

# Heraeus Noblelight America LLC – Terms and Conditions of Purchase 3/2011

## 1. General

1.1 This Purchase Agreement consists, in order of precedence, of the following: the Heraeus Purchase Order (also "Order") (typed portions control over pre-printed portions), the Product Specifications, and these Terms and Conditions (the "Purchase Agreement"). Conflicting terms and conditions presented at any time by Seller shall be considered to be proposals by Seller that go into effect only to the extent accepted in writing by Heraeus Noblelight America LLC, 1520 C Broadmoor Blvd. NE, 30518 Buford, GA ("Heraeus"). Pursuant to this Purchase Agreement, Seller agrees to sell and Heraeus agrees to purchase certain goods, products, and/or services as described on the face page of the Purchase Order (the "Goods")

## 2. Orders, Acceptance

2.1 A Purchase Order will be deemed accepted by Seller upon the earlier of Seller's (1) written acceptance of the front page of the Purchase Order, (2) shipment of any Goods, or (3) failure to provide written notice of rejection to Heraeus within five (5) business days after Heraeus's issuance of the Purchase Order or instructions. Heraeus may revoke or make any changes to this Purchase Order until accepted by Seller.

## 3. Price, Taxes and Payment

3.1 Purchase Price. Goods shall be billed at the price last quoted, or at the prevailing market price, whichever is lower. This order shall not be filled at a higher price than last quoted or charged without Heraeus's specific written authorization. The price of Goods shall be on the basis of F.O.B. destination.

3.2 No additional charges of any kind, including charges for boxing, packing, cartage, or other extras will be allowed unless specifically agreed to in writing in advance by Heraeus.

3.3 Taxes. Seller shall be responsible for the payment of any taxes related to purchase of Goods from Seller, as well any custom duties, value added tax or similar tariffs and fees, unless otherwise agreed to in writing by Heraeus. Seller may request, and Heraeus shall provide, a valid exemption certificate authorized by the appropriate governmental authority for any tax exempt transactions.

3.4 Payment terms. Heraeus's payment terms are Net 60 unless otherwise agreed in a writing signed by the parties.

## 4. Packing and Documentation

4.1 Quality. Supplier agrees, represents, and warrants

that all Goods supplied under this agreement will be manufactured in strict accordance with the applicable Heraeus specifications and requirements. Goods must consist only of new materials, unless otherwise specified. No changes or substitutions can be made in the raw materials, manufacture, processing, testing, or inspection of Heraeus Goods without prior written notification and approval. Heraeus reserves the right to withhold approval and/or reject parts that have been subjected to a change that has been made without prior authorization.

4.2 The Goods must be packaged securely and each shipment must include documentation stating the exact quantities and description of the Goods shipped. In the absence of such documents, Heraeus's count and verification will be deemed final. Applicable quality certifications will accompany each Goods shipment, unless otherwise specified on the front page of the Purchase Order. The order number must be shown on the exterior of all shipping containers, packages, invoices, bills of lading and other shipping documents. Packing Slips must be included in all shipments and last copy must state "ORDER COMPLETED."

## 5. Delivery

5.1 Time is of the essence. Delay in shipment or delivery will be reported immediately by Seller to Heraeus. Heraeus reserves the right to terminate this Purchase Order in whole or in part, with no liability to Seller, should Seller fail to make deliveries in accordance with this Purchase Agreement.

## 6. Risk and Title

6.1 Seller will retain title and risk of loss and further bear responsibility for warehousing and insurance until Delivery of the Goods F.O.B. at Heraeus's destination stated on the Purchase Order.

## 7. Inspection and Acceptance

7.1 Inspection. All Goods shall be received subject to Heraeus's right of inspection and rejection. Defective or non-conforming Goods will be held for Seller's instruction at Seller's risk and, if Seller so directs, will be returned at Seller's expense. Payment for Goods on this order prior to inspection shall not constitute acceptance thereof and is without prejudice to any and all claims that Heraeus may have against Seller.

7.2 Seller response time. Seller agrees to respond to all quality-related issues within two (2) business days of receipt by Seller's relevant product division of notification of a quality issue with suggestions on the course of action and next steps to resolve the issue.

