

## THE AMES COMPANIES, INC. - TERMS AND CONDITIONS OF PURCHASE

### 1. GENERAL

1.1. Definitions: As used in these terms and conditions of purchase (the "Terms"):

"Buyer" shall mean The Ames Companies, Inc. or its affiliate as indicated in the Purchase Order.

"Laws" means all applicable laws, ordinances, rules, regulations, codes, lawful orders, and permit or approval terms and conditions of any governmental or regulatory authority with jurisdiction over Buyer or Seller or of the facilities of either of them, and generally applicable industry or self-regulatory standards whether the same are regional, national or international and any changes thereto, including without limitation all health and safety rules and regulations imposed by all such authorities on Seller or on Buyer in connection with the Products provided or to be provided to Buyer, all Environmental Laws (as defined below) and all fair labor and standards laws.

"Products" means the raw materials, equipment, finished goods, parts, components, articles, services, work or other items covered by the Purchase Contract.

"Purchase Contract" means any purchase agreement between Buyer and Seller, collectively with the Terms and any applicable Purchase Order.

"Purchase Order" means any purchase order issued by Buyer to Seller.

"Seller" shall mean the person, firm, partnership, or corporation, entity, or individual named as the "seller" in the Purchase Contract and/or producing or furnishing the Products covered by the Purchase Contract.

"Specifications" means the written requirements for materials, equipment, construction systems, standards, performance and workmanship for the Product set forth in the Purchase Contract.

1.2. Acceptance. A Purchase Order is not binding on Buyer until it is accepted by Seller. Seller will be deemed to have accepted a Purchase Order when it (i) sends Buyer notice of acceptance in writing, (ii) starts to perform in accordance with the terms of the Purchase Order, or (iii) delivers any or all of the Products covered by the Purchase Order, whichever occurs first. If Seller does not accept the Purchase Order in writing or provide written notice that it has commenced performance within ten (10) days of Seller's receipt of the Purchase Order, the Purchase Order will lapse and have no binding effect on Buyer. Buyer may withdraw the Purchase Order at any time before it is accepted by Seller.

#### 1.3. Entire Agreement; Amendment:

(a) The Purchase Contract, with such documents as are expressly incorporated therein by reference, is intended by the parties as a final expression of their agreement with respect to such terms as are included therein and is intended as a complete and exclusive statement of the terms of their agreement.

(b) These Terms prevail over any terms or conditions contained in any other documentation and expressly exclude any of Seller's general terms and conditions of sale or any other document issued by Seller in connection with a

Purchase Order. *Acceptance by Seller shall create a binding agreement between Seller and Buyer and is expressly limited to these terms and conditions.*

(c) Any invoice, acknowledgement or other communication issued by Seller in connection with a Purchase Order shall be construed to be for record and accounting purposes only. Any terms or conditions set forth in such communication shall not apply to any Purchase Order and shall not be considered to be Seller's exceptions to such Purchase Order or an amendment to any Purchase Contract under which such Purchase Order was issued.

(d) No course of prior dealings between the parties and no usage of the trade shall be relevant to determine the meaning of the Purchase Contract. No additional terms or conditions proposed by Seller shall be a part of the Purchase Contract, unless such terms are set forth in a writing signed by an authorized representative of Buyer that specifically states that it amends the Purchase Contract.

(e) These Terms apply to any repaired or replacement Products provided by Seller hereunder.

(f) A PURCHASE ORDER DOES NOT CONSTITUTE AN ACCEPTANCE BY BUYER OF ANY OFFER TO SELL, ANY QUOTATION, OR ANY PROPOSAL. REFERENCE IN A PURCHASE ORDER TO ANY SUCH OFFER TO SELL, QUOTATION, OR PROPOSAL SHALL IN NO WAY CONSTITUTE A MODIFICATION OF ANY OF THE TERMS AND CONDITIONS OF THE PURCHASE ORDER. BUYER OBJECTS IN ADVANCE TO THE INCLUSION OF ANY ADDITIONAL, INCONSISTENT OR DIFFERENT TERMS PROPOSED BY SELLER IN THE ACCEPTANCE OR ACKNOWLEDGMENT OF A PURCHASE ORDER. THE INCLUSION OF SUCH TERMS BY SELLER WILL BE OF NO SIGNIFICANCE, AND SUCH PROPOSED TERMS WILL NOT BE CONDITIONS OR ADDITIONAL TERMS TO THE PURCHASE ORDER, AND BUYER'S ACCEPTANCE OF SELLER'S GOODS OR SERVICES SHALL NOT BE DEEMED AN ACCEPTANCE OF SUCH TERMS. Furthermore, the Purchase Contract will supersede, and Buyer will not be bound by, any "disclaimers" or "click to approve" terms or conditions now or hereafter contained in any web site used by Buyer in connection with the Products or the Purchase Contract.

### 2. PRODUCT; SPECIFICATIONS; CHANGES

2.1. Specifications: Seller shall review the Specifications and any design criteria or documents provided by Buyer immediately upon the parties' execution or the Buyer's issuance, as applicable, of a Purchase Contract. Seller shall manufacture the Products in accordance with the Specifications.

2.2. Seller Testing: Seller will regularly test the Products to ensure they meet the Specifications and any packaging requirements identified in the Purchase Contract. The timing and protocol for such testing must be approved in advance in writing by Buyer.

2.3. Claims Data. In determining what warranties to give on the Products, Buyer is entitled to rely on test data and other claim substantiation materials provided by Seller (the "Claims Data"). Seller will indemnify and defend Buyer for any claims or liabilities arising from warranties that Buyer gives in reliance

on inaccurate Claims Data, whether such inaccuracy results from flawed analysis, flawed testing, flawed reporting, unqualified technicians or otherwise.

2.4. Storage and Handling. Seller shall store, maintain and handle the Product in accordance with the requirements of the Purchase Contract (including any applicable Specifications) and under appropriate conditions and temperature, humidity, light and cleanliness to avoid weather hazards, fire, theft, vandalism and any other material adverse effect on the identity, strength, quality and purity of the Product.

2.5. Production Facility: All Products will be manufactured at and shipped from the facility (if any) indicated in the Purchase Contract. Seller shall obtain Buyer' prior written approval for any change to or relocation of any such site.

2.6. Changes: No change in the Products ordered under the Purchase Contract, or their method of production, including substitutions or changes in materials, equipment, processing, or production location shall be made by Seller, or any subcontractor without the prior written consent of Buyer. Buyer may make changes to the Purchase Contract, including to any specification, drawing, quantity, instruction, destination, delivery schedule or method of transportation relating to any Products furnished hereunder, and Seller shall comply with any such change. If any such change affects the Price of the Products furnished hereunder or the time required for Seller's performance under the Purchase Contract, an equitable adjustment in the Price or delivery schedule or both may be made. All claims for adjustments in Seller's favor shall be made in writing within ten (10) days after the change to which the adjustment relates is made, or Seller forgoes any such adjustment, and no such adjustment shall be binding upon Buyer unless Buyer has agreed in writing to the same. Seller shall not suspend performance while Buyer and Seller negotiate the impact of a change and any related adjustments, or at any time thereafter, unless so instructed in writing by Buyer.

2.7. Seller's Information: If the Purchase Contract covers the sale of Products in finished form for resale by Buyer, Seller grants to Buyer a non-exclusive, perpetual, irrevocable, worldwide, royalty-free right to use all information and data provided by Seller, including but not limited to, manuals, applications, safety information and cross reference data, in connection with Buyer' business. This right includes, but is not limited to, the right to copy, publish, sell, transfer, distribute, sublicense, and prepare derivative works (including translations) of such information by any method, form, or media now or hereafter known. Buyer has a non-exclusive, perpetual, irrevocable, worldwide, royalty-free right to use Seller trademarks, logos, service marks, tradenames, copyrighted material, and domain names ("Seller Marks") in connection with Buyer's promotional, sales or marketing materials, documentation or information, including but not limited to Buyer web sites and other electronic and paper media. This right includes, but is not limited to, the right to use, copy, publish, transfer, distribute, and prepare derivative works or translations containing Seller Marks in any form and media now or hereafter known; and to use Seller Marks with any promotional, sales or marketing materials, documentation or information.

2.8. Technical Assistance: At Buyer's request, Seller will furnish such technical assistance and information as it has available with respect to the Product and its use, including failure mode and effects analyses, and training materials. Unless otherwise agreed in writing, all such technical assistance and information will be provided free of charge.

Buyer may rely on such technical assistance and information for specific applications, and Seller will only furnish such assistance and information as it believes to be reliable. SELLER ASSUMES SOLE RESPONSIBILITY FOR RESULTS OBTAINED BY BUYER IN RELIANCE ON SUCH INFORMATION AND ASSISTANCE PROVIDED BY SELLER.

### 3. PRICE; MOST FAVORED CUSTOMER

3.1. Price: Except as otherwise set forth in this Article, the price of the Products is and will be the price stated in the Purchase Contract (the "Price"). No increase in the Price last charged or quoted will be effective, for increased material, labor or transportation costs or otherwise, without the prior written consent of Buyer. There shall be no adjustment to the Price to account for inflation or currency risk. Unless otherwise specified in the Purchase Contract, the Price includes all packaging, shipping, handling and transportation costs, insurance, rigging, installation, start-up, testing, palletization, customs duties and fees and applicable taxes. No extra charges are allowed, except those expressly agreed to by Buyer.

3.2. Discounts: All applicable discount periods and invoice payment dates shall be calculated from the date that complete and correct invoices are received by Buyer or the date of delivery, if later, for purposes of earning any discount or rebate and for meeting invoice payment dates on the date of the mailing of Buyer's check or Seller's receipt of electronic payment, as applicable. Any adjustments of Seller's invoice due to shortage, late delivery, rejection or other failures to comply with the Purchase Contract shall be made before payment. Payment of invoices shall not constitute acceptance of Products and shall be without prejudice to claims of Buyer.

3.3. Taxes: Unless otherwise provided in the Purchase Contract, Seller shall be responsible for the payment of all: (i) taxes and fees imposed in connection with Seller's performance under the Purchase Contract; (ii) taxes and contributions based on wages, salaries, or other compensation paid to Seller's employees as imposed by applicable law or union requirements; (iii) import/export license fees and import/export taxes and duties on all services and tangible items either imported or exported by Seller; and (iv) all federal income taxes, state taxes and fees levied on or measured by Seller's net income, including, without limitation any such taxes, assessments, duties or charges or increases not in effect on the effective date of the Purchase Contract. Seller agrees to indemnify and hold Buyer harmless against any and all tax liability or penalty asserted, assessed, or imposed with respect thereto by any governmental authority, unless and to the extent that such tax liability or penalty arises out of Buyer's incorrect identification of the sales tax exempt status of the item or items as to which the liability or penalty relates.

3.4. Most Favored Customer: The Price of the Products will be at all times the lowest price charged by Seller for similar volumes of similar Products. If at any time Seller charges any other buyer a price lower than the then current Price, Seller must so notify Buyer and apply that price to all Products to be delivered under the Purchase Contract. If it is later determined that the price Buyer paid for the Products was in excess of the price that should have been paid by Buyer to Seller pursuant to this Section, then Seller promptly will refund such excess amount to Buyer.

3.5. If Seller fails to meet the lower price, Buyer, at its option, may terminate all or a portion of the Purchase Contract, without liability, for cause.

3.6. Competition: If, at any time, Buyer receives a bona fide offer from any other supplier or suppliers located anywhere in the world (the "Other Supplier(s)") to supply product similar (in quality and quantity) to any Product to Buyer on more favorable terms (including, without limitation, price and payment terms) than the terms on which Seller then supplies such Product to Buyer, Buyer may grant Seller a right of first offer to match such offer and supply such Product to Buyer on the same terms offered by such Other Supplier(s).

#### 4. PAYMENT TERMS

4.1. Payment Terms: Unless otherwise agreed to, Seller shall issue an invoice to Buyer on or within ten (10) days after the completion of delivery and only in accordance with the Terms and any payment schedule set for in the Purchase Contract. Buyer shall pay all properly invoiced amounts due to Seller with respect to Product delivered to Delivery Locations within the continental United States within sixty (60) days after Buyer's receipt of such invoice, except for any amounts disputed by Buyer in good faith. If Buyer pays all undisputed invoiced amounts within thirty (30) days of its receipt of an invoice, Buyer shall receive a discount of two percent (2%) with respect to such invoiced amounts. All prices quoted and payments hereunder must be in US dollars, unless Buyer agrees to a different currency as indicated in the Purchase Order.

