

Terms and Conditions

FORM-085 18September2018

1. DEFINITIONS

- 1.1 “Deliverables” means the items specified in the Purchase Order (and/or any Statement of Work) to be delivered on the Delivery Date.
- 1.2 “Delivery Date” means the date or dates specified in the Purchase Order by which the Supplier is required to deliver the Work.
- 1.3 “Harmful Code” means any software intentionally designed to (i) disrupt, disable, harm or impede operation; or (ii) impair operations based on the lapse of time, including but not limited to viruses, worms, time bombs, time locks, drop-dead devices, access codes, security keys, back doors or trap door devices.
- 1.4 “Intellectual Property Rights” means any and all tangible and intangible (i) copyrights and other rights associated with works of authorship throughout the world, including but not limited to copyrights, neighboring rights, moral rights, and all derivative works thereof; (ii) trademark and trade name rights and similar rights; (iii) trade secret rights; (iv) patents, designs, algorithms, utility models, and other industrial property rights and all improvements thereto; (v) all other intellectual and industrial property rights (of every kind and nature throughout the world and however designated) whether arising by operation of law, contract, license or otherwise; and (vi) all registrations, applications, renewals, extensions, continuations, division, or reissues thereof nor or hereafter in force (including any rights in any of the foregoing.)
- 1.5 “Products” means tangible goods specified in the Purchase Order to be delivered on the Delivery Date.
- 1.6 “Services” means the services the Supplier is to perform for American Augers, Inc., (hereinafter “AA”) specified in the Purchase Order.
- 1.7 “Statement of Work or ‘SOW’” means the document specifying, without limitation, the scope, objectives, and timeframe of the Work that Supplier will perform for AA.
- 1.8 “Subcontractor” means a third party performing Work under an agreement (a “Subcontract”) with Supplier.
- 1.9 “Supplier Personnel” means Supplier’s employees, consultants, agents, independent contractors and Subcontractors.
- 1.10 “Third Party Intellectual Property” means the intellectual Property Rights of a third party which Supplier uses or incorporates into the Work.
- 1.11 “Work” means the Deliverables, Products and Services specified in the Purchase Order, including any SOW.
- 1.12 “Purchase Order” *see* definition in Section 2 below.
- 1.13 “Critical Dimension” means those dimensions with three decimal place or greater precision and/or major dimensions called out on drawings or called for on an inspection sheet that accompanies a drawing.
- 1.14 “Inspection Report” means a tabular comparison of the Supplier’s actual inspection results against all Critical Dimensions. Preferably provided in addition to an inspection sheet if such a sheet accompanies a drawing.

2. TERMS OF AGREEMENT

The “Purchase Order,” together with these Purchasing Terms and Conditions and any SOW’s, attachments and exhibits, specifications, drawings, notes, instructions and other information, whether physically attached or incorporated by reference (collectively the “Purchase Order”), constitutes the entire and exclusive agreement between AA and the supplier (the “Supplier”) identified in the Purchase Order. There are no representations, warranties, covenants or obligations except as set forth in the Purchase Order. AA’s submission of the Purchase Order is conditioned upon Supplier’s agreement that any terms different from or in addition to the terms of the Purchase Order, whether communicated orally or contained in any purchase order confirmation, invoice, acknowledgment, release, acceptance or other written correspondence, irrespective of the timing, shall not form a part of the Purchase Order, even though Supplier purports to

Terms and Conditions

FORM-085 18September2018

condition its acceptance of the Purchase Order on AA's agreement to such different or additional terms. Supplier's electronic acceptance, acknowledgment of the Purchase Order, or commencement of performance constitutes Supplier's acceptance of these terms and conditions. The Purchase Order does not constitute a firm offer and may be revoked at any time prior to acceptance. Capitalized terms used herein shall have the meaning assigned in section 1 herein unless otherwise defined in these Terms and Conditions.

