

## FUJI ELECTRIC OF CORP. OF AMERICA (REV 1): TERMS AND CONDITIONS FOR SALE OF PRODUCTS

**NOTICE:** These Terms and Conditions shall apply to and be incorporated by reference into Seller's quotations, purchase orders, and invoices regarding the sale of Products to Buyer. Seller's agreement to sell any Products is expressly conditioned upon Buyer's acceptance of these Terms and Conditions. Any additional or different terms proposed by Buyer are expressly objected to and will not be binding upon Seller unless agreed to in writing by Seller; moreover, no pre-printed facility entry form shall modify these Terms and Conditions even if signed by Seller's representative. Further, by accepting any Products hereunder, Buyer specifically waives any additional or different terms and conditions. Any oral or written representation, warranty, course of dealing or trade usage not contained in these Terms and Conditions or the Contract shall not be binding on Seller. Any order to perform work and Seller's performance of work shall constitute Buyer's acceptance of these Terms and Conditions. Unless otherwise specified in the quotation or Contract, any quotation by Seller shall expire 30 days from its date and may be modified or withdrawn by Seller at any time. Seller's acceptance of Buyer's purchase orders must be specifically agreed upon in writing by an authorized representative of Seller.

**1. Definitions.** Unless Seller otherwise agrees:

"Buyer" means the entity to which Seller is providing Products under the Contract.

"Contract" means either the contract agreement signed by both parties or the purchase order signed by Buyer and accepted by Seller in writing, for the sale of Products, together with these Terms and Conditions and any other documents incorporated therein by reference, such as relevant addenda under Article 15, the final quotation, the agreed scope(s) of work, and Seller's order acknowledgement as well as any changes under Article 17.

"Contract Price" means the agreed amount stated in the Contract for the sale of Products, including adjustments (if any) in accordance with the Contract.

"Hazardous Materials" means any chemical, substance, material or emission that is or may be regulated, governed, listed or controlled pursuant to any international, national, federal, provincial, state or local statute, ordinance, order, directive, regulation, judicial decision or other legal requirement applicable to Site as a toxic substance, hazardous substance, hazardous material, dangerous or hazardous waste, dangerous good, pesticide, radioactive material, regulated substance or any similar classification, or any other chemical, substance, emission or material, including, without limitation, petroleum or petroleum-derived products or by-products, regulated, governed, listed or controlled or as to which liability is imposed on the basis of potential impact to safety, health or the environment pursuant to any legal authority of the United States ("U.S.") or the country of the Site.

"Products" means all equipment, parts, materials, supplies, software, and other goods Seller has agreed to supply to Buyer under the Contract, including Refurbished Parts.

"Refurbished Parts" means used Products that have been repaired or reconditioned by Seller for resale.

"Seller" means Fuji Electric Corp. of America.

"Site" means the premises where Products are used, not including Seller's premises.

"Terms and Conditions" means these Terms and Conditions for Sale of Products.

**2. Payment.** Except as otherwise agreed to by Seller in writing, the following payment terms apply:

2.1 Buyer shall pay Seller all invoiced amounts in U.S. dollars and without right of set-off. Seller shall be entitled to payment of all charges associated with Seller's delivery of Products. Buyer shall pay Seller all invoiced amounts in U. S. dollars within 30 days from date of invoice. Buyer shall pay a monthly late payment charge computed at the rate of 1.5%, or the maximum interest rate permitted by applicable law, whichever is less, on any past-due amount for each calendar month (or fraction thereof) that the payment is overdue and all costs of Seller's collection efforts including, without limitation, all collection fees, reasonable attorneys' fees, and court costs. Should Buyer dispute any invoice, Buyer shall pay the full amount of outstanding invoice by the due date and within 30 days from the date of invoice, provide Seller a written explanation outlining the basis for the dispute. Failure to give such notice shall constitute Buyer's unqualified acceptance of the invoice and waiver of any such claims. Seller shall investigate any disputed invoice and within a reasonable time, notify Buyer of the outcome of such investigation.

