

# **Barnett Industries, Inc. d/b/a Indy Honeycomb USA**

## **TERMS AND CONDITIONS OF SALE**

Every product ("Product") sold by or through Barnett Industries, Inc. d/b/a Indy Honeycomb USA, or its affiliates ("Indy Honeycomb") to a purchaser ("Buyer") is sold subject to the following terms and conditions:

### **(1) PRIORITY OF TERMS AND CONDITIONS**

Indy Honeycomb hereby notifies Buyer in advance that Indy Honeycomb objects to any terms and conditions in Buyer's purchase order or other document that are additional to or different than these Terms and Conditions, whether or not the additional or different terms would materially alter these Terms and Conditions. If a contract between Indy Honeycomb and Buyer is established through performance or other conduct, the terms and conditions of that contract will not be deemed to consist only of terms and conditions as to which the parties' writings agree, but rather these Terms and Conditions will be a part of that contract and will prevail over the conflicting and/or different terms and conditions of any other document forming a part of the contract. No other terms (whether contained in any purchase order or other document) given by Buyer shall in any way modify or supersede any of these Terms and Conditions or otherwise be binding on Indy Honeycomb unless expressly accepted by a written instrument signed by an authorized corporate officer of Indy Honeycomb.

### **(2) PRICE AND ORDER ACCEPTANCE**

All packing, shipping, and labeling charges, if any, are in addition to the purchase price and may be invoiced to Buyer at any time. Prior to Indy Honeycomb's express acceptance of a Purchase Order, the price quoted for a product is subject to change. Unless Indy Honeycomb expressly states otherwise, the prices quoted for a product do not include any sales, use, excise, ad valorem, receipts or like taxes, import duties, or any other duties or charges whatsoever currently or hereafter imposed by any governmental authority, and all such taxes, duties and other charges shall be the responsibility of Buyer.

### **(3) PAYMENT; SECURITY INTEREST**

Payment is due in accordance with the payment schedule agreed to in writing by the parties. If no such schedule has been agreed to in writing, then the payment terms are full and final payment net thirty (30) days. At its option, Indy Honeycomb may impose a late charge of up to one-and-a-half percent (1.5%) per month on past due payments. All payments will be made without set-off or reduction of any kind. Restrictive endorsements or other statements on checks will not apply to Indy Honeycomb. Indy Honeycomb hereby retains a security interest in the Products to secure the payment of the purchase price and the performance of all other obligations of Buyer to Indy Honeycomb, whether now existing or hereafter arising, and whether or not arising under this contract.

### **(4) PAYMENT; TAXES**

If, following the date of this contract, the creditworthiness or financial responsibility of Buyer becomes or appears in Indy Honeycomb's judgment to have become impaired or unsatisfactory, Buyer shall, upon demand by Indy Honeycomb, provide Indy Honeycomb with assurance of Buyer's due payment of the full Contract price in form and substance satisfactory to Indy Honeycomb. If Buyer shall fail to comply with such demand of Indy Honeycomb, such failure shall be considered to constitute a repudiation of this Contract by Buyer with respect to Buyer's performance not yet due, and Indy Honeycomb shall, in addition to any other remedies available to a Indy Honeycomb for a buyer's repudiation at law, by statute, in equity or otherwise (including, without limitation, those remedies provided for in the Kentucky Uniform Commercial Code), have the right to: (i) suspend any performance on the part of Indy Honeycomb; (ii) resell Goods not yet delivered to Buyer (whether finished or unfinished) at one or more public or private sales, and at such times, places and prices, and on such other terms and conditions as Indy Honeycomb may, in its discretion, consider appropriate; and (iii) recover from Buyer all costs, expenses, disbursements and damages incurred or suffered by Indy Honeycomb as a result of any such suspension or resale.

