

## EMW GAS ASSOCIATION - PURCHASE ORDER TERMS & CONDITIONS

**SCOPE:** The terms and conditions set forth herein apply to all EMW purchase orders entered into after the effective date of these terms and conditions on November 1, 2017. Also applicable, are terms and conditions set forth: 1) on the face of an individual purchase order, and 2) in any plans, specifications and other documents incorporated by reference into the purchase order. The purchase order and any documents incorporated by reference are collectively referred to herein as an “**Order.**” Acceptance by EMW of any offer from a vendor, contractor, or other entity (**Seller**) is expressly limited to the terms and conditions of the Order. If any terms and conditions incorporated by reference conflict with the terms and conditions contained herein, the terms and conditions incorporated by reference are controlling. In order to effectuate a contract award, EMW must issue a purchase order and incorporate the contract by reference.

EMW hereby objects to and shall not be bound by any additional, different or conflicting terms, whether printed or otherwise, in any other communication between the parties, including on any of Seller’s forms, letter or papers. The terms and conditions of the Order shall control over any such additional, different or conflicting terms.

1. **Issuance:** A purchase order is valid only when authorized by EMW’s Chief Procurement Officer (**CPO**). EMW is not liable for charges incurred without EMW’s issuance of an authorized purchase order.
2. **Acceptance:** The terms of an Order shall be deemed accepted by Seller on the earlier of: (a) shipment of goods or rendering of services ordered, in total or in part; or (b) within 15 days of delivery of the Order by EMW to the Seller, absent written notification to EMW of non-acceptance.
3. **Entire Agreement:** The Order represents the entire agreement between Seller and EMW with respect to the goods and services described by the Order.
4. **Warranties:** Seller warrants that all material, work product, and merchandise supplied under the Order: (a) shall strictly conform to all specifications, drawings, samples, or other descriptions furnished to and approved by EMW; (b) shall be fit and serviceable for the purpose intended, as agreed to by EMW and Seller; (c) shall be of good quality and free from defects in materials and workmanship; (d) shall be new and not refurbished or reconditioned, unless expressly agreed to in writing by EMW; and (e) shall not infringe on any patent, copyright, mask work, trademark, trade secret or other intellectual property, proprietary, or contractual right of any third party. In addition, Seller warrants that EMW shall have good and marketable title to all goods (including all components thereof) purchased by EMW pursuant to the Order, free of all liens and encumbrances and that no licenses are required for EMW to use such goods, other than those provided to EMW by Seller as required by Section 26. With respect to services, Seller warrants that all services shall be provided in a professional and workmanlike manner, with a degree of skill and care consistent with current, good, and sound professional procedures. Neither receipt of material, work product or merchandise nor payment thereof shall constitute a waiver of this provision. If a breach of warranty occurs, EMW may, in its sole discretion, and without waiving any other rights, return for credit or require prompt correction or replacement of the nonconforming goods or services.
5. **Commercial Warranty:** The Seller agrees that it will provide EMW with the most favorable commercial warranties the Seller provides to any other customer for the goods, services, or construction and that the rights and remedies provided herein shall extend to EMW and are in addition to and do not limit any rights afforded to EMW by law or under this Order. In the event that the goods, services or construction are found to be defective or fail within the warranty period, Seller will, at its own expense, promptly repair the defects and if not repaired, refund the purchase price; furthermore, EMW may seek damages as provided in Paragraph 19.