2.2 Upon request from Seller, Buyer shall establish acceptable payment security in the form of an irrevocable, unconditional, sight letter of credit or bank guarantee allowing for pro-rata payments for partial Product deliveries, storage, export shipment, price adjustments, cancellation or termination, and all other payments due from Buyer under the Contract subsequent to down payments ("Payment Security"). The Payment Security shall be (a) issued or confirmed by a bank that is acceptable to Seller in its sole discretion, (b) payable at the counters of such acceptable bank or negotiating bank, (c) opened sixty (60) days prior to the earliest scheduled Products shipment, and (d) remain in effect until the latest of ninety (90) days after the latest scheduled Products shipment or final payment has been received. Buyer shall pay all banking charges including confirmation as well as all costs of extending Payment Security, when required. Seller will not begin performance until the Payment Security has been accepted by the Seller and has become operative. Buyer will increase the amounts or extend the validity period(s) and make appropriate modifications to any Payment Security within five business days of Seller's notification that such increase or extension is necessary to provide for payments becoming due. Seller shall be entitled to a day for day extension of the Contract schedule for each day delay in receiving Progress Payments or Payment Security acceptable to Seller.

2.3 If at any time Seller reasonably determines that Buyer's financial condition or payment

history does not justify the continuation of Seller's performance, Seller shall be entitled to, including but not limited to, restructure payments requiring full or partial payment in advance, request additional forms of Payment Security, suspend Contract fulfillment or terminate the Contract and charge Buyer a reasonable termination fee.

**3. Taxes and Duties.** Buyer agrees to pay directly when due and payable all taxes, surcharges, duties, fees, or other charges of any nature (including, but not limited to, ad valorem, consumption, excise, franchise, gross receipts, import, license, property, sales, service, stamp, storage, transfer, turnover, use, value-added, and other governmental taxes or assessments, and any and all items of withholding, deficiency, penalty, addition to tax, interest, or assessment related thereto), arising from Seller's performance of its obligations hereunder or Buyer's payment for work hereunder ("Buyer Taxes"), excluding taxes based on Seller's net income or any withholding or other payroll taxes related to Seller's employees. All payments due and payable by Buyer to Seller hereunder shall be made in the full amount of the Contract Price, free and clear of all deductions and withholding for Buyer Taxes. If Buyer deducts or withholds Buyer Taxes, Buyer shall pay additional amounts to Seller to cause the amounts Seller actually receives, net of deducted or withheld Buyer Taxes, to equal the full Contract Price. Buyer shall provide to Seller within one month of payment, accurate official receipts from the appropriate governmental authority for deducted or withheld taxes.

**4. Deliveries; Title Transfer; Risk of Loss; Storage.**

4.1 Seller shall deliver Products to Buyer EXW Seller's facility, place of manufacture or warehouse (Incoterms 2010). Buyer shall pay all delivery costs and charges or reimburse Seller for shipping charges plus 25%. Except for those obligations that are consistent with Incoterms 2010 specifically stated above, Seller shall not be liable in any claim asserted by Buyer with respect to delivery. Partial deliveries will be permitted. If Products delivered do not correspond in quantity, type, or price to those itemized in the invoice for the shipment, Buyer will so notify Seller in writing within 10 days after delivery of the shipment to Buyer. Seller may deliver any or all Products in advance of the delivery schedule. Delivery times are approximate and are dependent upon prompt receipt by Seller of all materials, Payment Security and information necessary to proceed with the work without interruption. Seller will use reasonable efforts to fill all orders according to the agreed schedule and quantity, but unless otherwise agreed by Seller in writing, failure to deliver Products by any such deadline shall not entitle Buyer to rescind orders, to terminate the Contract, or to any compensation or damages of any kind.

4.2 Title to Products shall pass to Buyer upon payment in full pursuant to Article 2 herein. Notwithstanding the foregoing, for any software provided by Seller hereunder, only the license to the software transfers as set forth herein.

4.3 In all events risk of loss or damage shall transfer to Buyer when the Products are picked up from Seller's facility, place of manufacture or warehouse.

4.4 If any Products cannot be shipped to or received by Buyer when ready due to any cause not attributable to Seller, Seller will notify Buyer and then may ship Products to a storage facility, including a facility within the place of manufacture, or to an agreed freight forwarder, at Buyer's sole expense. If Seller places Products in storage or if Products are detained at any port, the following conditions shall apply: (i) all risk of loss or damage shall immediately pass to Buyer if they had not already passed and delivery shall be deemed to have occurred; (ii) any amounts otherwise payable to Seller upon delivery or shipment shall be payable upon presentation of Seller's invoices; (iii) all expenses and charges incurred by Seller, such as for preparation for and placement into storage, handling, inspection, preservation, insurance, storage, demurrage, removal and any taxes shall be payable by Buyer upon submission of Seller's invoices; and (iv) when conditions permit and upon payment of all amounts due hereunder, Seller shall resume delivery of Products to the originally agreed point of delivery.

