

General Terms & Conditions - The following Standard Terms and Conditions form a part of the MCKELLAR Order Confirmation Form ("Order") unless otherwise specified. Seller means MCKELLAR Machine Products Ltd. ("MCKELLAR"). Buyer means the person to whom the Order is addressed.

MCKELLAR and the Buyer hereby agree that the following General Terms and Conditions govern the transaction arising out of the Order and the parties expressly intend that these terms and conditions govern the interpretation of their legal rights and responsibilities:

1. MCKELLAR and Buyer acknowledge and agree that the Order is executed by MCKELLAR and Buyer regarding Buyer's purchase of the items stipulated on the Order (collectively, the "Goods") from MCKELLAR.
2. MCKELLAR and Buyer intend that such terms and conditions herein, govern all purchases of the Goods by Buyer, and that any different or additional terms purported to be made or conditioned by Buyer, whether through the use of Buyer's purchase order form or otherwise, shall be of no force or effect unless expressly approved in a separate writing executed by an authorized officer of MCKELLAR.
3. No agent, employee or representative of MCKELLAR has any authority to bind MCKELLAR to any representation or warranty, whether made orally or in writing, concerning the Goods, other than as specifically set forth in writing in an Order Signed by MCKELLAR (collectively, the "Agreement Documents"). Buyer hereby affirms that neither MCKELLAR, nor any of its agents, employees or representatives, have made representations other than those specifically set forth in writing in the Agreement Documents concerning the Goods, and Buyer affirms that its purchase of the Goods is based solely upon the representations set forth in the Agreement Documents.
4. All Goods shall be deemed to be received in good condition unless Buyer adheres to the contract claim procedure set forth in the following procedure: claims by Buyer for shortages or for improper, defective or damaged Goods must be made in writing specifying in detail the nature and extent of the shortage, defect or damage within three (3) business days of delivery, accompanied, in the case of claim for shortage or damage, by the original freight bill (or a legible copy thereof) with a notation on the face thereof by the local agent of the carrier listing the items or quantity short or damaged.
5. Title to the Goods, including risk of loss thereof, shall transfer from MCKELLAR to Buyer at the Shipping Point, unless indicated otherwise on an Order. Buyer is responsible for all applicable taxes, fees and duties.
6. Except for claims under the MCKELLAR Guarantee, any legal action (including any arbitration proceeding) brought by Buyer pertaining to the Order must be commenced (or, in the case of arbitration, demanded) within one (1) year after the date of delivery of the Goods to Buyer.
7. Neither Party to this Agreement shall be liable to the other Party for any failure to perform any obligations hereunder to the extent that such failure is the direct or indirect result of conditions beyond either Party's control, including, but not limited to, an act of God, a governmental act, order, or regulation, a domestic or international problem such as a pandemic, riot, war, act of terrorism or insurrection, strike, fire, flood, earthquake, explosion, lockout or embargo, or any criminal activities of third parties. Quantities so affected may be eliminated from the amount ordered at the discretion of the party affected without liability and MCKELLAR may allocate its available supply among its purchasers, including its own internal customer divisions, in equitable manner as determined by MCKELLAR in its sole discretion, but the Order shall remain otherwise unaffected. Notwithstanding the foregoing, this Section shall not excuse any late payment by Buyer pursuant to this Agreement.
8. IN NO EVENT SHALL MCKELLAR HAVE ANY OBLIGATION OR LIABILITY TO BUYER OR ANY OTHER PERSON OR ENTITY (INCLUDING BUYER'S CUSTOMERS OR CONTRACTORS) FOR ANY LOSS OF USE, DELAY, LOSS OR INJURY TO EARNINGS, PROFITS OR GOODWILL, OR INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES (EVEN IF MCKELLAR HAS BEEN ADVISED OF THE POSSIBILITY THEREOF) ARISING OUT OF OR IN CONNECTION WITH THE SALE, DELIVERY, USE, REPAIR OR PERFORMANCE OF ANY OF MCKELLAR'S GOODS SUBJECT TO THE ORDER.