3. DELIVERY

- 3.1 Time is of the essence in Supplier's performance of its obligations under the Purchase Order. Supplier shall immediately notify AA if Supplier's timely performance under the Purchase Order is delayed or is likely to be delayed. AA's acceptance of Supplier's notice does not constitute AA's waiver of any of Supplier's obligations.
- 3.2 Upon receipt of the Purchase Order, Supplier will acknowledge receipt and provide any price, delivery date or country of origin corrections.
- 3.3 If Supplier delivers Work after the Delivery Date, AA may reject such Work.
- 3.4 AA will hold any Work rejected under this Purchase Order at Supplier's risk and expenses, including storage charges, while awaiting Supplier's return shipping instructions. Supplier shall bear all return shipping charges, including but not limited to insurance charges AA incurs on Supplier's behalf. AA may, in its sole discretion, destroy or sell at a public or private sale any rejected Work for which AA does not receive return shipping instructions within a reasonable time, and apply the proceeds, if any, first toward any storage charges.
- 3.5 Supplier will preserve, pack, package and handle the Deliverables and Products so as to protect the Deliverables and Products from loss or damage and in accordance with best commercial practices in the absence of any specifications AA may provide. Without limiting the foregoing, Supplier shall observe the requirements of any local laws and regulations regarding hazardous work, including but not limited to, with respect to accompanying information, packing, labeling, reporting, carriage, and disposal.
- 3.6 Supplier will include with each delivery of Products to AA, a packing list including ALL of the following information:
 - (i) Supplier name and contact information
 - (ii) Delivery address
 - (iii) Attention to
 - (iv) Packing List Number
 - (v) AA Purchase Order Number
 - (vi) AA Part Number as provided by Purchase Order
 - (vii) Item Description as provided by the Purchase Order
 - (viii) Quantity ordered
 - (ix) Quantity shipped
 - (x) Quantity backordered and expected delivery date (if applicable)
 - (xi) Unit of measure as provided by the Purchase Order
 - (xii) Serial number of Work, if applicable
 - (xiii) If required in the Purchase Order, Supplier's certification of conformance of the Work to the requirements.

Barcoding to Code 128 or Code 39 of AA Purchase Order Number and AA Part Number on the above packing slip information is preferred.

- 3.7 In addition, as part of complete Delivery documentation, Supplier will provide:
 - (i) Appropriate certifications and heat numbers for raw material such as carbon, steel, and stainless steel alloys, aluminum alloys, and other non-ferrous materials.

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Terms and Conditions

FORM-085 18September2018

- (ii) Heat numbers, legibly written on all raw materials for traceability.
- (iii) Process certifications and inspection results for heat treated, plated, or otherwise altered materials as called for on drawings.
- (iv) Inspection reports, or when applicable, inspection sheets for any Work containing Critical Dimensions.

3.8 Unless AA expressly instructs otherwise, Supplier will deliver all Work to AA facility or location specified in the Purchase Order. Supplier assumes responsibility for all shipping and delivering charges, unless AA expressly instructs otherwise, including but not limited to customs, duties, costs, taxes and insurance. Risk of loss for the Deliverables and Products does not pass to AA until acceptance in accordance with Section 5 hereof.

4. PRICE AND PAYMENT

4.1 Unless otherwise specified in the Purchase Order, the price for the Work includes all taxes and other charges such as shipping and delivery charges, duties, customs, tariffs, imposts and Government-imposed surcharges. Supplier will, at AA's request, break out from the price all such taxes and other charges in its invoices. Supplier shall use its best efforts to AA in all legal efforts to minimize taxes resulting from the performance of the Purchase Order.

4.2 AA will pay Supplier the price in accordance with the payment terms set forth in the Purchase Order following the later of (i) the Delivery Date; (ii) the date of AA's acceptance of all of the Work; or (iii) AA's receipt of a properly prepared invoice. Separate invoices must be provided for each shipment; invoices covering more than one shipment will not be accepted or honored. A properly prepared invoice must include the following information:

- (i) AA Purchase Order number
- (ii) Invoice Number
- (iii) Payment Terms
- (iv) Remit to Address
- (v) Attention to
- (vi) AA Part Number as provided by the Purchase Order
- (vii) Item Description as provided by the Purchase Order
- (viii) Quantity Ordered
- (ix) Quantity Invoiced
- (x) Unit of measure as provided by the Purchase Order

4.3 AA may, at any time, set off any amounts Supplier owes AA against any amounts AA owes to Supplier or any of its related entities.