4.2. Set-Off: Buyer may set off at any time any amount owing to Buyer, or any affiliate of Buyer, by Seller against any amounts payable at any time by Buyer to Seller or any affiliates of Seller. Any set-off under this Section shall be without prejudice to Buyer's right to amend or vary any claim it asserts against Seller in any subsequent negotiations, litigation or other proceedings arising out of the Purchase Contract or any other remedy.

4.3. Invoice Disputes: Buyer may in good faith dispute the validity or correctness of any invoice and may withhold payment on the disputed portion (including the entire invoiced portion, where the validity of the entire invoice is disputed) until the dispute is resolved. Seller shall seek to resolve all such disputes expeditiously and in good faith. Seller shall continue performing its obligations under the Purchase Contract notwithstanding any such dispute. Buyer may withhold payment for, among other reasons, any of the following:

- (i) Non-Conforming Products (as defined below) not promptly repaired or replaced;
- (ii) third-party claims filed or reasonable evidence indicating probable filing of such claims;
- (iii) failure of Seller to make payments properly to subcontractors, or for labor, materials, or equipment;
- (iv) damage to Buyer or another contractor;
- (v) breach of warranty.

#### 5. SHIPMENTS; DELIVERIES

5.1. Shipping: All Products are sold "CIP – Destination", unless otherwise agreed to or indicated in the Purchase Contract. Seller shall prepare all tangible Products for shipment so as to secure the lowest transportation rates consistent with timely delivery, and Seller shall be liable for any difference in freight charges relating directly or indirectly from any failure of Seller to comply herewith. If applicable, shipments shall be palletized to the maximum extent of palletization. Per Buyer's published shipping manual, if applicable, Buyer has the right to specify carrier and routing. No charge will be assessed against Buyer for packing, crating,

drayage or storage unless agreed upon in writing at the time of purchase. Seller shall give written notice of shipment to Buyer when Products are delivered to a carrier for transportation. Seller shall provide Buyer all shipping documents, including the commercial invoice, packing list, air waybill/bill of lading and any other documents necessary to release the Products to Buyer within three (3) business days after Seller delivers the Products to the transportation carrier. Buyer's count will be accepted as final and conclusive on shipments not accompanied by an itemized packing list. The Purchase Contract number and any applicable specific release number must appear on all shipping documents, shipping labels, bills of lading, air waybills, invoices, correspondence and any other documents pertaining to the Purchase Contract. Seller's failure to include the Purchase Contract number on any invoice may result in Buyer's rejecting the invoice and returning it to Seller, or may otherwise delay Buyer's ability to properly process and pay such invoice. No such delay shall be deemed a breach of the Purchase Contract.

5.2. Shipment Packaging; Bar Codes: All tangible Products shall be packed for shipment and/or palletized according to Buyer's instructions, or, if there are no instructions, in a manner sufficient to ensure that the Products are delivered in undamaged condition and in accordance with any applicable requirements of common carriers and all federal, state, and local laws, ordinances, rules and regulations. Seller shall pay for all damaged Product resulting from improper packaging or marking. Seller must provide Buyer prior written notice if it requires Buyer to return any shipment packaging material. Any return of such packaging material shall be made at Seller's expense. Seller will affix a permanent bar code label to each Product in accordance with Buyer's instructions and standards or any applicable specifications described in the Purchase Contract. Each Product will bear the stock keeping unit number assigned to it by Buyer. Seller will provide to Buyer an example of the bar code labeling that Seller proposes to use for review, and Seller will use reasonable commercial efforts to implement any comments Buyer provides to Seller regarding such labeling. Seller will provide to Buyer any information that Seller has that may be used in the analysis/interpretation of model number and serial number construction. This will include model and serial number templates/masks used in the manufacturing of the products as well as any model and/or serial number master tables used for warranty administration.

5.3. Deliveries: Seller shall deliver the Products in the quantities and on the date(s) specified in the Purchase Contract or as otherwise agreed in writing by the parties (the "Delivery Date"). No deliveries that consist of ½ truckload or greater will be accepted without an appointment. Unless otherwise agreed to in writing by Buyer, Seller shall not make a commitment for materials or production arrangements to fulfill the Purchase Contract in excess of the amount or in advance of the time necessary to meet Buyer's delivery schedule. All Products shall be delivered to the address specified in the Purchase Contract (the "Delivery Location") during Buyer's normal business hours or as otherwise instructed by Buyer. If no Delivery Date is specified, Seller shall deliver the Products within five (5) days of Seller's receipt of the applicable Purchase Order. Timely delivery of the Products is of the essence.

#### 5.4. Delays; Failure to Deliver:

(a) Seller shall promptly advise Buyer of any inability to make timely shipment. If Seller does not, or it appears that Seller will not, meet Buyer's delivery schedule, Buyer may, in addition to any other rights or remedies provided

by law or the Purchase Contract (including, without limitation, those set forth in Article 8 of these Terms): (i) cancel the Purchase Contract, in whole or in part, without liability to Seller except for payment for Products previously shipped and accepted; (ii) approve a revised delivery or work schedule; (iii) require that Seller ship via expedited routing to meet such delivery schedule or to recover the time lost; (iv) require that Seller grant Buyer first priority over any other previously scheduled production or delivery; and/or (v) require that Seller take any other action reasonably requested by Buyer to resolve the delay and/or to minimize the impact of the delay to Buyer.

(b) If Buyer approves a revised delivery schedule or requires Seller to ship via expedited routing, any additional transportation cost incurred as a result shall be paid by Seller.

(c) If Buyer instead cancels the Purchase Contract, Seller shall use its best efforts to promptly assist Buyer in locating alternate sources of supply, which in Buyer's sole discretion, are substantially the same in quality, form and function as the Products and provide to the alternate source of supply at no additional cost to Buyer or the alternate source of supply (technical assistance regarding the Products and a royalty-free license to use all intellectual property necessary to produce the Product(s) (including, but not limited to, the Specifications). Seller shall also pay to Buyer (x) the difference, if any, between the amount paid by Buyer to any alternate sources of supply for the Products and the Price for the Products; and (y) all amounts Buyer incurred as damages or penalties pursuant to third party agreements to which Buyer is bound which the failure to supply the Products by Seller caused Buyer to fail to meet its obligations to such third parties. Buyer shall invoice Seller for any amounts payable pursuant to this Section.

**5.5. Deliveries In Advance Of Schedule:** Products which are delivered in advance of schedule without authorization from Buyer may, at Buyer's option: (i) be returned to Seller at Seller's sole risk and expense; (ii) be accepted by Buyer with payment withheld by Buyer until the date that the particular Products are actually scheduled for delivery; or (iii) be placed in storage, at Seller's sole risk and expense, until the Delivery Date specified under Buyer's delivery schedule.

**5.6. Suspension of Delivery:** Buyer shall have the right to direct Seller to suspend all or any part of any delivery of Products for any reason or no reason whatsoever. Seller shall promptly suspend further performance to the extent specified, and during the period of such suspension shall properly care for and protect all work in progress and all materials, supplies, and equipment Seller has on hand. Seller shall use its best efforts to mitigate costs associated with suspension. If delivery is suspended pursuant to this Section, an equitable adjustment shall be made for any increase in the time and the cost (exclusive of profit) of performing the Purchase Contract necessitated by such suspension, and the Purchase Contract will be modified in writing accordingly by change order. No claim will be allowed under this Section unless the claim in an amount stated is asserted in writing within ten (10) days after Buyer's notice of the suspension. When the suspension has been terminated, Seller shall immediately commence performance, notwithstanding the fact that the amount of the adjustment in the Price, if any, of the order has not been agreed to.

**5.7. Title and Risk of Loss:** Title passes to Buyer upon delivery of the Products to the Delivery Location. Seller bears

all risk of loss or damage to the Products until delivery of the Products to the Delivery Location.

## **6. SELLER REPRESENTATIONS**

**6.1. Authority to Contract:** Seller represents that (i) it has all requisite legal power and authority to enter into and perform the Purchase Contract, (ii) the execution, delivery, and performance of the Purchase Contract and the consummation of the transactions contemplated thereby have been duly authorized by all requisite action on the part of Seller, (iii) the Purchase Contract is a valid and binding obligation of Seller and enforceable against it in accordance with its provisions, and (iv) its entry into the Purchase Contract does not violate or constitute a breach of any agreement to which it is a party or otherwise bound.

**6.2. Review of Purchase Order:** Seller's acceptance of any Purchase Order is a representation by Seller that it has inspected any applicable Specifications, has become familiar with the needs and operations of Buyer, the intended use of the Products to be furnished under the Purchase Order, and the interface, if any, between such Products and existing equipment and structures at the relevant Buyer facility. In addition, Seller represents that it has investigated and satisfied itself as to conditions affecting the Products, including all applicable Laws and conditions bearing upon transportation, disposal, handling, and storage of materials, the character of equipment of facilities needed prior to and/or during installation or delivery of the Products, scheduling of any applicable related services and providing any necessary facilities. No allowance of additional compensation or extension of time for completion will subsequently be made to Seller on account of its failure to acquaint itself with such matters

**6.3. Conflict of Interest:** Seller represents that no officer or employee of Buyer or any of its affiliates has been employed, retained, induced or directed by Seller to solicit or secure the Purchase Order with Buyer upon agreement, offer, understanding, or implication involving any form of remuneration whatsoever.

## **7. SELLER WARRANTIES**

**7.1. General:** All warranties of Seller in this Article or in any other part of the Purchase Contract or implied by law or equity shall survive any inspection, delivery, acceptance or payment of or for the Products by Buyer, and are cumulative. Seller's written warranty shall apply only to the extent that it offers warranty protection in addition to that afforded Buyer by applicable laws or the provisions of the Purchase Contract. All warranties shall run to Buyer, its successors, and assigns.

**7.2. Product Warranty:** Seller warrants that (i) it is the sole owner of any Products to be sold under the Purchase Contract, (ii) it has the unrestricted right to convey marketable title to the Products free and clear of all liens and encumbrances, (iii) there is no claim, litigation or proceeding pending or threatened against Seller alleging infringement of any patent or copyright or violation of any trade secret or any other proprietary right of any person with respect to the Products, or any component thereof (including, without limitation, any embedded software), and (iv), all Products furnished under the Purchase Contract (including any component thereof and software embedded therein) will (A) at all times during the Warranty Period comply with all conditions specified in the Purchase Contract and conform to all Specifications, drawings, designs, samples, instructions, and other instructions attached to the Purchase Contract, or otherwise delivered to Seller, and all standards and performance guarantees specified in the Purchase Contract, (B) comply with all Laws, (C) be manufactured,

handled, stored, packaged and transported in accordance with all then applicable Laws and other requirements, (D) be new, merchantable, and free from defects in material, workmanship, and design, (E) conform to any representations made by Seller, (F) be safe and appropriate for the purpose for which Products of that kind are normally used, (G) be of good workmanlike and merchantable quality, (H) be free and clear of all liens, security interests or other encumbrances, and (I) not infringe or misappropriate any third party's patent or other intellectual property rights. Any applicable statute of limitations runs from the date of Buyer's discovery of the noncompliance of the Products with the warranties.

**7.3. Services Warranty.** With respect to any services to be performed by Seller in connection with the performance under the Purchase Contract, Seller represents that it is fully qualified and properly staffed to provide the services set forth in the Purchase Contract, or as shall be incidental to any of the Products to be provided by Seller. Seller further represents that it shall provide such services in a timely, efficient and professional manner, and that such services will be performed by persons with the proper skill, training and background, and in accordance with the highest standards applicable to its industry. In addition, Seller represents that, when providing any services on Buyer's premises, Seller Personnel (as defined below) shall observe all relevant Buyer policies including those related to working hours, working rules and safety and security.

**7.4. Warranty Period; Additional Warranty Period.** Unless otherwise set forth in the Purchase Contract, all warranties contained in this Article shall commence on the date: (i) Seller first performs any services under a Purchase Contract, or (ii) Buyer first uses the Product (whichever earlier) and remain in full force and effect for a period of two (2) years thereafter (the "Warranty Period"). The Warranty Period with respect to repaired or replacement Products shall commence on the date of initial use of such repaired or replacement Product by Buyer.

