



Berco of America, Inc., W229 N1420 Westwood Drive, Waukesha, WI, 53186, USA

# Berco of America, Inc.

## TERMS AND CONDITIONS OF SALE

### VERSION 1.01

#### 1. Agreement

1.1. Subject to the terms and conditions set forth herein (“Terms of Sale”), Berco of America, Inc. (BoA) agrees to sell or provide such goods, products, parts, accessories and/or services, including any applicable documentation with respect thereto (collectively, “Goods”), as are identified and/or described in BoA’s sales quotations, sales order acknowledgements, change orders and/or invoices (collectively, “Sales Order Documentation”) issued by BoA to its customers identified in any such Sales Order Documentation (“Buyer”).

1.2. These Terms of Sale shall become binding upon BoA and Buyer upon the earlier

of (i) BoA’s issuance of a sales order acknowledgement to Buyer, or (ii) BoA’s shipment of Goods to Buyer, whether in whole or in part.

1.3. The Terms of Sale are expressly limited to the terms and conditions set forth herein unless expressly modified with reference hereto in any of the Sales Order Documentation. Any and all terms set forth on Buyer’s purchase order or otherwise proposed by Buyer are hereby objected to and shall be void unless expressly agreed to in a writing signed by BoA. These Terms of Sale and the Sales Order Documentation into which these Terms of Sale have been incorporated contain the entire agreement of the parties (“Agreement”) and all proposals, negotiations, representations or agreements made or entered into prior to or contemporaneously herewith, whether oral or in writing, are expressly superseded.

Berco of America, Inc.

Company subject to direction and coordination activity by thyssenkrupp AG.

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progress together.

## 2. Prices, Taxes and Clearances

2.1. Prices are FOB BoA's plant of distribution unless otherwise specified in writing by the parties. Prices are stated in United States Dollars and payment shall be made in United States currency unless otherwise specified in writing by the parties. Prices do not include sales, use, excise or any similar taxes. Any tax or other governmental charge upon the production, assembly, sale, shipment, or use of the Goods which BoA is required to pay or collect from Buyer shall be paid by Buyer to BoA unless Buyer furnishes BoA with a tax exemption certificate acceptable to the applicable taxing authority. Buyer shall be responsible for obtaining any necessary governmental clearances, including any import and/or foreign exchange license, which may be required by the federal, any state or any foreign government, or any subdivision or agency of any thereof.

## 3. Payment

3.1. Payment of the purchase price for the Goods (including any applicable sales or use tax) is, unless otherwise indicated, due and payable thirty (30) days from the date of invoice with respect thereto. Thereafter, the unpaid balance of the total purchase price might bear interest at the rate of one and one-half percent (1.5%)

per month until paid in full.

3.2. Invoices shall be dated as of the date of shipment. However, if, in the opinion of BoA, the financial responsibility of Buyer becomes impaired or unsatisfactory prior to payment in full with respect to the amounts due BoA under the Agreement, Buyer shall, if required by BoA to do so, make cash payments or furnish satisfactory security before any further deliveries are made. Failure or refusal by Buyer to comply with the requirements that BoA may impose upon Buyer in accordance with the foregoing shall entitle BoA to suspend deliveries under the Agreement during such failure or refusal or, alternatively, to terminate the Agreement. Any such action by BoA shall not in any way prejudice BoA's claim for damages or Buyer's obligations to pay for BoA's Goods already delivered.

## 4. Risk of Loss, Title and Shipment

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4.1. Risk of damage, destruction or loss, and title to the Goods, passes to Buyer upon delivery to the designated carrier, and upon such delivery no damage, destruction or loss of the Goods shall release Buyer from its obligations and liabilities to BoA under the Agreement. BoA will ship in accordance with instructions supplied by Buyer, but if Buyer fails to furnish such instructions, BoA will select what is, in its opinion, the most satisfactory manner of shipping and designate the carrier to be used for the shipment. Unless otherwise mutually agreed, shipping dates are approximate and based upon prompt receipt of all necessary information. Any prepayment by BoA of freight charges shall be for the account of Buyer and shall be paid by Buyer with the total purchase price for the Goods.