**5. Excusable Delays.** Seller shall not be liable in breach or default of its obligations under the Contract to the extent performance of such obligations is delayed or prevented, directly or indirectly, due to causes beyond its reasonable control, including, but not limited to, acts of God, fire, terrorism, war (declared or undeclared), epidemics, material shortages, insurrection, acts (or omissions) of Buyer or Buyer's suppliers or agents, any act (or omission) by any governmental authority, strikes, labor disputes, accidents, transportation shortages or delays, shortage or inability to obtain materials or components, supplier or vendor non-performance, embargo, or government act. The delivery or performance date

shall be extended for a period equal to the time lost by reason of delay, plus such additional time as may be reasonably necessary to overcome the effect of the delay. If Seller is delayed by any acts (or omissions) of Buyer, or Buyer's other contractors or suppliers, Seller shall be entitled to an equitable price and schedule adjustment.

#### **6. Compliance with Laws, Codes and Standards.**

6.1 The Contract Price, delivery and performance dates and any performance guarantees will be equitably adjusted to reflect additional costs or obligations incurred by Seller resulting from a change after Seller's proposal date in industry specifications, codes, standards, applicable laws or regulations.

6.2 Seller's obligations are conditioned upon Buyer's compliance with all U.S. and other applicable trade control laws and regulations. Buyer shall not transship, re-export, divert or direct Products other than in and to the ultimate country of destination specified on Buyer's order or declared as the country of ultimate destination on Seller's invoice.

6.3 Notwithstanding any other provisions, Buyer shall timely obtain any required authorization, such as an export license, import license, foreign exchange permit, work permit or any other administrative authorization, even if Seller applies for the authorization.

#### **7. Warranty.**

7.1 Provided that Buyer fulfills its payment obligations to Seller, Seller warrants to Buyer that, during the warranty period, Products shall be shipped free from defects in materials, workmanship, and title. Any items not manufactured by Seller shall carry only the warranty that the original manufacturers provide, and Seller gives no warranty on behalf of the manufacturers of such items. Furthermore, used Products other than Refurbished Parts shall be sold "as is."

7.2 Unless otherwise stated in the Contract, the warranty period for Products shall commence upon delivery and end one year from first use or 18 months from delivery, whichever occurs first, except that the warranty period for any software provided by Seller hereunder shall be 90 days from delivery.

7.3 If Products do not meet the above warranties, Buyer shall promptly notify Seller in writing within ten days after discovery and within the warranty period and shall follow all reasonable instructions of Seller. Seller shall, with reasonable speed at Seller's option, repair or replace the defective Products. If in Seller's reasonable judgment the Product cannot be repaired or replaced, Seller shall refund or credit monies paid by Buyer for that portion of Products that do not meet the above warranties. Any repair or replacement by Seller hereunder shall not extend the applicable warranty period. Seller shall, at its sole discretion, determine the specifications of any test to determine the presence of a defect. Seller shall have no liability for defects that arise after the warranty period has expired. If Products alleged by Buyer to not meet the above warranties are (i) not under warranty, (ii) determined not to be defective, or (iii) defective due to any cause or condition not covered under the warranties provided herein, Buyer agrees to reimburse Seller for all reasonable expenses incurred in traveling to the Site or in shipping, handling, or inspecting such Products.

7.4 Buyer shall bear the costs of access (including removal and replacement of systems, structures or other parts of Buyer's facility), de-installation, decontamination, re-installation and transportation of defective Products to Seller and back to Buyer.

7.5 These warranties and remedies are conditioned upon (a) the proper storage, installation, operation, and maintenance of Products and conformance with the proper operation instruction manuals provided by Seller or its suppliers or subcontractors, (b) Buyer keeping proper records of operation and maintenance during the warranty period and providing Seller access to those records, and (c) modification or repair of Products performed only by Seller or a third party authorized by Seller in writing. Seller does not warrant Products or any repaired or replacement parts against normal wear and tear or damage caused by damage in transit, misuse, negligence, accident, or use against the advice of Seller. Any modification or repair of any Products not authorized by Seller shall render the warranty null and void.