### **(5) SHIPPING AND DELIVERY**

Indy Honeycomb will ship products FOB (Buyer pays freight and insurance) Covington, Kentucky. For international transactions, delivery terms are Ex Works (Incoterms 2000) Covington, Kentucky. Any shipping schedule provided by Indy Honeycomb to Buyer is Indy Honeycomb's then current estimate of delivery dates. Indy Honeycomb will use reasonable efforts to deliver the product in accordance with that schedule, but does not warrant and/or guaranty any particular delivery dates. Indy Honeycomb will not be liable for any damages in connection with the delivery or non-delivery of any product, including but not limited to damages incurred during shipment or caused by a delay in delivery. Unless otherwise expressly provided for on the face of this Contract, Indy Honeycomb's delivery of Goods to a carrier shall constitute due delivery of such Goods to Buyer.

### **(6) INSPECTION AND ACCEPTANCE**

Upon arrival of any Goods at the place to which such Goods shall have been shipped hereunder, Buyer shall immediately inspect such Goods at its own cost, and if Buyer finds that such Goods do not conform to their description in this Contract or any other terms and conditions hereof, Buyer shall, within ten (10) days after their arrival, give Indy Honeycomb a written notice specifying the details of the non-conformity. A failure of Buyer to give such notice to Indy Honeycomb shall constitute an irrevocable acceptance of goods by Buyer. Indy Honeycomb shall have the right following any rightful rejection to substitute conforming Goods within a reasonable period of time after Indy Honeycomb's receipt of the aforesaid notice from Buyer.

### **(7) LIMITED WARRANTY**

(a) Indy Honeycomb warrants that the Goods will conform to the description appearing on the face of the Purchase Order. OTHER THAN SUCH LIMITED WARRANTY, PRODUCTS ARE PROVIDED HEREUNDER AS IS, AND NO WARRANTY OF ANY KIND, EXPRESS, IMPLIED, OR STATUTORY, WHETHER IN RELATION TO MERCHANTABILITY, HIDDEN DEFECTS, FITNESS FOR A PARTICULAR PURPOSE, COURSE OF PERFORMANCE, COURSE OF DEALING, USAGE OF TRADEMARK NON-INFRINGEMENT OR OTHERWISE IS GIVEN BY INDY HONEYCOMB TO BUYER OR ANY OTHER PARTY. Buyer will notify Indy Honeycomb of any failure to conform to the warranty within ten (10) business days after delivery; otherwise the Product will be deemed accepted by Buyer. If any Product does not conform to Indy Honeycomb's warranty, Indy Honeycomb will either replace the nonconforming Product or refund the applicable portion of the purchase price paid for the nonconforming Product (exclusive of freight, insurance, taxes, and other charges), at Indy Honeycomb's option. The foregoing remedy is exclusive and is granted in lieu of all other remedies.

(b) Buyer shall assume all risks and liabilities resulting from any use, process, consumption, resale or other disposition of the Goods delivered under this Contract.

### **(8) LIMITATION OF LIABILITY**

INDY HONEYCOMB WILL NOT BE LIABLE TO BUYER, ITS CUSTOMERS, EMPLOYEES OR AGENTS, UNDER ANY CLAIM OR CIRCUMSTANCES (INCLUDING WITHOUT LIMITATION ANY CIRCUMSTANCE INVOLVING A FINDING THAT A WARRANTY OR REMEDY HAS FAILED OF ITS ESSENTIAL PURPOSE), WHETHER THE CLAIM SOUNDS IN CONTRACT, TORT OR OTHER LEGAL THEORY, FOR INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING WITHOUT LIMITATION DAMAGES FOR LOST PROFITS OR REVENUE, LOST SALES, LOST GOODWILL OR LOSS OF USE OF ANY PRODUCT. IN NO EVENT WILL INDY HONEYCOMB'S AGGREGATE LIABILITY EXCEED THE PURCHASE PRICE FOR THE PRODUCT.