## 5. Force Majeure

5.1. BoA shall not be liable for any delay in delivery, or failure to deliver, due, directly or indirectly, to any cause beyond BoA's reasonable control, including, but not limited to, acts of God, fires, floods, strikes or other labor disputes, accidents, machinery or equipment breakdowns, acts of sabotage or terrorism, riots, wars, inability to obtain raw materials, components, fuel or supplies, delay in transportation or lack of transportation facilities, or any restrictions or delays imposed by or caused by policies of any federal, state, foreign or other governmental legislation, rules, regulations or orders. In the event of any such delay or failure, the Agreement shall not terminate, but the required date of

shipment of the Goods shall be extended for a period of time equal to the time lost by reason of any such failure or delay.

## 6. Cancellation

6.1. Buyer may only cancel the Agreement with BoA's consent and upon the payment to BoA of (i) the full purchase price for all Goods ordered by Buyer and ready for delivery, and (ii) with respect to all other Goods ordered by Buyer, the lesser of (x) the purchase price for such Goods and (y) a reasonable profit with respect to such Goods together with all costs incurred by BoA in connection with producing or assembling such Goods, including, without limitation, reasonable overhead plus the costs incurred by BoA with respect to all special dies, tools, patterns and fixtures, labor and other expenses in connection with BoA's performance under the Agreement, all such costs to be determined in accordance with generally accepted accounting principles. Solely for the purposes of this Section and only with respect to those cancellations caused by an increase in the purchase price

of Goods to be purchased pursuant to the Agreement, the purchase price for such Goods to be used in calculating cancellation charges payable under the Agreement shall equal the purchase price in effect immediately prior to the proposed price change. Upon Buyer's request and after the payment by Buyer of all cancellation charges to be paid hereunder, BoA shall make available for shipment to Buyer (which shipment shall be subject to these Terms and Conditions) all completed and partially completed Goods produced pursuant to the Agreement; provided, however, BoA may, at its sole option, accept any cancellation on a no charge basis, retaining in its possession any materials acquired for the processing of the canceled order.

## 7. Inspection and Acceptance

7.1. Upon delivery of the Goods to Buyer's designated shipping destination, Buyer shall promptly inspect the Goods for conformance to the Agreement. Any claim for shortage must be made in writing and received by BoA within ten (10) days after Buyer's receipt of the Goods along with documentation supporting the claim.

## 8. Warranty

8.1. Warranty/Remedy. Seller warrants that the materials, Goods manufactured by it will be free from defects in material and workmanship attributable to BoA and/or its supplier and shall not be valid in absence of Buyer's proof of the correct use, maintenance and conservation of the products and of no modification or repair to the products without BoA's consent. The foregoing warranty is expressly in lieu of all other warranties, expressed or implied. All other warranties, expressed or implied, including any warranty of merchantability or fitness for a particular purpose not expressly set forth herein, are hereby excluded. No affirmation of seller, by words or action, other than as set forth in this warranty clause shall constitute a warranty. Good which may be sold by seller but which are not manufactured by seller are not warranted by seller, but are sold only with the warranties, if any, of the manufacturers thereof. Seller's warranty does not apply to any Goods which have been subjected to misuse, mishandling, misapplication, neglect, accident, improper installation or modification (including but not limited to use of unauthorized parts or attachments).

a. Unless differently agreed upon with the Customer/s, the warranty shall have a limited duration of 12 months beginning from the date purchased from BoA or of 1500 working hours, whichever

occurs first, and shall be subject to the regular denunciation made by the Buyer according to the following article;

b. If any of the Goods are found by Seller to be defective, such Goods will, at Seller's option, be replaced or repaired at Seller's cost or Seller will refund the purchase price or give Buyer a reasonable allowance thereof. Any compensation for damages to the Buyer shall not exceed the invoiced price of the claimed product. The parties hereto expressly agree that Buyer's sole and exclusive remedy against the Seller shall be for the repair or replacement of the defective Goods or the refund of the purchase price or allowance thereof. Buyer hereby agrees that this exclusive remedy shall not be deemed to have failed of its essential purpose so long as the Seller is willing and able to repair or replace defective Goods in the prescribed manner or refund the purchase price or give Buyer an allowance thereof.

c. Any warranty claim by Buyer with reference to the Goods sold hereunder shall be deemed waived by the Buyer unless submitted in writing to Seller within the earlier of 30 days following the date Buyer discovered, or by reasonable inspection should have discovered, any claimed breach of the foregoing warranty. Any cause of action for breach of the foregoing warranty shall be brought within one year from the date of alleged breach was discovered or should have been discovered, whichever occurs first.

d. Seller's remedies relating hereto shall be cumulative and in addition to any other remedies provided herein or by law or in equity.

e. Upon expiration of the warranty period, no warranty request can be made to BoA.