7.6 Article 7 provides the exclusive remedies for all claims based on the failure of or defect in Products, whether the failure or defect arises before, during or after the applicable warranty period and whether a claim, however described, is based on contract, warranty, indemnity, tort, or extra contractual liability (including negligence), strict liability or otherwise. The warranties provided in Article 7 are exclusive and are in lieu of all other warranties, conditions and guarantees whether written, oral, implied or statutory. SELLER HEREBY DISCLAIMS (AND BY ACCEPTING THE PRODUCTS, BUYER HEREBY WAIVES) ANY AND ALL OTHER STATUTORY, EXPRESS OR IMPLIED WARRANTIES, REMEDIES OR CONDITIONS WITH RESPECT TO THE PRODUCTS INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WARRANTIES AGAINST HIDDEN OR LATENT DEFECTS, WARRANTIES OF NONINFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY RIGHTS, COMPLIANCE WITH ANY RULES OR PRACTICES ESTABLISHED UNDER APPLICABLE LAWS, REGULATIONS OR STANDARDS, OR ANY OTHER EXPRESS, STATUTORY OR IMPLIED WARRANTY OF ANY KIND ARISING OUT OF THE SALE, DELIVERY, USE OR PERFORMANCE OF THE PRODUCTS OR ARISING OUT OF COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE.

#### **8. Limitation of Liability.**

8.1 The total liability of Seller for all claims arising out of or relating to the performance or breach of the Contract or any Products shall not exceed (a) the Contract Price or (b) if this Contract is in the form of a blanket or master agreement under which Buyer places an order with Seller for Products to be purchased, (i) the final price of the particular order under which the specific Products giving rise to the claim are supplied or performed or (ii) ten thousand U.S. dollars (U.S. \$10,000) if the claim is not part of any particular order. Seller's liability shall terminate upon the expiration of the applicable warranty period, provided that Buyer may enforce a claim that accrued prior to that date by commencing an action before the expiration of the applicable statute of limitations or repose, but not later than one year after the expiration of such warranty period.

8.2 SELLER SHALL NOT BE LIABLE FOR LOSS OF PROFIT OR REVENUES, LOSS OF PRODUCT, LOSS OF USE OF PRODUCTS OR SERVICES OR ANY ASSOCIATED EQUIPMENT, LOSS OR INTERRUPTION OF BUSINESS, LOSS OF OPPORTUNITY, LOSS OF GOODWILL, DAMAGE TO REPUTATION, COST OF CAPITAL, COST OF COVER OR REPLACEMENT, DOWNTIME COSTS, INCREASED OPERATING COSTS, CLAIMS OF BUYER'S CUSTOMERS FOR SUCH DAMAGES, OR FOR ANY OTHER SPECIAL, CONSEQUENTIAL, INCIDENTAL, INDIRECT, PUNITIVE OR EXEMPLARY DAMAGES HOWEVER CAUSED.

8.3 If Buyer is supplying Products to a third party or using products or at a facility owned by a third party, Buyer shall require the third party to agree to be bound by this Article 8. If Buyer does not obtain this agreement for Seller's benefit or if the agreement is found void or unenforceable, Buyer shall indemnify, defend, and hold Seller harmless from and against any and all liability arising out of claims made by the third party in excess of the limitations and exclusions of this Contract.

8.4 Seller shall not be liable for any advice or assistance that is not required under the Contract or any representation or warranty of any third party.

8.5 For the purposes of Article 8, the term "Seller" shall mean Seller, its affiliates, subcontractors, and suppliers of any tier, and their agents and employees, individually or collectively.

8.6 The limitations and exclusions in Article 8 shall apply regardless of whether a claim is based in contract, warranty, indemnity, tort, or extra-contractual liability (including negligence), strict liability, or otherwise.

8.7 Buyer's and Seller's rights, obligations and remedies arising out of or relating to Products are limited to those rights, obligations, and remedies described in this Contract. Article 8 shall prevail over any conflicting or inconsistent terms in the Contract, except to the extent that such terms further restrict Seller's liability.