### **(5) PROPRIETARY RIGHTS**

Indy Honeycomb makes no representation or warranty that the sale, use or other disposition of Goods will not infringe on any patent, trademark, design, copyright or other intellectual property right (each an "Intellectual Property Right") of any third party in the United States or any other country. Indy Honeycomb hereby disclaims all liability for any liability, loss, damage, penalty, claim, suit, action, cost or expense (including, without limitation, attorney's fees and disbursements) incident to any actual or alleged infringement of any Intellectual Property Right of any third party resulting from the sale, use or other disposition of Goods. In the event that any claim or dispute arises in connection with any allegation that the sale, use or other disposition of Goods infringes upon any Intellectual Property Right of any third party, Indy Honeycomb reserves the right to terminate this Contract and shall have no liability for any loss, cost or expenses based upon, arising out of or otherwise in respect of such termination.

### **(6) LIMITATIONS OF LIABILITY**

IN NO EVENT, WHETHER AS A RESULT OF A BREACH OF CONTRACT OR WARRANTY, TORT (INCLUDING, WITHOUT LIMITATION, NEGLIGENCE AND STRICT LIABILITY) OR OTHERWISE, SHALL INDY HONEYCOMB BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, SPECIAL OR EXEMPLARY DAMAGES (INCLUDING, WITHOUT LIMITATION, LOSS OF PROFIT, REVENUE OR CONTRACT, LOSS OF USE, COST OF DOWNTIME, COST OF SUBSTITUTE

GOODS), OR FOR ANY CLAIMS MADE BY BUYER'S CUSTOMERS OR ANY OTHER PERSON FOR ANY SUCH DAMAGES. ALL CLAIMS FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT, SPECIAL OR EXEMPLARY DAMAGES WHICH MAY OTHERWISE BE RECOVERABLE BY BUYER AT LAW, IN EQUITY, BY STATUTE OR OTHERWISE, ARE HEREBY EXPRESSLY WAIVED BY BUYER.

**(7) TRADE RESTRICTIONS**

If, following the date of this Contract, (i) there shall be imposed any import, export or other restrictions on interstate or international trade or commerce or there shall be enacted or otherwise issued any law, regulation, or order regulating or purporting to regulate any import, export or other interstate or international trade or commerce in any way (such restrictions, laws, regulations and orders being hereinafter collectively referred to as "Trade Restrictions"), including, without limitation, any creation or increase (whether retaliatory or otherwise) of tariffs, import surcharges, antidumping or countervailing duties, fees, or any other form of charges whatsoever, or the imposition of any import or export quota or embargo, and (ii) Indy Honeycomb's ability to perform this Contract is adversely affected thereby, or its underlying economic assumptions with respect to this Contract become inaccurate in any respect, Indy Honeycomb shall have the option either (a) to terminate this Contract in whole or in part by written notice to Buyer, without incurring any liability to Buyer thereby, or (b) to continue to perform all of its obligations hereunder in respect of deliveries of the Goods, and in either case (except if this Contract is terminated in whole), Indy Honeycomb shall have the right to increase the price of the Goods by an amount equal to the full amount of all such tariffs, surcharges, duties, fees, and other charges, and any other costs or expenses, imposed on or incurred by Indy Honeycomb in connection with the sale of the Goods as a result of the imposition, enactment or issuance of any Trade Restriction.

**(9) EXPORT OR REEXPORT**

Buyer agrees that it shall not, directly or indirectly, export or transmit any Indy Honeycomb products and/or support services covered by this Contract to any country and/or end-user to which such export is restricted by any applicable regulations of the United States or any agency thereof, without the prior written consent from the United States Department of Commerce, Washington D.C. 20230, and/or any other required governmental agency. Buyer further warrants that it will not export or re-export any goods with knowledge that they will be used in the design, development, production, or use in chemical, biological, nuclear, or ballistic weapons, or in a facility engaged in such activities.

**(10) WARRANTY/REPRESENTATION**

Buyer represents and warrants that the Product ordered hereunder is not designed, developed, requested to be produced, for use in chemical, biological, nuclear, or ballistic weapons, or in a facility engaged in such activities. Buyer further represents and warrants that the Product ordered hereunder has not been specifically designed or modified for use as a defense article, as such term is defined in the International Traffic In Arms Regulations ("ITAR"). If such Product is classified as a defense article, including technical data provided by Buyer to Indy Honeycomb, Buyer represents and warrants that such information shall be communicated in writing to Indy Honeycomb at the time such information is known to Buyer. Buyer agrees to provide any information and/or documentation reasonably requested by Indy Honeycomb regarding any representation hereunder.