5. INSPECTION AND ACCEPTANCE

AA may reject any or all Work which does not conform to the applicable requirements within thirty (30) business days of Supplier's delivery of the Work. At AA's option, AA may (i) return the non-conforming Work to Supplier for a refund or credit; (ii) require Supplier to replace the non-conforming Work; or (iii) require the supplier to repair the non-conforming Work so that it meets the requirements. As an alternative to (i) through (iii), AA may accept the non-conforming Work and charge Supplier back for sort time and/or labor and materials necessary to repair the non-conforming Work. AA's payment to Supplier for Work prior to AA's timely rejection of such Work as non-conforming will not be deemed as acceptance by AA. Notwithstanding anything herein to the contrary, no Work will be deemed accepted unless accompanied by a packing list and documentation meeting the requirements of Section 3.5.

6. CHANGES

Terms and Conditions

FORM-085 18September2018

- 6.1 As used in this Section 6, "Change" means an alteration AA directs or causes within the general scope of this Purchase Order, the applicable SOW or both.
 - 6.2 AA, by modified Purchase Order, may make Changes in accordance with this Section 6.
 - 6.3 If Supplier asserts that AA has directed or caused a Change to the cost of or time for performance for which AA has not issued a modified Purchase Order, Supplier will promptly notify AA in writing of assumed Change, providing (i) a description of the action or inaction asserted to have cause the Change; (ii) an estimate of the equitable adjustment that would be required for Supplier to perform the Changed Work; and (iii) a date no less than thirty (30) from the date of notice by which AA must respond to Suppliers of notice so that Supplier may proceed with the Work unchanged. AA will evaluate Supplier's notice of Change in good faith, and if AA agrees that it has made a constructive change, AA will issue a modified Purchase Order to Supplier.
 - 6.4 Supplier shall, as promptly as practicable, after giving notice of the assumed Change, or within ten (10) days of receiving a modified Purchase Order, submit a request for equitable adjustment specifying the adjustment of the price or time for performance resulting from the Change.
 - 6.5 When necessary, the parties shall negotiate an amendment to the applicable SOW to incorporate a modified Purchase Order providing for an equitable adjustment to the price, time for performance, or both.
 - 6.6 Supplier will proceed with the Changed Work as directed, notwithstanding that the parties have not negotiated the amendment to this Purchase Order or the applicable SOW to incorporate the equitable adjustment.
7. REPRESENTATIONS AND WARRANTIES
- 7.1 Supplier represents and warrants that (i) it has the full power to enter into the Purchase Order and to perform its obligations under the Purchase Order; (ii) it has the right and unrestricted ability to assign the Work to AA including but not limited to the right to assign any Work performed by Supplier Personnel and Subcontractors; (iii) the Work, and AA's use of the Work, do not and will not infringe upon any third party's Intellectual Property Rights, right of publicity or privacy, or any other proprietary rights, whether contractual, statutory or common law; (iv) Supplier will not disclose to AA, bring onto AA's premises, or induce AA to use any confidential or proprietary information that belongs to anyone other than AA or Supplier which is not covered by the non-disclosure agreement between AA and Supplier; (v) Software supplied by Supplier does not contain any Harmful Code; and (vi) Supplier's Work conforms to AA's specifications, Supplier's quotation or proposal, and Supplier's literature or catalogs, and if none of the foregoing is applicable, then such Work is suitable for the intended use.
 - 7.2 AA warrants and represents to Supplier that it has the full power to enter into the Purchase Order to perform its obligations under the Purchase Order.
 - 7.3 Supplier warrants that all Work described herein shall be produced or performed in compliance with all applicable federal and state laws, rules and regulations.
 - 7.4 Supplier expressly warrants that all Work supplied to AA by Supplier resulting from the Purchase Order shall conform to the specifications, drawings or other description upon which the Purchase Order is based, shall be fit and sufficient for the purpose intended, merchantable, of sound material and workmanship, free from defects and free and clear of all liens and encumbrances. Inspection, testing, acceptance or use of the Work or Products by AA shall not affect Supplier's obligations under this warranty, and such warranty shall survive inspection, testing, acceptance and use.
8. ASSIGNMENT AND SUBCONTRACTING
- 8.1 Supplier may not assign any of its rights or delegate any of its obligations under the Purchase Order without prior, express written consent from AA, which AA will not be unreasonably withheld. AA may, at its option, void any attempted assignment or delegation undertaken without its prior written consent.