## **8. NON-CONFORMITY; RECALL**

**8.1. Inspection:** All Products are subject to final inspection and acceptance at the Delivery Location. Such inspection, if practicable, will be made within a reasonable time after delivery; provided that Seller agrees that time for acceptance or rejection of any Product shall not expire until Buyer's use of the Product in products which it manufactures or processes which embody or employ the Product, or use of any item which is an embodiment of the services performed by Seller, if applicable. Seller will submit, at no additional charge, a reasonable number of Product samples and/or testing data to Buyer within the requested lead-time for quality and performance testing or review to verify Product compliance with the Specifications. Buyer, at its sole option, may inspect all or a sample of the Products, and may reject all or any portion of the Products if it determines the Products are non-conforming or defective. Buyer's failure to inspect and accept or reject any Products shall not relieve Seller from responsibility for Products which are not in conformance with the Purchase Contract, nor does inspection and acceptance by Buyer relieve Seller of liability for any latent defects, nor for fraud or such gross mistakes as amount in fraud, nor shall anything herein relieve Seller from the obligation to inspect and test the Products covered by the Purchase Contract in accordance with good commercial practices and Buyer's requirements and Specifications, nor impose any liability upon Buyer for such failure of defects. Seller shall maintain inspection and test records pertaining to all Products for a period of two (2) years after delivery of such Products or as otherwise specified by Buyer and copies thereof shall be made

available to Buyer at any time upon request and without charge. Such records shall include the time and the manner in which and the person by whom the Products have been inspected and tested and the result of such inspections and tests. Any inspection or other action by Buyer under this Section shall not reduce or otherwise affect Seller's obligations under the Purchase Contract, and Buyer shall have the right to conduct further inspections after Seller has carried out its remedial actions. The making or failure to make any inspection of, or payment for, Products pursuant to the Purchase Contract shall in no way impair Buyer's right to reject non-conforming or defective Products, nor be deemed to constitute acceptance by Buyer of the Products, nor affect in any way Seller's obligations under the Purchase Contract notwithstanding Buyer's opportunity to inspect the Products, Buyer's knowledge of the non-conformity or defect, its substantiality or the ease of its discovery, nor Buyer's earlier failure to reject the Products.

**8.2. Non-Conforming Products; Remedial Measures:** Any Products furnished in fulfillment of the Purchase Contract that are not in compliance with the Specifications, or are otherwise not as Seller warranted them to be, or are shipped contrary to instructions, or in excess of quantities ordered, or are substituted for merchandise specified, or allegedly violating any law, rule or regulation, or are in anyway defect or unsafe, or are otherwise non-conforming (collectively "Non-Conforming Products") may be rejected by Buyer. If Buyer rejects any portion of the Products, Buyer will send notice of non-conformity to Seller. Within a reasonable time after receipt of Buyer' notice (not to exceed 30 days), Seller will recommend to Buyer remedial measures ("Remedial Measures") to maintain the market viability of the Non-Conforming Products, including changes in the Specifications, changes in the Price or other measures mutually agreed upon in writing by the parties. If Buyer approves of Seller's recommendations in writing, the Remedial Measures will be implemented at the earliest possible date. Any Remedial Measures requiring changes to product design will not increase the Price of the Product. Buyer's rights with respect to Non-Conforming Products are not exclusive and Buyer may pursue any other remedy available to it at law or in equity.

**8.3. Rejection; Replacement:** A notice of non-conformity will describe the manner in which the Products do not conform and may indicate whether Buyer elects to: (a) rescind or terminate the Purchase Contract in whole or in part; (b) accept the Non-Conforming Products at an equitably reduced price; (c) reject the Non-Conforming Products and require their replacement; or (d) reserve Buyer's rights. If Buyer requires replacement of the Non-Conforming Products, Seller shall, at its expense, within five (5) days, replace the Non-Conforming Products and pay for all related expenses, including, but not limited to, all expenses of unpacking, examining, repacking, storing and reshipping any rejected Products and any shipment of replacement Products by Seller. If Seller fails to timely deliver replacement Products, Buyer may replace them with goods from a third party and charge Seller the cost thereof and terminate the Purchase Contract for cause. Any acceptance shall not alter the rights of Buyer or obligations of Seller under the applicable warranty or other provisions of the Purchase Contract.

**8.4. Returns:** If Buyer returns any Non-Conforming Products, Seller shall immediately provide Buyer with a full refund of all payments made with respect to the Non-Conforming Product (and full credit against any unpaid amounts), including the full original Price and service fees. Upon request by Buyer, Seller shall provide Buyer with

packaging materials for return shipment at no cost, and Seller shall pay all freight, insurance and other costs and expenses incurred in connection with the return of Non-Conforming Products. Seller may not charge any fee for the return of Non-Conforming Products pursuant to this Section.

**8.5. Acceptance of Defective or Non-Conforming Product.** If Buyer prefers to accept Non-Conforming Products, it may do so instead of requiring correction, in which case a revised invoice will be issued to reflect an equitable reduction in the Price or, if the amount is determined after payment by Buyer, it shall be re-paid by Seller to Buyer within ten (10) days of such determination. Buyer's acceptance of any Non-Conforming Products shall not operate as a waiver of rights hereunder or otherwise relieve Seller from its responsibility for supplying and delivering Products in accordance with, or any other obligation of Seller under, the Purchase Contract.

**8.6. Discontinued Products:** Seller may not discontinue Products during the term of the Purchase Contract. If Seller intends to discontinue Products at any time after the term of the Purchase Contract, it will give Buyer at least six months prior notice.

**8.7. Non-Conforming Quantity:** Partial shipments must be accompanied by identifying documents, but such shipment shall not be construed as making Seller's obligations severable. If Seller delivers five percent (5%) more than or five percent (5%) less than the quantity of Products ordered, Buyer may reject all or any such Products upon the terms and conditions set forth herein. Any such rejected Products shall be returned to Seller at Seller's risk and expense, including expenses of unpacking, examining, repacking and reshipping. If Buyer does not reject the Products and instead accepts the delivery of Products at the increased or reduced quantity, the Price for the Products shall be adjusted on a pro-rata basis.

**8.8. Recall of Products:** If (i) Seller becomes aware that the Products are defective in any manner which is or may become harmful to persons or property, or (ii) if any individual Product or a Product in the same or similar product line which have been shipped to Buyer violates any of the warranties or specifications applicable thereto at a defect rate for the same defect of five percent (5%) or greater of the total of that type of Product purchased by Buyer during any calendar quarter, or (iii) if Seller otherwise breaches any of its warranties to Buyer hereunder, Seller shall immediately give notice thereof, including all relevant information with respect thereto to Buyer, and Seller shall indemnify, defend and hold Buyer, its successors, assigns, shareholders, officers, directors, employees, agents, customers and those selling or using its products, and any affiliated company of Buyer, and its officers, directors, shareholders, employees, customers, agents and the users of its products, harmless from and against any and all damages, liabilities, claims, losses, costs, expenses and fees (including reasonable attorneys' fees) paid or incurred by them arising out of or relating or incidental to such Products provided by Seller, including, without limitation, all marketing costs relating to the Products and any costs associated with recalling products developed, manufactured, or created by Buyer with the aid of such Products. Buyer may, at its option, be represented by and actively participate through its own counsel in any suit or action against the foregoing persons and entities. Should Buyer, either voluntarily or involuntarily, initiate a recall of such products, or if a government or agency shall take action with respect to them, Seller shall assist and cooperate with Buyer in all respects with said recall, including, but not limited to, developing a recall strategy for the products and working with Buyer and any applicable governmental agency in monitoring Buyer's recall operating and in preparing and

furnishing such reports, records or other such information as is necessary in connection therewith, and Seller agrees to pay all costs associated with such recall.

## **9. INDEMNITY AND INSURANCE**

**9.1. Indemnity:** Seller shall defend, indemnify and hold harmless Buyer, its successors, assigns, shareholders, officers, directors, employees, agents, customers and those selling or using its products, and any affiliated company of Buyer, and its officers, directors, shareholders, employees, customers, agents and the users of its products (each an "Indemnified Person") against any and all loss, injury, death, damage, liability, claim, deficiency, actions, proceedings, or investigations (whether formal or informal) or threats, judgment, interest, award, penalty, fine, cost or expense, including reasonable attorney and professional fees and costs, and the cost of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers, arising out of or resulting in any way from:

- (i) the Purchase Contract;
- (ii) the Products;
- (iii) Seller's negligence, willful misconduct or breach of the Terms or the Purchase Contract;
- (iv) Sellers' presence or that of Seller's agents, contractors, representatives or Buyer's property;
- (v) failure of the Products to comply with Specifications or with the expressed or implied warranties of Seller;
- (vi) defects in materials, design or workmanship of the Products;
- (vii) any repurchase, repair or recall of products necessitated by any defect in the Products;
- (viii) any violation of Laws by the Products or their labeling or packaging, or in the manufacture or sale thereof, which is attributable to Seller;
- (ix) any claim of unfair competition or that the Products (or any component of or software embedded in the Products) or Buyer's use or sale of the Products (or any component of or software embedded in the Products) infringe the patent, copyright, trademark, trade secret or other intellectual property right of any third party (each such Product, component or software, an "Infringing Item");
- (x) bodily injury to or death of persons (including employees of Seller and Buyer), or injury to or destruction of tangible property including the loss of use resulting therefrom:
  - A. Caused directly or contributory from the Products;
  - B. Caused by, incident to, in connection with, or arising directly or indirectly out of the performance by Seller, its agents, employees, or subcontractors of Seller's obligations under the Purchase Contract;
  - C. Arising directly or indirectly out of the presence of Seller, its agents, employees, or subcontractors in, on, or about any part of the site of installation of the Products, or the streets, sidewalks, and property adjacent thereto;
  - D. Arising directly or indirectly out of the misuse by Seller, or any other failure, of any machinery or equipment (including but not limited to

scaffolding, ladders, hoists, rigging, and supports) whether or not such machinery or equipment was furnished by Buyer, its officers, employees, agents, or by others.

(xi) liability to any person or governmental agency arising out of Seller's breach of any warranty herein or in the Purchase Contract;

(xii) the failure of Seller, or those acting under or for Seller, to comply with any Laws in connection with Seller's performance of the Purchase Contract (including, without limitation, Seller's ownership or operation of its business and facilities, fines or penalties by government authorities and claims arising from Seller's actual or asserted failure to pay taxes);

(xiii) any claim of Seller Personnel (as defined below) related to Seller or Buyer employee benefit plans or compensation arrangements;

(xiv) any claim of co-employment or of or relating to the employment relationship (including termination) with existing, past and prospective employees of Seller; or

(xv) any claims by Seller's subcontractors.

9.2. Notice of Actions: Upon its receipt of notice of the commencement of any action or other proceeding in respect of which indemnification may be sought hereunder, Seller promptly will assume full responsibility for defense of such suit or proceeding; provided that Seller may not enter into any settlement without Buyer's or other Indemnified Person's prior written consent. An Indemnified Person's failure to notify Seller regarding the commencement of any action or other proceeding shall not relieve Seller from any obligation hereunder unless, and only to the extent that, such omission results in Seller's forfeiture of substantive rights or defenses.

9.3. Infringed Items: With respect to any infringement (actual or claimed) of an intellectual property right, Seller shall avoid such claims or actions and to minimize any potential liability, at no additional cost to Buyer, by (i) procuring for Buyer the right to use and sell the Infringing Item (whether actual or claimed) for an unlimited duration; or (ii) modifying or replacing the alleged Infringing Item so that it no longer infringes, provided that the modified or replaced Products shall comply with all warranties and other Specifications, standards, and performance guarantees specified in the Purchase Contract. In addition to all other rights and remedies Buyer has at law, at equity or under the Purchase Contract, if Buyer, its customers or anyone selling or using the Products (or Buyer's products utilizing the Products) is enjoined from the use, sale or other disposition of such Products or products, conditionally or otherwise, Seller shall, at no additional cost to Buyer, repurchase the Products at the Price paid for such Products and/or Buyer's products at their purchase price, and repay all costs of all shipments of such Products and products incurred by Buyer.

9.4. Not Exclusive Remedy: The indemnification to be provided pursuant to this Section shall be in addition to any rights that any Indemnified Person may have at law, in equity, or pursuant to any warranties set forth in these Terms or elsewhere in the Purchase Contract.

9.5. Survival: Seller's indemnification obligations pursuant to this Article shall survive the expiration or earlier termination of the Purchase Contract.