9. MCKELLAR'S SOLE AND EXCLUSIVE WARRANTY WITH RESPECT TO THE GOODS IS SET FORTH IN THE APPLICABLE MCKELLAR GUARANTEE. NO OTHER WARRANTY, EXPRESS OR IMPLIED, IS EITHER MADE OR SHALL BE DEEMED MADE BY MCKELLAR WITH RESPECT TO THE GOODS. MCKELLAR EXPRESSLY DISCLAIMS ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR TRADE OR USAGE. IF MCKELLAR DOES NOT OFFER A WRITTEN MCKELLAR WARRANTY FOR THE GOODS SUBJECT TO AN ORDER, THEN IN NO EVENT SHALL MCKELLAR HAVE ANY OBLIGATION OR LIABILITY TO BUYER OR ANY OTHER PERSON OR ENTITY (INCLUDING BUYER'S CUSTOMERS OR CONTRACTORS) FOR ANY LOSS OF USE, DELAY, LOSS OR INJURY TO EARNINGS, PROFITS OR GOODWILL, OR INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES (EVEN IF MCKELLAR HAS BEEN ADVISED OF THE POSSIBILITY THEREOF) ARISING OUT OF OR IN CONNECTION WITH THE SALE, DELIVERY, USE, REPAIR OR PERFORMANCE OF ANY OF MCKELLAR'S GOODS SUBJECT TO THE ORDER. BUYER'S REMEDY FOR DEFECTIVE OR NONCONFORMING GOODS SHALL BE LIMITED TO, AT THE OPTION OF MCKELLAR, EITHER (1) RETURN OF THE NONCONFORMING OR DEFECTIVE GOODS AND REPAYMENT OF THE PURCHASE PRICE, OR (2) REPLACEMENT OF THE NONCONFORMING GOODS. MCKELLAR MAKES NO IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE OR OF MERCHANTABILITY FOR THE GOODS SUBJECT TO THE ORDER. THERE ARE ALSO NO IMPLIED WARRANTIES INTENDED OR INFERRED FROM ANY COURSE OF DEALING OR USAGE OF TRADE.
10. MCKELLAR'S LIABILITY ARISING OUT OF THE ORDER WILL NOT EXCEED THE ORDER PRICE. EXCEPT AS SET FORTH IN THE MCKELLAR WARRANTY, IN NO EVENT WILL MCKELLAR BE LIABLE TO BUYER, BUYER'S CONTRACTORS, CUSTOMERS OR ANY OTHER PERSON OR ENTITY FOR THE COST OF SUBSTITUTE GOODS. Buyer shall not be entitled to deduct from the price invoiced to it the amount of any claim asserted against MCKELLAR without MCKELLAR's written consent.
11. In the event that any provision of these General Terms and Conditions or of the Order shall be construed to be invalid or unenforceable for any reason, such invalidity or unenforceability shall not be deemed to affect the remaining provisions thereof, and these General Terms and Conditions and the Order shall be construed and enforced as if such provision had never been included therein.
12. The relationship between MCKELLAR and Buyer established under the Order is that of seller and purchaser, respectively. Buyer shall in no way be construed as acting as agent or representative of MCKELLAR in any dealings which Buyer may have with any other person, firm or corporation, and Buyer shall have no power to act for or to legally bind MCKELLAR in any such transaction. Buyer agrees that it will not in any way conduct its affairs to convey or suggest to third parties a status or identity inconsistent herewith.
13. Buyer shall not assign this Order or any right thereunder or hereunder without MCKELLAR's prior written consent. Any purported assignment without the prior written consent of MCKELLAR shall be null and void. For purposes of this Section 13, a change in control of Buyer (defined as the transfer of a controlling stock or other equity interest in Buyer) without MCKELLAR's prior written consent shall constitute a prohibited assignment. MCKELLAR may assign the Order and rights thereunder to any person, firm, corporation or other entity without Buyer's consent, prior, written or otherwise. Nothing expressed or implied in the Order is intended or shall be construed to give any person other than the parties hereto and their respective successors and permitted assigns any rights or remedies under or by reason of the Order.
14. Any notice, request, demand or other communication required or permitted hereunder shall be deemed to be properly given provided such notice, request, demand or other communication is transmitted to the address or facsimile number of recipient last known to sender by first class mail, postage prepaid, or by facsimile with electronic confirmation of receipt.
15. Subject to Sections 6 and 19 herein, in the event of any suit or arbitration to enforce the terms of the Order or to collect money damages for breach thereof, the prevailing party shall be entitled to reasonable attorneys' fees, expert and consulting fees, collection fees, court costs, costs of investigation and other related expenses incurred in connection with such suit or arbitration.