Terms and Conditions

FORM-085 18September2018

- 8.2 Supplier may not subcontract any of its rights or obligations under the Purchase Order without prior, express written consent from AA. If AA consents to the use of a Subcontractor, Supplier shall (i) guarantee and will remain liable for the performance of all subcontracted obligations; (ii) indemnify AA for all damages and costs of any kind, subject to the limitations in Section 11 (Indemnification), incurred by AA or any third party and caused by the acts and omissions of Supplier's Subcontractors and (iii) make all payments to its Subcontractors. If Supplier fails to timely pay a Subcontractor for work performed, AA will have the right, but not the obligation, to pay to Subcontractor and offset any amount due to Supplier by any amount paid to the Subcontractor. Supplier will defend, indemnify and hold AA harmless for all damages and costs of any kind, without limitation, incurred by AA and caused by Supplier's failure to pay a Subcontractor.
- 8.3 To the extent allowed by applicable law, no person who is not a party to a Purchase Order shall be entitled to enforce or take the benefit of any of its terms as a result of applicable legislation, custom, usage of trade, course of dealing or otherwise.

9. TERM AND TERMINATION

- 9.1 The Purchase Order will remain in effect with respect to any SOW already issued prior to expiration of the term of the Purchase Order until such SOW is either terminated or the Work is completed and accepted.
- 9.2 AA may terminate the Purchase Order, any SOW, or both at any time for no reason or for any reason upon ten (10) days written notice to Supplier. Upon receipt of notice of such termination, Supplier will inform AA of the extent to which it has completed performance as of the date of the notice, and Supplier will collect and deliver to AA whatever Work exists at that time. In determining the extent of Work completed, Supplier shall only include the percentage of its raw materials that is proportionate to the amount of product requested in the Purchase Order. AA will pay Supplier for all Work performed and accepted through the effective date of the termination, provided that AA will not be obligated to pay any more than the payment that would have become due had Supplier completed and AA accepted the Work. AA shall have no further payment obligation in connection with any termination.
- 9.3 Either party may terminate the Purchase Order, any SOW, or both immediately by delivering written notice to the other party upon the occurrence of any of the following events (i) a receiver is appointed for either party or its property; (ii) either party makes a general assignment for the benefit of its creditors; (iii) either party commences, or has commenced against it, proceedings under any bankruptcy, insolvency or debtors' relief law, if such proceedings are not dismissed within sixty (60) days from filing; or (iv) either party is liquidating, dissolving, or ceasing to continue with the ordinary course of doing business.
- 9.4 Either party may terminate the Purchase Order, any SOW, or both immediately by delivering written notice to the other party for any material breach not cured within thirty (30) days of receipt of notice of such breach. AA shall have no further payment obligation to Supplier under any terminated SOW if AA terminates the SOW under this Section 9.4
- 9.5 Any obligations or duties which, by their nature, extend beyond the expiration or termination of the Purchase Order shall survive the expiration or termination of the Purchase Order.