8.2.Limitation of Liability. Seller's liability (whether under the theories of breach of contract or warranty, negligence, or strict liability) for its goods shall be limited to repairing or replacing goods found by seller to be defective, or at seller's option. To refunding the purchase price of such goods or parts thereof provided, however, that the cost of such repaired or replaced goods shall not

exceed the total value of the contract. At Seller's request, Buyer will send, at Buyer's sole expense, any allegedly defective Goods to Seller's plant.

8.3. Disclaimer of Consequential and Incidental damages. In no event shall seller be liable for consequential or incidental damages arising out of or in connection with this agreement including without limitation breach of any obligation imposed on seller hereunder or in connection herewith. The remedy under the warranty provision is limited to repair or replacement. Consequential damages for purposes hereof shall include, without limitation, loss of use, income or profit or losses sustained as the result of injury (including death) to any person or loss of or damage to property (including, without limitation, property handled or processed by the use of the goods). Buyer shall indemnify Seller against all liability, cost or expense which may be sustained by Seller on account of any such loss, damage or injury.

## 9. Compliance with Law

BoA represents that Goods delivered or services performed by BoA pursuant to the Agreement will comply with the Fair Labor Standards Act of 1938, as amended.

## 10. Indemnification, Intellectual Property

In the event any Goods to be furnished under the Agreement are to be made in accordance with drawings, samples or manufacturing specifications designated by Buyer, Buyer agrees to hold BoA harmless from any and all damages, costs and expenses relating to any claim arising from the design, manufacture or use of such Goods or arising from a claim that such Goods furnished to Buyer by BoA, or the use thereof, infringes upon any intellectual property right, including, without limitation, patents or trade secrets, foreign or domestic, and Buyer agrees at its own expense to undertake the defense of any suit against BoA brought upon such claim or claims. In the event any Goods to be furnished under the Agreement are solely the design of BoA or its supplier, BoA agrees (subject to the last sentence of this Section) to hold harmless Buyer and its customers against damage awarded by a court of final jurisdiction in any suit or suits for the infringement of any intellectual property rights or the violation of any trade secrets by reason of the sale or use of such Goods furnished by BoA under the Agreement. Buyer agrees to notify BoA as soon as practicable of any charge or suit alleging any such infringement or violation, and agrees that the foregoing

agreement by BoA to indemnify shall not apply unless BoA shall have been so notified and given the opportunity to take over the defense thereof, and further, such agreement to indemnify shall not apply if (i) the claimed infringement is settled without the consent of BoA unless required by a final, not appealable decree of a court of competent jurisdiction, or (ii) the infringement or violation results from the use of any Goods delivered pursuant to the Agreement in combination with a product not delivered there under where such infringement or violation would not have occurred from the use of the Goods alone delivered pursuant to the Agreement.

## 11. Proprietary Rights Reservation

All information of any kind and nature (except for such information as may be established to be in the public domain or which Buyer may establish to be the property of Buyer) related to the design, engineering, production, process, method, device, technique, formulas, plans, diagrams, drawings, compilations, patterns, tools, dies or fixtures in connection with or related to any component, device, material or other goods, products and services manufactured, assembled, provided or delivered pursuant to the Agreement are proprietary in favor of BoA. Such information has been developed at great expense to BoA and may contain trade.

secrets of BoA or its supplier. Buyer shall not reproduce, disclose, distribute or utilize same without BoA's prior expressed written consent (which consent may be granted or denied at BoA's sole discretion) or as required by judicial or governmental action and Buyer shall exercise reasonable care to hold such information in confidence.