## 8. Cancellation

8.1 Heraeus reserves the right to cancel, on 15 days prior written notice to Seller, all or any part of the undelivered portion of any order without any liability to Seller.

8.2 Notwithstanding any provision to the contrary, Heraeus may cancel any order or terminate this Purchase Agreement by written notice to Seller immediately upon the happening of any of the following events:

- (1) if Seller has breached, or Buyer reasonably believes that Seller has breached, any provision pertaining to release, disclosure or misuse of confidential information, as defined in Section 18.1 below;
- (2) the dissolution of the Seller;
- (3) the insolvency, filing of a voluntary or involuntary petition under any law relating to bankruptcy, appointment by a court of a temporary or permanent receiver, trustee or custodian for the Seller's business, or an assignment for the benefit of creditors, of the Seller;
- (4) the non-permitted assignment, or attempted non-permitted assignment, by the Seller of any interest in this Purchase Agreement without the prior written consent of Heraeus; or

(5) if Seller sells its business, either through a stock or equity ownership transfer or through a sale of substantially all of its assets, to a third party.

## 9. Change of Manufacturing Process

9.1 Seller agrees to provide reasonable prior written notice to Heraeus of any changes to the manufacturing process or manufacturing location of the Goods that materially affect the fit, form or function of the Goods, or of Seller's plans to discontinue production of any Goods, in which case Seller shall give Heraeus an opportunity to make a "final buy" of up to one year's supply of such Goods.

## 10. Notices

10.1 Unless otherwise noted herein, all notices or correspondence pursuant to this Purchase Agreement shall be sent (or faxed with a follow up copy sent) to the address or number and to the contact on the Purchase Order or to such other address as may be designated by Heraeus.

## 11. Warranty and Indemnity

11.1 Warranty. Seller expressly warrants that all the Goods covered by this order or other description or specification furnished by Heraeus will be in exact accordance with such order, description or specification and free from defects in material and/or workmanship, and merchantable for a period of not less than three hundred and sixty-five (365) days after delivery to Heraeus. Such warranty shall survive delivery and shall not be deemed waived either by reason of Heraeus's acceptance of said materials or articles or by payment for them. Any deviations from this order or specifications furnished hereunder, or any other exceptions or alterations must be approved in writing by Heraeus.

11.2 Warranty claims. For defects or non-conforming Goods delivered, Heraeus's remedies shall include, at its option (1) acceptance of some or all of the Goods with a claim for damages, (2) rejection of some or all of the Goods and a termination of further deliveries, (3) subsequent performance by Seller with immediate repair of Goods, (4) or immediate replacement of Goods with conforming Goods. Heraeus may also remedy a defect itself and claim reimbursement of the costs thereby incurred.

11.3 Returns. If Seller is unable to complete replacement under 11.2(4) within ten (10) days of its receipt of notice from Heraeus of the defect or variation, then Heraeus shall immediately return such Goods to Seller and Seller shall immediately refund to Heraeus all monies paid by Heraeus to Seller for such Goods under this Purchase Agreement.

11.4 Non-Infringement. Seller warrants and covenants that the Goods do not and will not infringe or misappropriate the patent, trademark, copyright, trade secret or other intellectual property rights of any third party.

11.5 No Litigation. Seller warrants it is not involved in any pending litigation with respect to the Goods, nor has it been a party to such litigation at any time during the previous twenty-four (24) months.

11.6 Infringement Indemnity. Seller shall indemnify, defend and hold Heraeus harmless from any claims, losses, damages, liability and costs arising out of any claims, suits or actions alleging infringement of any intellectual property rights of a third party by the Goods purchased hereunder, and Seller shall, at its own expense, defend such claims, suits or actions alleging such infringement of any third party intellectual property rights against Heraeus. Seller may meet its obligation under this clause if Seller obtains a license for Heraeus or its customers to continue to use or to sell the purportedly infringing Goods.