10. CONFIDENTIAL INFORMATION AND PUBLICITY

- 10.1 If AA and Supplier have entered into a non-disclosure agreement ("NDA") which covers disclosure of confidential information under the Purchase Order, and if the term of the NDA expires before the expiration or termination of the Purchase Order, then the term of the NDA shall be automatically extended to match the term of the Purchase Order.
- 10.2 The party shall treat the terms, conditions and existence of the Purchase Order as Confidential Information as defined in the NDA.

Terms and Conditions

FORM-085 18September2018

10.3 Supplier shall obtain the express written consent of AA prior to any publication, presentation, public announcement or press release concerning its relation as a supplier to AA.

11. INDEMNIFICATION

11.1 As used in this Section 11, a “Claim” is any claim, demand, loss, damage, liability, cost or expense (including professional and attorneys’ fees and costs as incurred) for which one party (the “Indemnifying Party”) may be obligated to defend, indemnify and hold the other party (the “Indemnified Party”) harmless.

11.2 Supplier shall defend, indemnify and hold AA harmless from and against any and all Claims as incurred, arising out of or in connection with any (i) act or omission of Supplier (including Supplier’s Subcontractors) in performance of the Work; or (ii) any infringement of a third party’s Intellectual Property Rights or any other rights.

11.3 AA will indemnify and hold Supplier harmless from and against any and all Claims as incurred, arising out of or in connection with (i) Supplier’s use of information or materials provided to Supplier by AA; or (ii) infringement of a third party’s Intellectual Property Rights or any of the rights resulting from Supplier’s adherence to AA written instructions.

11.4 Each party will indemnify and hold the other party harmless from and against any and all Claims, as incurred, arising out of any negligent acts or omissions of the Indemnifying Party which results in personal injury (including death) or damage to tangible property.

11.5 The Indemnified Party will provide Indemnifying Party with prompt written notice of the Claim and permit the Indemnifying Party to control the defense, settlement, adjustment or compromise of any Claim. The Indemnified Party may employ counsel at its own expense to assist it with respect to any Claim. The Indemnified Party will have no authority to settle any Claim on the Indemnifying Party’s behalf.

11.6 If a third party enjoins or interferes with AA’s use of any Work, then in addition to Supplier’s obligations under Section 11.2 Supplier will use its best efforts to (i) replace or modify the Work as necessary to permit AA to continue to use the Work; or (ii) replace or modify the Work as necessary to permit AA to continue to use the Work; or if (i) and (ii) are not commercially reasonable, then (iii) promptly refund to AA the amount paid for any Work for which a third party enjoins or interferes with AA’s use of the Work.

11.7 Nothing in this Section shall limit any other remedies of the parties.

12. LIABILITY

12.1 Notwithstanding anything else in the Purchase Order or otherwise, AA will not be liable to Supplier with respect to the subject matter of the Purchase Order under any contract, negligence, strict liability or other legal or equitable theory for any amounts in excess of the amount AA paid to Supplier.

12.2 In no event will AA be liable to supplier for any incidental, indirect, special, consequential damages or loss of profits arising out of or in connection with the Purchase Order, whether or not AA was advised of the possibility of such damage.

12.3 The limitations will apply notwithstanding any failure of the central purpose of any limited remedy provided herein. Nothing in the Purchase Order limits either party’s liability for bodily injury of a person, death, or physical damage to property or any liability which cannot be excluded under applicable law.