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6. **Packing:** EMW's purchase order number MUST be on all invoices, packages, packing slips, bills of lading when the Order is delivered to EMW.
7. **Freight Charges:** Except as expressly provided in the Order, packing, shipping, unloading, assembling, and installation are included in the purchase price set forth in the Order and EMW shall not be charged any additional amounts for such services. All shipments on which freight charges are due must be prepaid. Collect shipments cannot be accepted. Shipment is Free on Board (FOB) Destination unless the Order states otherwise.
8. **Risk of Loss:** Seller shall bear the risk of loss of or damage to all goods purchased pursuant to the Order until they are received by EMW.
9. **Timely Delivery:** Time is of the essence in fulfillment of the Order. Shipment and delivery shall be made in accordance with the Order; provided that, if not addressed in the Order, delivery shall be made within ten (10) days of EMW's issuance of the Order. EMW may, at its option, and without limitation of any of its other rights, cancel any unfilled part of the Order if complete, conforming delivery is not made within the time specified. EMW is not required to accept partial or incomplete delivery. Acceptance of any part of the Order shall not bind EMW to accept any future shipments.
10. **Inspection:** EMW shall have the right to inspect and test all goods and/or services delivered under the Order. Neither receipt nor payment for goods and/or services shall constitute acceptance. EMW may reject any or all items that are nonconforming, as determined by EMW's sole reasonable judgment. EMW's failure to inspect shall not relieve Seller of any of its responsibilities. Material shipped in quantities in excess of EMW's stated requirements may be returned at Seller's expense. If goods are rejected, they will be held at Seller's risk and expense and Seller shall bear the risk of loss or damage to such goods until received by Seller.
11. **Payment Terms/Discounts:** Payment terms are net thirty (30) days unless otherwise specified in the Order. Discounts, if offered, will be computed from the date of actual delivery or receipt of invoice, whichever is later. EMW shall have no obligation to pay any amount prior to EMW's receipt of a correct and proper invoice for such amount prepared in accordance with the Order. Except as expressly provided in the Order, payment shall not be due until final acceptance by EMW. EMW shall have the right to reduce and set off against amounts payable under the Order any indebtedness or other claim which EMW may have against Seller, however and whenever arising.
12. **Taxes:** Unless otherwise specified, all offers by the Seller must include any applicable gross receipts tax. Unless goods are to be used for a construction project, EMW will furnish to Seller, a Type 9 Non-Taxable Transaction Certificate which evidences EMW's exemption from paying Gross Receipts Tax for purchase of tangible personal property (not services). The Seller is responsible for determining whether the tax is due and for payment of such taxes. Applicable taxes are to be included in each invoice and may not be billed more than sixty (60) days after providing the goods, services or construction to which the taxes apply.
13. **Indemnification:** Seller hereby agrees to indemnify and hold harmless EMW, its Board, officers, agents and employees against any and all damages, claims, expenses or other liability, including attorneys' fees, arising out of any: (a) alleged or actual infringement or misappropriation of any copyright, patent, trademark, trade secret or other right based upon the goods, services or construction provided by Seller pursuant to this Order; (b) negligence or willful misconduct of Seller; (c) Seller's failure to perform fully its obligations herein in a timely manner; or (d) breach of any of Seller's representations and warranties herein.

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- 14. Insurance:** Seller shall maintain in effect during the term of the Order, Commercial General Liability Insurance, Business Automobile Liability Insurance, and Workers' Compensation Insurance in the amounts and as otherwise specified by EMW. Seller shall furnish certificates of insurance in a form satisfactory to EMW upon EMW's request prior to providing goods, services or construction under the Order.
- 15. Right to Audit:** Seller shall maintain complete and accurate records of all financial transactions associated with this Order, including, but not limited to, invoices and other official documentation which support all charges under this Order. Seller shall retain such records for three (3) years after final payment, or longer if required by law. Authorized representatives of EMW may inspect and copy records pertaining to this Order at the Seller's office during business hours. Seller shall include this audit provision in any subcontracts issued in support of this Order.
- 16. Termination for Lack of Appropriations:** Notwithstanding any provision in this Order to the contrary, payments hereunder are contingent upon the EMW Board making the necessary appropriations. If sufficient appropriations are not made, this Order may be terminated at the end of EMW's current fiscal year upon written notice given by EMW to the Seller and such event shall not constitute default. All payment obligations of EMW and all of its interest in this Order will cease upon the date of such termination. EMW's determination regarding appropriations shall be accepted by the Seller and shall be final.
- 17. Termination for Convenience:** EMW may, by written notice to Seller, terminate the Order, or any part thereof, for any or no reason, for EMW's convenience. Upon notice of termination, Seller shall immediately stop all work and cause its suppliers and/or subcontractors to stop all work in connection with the Order. If EMW terminates for convenience, EMW shall pay Seller for goods and services accepted as of the date of termination, and subject to Paragraph 20, for Seller's actual, reasonable, out of pocket costs incurred directly as a result of such termination. EMW shall have no responsibility for work performed after Seller's receipt of notice of termination.
- 18. Termination for Cause:** EMW may, by written notice to Seller, terminate the Order, or any part thereof, if Seller breaches any of the terms and conditions of the Order, becomes insolvent or files for bankruptcy protection, or the Seller becomes ineligible to receive funds from any federal, state or local agency. This provision does not waive EMW's right to file a claim in any bankruptcy proceeding if EMW has been damaged by the breach. If EMW terminates for cause, EMW shall have no payment obligations to Seller. Should a court of competent jurisdiction subsequently determine that EMW's termination for cause was wrongful or unjustified, then such termination shall automatically be considered termination for convenience and Seller shall have all rights under that provision, but no other rights or claims for damages.
- 19. Damages:** Without limiting EMW's rights and remedies at law or in equity, EMW reserves the right to charge Seller for any loss, expense (including reasonable attorneys' fee) or damages sustained as a result of Seller's failure to deliver conforming goods or services or other breach of the Order, including without limitation, expenses incurred in connection with EMW's purchase of substitute goods, incidental damages and consequential damages resulting from Seller's failure or breach.
- 20. Limitation of EMW's Liability:** EMW shall not be liable to Seller, its employees, representatives, agents, suppliers, or subcontractors for any anticipated profits or incidental damages (except to the extent expressly provided in Paragraph 17) or for consequential damages. Without limiting the foregoing, EMW's liability for any claim arising directly or indirectly under or in connection with the Order shall in no event exceed the cost of the goods or services giving rise to the claim. EMW shall have no liability for penalties of any kind.