11.7 Product Liability Indemnification. Seller agrees to and hereby does indemnify, release, defend and hold Heraeus and its officers, directors, employees, shareholders, agents, successors and assigns harmless from and against all claims, damages, losses, costs and expenses, including attorneys' fees, arising in favor of any person, firm or corporation on account of personal injury or property damage alleged to be caused by the Goods.

## 12. LIMITATION OF LIABILITY

12.1 IN NO EVENT SHALL HERAEUS BE LIABLE TO SELLER OR SELLER'S AGENTS OR TO ANY THIRD PARTY FOR ANY INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF, OR IN CONNECTION WITH, THIS PURCHASE AGREEMENT, WHETHER OR NOT HERAEUS WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGE.

## 13. Excused Performance

13.1 In the event Supplier fails to deliver Goods due to a force majeure cause, such as fire, flood, earthquake or other natural or man-made acts beyond its reasonable control, Heraeus may either (1) terminate this Purchase Agreement or any part hereof as to the Goods not shipped; or (2) suspend the Purchase Agreement in whole or in part for the duration of the delaying cause and purchase Goods sufficient to cover and deduct the cost from any commitment to Seller the quantity so purchased.

## 14. Offset

14.1 Heraeus may offset against Seller's account any claims, refunds or other damages due to Heraeus under this Purchase Agreement.

## 15. Severability

15.1 If any provision of this Purchase Agreement is prohibited by law, or held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions will remain in full force and effect.

## 16. Waiver

16.1 No failure by Heraeus or Seller to enforce or take advantage of any provision hereof shall constitute a waiver of the right subsequently to enforce or take advantage of such provision.

## 17. Governing Law, Arbitration and Venue

17.1 This Purchase Agreement will be construed in accordance with and governed solely by the laws of the State of New York, USA, without regard to its conflict of laws rules. Any dispute arising out of this Purchase Agreement shall be resolved by arbitration administered and resolved by the American Arbitration Association ("AAA") by a single arbitrator in accordance with the Commercial Arbitration Rules of the AAA, including the Optional Rules for Emergency Measures of Protection, in

effect at the time the arbitration is commenced (except as modified herein). Any arbitration or award shall issue within one (1) year from the date claimant filed its notice of intention to

arbitrate (i.e. the demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. Any evidentiary hearing shall be held on consecutive hearing days. Any monetary award in the arbitration initiated under this clause shall include pre-award interest at the rate of one and a half percent (1.5%) per month from the time of the acts giving rise to the award. Judgment on the award rendered by the arbitrator may be entered in any court having appropriate jurisdiction.

17.2 If arbitration as above fails or is impossible, any actions brought under this Purchase Agreement will have venue solely in the United States District Court for the Southern District of New York or in the Supreme Court of New York County, New York and Seller waives any and all objection to venue and jurisdiction of such courts.

#### **18. Confidentiality and Property**

18.1 Heraeus may provide to Seller certain information (written and verbal), intellectual property, supplies, drawings, software, specifications, tools, equipment, molds, fixtures and other proprietary items as Heraeus may determine necessary for Seller to fulfill this Purchase Order. All of these are Heraeus property and are confidential. Seller undertakes to protect this confidential information with the same degree of care as it uses for its own confidential information, but no less than reasonable care. Without Heraeus's prior written consent, Seller will not (1) disclose any Confidential Information, including the terms of this Purchase Agreement, except to its employees as necessary for Seller to perform its obligations under this Purchase Order, (2) use any Confidential Information except as necessary for Seller to perform its obligations under this Purchase Order, or (3) transfer any Confidential Information to a third party.

18.2 Upon completion of this Purchase Order, at the direction of Heraeus in writing, Seller shall destroy or return any confidential information or copies thereof. Seller assumes liability for loss, damage or misuse of the confidential information. If Heraeus reasonably requests, Seller must execute a more extensive confidentiality agreement to be provided by Heraeus to protect the Confidential information.

18.3 Heraeus will, at all times, have and retain all rights, title, and interests to all its own property, in whatever form provided. Any scrap resulting from a manufacturing process performed on Heraeus's property also constitutes "Property." Seller will not cause or permit any lien, encumbrance or other security interest to be asserted against any Property. Any improvement of or additions to the Goods by Heraeus are Heraeus's property.