#### **9. Dispute Resolution, Governing Law.**

9.1 Any dispute arising out of or in connection with the Contract, including any question regarding its existence, validity, or termination, shall be resolved in accordance with this Article 9 and will be settled, if possible, by negotiation of the parties. If a dispute is not resolved by negotiations, either party may, by giving written notice, refer the dispute to a meeting of appropriate higher management of each party, to be held within twenty (20) business days after giving notice. If the dispute is not resolved within thirty (30) business days after the date of the meeting of higher management, or any later date to which the parties may agree, either party may submit any claim, legal action or proceeding (including without limitation claims for set-off or counterclaim) regarding the dispute to the U.S. District Court for the Southern District of New York, or in the event that such court lacks jurisdiction to hear the claim, in the appropriate state courts of New York County, New York, and the parties irrevocably consent to the exclusive jurisdiction of those courts for such claims. Each party submits to and accepts generally and unconditionally the jurisdiction of those courts with respect to its person and property, and irrevocably consents to the service of process in connection with any such action or proceeding by personal delivery to the party or by registered or certified mail, postage prepaid, to its address for notice under the Contract.

9.2 The validity, performance and all matters relating to the interpretation and effect of the Contract and all further documents executed pursuant to it shall be construed and interpreted in accordance with the laws, excluding the rules on the conflict or choice of laws, of the State of New York, U.S.

9.3 In the event of any legal action concerning or arising out of this Contract, the prevailing party shall be entitled to an award of attorney's fees and legal and accounting fees and costs, in addition to other relief. The term "prevailing party" shall include, without limitation, a party who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other party of its claim or defense.

9.4 No action against Seller for breach hereof shall be commenced more than one year after accrual.

**10. Confidentiality.** 10.1 In connection with the Contract, Seller and Buyer (as to

information disclosed, the "Disclosing Party") may each provide the other party (as to information received, the "Receiving Party") with Confidential Information. "Confidential Information" means (a) all pricing information for Products, (b) all Contract terms, (c) all information that is designated in writing as "confidential" or "proprietary" by Disclosing Party at the time of written disclosure, (d) all information that is orally designated as "confidential" or "proprietary" by Disclosing Party at the time of oral disclosure and is confirmed to be "confidential" or "proprietary" in writing within 10 days after oral disclosure, and (e) all information and data regarding Disclosing Party's or any of its affiliates' business, operations, business and marketing plans, employees, properties, business goals and strategies, financial data, customers, contractual terms and conditions with third-party vendors, suppliers, and customers, technical data, designs, procedures, methods of operation, material specifications, material source data, drawings, equipment specifications, operating parameters, design variable and constraint information, development techniques or plans, patents, "know-how," trade secrets, programs, hardware, software, and other technical or proprietary information. The obligations of Article 10 shall not apply as to any portion of the Confidential Information that: (i) is or becomes generally available to the public other than from disclosure by Receiving Party, its representatives, or its affiliates, or a violation of law or breach of an obligation of confidentiality; (ii) is or becomes available to Receiving Party, its representatives, or affiliates on a non-confidential basis from a source other than Disclosing Party when the source is not, to the best of Receiving Party's knowledge, subject to a confidentiality obligation to Disclosing Party; (iii) is independently developed by Receiving Party, its representatives, or affiliates, without reference to the Confidential Information; (iv) is required to be disclosed by law, a valid legal process or a government agency; (v) is approved for disclosure in writing by an authorized representative of Disclosing Party; or (vi) Seller discloses to its financial advisors for analytical purposes, provided that such financial advisors are subject to an obligation as to confidentiality no less onerous than that set out in Article 10.

10.2 Receiving Party agrees: (i) to use the Confidential Information only in connection with the Contract and permitted use(s) and maintenance of Products; (ii) to take reasonable measures to prevent disclosure of the Confidential Information, except to its employees, agents, attorneys, or financing parties who have a need to know for Receiving Party to perform its obligations under the Contract or to use and maintain Products, who are informed of the confidential nature of the Confidential Information, and who agree to be bound by the confidentiality obligations set forth herein (collectively, the "Representatives"); and (iii) not to disclose the Confidential Information to any third party, including, without limitation, a competitor of Disclosing Party. Seller may disclose Buyer's Confidential Information or a portion thereof to its affiliates that have a need to know such information, that are informed of the confidential nature of the Confidential Information, and that agree to be bound by the confidentiality obligations set forth herein. Receiving Party agrees to obtain a commitment from any recipient of Confidential Information to comply with the terms of Article 10. Confidential Information shall not be reproduced without Disclosing Party's written consent, and Receiving Party shall return all copies of Confidential Information to Disclosing Party upon request except to the extent that the Contract entitles Receiving Party to retain the Confidential Information. Seller may also retain one copy of Buyer's Confidential Information until all its potential liability under the Contract terminates. The Receiving Party shall be responsible for any breach of this Article 10 by any of its Representatives.

