT FROM OR ADDITIONAL TO THOSE CONTAINED HEREIN (WHETHER OR NOT BUYER SENDS ITS DOCUMENTS BEFORE OR AFTER SELLER SENDS THIS FORM), AND ALL SUCH DIFFERENT OR ADDITIONAL TERMS AND CONDITIONS SHALL BE NULL AND VOID AND OF NO EFFECT.**

**1. Price.** Prices are subject to change by Seller without notice. Increases in labor, freight and material costs before completion of contract plus applicable overhead as well as surcharges may be invoiced to Buyer.

**2. Delivery or Performance.** Unless otherwise specified on the face hereof, all deliveries are F.O.B. point of shipment. Shipment will be made in accordance with instructions issued by Seller. Upon delivery of goods to carrier, Buyer assumes risk of all loss and damage resulting from any cause whatsoever. Shipping, delivery or performance dates are approximate and are not guaranteed. Seller will use reasonable commercial efforts to meet the delivery dates but is not liable for any direct or indirect costs resulting from late delivery. Seller reserves the right to ship and invoice for a quantity of goods which may vary up to ten percent over or under the quantity specified and Buyer agrees to accept delivery and pay for such revised quantity and consider the shipment to be complete. Partial deliveries shall be accepted by the Buyer and paid for at contract prices and terms. Buyer shall have no right to delay the delivery or shipment date. Seller may charge storage charges for any goods which it holds for Buyer.

**3. Force Majeure.** Seller shall not be liable for any delay or other failure of performance due to causes beyond its reasonable control, including without limitation acts of God, acts of Buyer, acts of military or civil authorities, fire or other casualty, strikes, lockouts, weather, epidemic, war, riot, delays in transportation or car shortages, inability to obtain necessary labor, materials, components, equipment, services, energy or utilities through Seller's usual and regular sources at usual and regular prices or failure or inability of the manufacturer of the goods to perform. In any such event, Seller may, with notice to Buyer, at any time and from time to time without further liability to Buyer (a) postpone its performance, (b) make partial performance or cancel all or any portion of this contract or (c) allocate available quantities among its customers in any manner which Seller deems reasonable. Cancellation of any part of this contract shall not affect Seller's right to payment for performance of any other part hereof.

**4. Warranty and Remedy.** Unless otherwise expressly stated on the face hereof, Seller warrants to Buyer, for a period of 15 days from the date of shipment and/or performance of services, that the goods delivered hereunder conform to Seller's then Current Specifications. Materials and services furnished by Seller's suppliers or subcontractors and supplied by Seller to Buyer are warranted by Seller only to the extent of the supplier's or subcontractor's express warranty to Seller and only to the extent such party honors its warranty after notification by Seller. If during such period Buyer promptly notifies Seller in writing of any breach of such warranty and complies with Seller's applicable warranty procedures, Seller shall thereupon, at Seller's option, re-perform services, repair or replace any defective goods at Seller's plant or refund the price of the goods or services or part thereof which

gives rise to the claim. The foregoing shall constitute the sole and exclusive remedy of Buyer and the full liability of Seller for any breach of warranty. **THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, WHETHER WRITTEN, ORAL OR IMPLIED, INCLUDING ANY WARRANTY OF PERFORMANCE, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THE FOREGOING WARRANTY SUPERSEDES AND EXCLUDES ANY ORAL WARRANTIES OR REPRESENTATIONS, OR WRITTEN WARRANTIES OR REPRESENTATIONS MADE OR IMPLIED INCLUDING, WITHOUT LIMITATION, IN ANY MANUAL, LITERATURE, ADVERTISING BROCHURE OR ANY OTHER MATERIALS OR BASED ON CUSTOM OR OTHERWISE. ALL WARRANTIES OF PERFORMANCE, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED.** Seller shall have no liability for any damages or claims if Buyer uses goods that do not conform to Current Specifications. If Buyer has made any repairs or alterations to any goods, Buyer will have waived all warranty claims. No warranties may be assigned to any subsequent Purchaser or user of the goods or services. Current Specifications means the current technical drawings of the manufacturer of the goods.

**5. Limitations of Seller's Liability.** Seller's liability on any claim of any kind, including, without limitation, negligence, with respect to goods or services shall in no case exceed the purchase price of the good or service or part thereof which gives rise to the claim. IN NO EVENT SHALL SELLER BE LIABLE FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES OR SIMILAR DAMAGES (INCLUDING, WITHOUT LIMITATION, LOST PROFITS OR ECONOMIC DAMAGES), OR FOR DAMAGES IN THE NATURE OF PENALTIES.

**6. Buyer's Use.** Buyer assumes sole responsibility for analyzing and determining the suitability of any services and goods supplied by Seller including all parts and components and Buyer agrees that it is not relying on Seller in making such determination even if Seller provided assistance, guidance or design. Buyer assumes full responsibility for any particular use or purpose. Buyer will not order or use any goods or services unless it is satisfied that the goods and services are suitable for Buyer's use and conform to all of its requirements. Buyer agrees to store and use all goods and services in a safe manner. Seller is cautioning Buyer that not all products are compatible with plastic, glass, metal or the other goods and Buyer agrees not to use any goods with any abrasive, caustic or acid solutions or any other substance which may cause injury to persons or property.

**7. Limitation of Actions.** Any action against Seller with respect to the goods or services which are the subject of this contract will be forever barred and waived and released by Buyer if it is not commenced by Buyer within one year from the date of delivery of the particular good or service which gives rise to the claim.