**(11) FORCE MAJEURE**

Indy Honeycomb shall not be liable for any delay or default in delivery of any Goods or performance of any Services if such delay or default is due to acts of God or of a public enemy, acts of any government or any state or political subdivision thereof, fires, floods, explosions or other catastrophes, epidemics or quarantine restrictions, strikes slowdowns or labor stoppages of any kind, freight embargoes, delays or accidents in transportation, delays in suppliers' furnishing Goods to Indy Honeycomb due to any such cause, any supplier's insolvency or bankruptcy, or any other cause or causes beyond the reasonable control of Indy Honeycomb. In the event of any such occurrence, Indy Honeycomb shall have the right to apportion its production or deliveries among its customers as it may choose and, if Indy Honeycomb is prevented from delivering to Buyer all or any part of the Goods or from performing any Services because of any such occurrence, Indy Honeycomb shall have such additional time within which to perform this Contract as may be reasonably necessary under the circumstances.

**(12) CANCELLATION**

If Buyer fails to carry out any of the terms and conditions of this Contract or of any other contract with Indy Honeycomb, or becomes insolvent, or if a proceeding is instituted or commenced by or against Buyer under any bankruptcy, insolvency or similar law, or if a receiver, trustee or liquidator is appointed for Buyer or any of its assets, or Buyer executes an assignment for the benefit of creditors, Indy Honeycomb may refuse to make further deliveries under this Contract and may forthwith cancel this Contract upon written notice to Buyer, without prejudice to any right of Indy Honeycomb existing under this Contract at the time of such cancellation.

**(13) REMEDIES**

The remedies herein reserved to Indy Honeycomb shall be cumulative and in addition to any other or further remedies provided at law or in equity.

**(14) APPLICABLE LAW AND SUBMISSION TO JURISDICTION**

These Terms and Conditions, the construction of these Terms and Conditions, all rights and obligations between the parties to these Terms and Conditions, and any and all claims arising out of or relating to the subject matter of these Terms and Conditions, will be governed by the laws of the Commonwealth of Kentucky U.S.A., without regard to its conflict of laws principles. The rights and obligations of the parties to these Terms and Conditions will not be governed by the provisions of the 1980 UN Convention on Contracts for the International Sale of Goods; rather these rights and obligations will be governed by the laws of Kentucky. Any litigation or other legal proceeding of any kind based upon or in any way related to these Terms and Conditions, its subject matter, or the rights or obligations of the parties to these Terms and Conditions, will be brought exclusively in an appropriate court of competent jurisdiction (state or federal) located in Kenton County, Kentucky, and must be brought within two years after the date on which the claim accrued. Any action brought in such courts will not be transferred or removed to any other state or federal court. The parties consent to the exercise of jurisdiction over them by the above-named courts as their freely negotiated choice of forum for all actions subject to this forum selection clause.

**(15) ENTIRE AGREEMENT; MODIFICATION**

This Contract constitutes the entire agreement between Buyer and Indy Honeycomb in respect of the subject matter hereof and supersedes all prior agreements, written or oral, with respect thereto. Any alterations or modifications hereof shall be by mutual agreement of the parties and shall not be binding on Indy Honeycomb unless agreed to by Indy Honeycomb in writing.

**(16) ASSIGNMENT; WAIVER**

Buyer shall neither assign any rights nor delegate any duties under this Contract without the prior written consent of Indy Honeycomb. No claim or right of Indy Honeycomb arising out of a breach of this Contract shall be discharged in whole or in part by waiver or renunciation of such claim or right unless such waiver or renunciation is made by Indy Honeycomb in writing. No delay on the part of Indy Honeycomb in exercising any right hereunder shall operate as a waiver or renunciation thereof, nor preclude any further exercise thereof or the exercise of any other such right.