10.3 If Receiving Party or any of its affiliates or representatives is required by law, legal process or a government agency to disclose any Confidential Information (including, but not limited to, deposition, interrogatory, request for documents, subpoena, or civil investigative demand), such party agrees to provide Disclosing Party with prompt written notice to permit Disclosing Party to seek an appropriate protective order or agency decision or to waive compliance by Receiving Party with the provisions of Article 10. In the event that efforts to secure confidential treatment are unsuccessful, and if the Receiving Party is, in the opinion of its counsel, compelled to disclose the Confidential Information, Receiving Party may lawfully revise the Confidential Information to make it non-proprietary or to minimize the loss of its proprietary value or disclose that portion of the Confidential Information that its counsel advises that it is compelled to disclose and will obtain assurances that confidential treatment will be accorded to that portion of the Confidential Information that is being disclosed. Receiving Party agrees not to oppose any action of the Disclosing Party intended to obtain a protective order or other reliable assurance that confidential treatment will be accorded to the Confidential Information.

10.4 Confidential Information shall remain the sole property of the Disclosing Party, and nothing in Article 10 grants Receiving Party any license to the Confidential Information, except as specifically set forth herein, or to any invention, patent, trademark or copyright now or later owned or controlled by Disclosing Party.

10.5 Buyer shall not disclose Confidential Information to Seller unless it is required to do so to enable Seller to perform work under the Contract. If Buyer discloses Confidential Information, Buyer warrants that it has the right to disclose the information, and Buyer shall indemnify and hold Seller harmless against any claims or damages resulting from improper disclosure by Buyer.

10.6 Buyer shall not make any public announcement about the Contract or related documents,

including its existence, without prior written Seller approval and on Seller approved terms.

10.7 As to any individual item of Confidential Information, the restrictions of Article 10 shall expire five (5) years after termination or expiration of the Contract. Each Receiving Party acknowledges and agrees that to the extent the Confidential Information includes material that is protected under the copyright, trademark, patent, trade secret or other intellectual property rights laws of any jurisdiction, each Receiving Party's use of such Confidential Information will be subject to the restrictions and obligations created under such laws and may be restricted from disclosure for greater periods of time than those provided above, as provided under such laws.

10.8 Seller and Buyer understand and acknowledge that neither party is making any representation or warranty, express or implied, as to the accuracy or completeness of the Confidential Information, and neither party nor any of its officers, directors, employees, members, shareholders, subsidiaries, affiliates, or Representatives will have any liability resulting from the use of the Confidential Information except with respect to any liability arising under the terms hereunder.

10.9 Article 10 does not supersede any separate confidentiality or nondisclosure agreement signed by the parties.

## 11. Health and Safety Matters.

11.1 Buyer shall take all necessary precautions, at all times, for the health and safety of Seller personnel at Site. These include, but are not limited to: providing to Seller for review, and instructing Seller's personnel regarding, Buyer's safety practices; proper and safe handling of, and protection of Seller's personnel from exposure to, Hazardous Materials; confined spaces; energization and de-energization of all power systems (electrical, mechanical and hydraulic) using safe and effective lock-out/tag-out (LOTO) procedures including physical LOTO or a mutually agreed upon alternative method; and conducting periodic safety meetings.

11.2 Seller may, from time to time, conduct safety audits to ensure the existence of safe site and working conditions and make recommendations to Buyer concerning them. Whether or not Seller conducts safety audits or makes recommendations, Buyer will remain responsible for providing a work environment that is safe and that complies with all applicable legal requirements. Buyer will make its local medical facilities and resources available to Seller personnel who need medical attention, for the duration of their needs. Under no circumstance will Seller personnel be required to work more than any maximum time periods allowed by applicable law.

11.3 If, in Seller's reasonable opinion, the safe execution of the Contract at Site is, or is apt to be, imperiled by security concerns, local conditions, war (declared or undeclared), armed conflict or threatened conflict, civil unrest, terrorist acts or threats, threat to safety or well-being of the Site or personnel or Seller's persons or interests, the presence of or threat of exposure to Hazardous Materials, or unsafe working conditions, Seller may, in addition to other rights or remedies available to it, evacuate some or all of its personnel from Site, suspend performance of all or any part of the Contract, or transfer such performance and supervise it at a location solely determined by Seller. Buyer shall assist in any evacuation. Any delay that results shall be considered excusable.

11.4 Before issuing its purchase order, Buyer shall advise Seller in writing of all applicable Site-specific rules, regulations, safety codes, and laws that apply to Products.