**8. Indemnification and Waiver.** Buyer shall defend, indemnify and hold harmless Seller from any cost, loss or damage sustained by Seller and from and against all claims asserted against Seller by Buyer or any other party with respect to the goods or services which are the subject of this contract. This indemnity includes but is not limited to costs, loss, damages and claims arising in whole or in part out of (a) failure of Buyer, its agents, employees or customers to follow specifications, instructions, warnings or recommendations furnished by Seller, (b) failure of Buyer, its agents, employees or customers to comply with all applicable laws and regulations, including, but not limited to any applicable Federal, state and local laws and regulations governing hazardous materials or safety, all as they may be amended or supplemented from time to time, (c) misuse of the goods by Buyer, its agents, employees or customers including use of goods with any substance that causes injury to person or property, (d) misrepresentation by Buyer, its agents, employees or customers, (e) the sole or contributing negligence of Buyer, its agents, employees or customers, or (f) alleged infringement of any patent, trademark or copyright as a result of Seller's performance in accordance with Buyer's designs, plans, specifications or directions, (g) any and all lawsuits, liabilities, damages, injuries, claims, demands and expenses (including attorneys' fees and legal expenses) of whatever kind and nature arising on account of the manufacture, use, storage, maintenance or repair of any of Seller's goods regardless of by whomever manufactured, used, operated, maintained or stored and/or arising as a result of claims based upon strict liability imposed upon Seller except for claims directly resulting from Seller's gross negligence. Buyer hereby waives and releases Seller from all rights of contribution or indemnity to which it may otherwise be entitled. As used in paragraph 8 hereof, the term "Seller" shall mean the Seller, its officers, directors, employees, parent, subsidiaries, divisions, affiliates,

successors and assigns. This Indemnity shall continue in full force and effect notwithstanding the termination of any order or contract.

**9. Cancellation by Buyer.** Buyer may cancel this contract only upon Seller's written agreement and payment of reasonable cancellation charges including, without limitation, (1) the price for goods, services and raw materials completed or ordered prior to Seller's receipt of such notice together with reasonable profit thereon, (2) all costs previously incurred in connection with uncompleted goods or services together with reasonable profit thereon, and (3) all other expenses incurred by Seller by reason of such cancellation.

**10. Taxes.** All taxes and other charges imposed by federal, state, local or foreign governments on the manufacture, sale, shipment, import, export or use of the goods (other than income taxes) are not included in the price and shall be paid by Buyer. Buyer shall defend, indemnify and hold harmless Seller from and against all liabilities for such taxes or charges and attorney's fees or costs incurred by Seller in connection therewith. If applicable, Buyer shall provide Seller with a tax exemption certificate from the taxing authorities.

**11. Advice and Assistance.** Upon request, Seller in its discretion may furnish to Buyer technical advice, design services or assistance regarding the goods or services. Seller assumes no obligation or liability for the advice, services or assistance given or results obtained, which shall be at Buyer's sole risk.

**12. Buyer's Materials.** All of Buyer's tooling, goods, and other property in Seller's possession shall be fully insured by Buyer and Buyer releases Seller from all liability for loss or damage to such material caused by Seller's negligence or otherwise. Whenever one year has elapsed since the completion of any order from Buyer requiring the use of such materials, Seller may make any use or disposition of such materials without any liability to Buyer.

**13. Seller's Proprietary Rights.** Seller shall be the sole owner of all drawings, inventions, tooling and improvements made by or for Seller in connection with the performance of this contract. Buyer shall not reproduce any drawing furnished by Seller. Buyer shall not use or disclose any of Seller's trade secrets or confidential information, whether or not designated as such, except as required in connection with the use or resale of the goods or services covered by this contract.

**14. Credit and Collection.** Seller is relying upon Buyer's representation of solvency and if Seller at any time reasonably believes that Buyer is insolvent or its credit is impaired, Buyer shall be in material breach hereof and Seller may, without liability to Buyer, withhold performance, change payment terms and/or repossess goods previously delivered. Title to goods shall remain in Seller until payment in full is received. In extending any credit hereunder, Buyer shall pay to Seller interest on the unpaid amount at the maximum annual rate permitted by law or 1-1/2% per month, whichever is less and if Buyer fails to pay according to the terms of this contract, Seller may make such charges and may also collect the amount unpaid with Buyer being liable to Seller for all costs of collection including attorney's fees and court costs.

**15. Buyer's Financial Responsibility.** If Seller shall at any time doubt Buyer's financial responsibility, Seller may demand adequate assurance of due performance or decline to make any further shipments except upon receipt of cash payment in advance or security. If Seller demands adequate assurance of due performance and the same is not forthcoming within 10 days after the date of Seller's demand, Seller may at its option (1) defer shipments under any order from Buyer which Seller has accepted until adequate assurances are received or (2) cancel this order and any other order from Buyer which Seller has accepted and recover damages.

**16. Miscellaneous.** This contract constitutes the entire agreement between Buyer and Seller relating to the goods or services which are the subject hereof. No modifications shall be binding upon the Seller unless in writing signed by Seller's duly authorized representative. If any term or provision of this contract shall to any extent be invalid or unenforceable, such provision will be enforced to the maximum extent permitted by applicable law and the remainder of the contract shall not be affected

thereby, and each term and provision of this contract shall continue to be valid and enforced to the fullest extent permitted by law. No waiver by either party of default shall be deemed a waiver of any subsequent default. The captions used herein shall have no substantive significance.

**17. Choice of Law and Jurisdiction.** These terms and conditions shall be construed in accordance with the laws of the State of New York, without regard to principles governing conflicts of laws. Buyer and Seller consent to the jurisdiction and venue of the federal and state courts situated in or having their situs over Holtsville NY.

**18. Attorneys' Fees.** If Seller pursues any legal action to enforce any of its rights, Seller shall be entitled to recover from Buyer all reasonable attorneys' fees and all other costs and expenses incurred by Seller in connection with such action.