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21. **Severability:** If any provision of the Order is determined to be invalid, illegal or unenforceable, the remaining provisions of the Order in favor of EMW remain in full force, so long as the essential terms and conditions remain valid, binding and enforceable.
22. **Waiver:** No waiver by EMW of any provision of the Order or any breach hereunder shall be deemed a waiver of any other provision or subsequent breach, nor shall any such waiver constitute a continuing waiver by EMW. Delay or failure of EMW to insist on strict performance of any provision of the Order or to exercise any rights or remedies hereunder shall not be deemed a waiver of any other remedies.
23. **Assignment/Changes:** Seller may not assign, transfer, or subcontract any part of the Order without the prior written consent of EMW's CPO or CPO designee. Any such assignment, transfer, or subcontract in violation of this provision shall be null and void. No such assignment, transfer, or subcontract shall relieve the Seller from the obligations and liabilities under this Order. In no case shall the Order be changed without the prior written approval of EMW's CPO.
24. **Compliance with Ethics Provisions:** the Seller certifies that it: (1) has not, either directly or indirectly, entered into action in restraint of free competitive bidding; (2) presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of this Order; and (3) has followed and will continue to follow all requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978.
25. **Compliance with Laws:** In fulfilling the Order, the Seller shall comply with all applicable laws, ordinances and codes of the federal, state and local governments, including, but not limited to, all federal, state and local non-discrimination provisions.
26. **Permits and Other Approvals:** Seller will obtain and maintain, and furnish to EMW upon request, any and all permits, licenses, approvals, certificates and other documents required by EMW pursuant to the Order, or as otherwise required by applicable law.
27. **Notice or Inquiries to EMW:** Direct all inquiries concerning this Order to: Chief Procurement Officer, EMW Gas Association, P.O. Box 118, Estancia, NM 87016 or call 505-384-2369.
28. **Governing Law and Consent to Jurisdiction:** This Order is governed by the laws of the State of New Mexico without regard to principles of conflicts of law. Any and all actions or proceedings relating to the subject matter of this Order will be subject to the exclusive jurisdiction of state and federal courts located in Torrance County and Bernalillo County, New Mexico, and the Seller is deemed to have waived its right to object to such jurisdiction.

**It is Seller's responsibility to obtain and adhere to EMW's Purchase Order Terms and Conditions available at [www.emwgas.com](http://www.emwgas.com) or upon request from the Chief Procurement Officer, EMW Gas Association, P.O. Box 118, Estancia, NM 87016 or call 505-384-2369.**

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