11.5 Operation of Buyer's equipment is the responsibility of Buyer. If Buyer requires or permits Seller's personnel to operate Buyer's equipment at Site, Buyer shall indemnify and save Seller, its employees and agents, harmless from expense and liability (including reasonable attorneys' fees) incurred by or imposed upon Seller, its employees and agents, based upon exposure to Hazardous Materials, injury to persons (including death) or damage to property resulting from operation of equipment at Site by Seller personnel. Buyer shall not require Seller personnel to work on other projects or equipment during the Contract term.

## 12. Site Access and Conditions; Hazardous Materials.

12.1 Buyer shall provide Seller access to Site and any other facilities free of charge, including the operating and development environment and information, as necessary for Seller's performance of the Contract. Prior to Seller starting any work at Site, Buyer will (i) provide documentation that identifies any existing Hazardous Materials on or about the Site, and (ii) allow Seller, at its option, access to Site to perform or have performed a Site evaluation, including without limitation, a review of applicable documents and visual examination of the Site. Whether or not Seller conducts any evaluation, Seller will have no responsibility or liability for existing Site conditions. Buyer shall provide Seller access to results of any monitoring or sampling data related to or in the vicinity of Seller's work during the Contract term and, if Buyer has reason to believe that Site conditions have changed during the performance of the Contract, shall disclose such information to Seller.

12.2 Seller may, and, if feasible, before such conditions are disturbed, notify Buyer in writing of: (i) subsurface, latent physical or other conditions at Site, including but not limited to Buyer's health and safety requirements, differing materially from those indicated

in the Contract or otherwise disclosed by Buyer; and (ii) previously unknown physical conditions at Site, including archaeological remains, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract. Buyer shall promptly investigate those conditions. If it is determined that any conditions do materially differ and cause an increase in Seller's cost of, or the time required for, performance of any part of the work under the Contract, the parties shall make an equitable adjustment in price and schedule and modify the Contract in writing accordingly.

12.3 If, at the Site, Seller encounters Hazardous Materials that require special handling or disposal, Buyer shall immediately take whatever precautions are required to eliminate legally the hazardous conditions so that the work under the Contract may safely proceed. Seller shall not be obligated to commence or continue work until Buyer causes the hazardous conditions to be removed. If any such Hazardous Materials cause an increase in Seller's cost of or time required for performance of any part of the work, the parties shall make an equitable adjustment to the price and schedule and modify the Contract in writing accordingly. Buyer agrees to properly store, transport and dispose of all Hazardous Materials introduced, produced or generated in the course of Seller's work at the Site.

**13. Indemnification.** Buyer shall indemnify, defend, and hold harmless Seller and its shareholders, directors, employees, agents, and affiliates from and against any and all claims, damages, losses, causes of action, demands, judgments and expenses (including, without limitation, consultant and expert expenses, court costs, and reasonable attorneys' fees) arising out of or relating to (a) any Hazardous Materials which are or were (i) present on or about the Site prior to the commencement of Seller's work, (ii) improperly handled or disposed of by Buyer or Buyer's employees, agents, contractors or subcontractors, or (iii) brought, generated, produced or released on Site by parties other than Seller; (b) Buyer's, or its employees', agents', contractors', or invitees', negligence; (c) any personal injury or property damage to Seller's personnel or property at the Site; or (d) Buyer's breach of the Contract.

#### **14. Termination and Suspension.**

14.1 Buyer may terminate the Contract (or any portion thereof) for cause if Seller substantially breaches a material obligation which does not otherwise have a specified contractual remedy, provided that: (a) Buyer shall first provide Seller with detailed written notice of the breach and of Buyer's intention to terminate the Contract; and (b) Seller shall have failed, within 60 days after receipt of the notice (or such extended period as is considered reasonable by the parties), to either (i) commence and diligently pursue cure of the breach, or (ii) provide reasonable evidence that the breach has not occurred. If Buyer terminates the Contract as provided in this Article 14.1, Buyer shall pay to Seller all portions of the Contract Price allocable to work performed (for example, the price for Products completed or partially completed before the termination) before the effective date of termination.

