



The Physicians' Preferred Airway Stent

A **Theken Company** 

PURCHASE ORDER TERMS AND CONDITIONS

Buyer hereby orders certain items and goods identified on the face hereof from Seller upon the terms set forth on the face hereof and herein below:

1. PRICE: The price shall not be higher than that appearing on the face of this Purchase Order (the "Order"), or if no price appears thereon, then no higher than that last quoted by Seller prior to issuance of this Order. Unless designated on this Order, the price incorporates any applicable costs, fees, and other charges including but not limited to any applicable taxes, shipping, and insurance.

2. INSPECTION & ACCEPTANCE: Delivery of the goods and materials shall not constitute acceptance of such goods and materials. All goods and materials shall be subject to inspection and acceptance by Buyer after delivery to Buyer's location. In addition to the preceding sentence, Buyer may refuse to accept items delivered under this Order if Seller fails to submit the certification, documentation, test data or reports as specified in the Order. Buyer may use any procedures it may deem reasonable for the conduct of any inspection on any goods or materials delivered under this Order, in its sole discretion, and the acceptance of such goods or materials shall be subject to such inspection. Goods or materials failing to meet the requirements of this Order will be held at Seller's risk and may be returned at Seller's expense.

3. SUBSTITUTION AND EXTRAS: No substitutions of materials or accessories may be made without Buyer's written consent. No charge will be allowed for extras, shipping, packing, crating, freight or other carrier's charges, unless designated on this Order. If Buyer designates a specific shipper on the front of this Order, Seller agrees to use such shipper. In the event Seller fails to use such shipper, Seller shall be responsible for any increase in shipping costs to Buyer along with any other costs and expenses incurred by Buyer due to Seller's failure to use the designated shipper.

4. CANCELLATION: In addition to any other rights that the Buyer may have, Buyer reserves the right to cancel this Order in whole or in part. Buyer may hold Seller responsible if goods or materials furnished pursuant to this Order or any shipment thereunder is not as specified or if delivery is not made when and as specified. **TIME OF PERFORMANCE OF THIS ORDER IS OF THE ESSENCE.** Buyer may cancel this Order in whole or in part if the Seller is adjudicated a bankrupt, if a petition under the Bankruptcy Act is filed against Seller, if Seller makes an assignment for the benefit of creditors, if a receiver of the property of Seller is appointed or if an action under any law for the relief of debtors is taken in respect of Seller. Upon any cancellation of this Order by Buyer, for any reason, **IN NO EVENT SHALL SELLER BE ENTITLED TO LOST OPPORTUNITY COSTS, UNABSORBED OVERHEAD OR ANTICIPATED PROFITS AS A RESULT OF SUCH CANCELLATION.**

5. PRODUCTION: Unless otherwise agreed in writing, Seller shall not make material commitments or production arrangements in excess of the amount, or in advance of the time, necessary to meet Buyer's delivery schedule, except at Seller's own risk. It is the Seller's responsibility to comply with this schedule but not to anticipate Buyer's requirements.

6. PATENT, COPYRIGHT AND TRADEMARK INDEMNIFICATION: Seller warrants that it will defend at its expense the allegations of any suit against Buyer or Buyer's customers respecting infringement of any U.S. or other Letters Patent, or violation of any copyright or trademark, covering all or part of the goods or materials furnished under this Order, its manufacture and/or its use, or Seller shall procure for Buyer or Buyer's customers the right to continue to use such goods or materials, or replace it with substantially equivalent non-infringing or non-violating materials. Buyer shall reasonably notify Seller of any charge of and suit for such infringement and tender to Seller the defense of such allegations, Buyer having the right to be represented in such defense with legal counsel of Buyer's choice, and Seller shall indemnify Buyer for all associated legal costs and other costs of defense.

7. OVER-SHIPMENT: Materials shipped in excess of quantity ordered may be returned at Seller's expense, which expense shall include, but not be limited to, packing and freight charges and Buyer's labor costs, or, alternatively, at Buyer's option, Buyer may charge Seller an amount not to exceed fifteen dollars per package, plus shipping costs.

8. TITLE & RISK OF LOSS: Unless otherwise specified on the face of this Order, all risk of loss or damage and title to the goods or materials furnished under this Order shall pass to Buyer upon delivery at Buyer's premises.

9. WARRANTY: Seller expressly warrants that all goods and materials specified in this Order shall conform to the specifications, drawings, samples or other description upon which this Order is based, shall be fit and sufficient for the purpose intended, merchantable, new, of good material and workmanship, and free from defect. Inspection, test, acceptance or use of such goods or materials shall not affect Seller's obligation under this warranty. This warranty shall run to Buyer, its successors, assigns and customers and the user of its products and shall survive termination or cancellation hereof. Seller agrees to replace or correct defects (including labor and transportation) in any goods or materials not conforming to the foregoing warranty promptly, without expense to Buyer, when notified of such non-conformity. In the event of failure by Seller to promptly correct defects in or replace non-conforming goods or materials, Buyer, after reasonable notice to Seller, may make such corrections or replace such goods and charge Seller for costs incurred by Buyer thereby. The warranties and remedies contained in this Order supplement the warranties and remedies provided by the Uniform Commercial Code, which warranties and remedies shall not be disclaimed or limited in any way by Seller.