## 12. Return Authorization

Except if permitted and/or requested under Section 8 (Warranty) or in this Section, Buyer may not return any Goods delivered pursuant to the Agreement. Buyer may, with the prior consent of BoA (which consent may be granted or denied at BoA's sole discretion), but only if the Buyer is provided with an RGA Number from BoA, and in conformity with shipping instructions provided by BoA, return Goods delivered to Buyer that are free from any damage whatsoever and in fair saleable condition; provided, however, that Buyer agrees to pay BoA a restocking charge equal to twenty percent (20%) of the purchase price of such Goods together with any transportation, taxes and/or rework charges incurred by BoA in connection with the return of such Goods, if Buyer has paid the full purchase price for such returned Goods.

### **13. Uniform Commercial Code; BoA's Security Interest**

Until the entire purchase price for the Goods (as set forth in invoices from time to time issued to Buyer by BoA) has been fully paid, BoA shall have, to secure payment thereof, a continuing senior purchase money security interest in the Goods and proceeds thereof. Upon a default under these Terms and Conditions, BoA shall have all of the rights and remedies of a secured party under the Uniform Commercial Code as from time to time in effect in the State of Wisconsin or in any other applicable State.

### **14. Default**

14.1. The occurrence of any of the following events shall constitute Buyer's default under the Agreement: (i) Buyer's failure to make timely payment of any sum owing to BoA under the Agreement; (ii) institution of any proceedings by or against Buyer under any bankruptcy, insolvency or similar law; (iii) appointment or application for a receiver for Buyer; (iv) an assignment by Buyer for the benefit of creditors; (v) failure of Buyer to furnish BoA upon BoA's request, with a written representation reaffirming Buyer's solvency (it being understood that the Agreement constitutes a representation by Buyer that it is solvent); or (vi) BoA deems itself not secured with respect to performance by Buyer under the Agreement.

14.2. Upon Buyer's default hereunder, BoA may, upon written notice to Buyer, cancel any remaining obligations of BoA under the Agreement, in which case, at BoA's options:

- a) Buyer shall pay for all Goods delivered and for all Goods completed or in process pursuant to the Agreement;
- b) With respect to any Goods for which BoA has not received full payment, BoA may stop additional deliveries, retake (or retain) possession of such Goods wherever located (all without notice, demand or legal process) and retain, lease
- c) or resell such Goods without accounting to Buyer and any payments received by
- d) BoA from Buyer may be retained as liquidated damages;



- e) BoA may declare any outstanding balance immediately due and owing and collect same from Buyer without further notice or demand, together with interest
- f) at the maximum rate permitted by law; and/or
  
- g) Refuse to deliver any Goods except on a cash basis.

## 15. Miscellaneous

15.1 BoA shall be an independent contractor with respect to Buyer in the performance of the Agreement. Neither party hereto, nor any respective agent of either party, shall be regarded as an agent or employee of the other. The Agreement shall not be construed to be a joint venture between the parties.

15.2 No waiver by BoA of any default shall be deemed a waiver of any subsequent default unless the same shall be signed in writing by BoA.

15.3 If any provision of the Agreement is held to be invalid under applicable law, such invalidity shall not affect the remaining provisions of the Agreement.

15.4 The provisions of the Agreement shall be binding upon and inure to the benefit of the respective representatives, successors and assigns of the parties hereto, including, without limitation, a debtor-in-possession; provided, however, that no interest herein may be assigned by Buyer without the prior written consent of BoA.

15.5 No waiver, alteration or modification of the terms and conditions hereof shall be valid or binding upon BoA's unless made in writing and signed by BoA.



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15.6 This Agreement shall, for all purposes, be governed by and construed under the laws of the State of Wisconsin as applied to agreements between Wisconsin residents. Without limitation of the foregoing, Buyer irrevocably agrees that all actions or proceedings in any way, manner or respect arising out of or from, or relating to, the Agreement shall be litigated only in Wisconsin State Courts or in the United States District Court for the Southeastern District of Wisconsin. Buyer consents and submits to the jurisdiction of any local, state or federal court located within said State, and waives any and all objections to jurisdiction that Buyer may have under the laws of the State of Wisconsin or the United States, including any claim or objection that any such court is an inconvenient forum. Further, Buyer hereby waives, to the fullest extent permitted by law, all rights to have any dispute or claim arising under the Agreement litigated before a jury.

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