9.6. Not Limited by Worker's Compensation: In any and all claims against any Indemnified Person by any employee of

Seller, any subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, the indemnification obligation under the Purchase Contract shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Seller or any subcontractor under any Workers' Compensation Act, disability benefits acts, or other employee benefits acts.

9.7. Insurance: Seller shall comply with any insurance requirements set forth in the Purchase Contract. If no such requirements are set forth in the Purchase Contract, or to the extent that any such provisions do not conflict with the terms of this Section, the following terms of this Section shall apply. During the term of the Purchase Contract and for a period of ten (10) years thereafter or for the life of the Products, whichever is longer, Seller shall, at its own expense, maintain and carry insurance in full force and effect which includes, but is not limited to, comprehensive general liability insurance (including product liability) with an insurer satisfactory to Buyer, covering all claims involving bodily injury or property damage arising out of or in connection with the Products furnished hereunder in amounts of not less than \$1,000,000 for all liability arising out of or injury to or death of one or more persons in any one occurrence, and not less than \$1,000,000 for all liability arising out of injury to or destruction of property in any one occurrence, or in such greater amount and coverages as are considered prudent in Seller's industry. In addition, such insurance shall include Buyer and the other Indemnified Persons as named insureds, be primary to any insurance of Buyer, be occurrence based, and provide that it applies separately to each insured against whom a claim is made or suit is brought. Seller shall provide Buyer with certificate of liability insurance including Buyer and the other Indemnified Persons as named insureds covering, within limits reasonably acceptable to Buyer the insurable risks included above. Certificates must show the date of expiration of each policy and contain an agreement by the insurance carrier that policies will not be canceled or changed until after thirty (30) days written notice of such cancellation or change is delivered to Buyer.

## 10. INTELLECTUAL PROPERTY.

10.1. Existing Rights: The intellectual property rights of Buyer which exist on the date the Purchase Contract is executed or delivered shall continue to be owned by or licensed to Buyer, and Seller shall have no rights therein. Seller grants to Buyer a non-exclusive, perpetual (or other maximum term permitted by applicable Law), fully paid-up license to use, copy, and store, and to transfer, or to modify and create derivative works from, any information, writing, material, software, product, concept, invention, modification, discovery, design, development, improvement, process, formula, data, technique, know-how, manufacturing method, trade secret or intellectual property right whatsoever or any interest therein (whether or not patentable or registrable under copyright or similar statutes or subject to analogous protection) owned, created, or conceived by Seller prior to the effective date of the Purchase Contract, and/or any third party rights, which form part of the Products and which are necessary for Buyer to receive the benefit of the Products. Seller shall, at Buyer's request, do all acts and execute all documents reasonably required to enable Buyer to obtain the full intended benefit of this Section.

10.2. Inventions: If Products are to be manufactured to Buyer's Specifications and delivered in finished form for resale pursuant to the Purchase Contract, then in connection with the activities performed under the Purchase Contract, any

information, writing, material, software, product, concept, invention, modification, discovery, design, development, improvement, process, formula, data, technique, know-how, manufacturing method, secret or intellectual property right whatsoever or any interest therein (whether or not patentable or registrable under copyright or similar statutes or subject to analogous protection) relating to the Product that Seller makes, conceives, creates, discovers, reduces to practice or becomes possessed of, shall be the exclusive property of Buyer from the moment of their creation and shall be marked accordingly and may be used by Buyer for any purpose or be disposed of by Buyer and its assigns without any limitation whatsoever. All rights in any Invention belong to Buyer for its worldwide exploitation, for the duration of the available term of protection and for all means, media, form or formats of exploitation, including without limitation, the right to reproduce, use, adapt, modify, transform, publish, distribute, publicly perform and communicate, translate and to prepare derivative works or to assign, sell or license such rights on an exclusive or non-exclusive basis.

10.3. Designs: Absent a written agreement of the parties to the contrary, Buyer will exclusively own all right, title and interest in and to all unique cosmetic designs, ornamental appearance and trade dress embodied in any and all Innovations incorporated into a Product, (including design patents and pending applications, regardless whether such Design IP originated solely with Buyer, solely with Seller or its affiliates or jointly with Buyer, Seller, and/or others.

10.4. Embedded Software and Other Works of Authorship; License: Seller grants to the Buyer a permanent, irrevocable, transferable, non-exclusive, sublicensable, fully paid-up, royalty-free license (the "License") under each copyright it owns or controls or has a right to license in any work of authorship (including Embedded Software) fixed in any tangible medium of expression delivered by Seller under the Purchase Contract to use, reproduce, repair, and modify such work, prepare derivative works, distribute copies of such work to the public, and to perform and display such work publicly. "Embedded Software" means software that is embedded in or otherwise delivered with the Products and performs operating or other functions. Seller shall deliver the source code for any Embedded Software to Buyer (i) upon Buyer's request, so as to enable Buyer to get the full benefit of the License, and/or (ii) in the event that Seller is unable or unwilling to maintain, extend or modify the Embedded Software.

10.5. Adverse Patent Claims: Seller shall immediately notify Buyer in writing if Seller has any reason to believe that any process, product, equipment, material or other element or feature of any item specified in the Purchase Contract might be the subject of any adverse patent rights or other adverse rights, and if so what such features may be at issue, and of any claim or potential claim of any such right which shall come to the attention of Seller during performance of the Purchase Contract, and shall require its subcontractors similarly to give notice of any such issue. To the extent that Seller or one of its subcontractors is aware of such a potential or actual claim and fails promptly to give Buyer notice in writing of such actual or potential claim, Seller shall be required to make any license, damage or other payments required as a consequence of the utilization of such element or feature.

10.6. Buyer's Marks: Any use by Seller of Buyer's business or product names, logos and trademarks requires the prior written consent of Buyer. All such names, logos and trademarks shall remain the exclusive property of Buyer.

10.7. Survival. This Article shall survive the complete performance of the Purchase Contract, or any earlier termination of the Purchase Contract, until agreed otherwise in writing by both parties.

## 11. COMPLIANCE

11.1. Laws: Seller and its employees, subcontractors and agents shall at all times comply with all applicable Laws relating to or affecting the Products, and their design, manufacture, components, storage, use, handling and transportation, or the Purchase Contract, and Seller shall provide Buyer with certificates of such compliance in form acceptable to Buyer, upon Buyer's request.

11.2. Government Procurement: Products purchased hereunder may be used in performance of a government procurement contract. Accordingly, contract clauses required by the government in such circumstances, and all rules and regulations promulgated under the specific acts cited, are incorporated into the Purchase Contract by reference. Seller shall comply with such clauses and furnish information and certificates of performance requested by Buyer or the government. Among clauses so incorporated are those in relation to the following: Examination of Records; Renegotiation; Notice to Government of Labor Disputes; Contract Work Hours and Safety Standards Act-Overtime Compensation; Nonsegregated Facilities, and the Walsh-Healey Public contracts Act. With respect to Equal Employment Opportunity requirements, Seller shall, during performance of the Purchase Contract, comply with and be bound by all provisions of Executive Purchase Order 12246 as amended, and the rules, regulations, and the relevant orders of the Secretary of Labor relation to Equal Employment Opportunity applicable to government contractors and subcontractors, including Section 202 of Executive Order 11246, as amended by Executive Order 11375, the Vietnam Era Veterans Readjustment Assistance Act of 1974, the Rehabilitation Act of 1973, as amended, and those governing contracts with business concerns operating in areas of surplus labor (48 C.F.R. Part 20), with women owned business concerns (Executive Order 12138) and with small and disadvantaged business concerns (15 U.S.C. 637), all as amended from time to time, and shall furnish certificates of compliance whenever requested by Buyer.

11.3. Permits and Government Approvals. Seller shall obtain or provide all governmental, regulatory or customary local approvals, notices, permits, powers-of-attorney, licenses, consents or similar requirements ("Government Approvals") necessary for Seller and/or its agents to make and provide, or otherwise relate to, the Products and its obligations under the Purchase Contract. Seller shall be responsible for monitoring and properly notifying Buyer of any Government Approvals required in connection with the Products. Buyer shall have the right to terminate the Purchase Contract upon notice to Seller in whole or in part for cause in the event Seller fails to apply in a timely manner for and obtain and maintain all relevant Government Approvals. Unless otherwise expressly identified in the Purchase Contract, Buyer is not responsible for and shall not participate in or provide any assistance in connection with the Government Approvals.

11.4. Import/Export: Seller shall comply with all export and import laws and treaties of all countries involved in the manufacture, sale and transport of Products under the Purchase Contract. Seller assumes all responsibility for shipments of Products requiring any government import clearance. Unless otherwise agreed to by the parties, all customs, duties, costs, taxes, insurance premiums, and other

expenses relating to such transportation and delivery shall be at Seller's expense. Buyer may terminate the Purchase Contract if any government authority imposes antidumping duties, countervailing duties or any retaliatory duties on the Products and Buyer would be liable for the payment thereof. When Products furnished under the Purchase Contract are for export and ultimate use in a country other than the United States, Seller shall provide to Buyer, within ten (10) days after issuance of a Purchase Order, a written notice stating whether any authorization for the export of such items is required by the exporting country. Seller shall assist Buyer in obtaining all such authorizations for export without any additional cost to Buyer. Assistance shall be in the form of technical data, drawings, brochures, technical expertise or other means as deemed necessary.

11.5. Conflicts of Interest. In connection with any Products provided pursuant to the Purchase Contract, Seller shall not accept for its own account any trade discounts or contributions, or deal with (or recommend that Buyer deal with) any firm in which Seller has any financial or other interest, or undertake any activity or employment which would or could create a conflict of interest or compromise Seller's professional judgment or prevent Seller from serving the best interests of Buyer. If Seller shall become aware of any facts which are or may be in violation of the preceding provisions of this Section or shall have any financial or other interest in any firm with which Buyer is dealing or proposes to deal in connection with the Purchase Contract, Seller shall immediately advise Buyer thereof in writing. In addition, Seller shall adhere to any further conflict of interest policy adopted by Buyer and promulgated to Seller during the term of the Purchase Contract. Without limiting the generality of the foregoing, it shall be deemed a conflict of interest and a material breach of the terms of the Purchase Contract for Seller to employ or to accept bids from any subcontractors employing any relatives (including in-laws) of any of the officers, directors or supervisors of Seller. Any breach hereunder shall entitle Buyer, in addition to all other remedies, to terminate the Purchase Contract, without liability, for cause.

11.6. Environmental Laws: Notwithstanding any other terms and conditions in the Purchase Contract or any other document, the following terms and conditions shall apply with regard to Seller's environmental responsibilities:

(a) Seller is solely responsible for compliance with all Environmental Laws which apply or may apply to its operations, including such operations as are necessary to provide Products. Seller's responsibility includes but is not limited to, where applicable, ensuring the proper handling and disposal of any hazardous or toxic substances or wastes and other waste materials and obtaining all necessary licenses, permits or approvals required by the applicable Environmental Laws. "Environmental Laws" means any federal, state or local law, common law doctrine, rule, order, decree, judgment, injunction, license, permit or regulation relating to environmental matters, including those pertaining to land use, air, soil, surface water, ground water (including the protection, cleanup, removal, remediation or damage thereof), public or employee health or safety or any other environmental matter, together with any other laws (federal, state or local) relating to emissions, discharges, releases or threatened releases of any pollutant or contaminant including, without limitation, medical, chemical, biological, bio-hazardous or radioactive waste and materials, into ambient air, land, surface water, groundwater, personal property or structures, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage,

disposal, transportation, discharge or handling of any contaminant.

(b) Seller warrants and certifies that it employs personnel (or retains independent contractors) with the necessary training and qualifications in the environmental field to accurately assess Seller's responsibilities under federal, state and local environmental laws, regulations, ordinances and other requirements, and with the necessary qualifications to assure compliance with those requirements.

(c) Seller specifically acknowledges that Buyer has no responsibility for, nor control over Seller's activities which may be regulated by federal, state, or local Environmental Laws, regulations, or ordinances. Further, Seller acknowledges that Buyer has not, in any manner, arranged for the disposal or treatment of any of Seller's waste materials, such being the sole responsibility of Seller.