16. Any sums not paid when due shall bear interest at the rate of one and one-half percent (1.5%) per month (compounding) until paid, provided that if such rate of late charge is not permitted by law, the highest legal rate shall be charged. In the event payment is not made as provided herein, MCKELLAR shall have the right to withhold further Goods until payment is made or all outstanding balance owed immediately or to terminate the Order and receive damages until paid. MCKELLAR reserves the right to change credit terms on any outstanding (portion) of an Order in case of any sums not paid when due.
17. In the event Buyer is adjudicated bankrupt or files a voluntary petition in bankruptcy, makes an assignment for the benefit of creditors or applies for or consents to the appointment of a trustee or receiver over a substantial part of Buyer's property, MCKELLAR shall have the right to terminate the Order and collect for all work performed through the date of termination and, to the extent reasonably related to such termination, following the date of termination.
18. MCKELLAR reserves the right to secure full or partial payment in advance if, in MCKELLAR's sole discretion, the financial condition of Buyer does not justify credit extension. MCKELLAR reserves the right to require collateral from Buyer to secure repayment for Buyer's credit account or individual Purchase Orders.
19. This Proposal and the transactions contemplated hereby shall be governed by and construed in accordance with the laws of the Province of Ontario without regard to any conflict of law principles. All claims, complaints or demands by any party hereto arising out of this Order or the transactions described therein shall be settled by arbitration in accordance with the *Arbitration Act* ("Arbitration Act, 1991, S.O. 1991, c. 17"). Any judgment upon the award rendered by an arbitrator(s) may be entered in any court of competent jurisdiction. The arbitration shall take place in Burlington, Ontario. Jurisdiction of an arbitrator shall be exclusive as to disputes relating to this Order or the transactions described therein and the parties hereto agree that in any such dispute the arbitrators shall apply Canadian law. The parties hereto further agree that this agreement to arbitrate shall be specifically enforceable under the laws of the Province of Ontario. No party shall have the right to appeal any final determination by the arbitrators with respect to the matters before them or otherwise to submit a dispute relating to this Order or the transactions described therein to a court of law other than to enforce such final determination or arbitration award. With respect to matters submitted to arbitration, each of the parties hereto shall bear its own respective costs, fees and expenses (including reasonable fees, expenses and disbursements of attorneys) in connection with such arbitration. Buyer and MCKELLAR shall each pay one-half of the total costs, fees and expenses of the arbitrator. Notwithstanding the foregoing, MCKELLAR shall have the right to join Buyer in any action involving MCKELLAR and any third party, and the foregoing requirement to arbitrate shall not apply to any such action.
20. In no event shall MCKELLAR be liable to Buyer or any third party for any claims, costs or damages arising out of or relating to lack of compliance with any applicable code(s) or industry standard(s). Buyer agrees to defend, indemnify and hold MCKELLAR harmless from any and all liability, claims, costs or damages of whatsoever kind, nature or description, arising out of or relating to lack of compliance with any applicable code(s) or industry standard(s).
21. Any sums not paid when due shall bear interest at the rate of one and one-half percent (1.5%) per month (compounding) until paid, provided that if such rate of late charge is not permitted by law, the highest legal rate shall be charged. In the event payment is not made as provided herein, MCKELLAR shall have the right to withhold further Goods until payment is made or all outstanding balance owed immediately or to terminate the Order and receive damages until paid. MCKELLAR reserves the right to change credit terms on any outstanding (portion) of an Order in case of any sums not paid when due.
22. In the event Buyer is adjudicated bankrupt or files a voluntary petition in bankruptcy, makes an assignment for the benefit of creditors or applies for or consents to the appointment of a trustee or receiver over a substantial part of Buyer's property, MCKELLAR shall have the right to terminate the Order and collect for all work performed through the date of termination and, to the extent reasonably related to such termination, following the date of termination.
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25. In no event shall MCKELLAR be liable to Buyer or any third party for any claims, costs or damages arising out of or relating to lack of compliance with any applicable code(s) or industry standard(s). Buyer agrees to defend, indemnify and hold MCKELLAR harmless from any and all liability, claims, costs or damages of whatsoever kind, nature or description, arising out of or relating to lack of compliance with any applicable code(s) or industry standard.