10. INDEMNITY: Seller shall defend and indemnify Buyer against all damages, liabilities, claims, losses and expenses, either direct, indirect or consequential (including attorneys' fees and other costs of defense) arising out of, in any way except from Buyer's negligence, from any defect in the goods or materials purchased hereunder or from any act or omission of Seller, its agents or employees. This indemnity obligation of Seller shall survive the expiration or termination hereof.

11. DATA: Seller shall not use or disclose to any third party any data, designs or other information belonging to or supplied by or on behalf of Buyer, except in the performance of this or other orders for Buyer. Upon Buyer's request, such data, designs or other information and any copies thereof shall be returned to Buyer. Where Buyer's data, designs or other information are furnished to Seller's suppliers for procurement of supplies by Seller for use in the performance of Buyer's orders, Seller shall insert the substance of this provision in its orders. Any knowledge or information which Seller has disclosed or may hereafter disclose to Buyer incident to this Order, shall not, unless agreed in writing by Buyer, be deemed to be confidential or proprietary information, and accordingly will be acquired free from any restriction. No employee of Buyer has authority to make any agreement, express or implied, limiting the use of or providing for the confidentiality of information received by him/her, unless such agreement is made in writing and signed by the President of Buyer.

12. SPECIAL EQUIPMENT: Unless agreed in writing by Buyer, all tools, equipment or materials furnished to Seller by Buyer and any replacements thereof, shall be and remain the personal property of Buyer. Such property shall be plainly marked or otherwise identified by Seller as "Property of NextStep" and shall be safely stored separate and apart from Seller's property. Seller shall not substitute any property for Buyer's property and shall not use Buyer's property except in filling Buyer's orders. Such property while in Seller's custody or control shall be held at Seller's risk, shall be kept insured by Seller at Seller's expense in an amount equal to the replacement cost with loss payable to Buyer. Such property shall be subject to removal at Buyer's written request, in which event Seller shall prepare such property for shipment and shall deliver it to Buyer in the same condition as originally received by Seller, reasonable wear and tear excepted, all at Seller's expense. Seller shall have no lien against such property and waives any rights it may have to any lien.

13. CHANGES IN WRITING: This Order represents the final written expression of agreement between Buyer and Seller, constituting the entire contract between Buyer and Seller and superseding all previous communications, either oral or written. In the event the terms and conditions of this Order are inconsistent in any manner with a quotation or proposal from Seller, this Order shall be deemed a counteroffer and Seller's subsequent delivery shall be deemed Seller's acceptance of such counteroffer on the terms and conditions contained herein. No terms and conditions other than those set forth above and on the face of this Order shall be effective unless said changes are reduced to writing and signed by both parties. Shipment by Seller of goods or materials pursuant to this Order shall be deemed to be an acceptance by Seller of the terms and conditions of this Order. Any different terms and conditions in Seller's acknowledgment of this Order, in Seller's invoice, or elsewhere, regardless of whether such terms and conditions are material or not, shall not be binding unless expressly accepted in a writing signed by Buyer. Buyer specifically objects to the inclusion of any different or additional terms and conditions by Seller in acknowledging, confirming or accepting this order. If Seller does include different or additional terms and conditions in its acknowledgment, acceptance, confirmation, invoice or other written form sent in response to this Order, neither Buyer's acceptance or delivery of all or part of the goods, nor Buyer's payment for the goods shall constitute acceptance of such additional or different terms, but instead the terms and conditions of this Order shall govern. Neither this Order nor any interest herein shall be transferred or assigned by Seller without the written approval of Buyer.

14. MISCELLANEOUS: Seller shall cause the work and materials contemplated hereunder to be performed and manufactured in strict conformity with federal, state and local laws and Seller agrees, upon request, to furnish Buyer a Certificate of Compliance with any or all such laws in such form as Buyer may require. All disputes as to the legality, interpretation, application, or performance of this order or any of its terms and conditions shall be governed by the laws of the State of Ohio, without regard to conflict of laws provisions. Seller shall be deemed to have conclusively agreed that venue and jurisdiction for any dispute resolution hereunder shall be solely and exclusively with a court of competent jurisdiction located in Akron, Ohio. If delivery is not made within the time specified herein, Buyer may purchase such goods elsewhere and charge Seller the difference in price and/or Buyer may cancel the entire Order or any undelivered portion thereof. Payments due Seller may be offset against sums owed by Seller to Buyer. Nothing in this contract shall be construed as creating any act or beneficial right in or on behalf of any third party. The failure of either party to insist or enforce in any instance strict performance of any of the terms of this contract or to exercise any rights hereunder conferred, shall not be construed as a waiver or relinquishment to any extent of its right to assert or rely upon such terms or rights on any future occasion.

Please contact Purchasing at purchasing@theken.us with questions. Please email all bills to ap@theken.us.