(d) Seller shall indemnify and hold harmless Buyer, its officers, directors, employees, and agents against and from any and all claims, suits or actions of any nature whatsoever including but not limited to claims for response costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 et seq., any implementing regulations and analogous state laws and regulations arising from Seller's use, handling or disposal of hazardous and/or toxic substances or other waste materials, or arising from Seller's alleged noncompliance with any federal, state or local environmental laws, regulations, ordinances, licenses, permits, or other requirements whatsoever, or arising from any claim that Seller's improper use, handling or disposal of hazardous or toxic substances or other materials has resulted in personal injury or property damage to any third party.

(e) For the purpose of monitoring Seller's compliance with the terms of the Purchase Contract, Seller hereby authorizes Buyer to perform a compliance review, including a tour of Seller's facility, at any time upon notice to Seller for Buyer's sole benefit. No inspection by Buyer relieves Seller of any obligation hereunder.

## 12. ACCOUNT MANAGEMENT; SUBCONTRACTORS

12.1. Account Management: Seller will dedicate such assistance and resources as are reasonably necessary to manage Buyer's account with Seller and to manage Seller's administrative and other obligations under the Purchase Contract. Seller will designate a single point of contact (whether by name or title) to ensure that all Products supplied by Seller are managed effectively and are consistent with Buyer's overall product strategy. As reasonably requested by Buyer, Seller will provide information relating to Product tracking and account support, including sales and delivery performance, market and industry trends.

12.2. Subcontractors: Seller shall not retain any subcontractors (including affiliates) to perform work under the Purchase Contract without the prior written consent of Buyer, except as set forth in the Purchase Contract. Notwithstanding the foregoing, no subcontracting shall relieve Seller of its responsibility and liability for any work performed or Products supplied by its subcontractor.

## 13. SELLER'S BUSINESS OPERATIONS

13.1. Business Continuity: Seller shall develop and shall deliver to Buyer upon request for its approval a reasonably detailed business continuity plan (the "BCP"). The BCP shall be revised and updated by Seller from time to time and Seller shall submit such revised and updated BCP to Buyer for review

and approval. Seller shall implement and comply with the BCP and test and successfully certify to Buyer that the BCP is fully operational and capable of restoring operations so that Seller is able to provide the Products.

13.2. Efficiency: Consumer Rating: Until completion of the Purchase Contract, Seller hereby agrees to ensure continuity in its supply of the Products to all of Buyer's receiving sites. Seller pledges to improve the supply chain through inventory reduction, quick response, vendor managed inventory programs and just-in-time delivery. Throughout each year of the term of the Purchase Contract, Seller will use best efforts to increase the rating it receives for Products manufactured by Seller from the previous year's rating it received (if any) from Consumer Reports. Seller will endeavor to achieve one of the top three rated spots by Consumer Reports (including CR Best Buys and Quick Picks) for each product category that Seller manufactures for Buyer during every review by Consumer Reports.

13.3. Business Ethics:

(a) Seller must adhere to the highest standards for morality and integrity in the conduct of its business. Seller is prohibited from soliciting, offering or accepting any form of gifts, gratuities or any other form of "pay off" or other fee to or from any agent, officer, employee, owner or other representative of any factory or manufacturer with which it does business. This shall include any gifts or bribes in the form of the "red envelope", whether in relation to the celebration of birthdays or other holidays. Gifts of a nominal amount will be acceptable on special occasions, but must be communicated in advance in writing to Buyer, and Buyer shall respond promptly to Seller if such nominal gift is permissible for the associate to receive.

(b) Seller is prohibited from offering any form of bribery or "pay off" to any testing group, examiner, inspector or other party charged with providing product testing, testing results or quality control services relative to products manufactured for Buyer.

(c) Buyer may, by written notice to Seller, terminate the Purchase Contract if it is found that gratuities (in the form of entertainment, gifts or otherwise), were offered or given by Seller, or any agent or representative of Seller to any officer or employee of Buyer with a view toward securing the Purchase Contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of the Purchase Contract.

(d) Seller must comply fully with all Buyer Policies and all requirements of the applicable local and national labor laws and health and safety standards. Buyer maintains a ZERO tolerance policy for the practice of employing prison labor and child labor and Seller must maintain and enforce the same ZERO tolerance policy.

(e) Seller recognizes that Buyer and Buyer's customers subscribe to various corporate integrity agreements, policies, and codes of conduct and/or ethics ("Buyer's Policies") that impose certain obligations on vendors such as Buyer and on Buyer's subcontractors and suppliers. The Buyer Policies may require Buyer and its subcontractors and suppliers to embrace standards of legal compliance and ethical behavior consistent with such policies. Buyer will advise Seller of the Buyer Policies mandated by Buyer's customers. Seller represents, warrants and undertakes that it and its subcontractors shall perform the Purchase Contract and operate their business in conformance to any and all Buyer's

Policies relevant to the Products and shall monitor, comply with and implement any tasks or requirements relating to all Laws applicable to the Products and the performance of Seller's obligations under the Purchase Contract. Seller shall pay all costs relating to compliance with Buyer Policies and Laws (including any system changes required for such compliance), without reimbursement by Buyer. In addition, Seller shall follow and comply with instructions and directions (including Buyer Policies) provided by Buyer resulting from Buyer's interpretation of Laws.

(f) In the event that Seller or its subcontractor fails to meet and maintain certain ethical standards, the parties shall agree upon what measures should be taken to improve Seller's performance (an "Improvement Plan"). If the parties are unable to agree upon an Improvement Plan or Seller or its subcontractor does not implement the Improvement Plan within an agreed reasonable timescale (which shall in any event not be in excess of twelve (12) calendar months), Buyer shall be entitled to terminate the Purchase Contract.

13.4. FCPA: Neither Seller nor any Seller affiliate, subcontractor, officer, employee or agent has taken or shall take any action or make any payment in violation of, or which may cause Seller or subcontractor or Buyer to be in violation of, the Foreign Corrupt Practices Act of 1977, as amended, or any comparable Laws in any country from or to which Seller provides Products to Buyer. Seller further represents that no person employed by Seller or any Seller affiliate, subcontractor, officer, employee or agent in connection with its obligations under the Purchase Contract is an official of the government of any country or of any agency thereof, and that no part of any monies or consideration paid hereunder shall accrue for the benefit of any such official.

13.5. EEO. Seller certifies that it has an affirmative action policy ensuring equal employment opportunity without regard to race, color, national origin, sex, age, religion or handicap, that it maintains no employee facilities segregated on the basis of race, color, religion or national origin and that it is not debarred or suspended from being awarded Federal or Federally assisted contracts. In addition, if applicable to the Purchase Contract, the following laws, orders and regulations, as amended, are hereby incorporated by reference: Executive Order 11246; Vietnam Era Veterans Readjustment Act; Rehabilitation Act of 1973; Veterans Compensation, Education and Employment Act; 41 CFR 60-1.4 (Equal Employment Opportunity); 41 CFR 60-250.4 (Veterans Affirmative Action); 41 CFR 60-741.4 (Handicap Affirmative Action); 41 CFR 601.40 (Affirmative Action Plans); 41 CFR 601.7 (EEO1 Reports); 41 CFR 61650 (Veterans Employment Reports).

13.6. Environmental Stewardship. The policy of Buyer is to protect the health, safety and quality of life of its employees and the public, and to exercise responsible stewardship of natural resources that may be impacted by its activities. To realize this, Buyer is committed to maintaining programs and procedures for the environmentally responsible management of facilities, materials, production processes, products and packaging, transportation and distribution, and waste and its minimization, energy, general business operations and contracted goods and services. Seller agrees with this policy and further acknowledges that it shall ensure that its performance under the Purchase Contract shall be in compliance with all applicable Buyer environmental policies.

13.7. Violations. Seller agrees, in the event of an allegation of substance (the determination of which will be solely made by Buyer), that there has been a violation of this Article. Seller will cooperate in every reasonable manner with

Buyer in establishing whether the allegation is true. Notwithstanding any provisions of the Purchase Contract to the contrary, if a violation of this Article is found to have occurred and is deemed material by Buyer, Buyer may cancel the Purchase Contract.

13.8. Audit Rights. Without limiting any right of the Buyer in the Purchase Contract, Buyer and/or its agent (each a "Buyer Auditor") shall have the right to confirm and validate Seller's compliance with the terms of the Purchase Contract through audits of Seller's documents, systems and operations and facilities, and conduct interviews with Seller's personnel. Seller shall provide access at all reasonable times and after reasonable notice to Buyer Auditor to any facility or part of a facility at which Seller is manufacturing or storing the Products and to any and all data and records relating to the Products provided to Buyer. The foregoing audit rights shall include, when applicable, audits of (i) practices and procedures, (ii) pricing, and (iii) security practices and procedures. The expense of an audit or examination shall be borne by Buyer unless an audit reveals that Seller is not in compliance with the requirements of the Purchase Contract or there has been an overcharge, in which case Seller will pay all such expenses.

#### 14. BUYER'S RIGHTS AND REMEDIES

14.1. Generally: Buyer's rights and remedies under the Purchase Contract are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise. Buyer's remedies shall include incidental and consequential damages. Seller acknowledges that any breach of the terms, conditions or covenants set forth in the Purchase Contract would be competitively unfair and may cause irreparable damage to Buyer and that a recovery of damages at law would be an adequate remedy. Accordingly, for any breach by Seller of the terms, covenants or conditions of the Purchase Contract, Seller hereby consents to a restraining order and/or injunction against Seller, without the posting of bond, in addition to any other legal or equitable rights or remedies Buyer may have.

14.2. Termination for Convenience: Buyer may terminate all or a portion of the Purchase Contract at its convenience immediately by written notice to Seller. In such case, Seller shall immediately stop work on the applicable portion of the Purchase Contract and cause any of its suppliers or subcontractors to cease such work. Nothing hereunder shall limit Buyer's right to terminate the Purchase Contract for failure of Seller to perform in accordance with the Purchase Contract, in which event Seller shall be liable to Buyer for damages including the excess cost of obtaining similar goods or services. If Buyer terminates the Purchase Contract for any reason, Seller's sole and exclusive remedy is payment for the Products received and accepted by Buyer prior to the termination. In no event shall Buyer be responsible for loss of anticipated profit nor shall reimbursement exceed the order value. In no case shall Buyer's responsibility be greater than liability equal to thirty (30) days of finished Products and/or work in process (WIP) and thirty (30) days of raw material unless specifically agreed to in writing by Buyer. Further, if the Products are being supplied in connection with a prime contract which is terminated for the convenience of Buyer, any termination settlement under the Purchase Contract shall be as provided in the prime contract and Seller shall not be entitled to receive any amount greater than its equitable portion of any amount Buyer may recover from the owner for such termination.

14.3. Termination for Cause: Without prejudice to any right or remedy of Buyer, and after giving Seller seven (7)

days' written notice, during which period Seller fails to cure, Buyer may terminate all or a portion of the Purchase Contract for cause, if:

(i) Seller breaches a material provision of the Purchase Contract; or commits numerous or repeated breaches of its duties or obligations under the Purchase Contract, even if cured;

(ii) Proceedings are voluntarily or involuntarily instituted by or against, Seller under any federal or state bankruptcy or insolvency law;

(iii) Seller ceases operations, becomes insolvent, or makes a general assignment for the benefit of its creditors;

(iv) Buyer has a good faith basis to believe or a reasonable belief that Seller is not timely meeting its financial obligations to its subcontractors, or Seller fails to make prompt payment to subcontractors or for materials or labor, or disregards any Laws;

(v) Seller submits any falsified document; or

(vi) A construction lien claim or notice of unpaid balance or mechanic's or materialmen's lien or notice of intention to file a lien or a stop payment notice is filed with or served on Buyer and not immediately bonded, discharged or insured over by Seller in a manner satisfactory to Buyer.

If termination under this Section is judicially determined not to have been with the required cause, such termination shall be deemed a termination for convenience.

14.4. Transfer Upon Termination. Upon termination of the Purchase Contract or any portion thereof, Seller shall provide Buyer with all finished Products under the Purchase Contract or applicable portion thereof in Seller's (or its agents' or subcontractors') possession or control, and all Buyer Confidential Information. In addition, upon Buyer's request, Seller shall transfer all contracts and arrangements, if any, entered into by Seller pursuant to the Purchase Contract, at no cost to Buyer and with the approval of the applicable third parties.