18.4 Except as provided herein, no license or grant of the Property is given to Seller.

18.5 Heraeus may seek injunctive relief to enforce this section.

#### **19. Compliance with Laws; Heraeus Code of Conduct**

19.1 Compliance with Laws. In filling this Purchase Order, Seller shall comply with all applicable federal state and local employment, environmental and other laws, government regulations and orders.

19.2 Equal opportunity. Seller represents and warrants that it will not discriminate against any employee or applicant for employment because of race, color, religion, disability, sex, national origin, age or any unlawful criterion and that it shall comply with all applicable laws against discrimination and all applicable rules, regulations and orders issued thereunder or in implementation thereof.

19.3 Heraeus Code of Conduct. By acting responsibly, Heraeus wishes to strengthen its good reputation. The principles for responsible action are laid down in the Heraeus Code of Conduct, a copy of which has been made available to Seller. In regard to compliance with laws, Heraeus is particularly interested in Seller's compliance with all rules and regulations pertaining to free competition, export and import restrictions, and customs and tax regulations. In connection to its business transactions with Heraeus, the Seller shall not, directly or indirectly, offer, promise, authorize or make a corrupt payment of money (i.e., a bribe) or anything else of value to any of its business partners, nor to any domestic or foreign official. The Seller covenants to ensure for its own staff fair pay, appropriate working hours, safety at work, and a non-discriminatory working environment.

19.4 Environment, Health and Safety. All manufacturing, packaging and materials used in the manufacture of the Products will satisfy all governmental laws and regulations in existence at the time of manufacture related to safety and restricted, toxic or hazardous materials, including environmental, electrical and electromagnetic considerations applicable to the country of delivery set forth in this Purchase Order. Seller certifies that its Goods and Processes do not use, contain or include any ozone depleting substances listed as "Class I controlled substances" by the United States Environmental Protection Agency (40 C.F.R. pt. 82 subpt. A app. A), as classified on the date of manufacture.

#### **20. Most Favored Customer**

20.1 Each aspect of the prices, warranties, benefits and other terms provided to Heraeus under this Purchase

Agreement are and will remain at least equal to the terms that have been offered and/or will be offered by Seller to its other customers. If Heraeus learns that Seller has provided or will provide better terms than those provided to Heraeus under this Purchase Agreement, Heraeus will seek the same or better from Seller. If Seller fails to provide such terms, Heraeus, at its option, may be released from this Agreement.

#### **21. Miscellaneous**

21.1 Headings. The headings contained in these Terms and Conditions are for reference only and are not to be construed to affect the construction or interpretation hereof.

21.2 Entire Agreement. These Terms and Conditions, and any orders and/or Product Specifications attached, constitute the entire understanding and agreement of the Parties, and supersede all prior oral or written negotiations and agreements between the Parties with respect to the subject matter of this Purchase Agreement. Conflicts between the Terms and Conditions, Product Specifications, and Orders

shall be resolved in the following order of precedence: Typed additions to a Purchase Order are superior to the pre-printed order, which is superior to Product Specifications, which are superior to these Terms and Conditions. Otherwise, no modification, change or amendment of these Terms and Conditions shall be valid unless made in writing and signed on behalf of each Party hereto by its duly authorized officer or representative on a subsequent date.

21.3 No third-party beneficiary. This Purchase Agreement is entered into solely for the benefit of the parties hereto, and no other person shall acquire the right to enforce any provision of this Purchase Agreement against either party. Neither this Purchase Agreement nor any part thereof may be assigned by Seller, whether voluntarily or by operation of the law, to a third party without the prior written consent of Heraeus. Heraeus may freely assign this Purchase Agreement or any part thereof.

21.4 Survival. All provisions that are continuing in nature, including but not limited to those involving confidential information, will survive termination of this Purchase Agreement.

21.5 Remedies. The rights and remedies provided to Heraeus herein are cumulative and in addition to any other rights and remedies provided by law or equity (or provided under the Uniform Commercial Code except to the extent modified herein).