Terms and Conditions

FORM-085 18September2018

13. INSURANCE

- 13.1 Any Subcontractor shall maintain during the progress of the Work, and if required to return during the warranty period, insurance with the minimum limits and coverages as shown below or, if higher, the requirements set forth in prime contract documents:
- 13.2 Workers Compensation coverage meeting the statutory requirements of the State in which the work is to be performed and containing Employer's Liability Insurance in an amount of \$500,000.00 for each insured limit. A waiver of subrogation in favor of AA shall be provided.
- 13.3 Commercial General Liability coverage providing limits of \$1,000,000.00 each occurrence and \$2,000,000.00 aggregate (per project.) The policy must include AA as an Additional Insured. Coverage provided for the Additional Insured must be on a primary and noncontributory basis. Coverage must include premises/operations, independent contractors, products/completed operations and contractual liability. Coverage shall be provided on the latest edition of ISO Form CG 0001 or equivalent (General Liability) and ISO Form CG 2010 11/85 or equivalent (Additional Insured.) All exclusionary endorsements attached to these forms must be indicated on the certificate of insurance. A waiver of subrogation in favor of AA shall also be provided.
- 13.4 Commercial Automobile Liability coverage on all owned, non-owned and hired vehicles brought onto AA premises with limits equal to 13.3 above.
- 13.5 Commercial Umbrella Liability coverage with limits of \$5,000,000.00 per occurrence and \$5,000,000.00 aggregate providing excess coverage over 13.2, 13.3 and 13.4 above including the Additional Insured.
- 13.6 A certificate of insurance, on an approved form, must be delivered to AA prior to commencing the work and must state that coverage will not be altered, canceled or allowed to expire without thirty (30) days written notice to AA.
- 13.7 It is agreed that any of Supplier's Subcontractor shall purchase and maintain property insurance for material and equipment used. It is further agreed that the subcontractor shall have no recourse or rights of subrogation for loss or damage to any such property from AA.
- 13.8 The Supplier must obtain equivalent insurance coverage from any and all Subcontractors or suppliers, if any, before permitting them on site. Otherwise, their protection must be included within the Supplier's insurance policies.
- 13.9 It is understood and agreed that authorization is hereby granted to AA to withhold payments to any Subcontractor until a property executed certificate of insurance is delivered.
- 13.10 Subcontractor agrees to maintain the above insurance for the benefit of AA for a period of ten (10) years or the expiration of the statute of limitations, whichever is greater.

14. GOVERNING LAW

The Purchase Order shall be construed in accordance with, and all disputes shall be governed by, the laws of the State of Ohio without regard to its conflicts of law rules. Supplier and AA agree that the proper venue for all actions arising out of, in connection with, or in any way relating to the Purchase Order or these Terms and Conditions will be initiated and maintained in a State or Federal Court in the State of Ohio. The parties agree to submit to such Court's jurisdiction.

15. GENERAL

- 15.1 Any notice to be given under the Purchase Order will be in writing and addressed to the party at the address stated on the front of the Purchase Order. Notices will be deemed given as effective (i) if personally delivered, upon delivery; (ii) if sent by overnight service with tracking capabilities, upon receipt; (iii) if sent by fax or electronic mail, at such time as the party which sent the notice receives confirmation of receipt by the applicable method of transmittal; or (iv) if sent by certified or registered mail, within five (5) days of deposit in the mail receptacle.

Terms and Conditions

FORM-085 18September2018

- 15.2 If any court of competent jurisdiction holds that any provision of the Purchase Order is illegal, invalid, or unenforceable, the legality, validity and enforceability of the remaining provisions of the Purchase Order will not be affected or impaired, and all remaining terms of this Purchase Order remain in full force and effect, provided that this provision shall not be applied to defeat the intent of the parties.
- 15.3 A party's election not to insist on strict performance of any requirement of the Purchase Order will not operate or be construed to waive any future omission or breach, or any other provision of the Purchase Order.
- 15.4 If there are conflicting terms between the Purchase Order and Purchase Terms and Conditions, the Purchasing Terms and Conditions shall prevail.
- 15.5 The section and subsection heading have been included for convenience only and are not part of the Purchase Order and shall not be taken as an interpretation of any provision of the Purchase Order.
- 15.6 The Purchase Order shall be binding upon and shall inure to the benefit of the parties and their respective heirs, legatees, personal representatives and other legal representatives. Except as otherwise specifically provided, the Purchase Order is not intended and shall not be construed to confer upon or to give any person other than the parties any rights and remedies.
- 15.7 The Purchase Order may be amended, waived, changed, modified or discharged only by an agreement in writing signed by all of the parties.