14.5. Transition Rights. Upon expiration or termination of the Purchase Contract for any reason, Seller will provide Buyer with all reasonable transition assistance ("Transition Assistance") requested by Buyer, for up to 12 months after such expiration or termination (the "Transition Period"), relating to the transition of the supply of Product to other sources of supply, including continued production and sale of Products and the provision of all services necessary for an orderly conversion, provided that if Buyer desires any additional services which Seller does not provide to its other customers, the parties shall meet and discuss whether such services are practicable or whether it is more appropriate, efficient and cost-effective for Buyer or some other party to render them. Such Transition Assistance may include, at Buyer's option, month to month extensions of the Purchase Contract. For Products which Buyer was receiving from Seller prior to such expiration/termination, the fees applicable to such Transition Assistance will be the rates which Buyer was paying prior to such expiration/termination which will continue to apply during any such Transition Period. For all other Transition Assistance, Seller will not charge Buyer fees in excess of the Seller's then standard rates (taking into account the average discount Seller provides to its similarly sized customers) or, if such services are not provided to others or there is no "standard rate", Seller's out of pocket cost of providing them. Notwithstanding anything to the contrary in these Terms, the

Term of the Purchase Contract will be extended for the duration of any Transition Assistance requested by Buyer.

14.6. Waiver: Except as otherwise set forth in the Purchase Contract, no failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from the Purchase Contract shall operate or be construed as a waiver thereof, nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

## 15. NONDISCLOSURE AND CONFIDENTIALITY

15.1. Advertising, Nondisclosure of Contents of Purchase Contract: Seller shall not, without first obtaining the written consent of Buyer, in any manner advertise, publicize, publish or otherwise draw attention to the fact that Seller has furnished or contracted to furnish the Products to Buyer, or disclose any of the details connected with the Purchase Contract to any third party except as required for procurement of supplies and services for use in the performance of the Purchase Contract, and then only after the substance of this prohibition is inserted in its orders and made binding upon any third party. Additionally, Seller shall not disclose or refer to Seller's relationship with Buyer. Seller shall not make, place or disseminate any advertising, public relations, promotional material or any material of any kind using the name of Buyer and/or its subsidiaries, divisions or affiliates or using their trademarks, without the prior written approval of Buyer, nor shall it issue, make, release, distribute or authorize for distribution any press release, information, statement, letters or materials (irrespective of medium) that makes mention of or uses Buyer's name(s), logos, trademarks, or goodwill in any manner whatsoever, except as may otherwise be mutually agreed by the parties or as may be required by applicable Laws.

### 15.2. Confidential Information:

(a) All non-public, confidential or proprietary information of Buyer, including, but not limited to, any Specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, customer lists, pricing, discounts or rebates, disclosed by Buyer to Seller, whether disclosed orally or disclosed or accessed in written, electronic or other form or media, and whether or not marked, designated or otherwise identified as "confidential," in connection with the Purchase Contract is confidential, solely for the use of performing the Purchase Contract and may not be disclosed to any party other than those employees and contractors (who have agreed to be bound by the terms of this Section) of Seller who require the same for the performance of their duties in connection with the Purchase Contract, copied, reverse engineered, or used in any other way, unless authorized by Buyer in writing. If Buyer gives such written consent, Seller will strictly comply with the terms and conditions of any such consent and, even after such consent, will not use Buyer's name or any of its trademarks, service marks, trade names or logos except with the express prior written consent of Buyer to the specific use. Upon Buyer's request, Seller shall promptly return all documents and other materials received from Buyer.

(b) Seller acknowledges that the unauthorized use or disclosure of Confidential Information by it or by its employees or agents may give rise to irreparable injury and that money damages may not adequately compensate Buyer for such injury. Accordingly, Buyer may seek and obtain injunctive relief against Seller or its employees or agents, or any individual furnished Confidential Information of Buyer hereunder to prevent the breach or threatened breach of this

Section, in addition to any other legal remedies which may be available to Buyer.

(c) Seller shall: (i) promptly notify Buyer of any unauthorized possession, use or knowledge, or attempt thereof, of Buyer's Confidential Information by any person or entity that may become known to Seller, (ii) promptly furnish to Buyer full details of the unauthorized possession, use, or knowledge, or attempt thereof, and assist Buyer in investigating or preventing the recurrence of any unauthorized possession, use, or knowledge, or attempt thereof, of Buyer's Confidential Information, (iii) cooperate with Buyer in any litigation and investigation against third parties deemed necessary by Buyer to protect its proprietary rights, and (iv) use commercially reasonable steps to prevent a recurrence of any such unauthorized possession, use, or knowledge, or attempt thereof, of Buyer's Confidential Information. Seller shall bear the cost it incurs as a result of compliance with this Section.

(d) If (i) Seller's facilities are shared with a third party or third parties and (ii) any part of the business of Seller or any third party is now or is in the future competitive with Buyer's business, Seller shall develop a process, subject to Buyer's approval, to restrict access in any such shared environment to Buyer's Confidential Information so that Seller's Personnel providing services to such competitive business do not have access to Buyer's Confidential Information.

(e) While at Buyer's facilities or using Buyer's equipment, Seller and Seller Personnel shall observe and follow Buyer Policies, including those Buyer Policies relating to security of and access to Confidential Information, facilities, telephone systems, electronic mail systems, and computer systems.

(f) This Section shall not apply to information that is: (i) in the public domain; (ii) known to Seller at the time of disclosure; or (iii) rightfully obtained by Seller on a non-confidential basis from a third party.

### 15.3. Computer Access.

(a) If Seller is given access, whether on-site or through remote facilities, to any computer or electronic data storage system of Buyer or its affiliates in order to perform under a Purchase Contract, then Seller will use such access solely to perform such obligations and will not attempt to access any computer system, electronic file, software or other electronic services other than those specifically required to perform its obligations under the Purchase Contract.

(b) Seller will limit such access to those of its employees, agents and contractors who need to have such access in connection with the Purchase Contract, will advise the Buyer in writing of the name of each such personnel who will be granted such access, and will strictly follow all the Buyer's reasonably and normal security rules and procedures for use of the Buyer's electronic resources.

(c) All user identification numbers and passwords disclosed to Seller and any information obtained by Seller as a result of its access to, and use of, the Buyer's computer and electronic storage systems will be deemed to be, and will be treated as, Confidential Information of the Buyer.

(d) Seller will cooperate with the Buyer in the investigation of any apparent unauthorized access by Seller to the Buyer's or its Affiliates' computer or electronic data storage systems or unauthorized release of the Buyer's Confidential Information by Seller.

(e) Seller represents and warrants that its computers and electronic storage systems (collectively, "Seller's Computer System") will be free from any computer code or instructions that may disrupt, damage or interfere with Buyer's Computer System (as defined below), e.g. malicious code, viruses, etc.

(f) Buyer disclaims all warranties, express or implied, with respect to its computers and electronic storage systems (collectively, "Buyer's Computer System". Buyer further disclaims all liability and responsibility for any amount or kind of loss or damage that may result to Seller or a third party (including without limitation, any direct, indirect, punitive or consequential loss or damages, or any loss of income, profits, goodwill, data, contracts, use of money, or loss or damages arising from or connected in any way to business interruption, and whether in tort (including without limitation negligence), contract or otherwise) in connection with Buyer's Computer System in any way or in connection with the use, inability to use or the results of use of Buyer's Computer System, including but not limited to loss or damage to Seller's Computer System, and other equipment, software, data or property of Buyer on account of Seller' access to, or use of, Buyer's Computer System.

15.4. Survival: The obligations of this Article shall survive any expiration or termination of the Purchase Contract. This Section is in addition to, and will complement and supplement, any other agreement between the parties regarding confidentiality or security of information, whether effective before or after the effective date of the Purchase Contract, and will not be construed to impair any other right, duty, liability or remedy the parties may have under such agreements, all of which shall be cumulative.

## 16. RELATIONSHIP OF PARTIES

16.1. Non-Exclusivity: Seller may sell Product to third parties, provided, that Seller may not quote, sell, distribute, market or rebrand Products (i) that were made specifically to Buyer's unique and/or specific Specifications, and/or (ii) on which Buyer's brand appears or to which its brand label is affixed. In addition, if Buyer's customers are also Seller's customers, Seller agrees that it will not sell, distribute or market to such customers (either directly or indirectly through the manufacture of such finished products for resale by others) any products that are functionally equivalent or otherwise competitive with the Products. Buyer reserves the right to contract with other manufacturers and Sellers for the procurement of comparable products and services. Unless otherwise set forth in the Purchase Contract or agreed to in writing, Buyer is not obligated to any minimum purchase or future purchase obligations under the Purchase Contract.

16.2. Independent Contractors: The relationship between the parties is that of independent contractors. Nothing contained in the Purchase Contract shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.

16.3. Due Care: Seller will exercise due care not to damage or lose any system or data of Buyer. If any Products provided by Seller, including those provided by any affiliate or third party subcontractor to Seller, directly or indirectly causes any damage or loss to Buyer system or results in the loss of any Confidential Information or data, Seller will, at no additional charge to Buyer, use its best efforts to reduce the effects of such damage or loss and will be

responsible and liable to Buyer for the full amount of such damage or loss.

## 17. SELLER MANAGED INVENTORY.

If Buyer has elected to have Seller control the management, maintenance and replenishment of all or a portion of Buyer's stock of the Products on or off Buyer's premises (the "Managed Inventory"), then the following additional terms of this Article shall apply unless the parties otherwise agree in writing.

17.1. Minimum Inventory Levels. Seller is responsible replenishing all Products in the Managed Inventory, as necessary, to maintain in stock at the Buyer's designated warehouse or storage space the minimum number of units of saleable Products (the "Minimum Inventory Level") specified in the Purchase Contract. Buyer shall issue a blanket purchase order to Seller to remain effective during the term of the Purchase Contract. Buyer shall identify the blanket purchase order by inserting [BK/BE] in the BEG02 element of an 850 EDI data transmission. As Buyer sells, consumes or otherwise uses Product, it will so notify Seller and Seller will deliver to Buyer a monthly invoice with respect to the Products consumed during the prior month within ten (10) days of the month's end. Buyer shall return to Seller, at Seller's expense, quantities delivered in excess of the level necessary to maintain the Minimum Inventory Level. In the event a Product is not available for shipment at the time Buyer accepts an order for a Product from a customer, Seller shall pay all freight and shipping costs to deliver the Product directly to the customer when the Product becomes available.

17.2. Title to Managed Inventory: Notwithstanding anything to the contrary contained in these Terms, Seller shall retain title and risk of loss with respect to the Products in the Managed Inventory unless and until they are purchased by Buyer, at which time Seller shall transfer title to the Products to [Buyer/Buyer's customers]. Until the purchase of a Product from Managed Inventory and the transfer of title from Seller to [Buyer/Buyer's customers], Seller shall be responsible for paying all taxes, including personal property and inventory taxes, relating to the Managed Inventory.

17.3. Shrinkage Allowance: Buyer agrees to provide Seller with an aggregate shrinkage/damage allowance of two percent (2%) (or such other percentage as agreed to by the parties) of the total cost of goods attributable to Products handled by Seller in the previous 12 months.

## 18. PACKAGING SERVICES

If packaging services are to be provided pursuant to the Purchase Order, then the following additional terms of this Article shall apply unless the parties otherwise agree in writing.

18.1. Packaging. Buyer shall provide such packaging, inserts and/or labels to Seller in finished or camera-ready format, unless otherwise stated in the Purchase Contract.

18.2. Product Labeling Requirements. Seller will comply with Buyer labeling requirements set forth in the Purchase Contract and any applicable government regulations. Buyer may unilaterally require changes in the labeling of Products.

18.3. Visual Branding Language. Seller will design all Products to be consistent with the Specifications regarding badge and graphics for Products (if any).

## 19. CAPITAL EQUIPMENT

If capital equipment ("Equipment") is to be delivered pursuant to the Purchase Contract, then the following

additional terms of this Article shall apply unless the parties otherwise agree in writing.:

19.1. Definitions: For purposes of this Article, “Delivery Date/ Production Ready Date” means the date that Equipment shall be delivered, installed and production ready to the location designated in the Purchase Contract, and “Acceptance Date” means the date that the Equipment shall successfully complete any applicable acceptance testing described in the Purchase Contract.

19.2. Technological Developments: Seller shall promptly advise Buyer of all reasonably available technological advances which are known or become known to Seller over the course of performance of its obligations under the Purchase Contract which may result in the Equipment having added value (e.g. better performance, design, material, longer useful life, etc.) to Buyer.

19.3. Reviews Prior To Build: Seller shall review the design of the Equipment immediately upon execution or delivery, as applicable, of the Purchase Contract. Buyer shall have the option to review the design again during the design period to verify Seller’s progress and compliance with the Specifications. Prior beginning to construct or build the Equipment, Seller shall host a final design review on its own site. All designs, layout and detail drawings, etc. necessary for Buyer verification and review will be made available during these reviews. Upon request, Seller’s design engineers responsible for the design of any particular machine member will be made available to Buyer during these reviews for consultation and understanding of the Equipment’s design.

19.4. Reviews During Build: During the period Seller is building the Equipment, Buyer shall have the right of access to Seller’s plant as may be necessary to allow Buyer to review Seller’s progress, verify that the Equipment is being built so as to conform to the Specifications, and verify that a progress payment contingency has been completed. To expedite these reviews and maintain some continuity, the parties shall each nominate one person to act as their companies’ respective coordinators for information flow between companies.

19.5. Project Tracking Schedule: To enable Buyer to evaluate Seller’s progress in the design and build of the Equipment, Seller, within thirty (30) days after execution or delivery, as applicable, of the Purchase Contract, shall supply Buyer with a predetermined Project Tracking Schedule detailing events required during the project, indicating the planned duration of each event, and at Buyer’s request, will report bi-weekly to Buyer as to progress. This report will be given in such a manner as to enable Buyer to evaluate the progress being made by Seller in the major build steps as against the predetermined Project Tracking Schedule. Within ten (10) days from acceptance of any change order submitted pursuant to the Purchase Contract, Seller shall also submit for review by Buyer a revised Purchase Tracking Schedule indicating any changes resulting from the change order.

19.6. Acceptance/Performance Testing:

(a) Prior to shipment, Seller shall conduct a pre-shipment trial on each piece of Equipment to validate its performance. The length of the trial shall be agreed upon between Seller and Buyer. A representative from Buyer may be on-site to witness the pre-shipment trials.

(b) If Buyer determines that the Equipment delivered demonstrates its performance to be in accord with the Specifications, the Equipment will be accepted by the

Buyer. The acceptance of the Equipment shall in no way release Seller of any of its obligations under the Purchase Contract (warranty or otherwise).

(c) In the event that the acceptance procedure identifies areas of performance non-compliance which in Buyer’s discretion do not materially impair Buyer’s use of the Equipment in the short term, Buyer shall have the option to certify its provisional acceptance of the Equipment. In this case, Buyer shall itemize those areas in which the Equipment has failed to perform acceptably. Seller shall acknowledge the list and inform Buyer, in writing, as to when the non-conformance shall be corrected. Seller agrees that time is of the essence with regard to such corrective modifications. Buyer shall have the right to withhold payment of any funds normally due by virtue of acceptance. The amount of the payment withheld shall be determined by Buyer and shall be reasonably commensurate with the reduced value of the Equipment. Upon completion of the modifications by Seller, Seller shall notify Buyer of same and the acceptance procedures shall be rerun in their entirety should Buyer elect to do so. Should Seller fail to meet the corrective modification completion date, Buyer may, at its option, revoke its provisional acceptance and use any of its remedies provided under the Purchase Contract or by the appropriate Uniform Commercial Code.

19.7. Payment Schedule: The Purchase Price shall be paid according to the progress payment schedule outlined on the Purchase Contract. If the Purchase Contract does not set forth a progress payment schedule then, unless otherwise agreed to by the parties, the progress payment schedule is as follows:

10%	Down with Purchase Contract.
30%	Due at time of Shipment/Delivery.
30%	Due at Time of Production Ready Date.
30%	Final Payment after Buyer Acceptance Date

19.8. Production Delay. If the actual production ready date goes beyond the scheduled Production Ready Date set forth in the Purchase Contract a penalty of \$3,000.00 per day (or such other amount as agreed to by the parties) will be assessed for each day beyond the scheduled production ready date.

19.9. Use Of Carrier: Seller shall use any carrier designated in the Purchase Contract, however, in the event that the designated carrier is unavailable and without a delay in delivery Seller may substitute a carrier of a similar type and reputation, provided however, that Seller shall have first used its best efforts to notify Buyer of the substitution.

19.10. Buyer Option To Delay Delivery: Buyer has the right, at no additional charge, to postpone delivery of all or part of the Equipment for a maximum period of thirty (30) days. If Buyer exercises this right to delay delivery, Buyer has the right to commensurately delay its progress payment(s), if any, due upon shipment of the Equipment.

19.11. Security:

(a) To secure Buyer progress payments prior receipt of the Equipment, title to and first security interest in the Equipment, any work in progress and materials required for the execution of Seller’s obligations under the Purchase Contract, and any work Seller may subcontract in the support of the performance of its obligations thereunder, shall vest in Buyer to the extent Buyer has made progress payments according to the Purchase Contract.

(b) Seller hereby authorizes Buyer, as Seller's attorney in fact, to execute and deliver on behalf of Seller and file any such financing statements or other documents or instruments as may be necessary to protect, perfect or maintain the perfection of the security interest set forth above.

(c) Seller agrees to pay the bills of its suppliers promptly and to comply with reasonable requests for evidence of payment; provided, that Seller shall have the right to withhold payment to any of its suppliers who have furnished defective, substandard or incorrect materials or workmanship. Seller agrees to protect the interest of Buyer as defined in this Section by not permitting any attachments to the equipment of liens, encumbrances or claims for labor or material and to protect and hold Buyer harmless from all such claims, liens and encumbrances growing out of the design, manufacture, assembly, transit and installation of the equipment.

19.13. Seller Responsibilities: Notwithstanding any other terms and conditions in the Purchase Contract or in any other document, until the Products are received and accepted by Buyer, Seller retains all risk and responsibility for its proper handling and shipment, and for any by-product or waste stream there from. Seller shall, and hereby does, indemnify and hold harmless Buyer, its officer, directors, employees and agents from all claims, demands, suits or actions, environmentally related or otherwise, of any nature whatsoever, including reasonable attorney's fees and expenses, arising from Seller's performance of any specified, required or requested services for, or the furnishing of Equipment to Buyer. Seller agrees to defend Buyer, at Buyer's request against any such claim, demand or suit.

## 20. MANUFACTURING, TOOLING AND OTHER CUSTOM WORK.

If Seller's performance of the Purchase Order involves any manufacturing, tooling or other custom work, then the following additional terms of this Article shall apply unless the parties otherwise agree in writing.

20.1. Quality: Seller shall be responsible for the performance of all activities affecting quality and schedule including those of its suppliers. Buyer reserves the right to review the quality assurance and quality control procedure components of Seller's internal quality system and the procedures used to meet the quality requirements for the Products (the "Quality Plan"). Seller shall ensure that the quality and inspection requirements of the Purchase Contract are made a part of its purchase orders to its suppliers for all goods or services which are used in the equipment purchased or services provided under the Purchase Contract. Seller shall obtain and submit Quality Plans as required from its suppliers.

20.2. Reviews: During the design period, Seller shall make the design available for Buyer's review to verify Seller's progress and compliance with the Specifications. Prior to the release of the design to build, Seller shall host a final design review on its own site. Seller shall make all designs, layout and detail drawings, etc., available during these reviews and, at Buyer's request, Seller shall likewise make its design engineers responsible for the design of any Products or component of the Products available during these reviews for consultation and understanding of the Product's design.

20.3. Inspections: Upon five (5) days' notice, Seller shall permit representatives of Buyer to visit and inspect any facility at which Product is produced and packaged, to confirm Seller's conformity with the Specifications and the compliance of Seller and of the Products manufacturing process with both the Quality Plan and all existing and future Laws. (If for any

reason Seller changes the date for a scheduled inspection, Seller shall immediately notify Buyer's authorized representative of such schedule change.) Buyer's inspection and witnessing of testing, or lack of inspection or witnessing of testing, shall in no way release Seller from any obligations related to the Purchase Contract. If Buyer's representatives conclude that the Products or the manufacturing process fails to conform to the Purchase Contract, Specifications, Quality Plan or Laws, Seller shall use its best efforts to resolve the issue as promptly as possible. Notwithstanding the foregoing, if Seller is unable to resolve the issue to Buyer's full satisfaction as promptly as desired by Buyer, Buyer may, in its sole discretion, immediately terminate the Purchase Contract.

20.4. Project Tracking Schedule: Complete and accurate information is required to maintain the overall schedule for any project pursuant to the Purchase Contract. Accordingly, within thirty (30) days of execution or issuance, as applicable, of the Purchase Contract, Seller shall supply Buyer with a Project Tracking Schedule detailing events required during the project, indicating the planned duration of each event. Thereafter, Seller will report bi-weekly to Buyer as to progress, and shall provide the following: (i) periodic performance, financial, utilization, compliance and status reports as requested by Buyer; and (ii) any other reports set forth in the Purchase Contract. Seller shall provide such reports every fourteen (14) days thereafter, unless the parties agree in writing to a different schedule of reporting. The format and content of such reports shall be as reasonably requested by Buyer. In addition, Seller shall provide ad hoc reports as requested by Buyer or its agents, representatives and regulators. Within ten (10) days of execution of any change order, Seller shall submit for review by Buyer a revised Project Tracking Schedule indicating any changes resulting from the change order.

## 21. MATERIALS, TOOLING AND OTHER PROPERTY

21.1. Material, Equipment, Tooling and Facilities: Unless otherwise set forth in the Purchase Contract or agreed in writing, Seller will supply all materials, equipment, tools, molds, patterns, jigs, dies, templates, drawings, licenses, sources of supply, and facilities required to perform the Purchase Contract.

### 21.2. Buyer Property:

(a) Buyer shall at all times remain the sole owner of any and all materials, equipment, tools, molds, patterns, jigs, dies, templates, or drawings furnished to Seller by Buyer, or paid for by Buyer (directly or indirectly), or to be delivered by Seller under the Purchase Contract, and any replacement thereof or any materials affixed or attached thereto (collectively, "Buyer Property"), and Supplier will do all acts and things and execute any document as may be required by Buyer to ensure that such ownership is and shall remain with Buyer at all time.

(b) Buyer Property shall be subject to removal from Seller's or subcontractor's premises at any time by Buyer without further charges of any nature, and Buyer shall have the absolute right to enter Seller's or its subcontractor's premises at any time to inspect or remove the Buyer Property. Seller will do all things as may be necessary to ensure, at all times, that Buyer Property remain movable property and are not affixed in any way to Seller's premises as to become or be deemed to become real property.

(c) Seller shall at its expense maintain all Buyer Property in good condition and repair, replacing any such items if necessary, including repairs or replacements on account of ordinary wear and tear.

(d) Seller shall not to move Buyer Property or any portion thereof for any other purpose than for returning same to Buyer or as otherwise instructed by Buyer, in accordance with the Purchase Contract.

(e) Seller acknowledges that Buyer Property has been provided for Seller's own use in manufacturing Products for Buyer and not for a commercialization purpose, resale or any other purpose. Except with Buyer's prior written consent, Seller shall not use Buyer Property for any purpose other than in the performance of work for Buyer. Seller shall not hold itself out as owner of Buyer Property nor use Buyer Property as security for any indebtedness, nor copy or duplicate the design of Buyer Property except as replacements thereof for Buyer's sole use.

(f) Buyer grants no warranty whatsoever regarding Buyer Property which is expressly excluded and Seller acknowledges that it is using Buyer Property at its own risks.

(g) All Buyer Property shall be kept insured by Seller at Seller's expense against risk of fire and other perils and with extended coverage in an amount equal to the cost of replacement, and Seller shall furnish Buyer with certificates of such insurance listing Buyer as an additional named insured. Such insurance will not be canceled or changed until after thirty (30) days written notice of such cancellation or change is delivered to Buyer.

(h) Buyer Property shall be clearly marked or otherwise designated with permanent labeling as the property of Buyer, and at no additional cost to Buyer, shall be delivered to Buyer, properly packaged for shipment CIP – Destination. Seller's premises, promptly upon Buyer's request. Such items shall not be removed from their usual location on Seller's premises without Buyer's written consent.

## **22. WORK ON BUYER'S PREMISES.**

If Seller's performance of the Purchase Order involves any work or operations by Seller and/or its subcontractors upon property owned or controlled by Buyer, then the following additional terms of this Article shall apply unless the parties otherwise agree in writing.

**22.1. Seller's Performance:** Seller shall perform the work in a prompt, efficient and workmanlike manner so as to promote the general progress of the entire project, and shall not, by delay or otherwise, interfere with or hinder the work of Buyer.

**22.2. Seller Personnel:** Seller acknowledges and agrees that any employee, subcontractor, representative or agent that Seller brings on-site to perform services on Buyer's premises ("Seller Personnel") is not an employee of Buyer. Seller acknowledges and agrees that all matters of compensation and benefits (including pension plans, profit sharing plans, life insurance plans, medical plans, cafeteria plans, disability plans, severance plans, vacation or sickness arrangements, bonus or stock option arrangements, or any other compensation or incentive compensation arrangements) of any nature whatsoever for Seller Personnel are solely matters between Seller and Seller Personnel. Seller Personnel shall not be entitled to workers' compensation, unemployment insurance, vacation time, vacation pay, sick leave, retirement benefits, health, disability or life insurance, social security benefits or any other employee benefits from Buyer. Seller acknowledges and agrees that it shall withhold and submit to the applicable governmental authorities all applicable taxes from Seller Personnel's paychecks. At no time shall any Seller Personnel represent himself or herself as an employee or

representative of Buyer. Seller shall defend, indemnify and hold Buyer and its employees, directors, officers, principals and agents harmless against any and all claims, demands or causes of action of every kind and character arising from or in connection with any claims for (i) benefits that that Buyer makes available to its employees, (ii) co-employment or relating to the employment relationship (including termination) with existing, past and prospective employees of Seller and Seller Agents; and (iii) taxes, penalties and interest made by any governmental authority arising out of any payments that Seller makes to Seller Personnel which are not otherwise the responsibility of Buyer under the Purchase Contract.

**22.3. Conduct on Premises:** Seller is responsible for the actions of all Seller Personnel and for their supervision, direction and control. At all times while on Buyer premises, Seller Personnel shall obey all applicable laws and regulations, as well as all Buyer rules and regulations and all instructions of authorized Buyer representatives, and shall not engage in inappropriate conduct, such as, but is not limited to: (i) failure to follow Buyer rules and regulation, or the instructions of Buyer authorized representatives; (ii) use or possession of alcohol, illegal drugs or any other controlled substance, except for approved medical purposes; (iii) use or possession of a weapon of any sort; (iv) harassment, threats or disorderly, disruptive or violent behavior, or (v) any other behavior which may reflect adversely on Buyer business or reputation.

**22.4. Background Checks, Drug Tests:** Buyer may in its discretion require any Seller Personnel to undergo one or more criminal or other background checks, drug tests and similar tests. Seller hereby consents to the foregoing and agrees that Buyer need not allow Seller or such employees on-site until it has received satisfactory results of such checks and tests.

**22.5. Insurance:** Seller and/or its subcontractors shall maintain and carry such public liability, bodily injury, property damage, contractual liability injury and contractual property damage, and employee's liability and compensation insurance and automotive and motor vehicle liability insurance in amounts, policies, and in companies satisfactory to Buyer, as protect, in the sole judgment of Buyer, Buyer from any claim, loss, or damage which may result in any way from any act or omission of Seller, its agents, employees and/or subcontractors and from any claims under applicable worker's compensation laws or regulations and Seller shall furnish Buyer with such certifications of said insurance as Buyer may request. All insurance policies obtained by Seller and Seller's agents and subcontractors shall contain a clause stating the name and address of Buyer and that Buyer is to be notified in writing by the insurer at least ten (10) days prior to cancellation of, or any material change in, the policy.

**22.6. Limitation of Liability:** BUYER SHALL NOT BE LIABLE TO SELLER OR SELLER PERSONNEL OR ANY OTHER PERSON FOR PROPERTY DAMAGE, PERSONAL INJURY OR DEATH ARISING IN ANY MANNER FROM OR IN THE COURSE OF THEIR PRESENCE OR THE PRESENCE OF PERSONS THEY BRING TO BUYER PREMISES UNDER THE PURCHASE CONTRACT.

## **23. MISCELLANEOUS**

**23.1. Reports:** Seller shall provide such periodic reports as indicated in the Purchase Contract, which may include but are not limited to those related to performance, finances, utilization, compliance and status. The language, format, media, content, and frequency of such reports shall be as set forth in the Purchase Contract or as otherwise reasonably requested by Buyer. Seller shall also provide ad hoc reports as requested by Buyer or its agents.

23.2. Cooperation: Buyer may engage a third party to manage all or part of Purchase Contract on Buyer's behalf at Seller's expense. Seller shall cooperate and interact with any such third parties as requested by Buyer, including by providing documentation, data and other information relating to the Products to the extent reasonably necessary for the performance of services by such third party. Buyer may provide such documentation, data or other information directly without Seller's consent, subject to protection of Seller's Confidential Information. Buyer agents and third party contractors shall be subject to reasonable confidentiality requirements.

23.3. Liens: Seller agrees to indemnify, hold harmless and defend Buyer from and against all laborers', materialman's, mechanics', or other liens arising from the performance of Seller's obligations under the Purchase Contract and shall keep Buyer's premises free from all such claims, liens, and encumbrances. To the full extent permitted by applicable Laws, and to the extent of payments made or processed, Seller, for itself and all of its suppliers, waives all rights of lien against the property and premises of Buyer, and Seller shall provide Buyer on demand appropriate waivers and release of all liens, charges and encumbrances in form any and content satisfactory to Buyer from Seller and from all those who performed services or furnished materials under the Purchase Contract. If any lien or claim remains unsatisfied at completion or termination of the Purchase Contract, Seller shall promptly refund to Buyer all costs incurred by Buyer in extinguishing such lien or claims including any cost of filing and attorneys' fees.

23.4. Force Majeure: Neither party shall be liable to the other for any delay or failure in performing its obligations under the Purchase Contract to the extent that such delay or failure is caused by an event or circumstance that is beyond the reasonable control of that party, without such party's fault or negligence, and which by its nature could not have been foreseen by such party or, if it could have been foreseen, was unavoidable ("Force Majeure Event"). Force Majeure Events include, but are not limited to, acts of God or the public enemy, government restrictions, floods, fire, earthquakes, explosion, epidemic, war, invasion, hostilities, terrorist acts, riots, strike, embargoes or industrial disturbances. Seller's economic hardship or changes in market conditions or equipment breakdowns not due to Force Majeure Events are not considered Force Majeure Events. Seller shall use all diligent efforts to end the failure or delay of its performance, ensure that the effects of any Force Majeure Event are minimized and resume performance under the Purchase Contract. If a Force Majeure Event prevents Seller from carrying out its obligations under the Purchase Order for a continuous period of more than twenty (20) days, Buyer may terminate the Purchase Contract (or affected portion thereof) immediately, without liability, by giving written notice to Seller.

23.5. Limitation of Liability: Nothing in the Purchase Contract shall exclude or limit (i) Seller's liability with respect to its defense and indemnification obligations under the Purchase Contract, or (ii) Seller's liability for fraud, personal injury or death caused by its negligence or willful misconduct. An action by Seller arising out of or related to the Purchase Contract shall be commenced within one (1) year from the date the right, claim, demand or cause of action shall first occur, or be barred forever.

23.6. Liquidated Damages. Seller and Buyer hereby agree that any liquidated payments which may be due under a Purchase Contract are not intended by the parties as penalty payments or as a sole remedy, but are instead intended as

liquidated damages to compensate Buyer, in part, should Seller fail to meet its obligations hereunder. Furthermore, the parties agree that these amounts are reasonable and appropriate because of the difficulty, time and cost of determining Buyer's actual damages resulting from such failure.

23.7. Assignment: Change of Control:

(a) Seller shall not assign, transfer, delegate, encumber or subcontract any of its rights or obligations under the Purchase Contract, including by operation of law (for example by merger or consolidation) without the prior written consent of Buyer. Any purported assignment or delegation in violation of this Section shall be null and void. No assignment or delegation shall relieve Seller of any of its obligations hereunder. Buyer may at any time assign, transfer or subcontract any or all of its rights or obligations under the Purchase Contract without Seller's prior written consent. All of the covenants, conditions and obligations contained in the Purchase Contract shall be binding upon and shall inure to the benefit of the respective successors and assignees of Buyer and, subject to the restrictions of this Section, Seller.

(b) Seller agrees to provide to Buyer notice of any information regarding any transaction which result in a partial or total change of ownership or control of Seller's business, including details of the transaction and any conditions placed on the transaction. For purposes of this Section "transaction" is construed broadly and includes, without limitation, sales, mergers, acquisitions, and devises.

23.8. Governing Law: All matters arising out of or relating to the Purchase Contract will be governed by and construed in accordance with the laws of the State of New York, without giving effect to the choice of law provisions thereof. Neither the United Nations Convention on Contracts for the International Sale of Products (CISG) nor the Convention on the Limitation Period for the International Sale of Products shall be applicable to the Purchase Contract or otherwise be used in the interpretation of these Terms.

23.9. Jurisdiction: Any action brought by either party hereto concerning, or relating to, the Purchase Contract shall be brought in the federal or state courts (as applicable) within the State of New York; provided, however, that if (i) the defendant in any such action (A) is not subject to the jurisdiction of the U.S. courts, and (B) refuses to be subject to the jurisdiction of U.S. courts, or (ii) Buyer so elects, then any action shall be finally settled by arbitration in London, England under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with those Rules. The arbitration proceedings shall be conducted, and the award shall be rendered, in the English language. Judgment on any award rendered by the arbitrators may be entered in any court having jurisdiction, and the parties acknowledge and agree that any judgment would be enforceable in their respective countries pursuant to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. The arbitrators shall determine the dispute in accordance with the laws of the State of New York. The award of the arbitrators shall be final and binding upon the parties. The arbitrators shall have the authority to award equitable relief, attorneys' fees and costs and other relief as may be appropriate.

23.10. Continued Performance: Seller acknowledges that the timely and complete performance of its obligations pursuant to the Purchase Contract is critical to the business and operations of Buyer. Accordingly, in the event of a dispute between Buyer and Seller, Seller shall continue to so

perform its obligations under the Purchase Contract in good faith during the resolution of such dispute unless and until the Purchase Contract expires or terminates.

23.11. Notices: All notices, request, consents, claims, demands, waivers and other communications under the Purchase Contract (each, a "Notice") shall be in writing and addressed to the parties at the addresses set forth in the Purchase Contract or to such other address that may be designated by the receiving party in writing. All Notices shall be delivered by personal delivery, nationally recognized overnight courier (with all fees pre-paid), facsimile (with confirmation of transmission) or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in the Purchase Contract, a Notice is effective only (i) upon receipt of the intended receiving party, and (ii) if the party giving the Notice has complied with the requirements of this Section.

23.12. Buyer's Consent: All consents and approvals of Buyer required by the terms of a Purchase Contract may be withheld at Buyer's sole discretion unless otherwise stated.

23.13. Severability: If any term or provision of the Purchase Contract is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of the Purchase Contract or invalidate or render unenforceable such term or provision in any other jurisdiction.

23.14. Language. The only official version of a Purchase Contract, and all communications related to the Purchase Contract shall be in the English language

23.15. Survival: Provisions of the Purchase Contract which by their nature should apply beyond their terms will remain in force after any termination or expiration of the Purchase Contract.

23.16. Electronic Processing: Unless otherwise agreed to by Buyer and Seller, the parties shall process Purchase Orders and other related documents (including invoices and ship notices) and installment payments and advances in respect of all monetary obligations between Buyer and Seller electronically, through electronic data interchange (EDI), either directly or through a third party provider satisfactory to both parties. Each party shall be responsible for its own costs, including the costs of any provider with which it contracts. All EDI transactions shall be in accordance with standards approved by the Accredited Standards Committee X 12 (ASCX12), and in accordance with the instructions and procedures required by Buyer. Each EDI invoice (or ship notice, in the absence of an invoice) shall contain an appropriate, agreed upon code, symbol or statement affirming Seller's compliance with all applicable requirements of the Fair Labor Standards Act, as amended and of the regulations and orders of the United States Department of Labor issued pursuant thereto. Any electronic fund transfer and wire transaction shall be in accordance with National Automated Clearing House Association (NACHA), rules, and in accordance with the instructions and procedures established by Buyer from time to time. Neither party shall be liable to the other for any special, incidental, exemplary or consequential damage arising from or as result of any delay, omission or error in the electronic transmission of receipt of any documents, even if the other party has been advised of the possibility of such damages.