14.2 Seller shall have the right to suspend or terminate the Contract (or any portion thereof) immediately for cause if: (i) Buyer becomes insolvent, makes an assignment for the benefit of its creditors, has a receiver or trustee appointed for the benefit of its creditors, or files for protection from creditors under any bankruptcy or insolvency laws; (ii) there is an excusable delay (as per Article 5 above) lasting longer than 120 days; (iii) any representation or warranty made by Buyer herein or in any document or certificate furnished by Buyer in connection herewith proves to be incorrect in any material respect; (iv) Buyer materially fails to comply with any terms of the Contract, including but not limited to, failure or delay in receiving Payment Security under Article 2 or making any payment when due or fulfilling any payment conditions; or (v) Buyer fails or delays making any payment when due or fulfilling any payment conditions under any contract between the parties.

14.3 If the Contract (or any portion thereof) is terminated for any reason other than those set forth in Article 14.1 above, Buyer shall pay Seller for all Products completed or partially completed before the effective date of termination, plus a cancellation charge equal to 80% for made to order Products and 15% for all other Products of the Contract Price allocable to the uncompleted Products.

14.4 Buyer shall pay any reasonable expenses incurred by Seller in connection with a suspension or termination, including expenses for repossession, fee collection, demobilization or remobilization or costs of storage during suspension upon submission of Seller's invoice(s). The schedule for Seller's obligations shall be extended for a period of time reasonably necessary to overcome the effects of any suspension.

**15. Software.** If Seller provides any software to Buyer, the terms of this Contract shall apply including the Software License Addendum. If there is any conflict between these Terms and Conditions and the terms of any applicable addendum, the terms of the addendum shall prevail. For the purposes of Article 15, "Seller" means Seller, its affiliates, and their successors or assigns.

#### **16. Intellectual Property.**

16.1 Seller shall indemnify Buyer against any damages, costs and expenses arising out of any suit, claim, or proceeding (a "Claim") alleging that Products infringe a patent in effect in the U.S., an EU member state or country of delivery (provided there is a corresponding patent issued by the U.S. or an EU member state), or U.S. copyright or copyright registered in the

country of delivery; provided that: (a) Buyer promptly notifies Seller in writing of any such Claim; (b) Buyer makes no admission of liability and gives Seller sole authority, at Seller's expense, to direct and control all defense, settlement, and compromise negotiations; and (c) Buyer provides Seller with full disclosure and assistance that may be reasonably required to defend any such Claim.

16.2 Seller shall have no obligation or liability with respect to any Claim based upon: (a) any Products that have been altered, modified, or revised; (b) the combination, operation, or use of any Products with other products or services when such combination is part of any allegedly infringing subject matter; (c) failure of Buyer to implement any update provided by Seller that would have prevented the Claim; (d) unauthorized use of Products, including, without limitation, a breach of Contract provisions; or (e) Products made to Buyer's specifications. Buyer shall indemnify, defend, and hold harmless Seller against all damages, costs, and expenses arising out of a Claim related to Buyer's design, specifications, or instructions.

16.3 Should any Products, or any portion thereof, become the subject of a Claim, Seller may at its option (a) procure for Buyer the right to continue using the Products, or portion thereof, (b) modify or replace it in whole or in part to make it non-infringing, or (c) failing (a) or (b), take back Products and refund any fees received by Seller attributable to the infringing Products.

16.4 This states Seller's entire liability for indemnification for intellectual property rights infringement for Products. Buyer waives any moral rights. In no event shall Seller's total liability to Buyer under or as a result of compliance with the provision of this Article 16 exceed the aggregate sum paid to Seller by Buyer for the purchase of the allegedly infringing Products.

16.5 Notwithstanding the foregoing, with respect to any Products, or portions thereof, which are not manufactured or developed by Seller, only the indemnity of the manufacturer or developer, if any, shall apply.

16.6 Each party shall retain ownership of all Confidential Information and intellectual property it had prior to the Contract. All intellectual property conceived, created, or provided by Seller, whether alone or with any contribution from Buyer or its personnel, shall be owned exclusively by Seller. For example, Seller shall own exclusively all rights in ideas, inventions, works of authorship including derivative works, strategies, plans, data, know-how, and other intellectual property created in or resulting from the Contract, including but not limited to all patent rights, copyrights, moral rights, rights in proprietary information, database rights, trademark rights and other intellectual property rights. To the extent that Buyer may acquire any right or interest therein, Buyer irrevocably assigns all such right and interest exclusively to Seller and agrees to execute assignments and other documentation as necessary to achieve that result. Nothing in this Contract shall be deemed to grant a license directly or by implication, estoppel, or otherwise, to any such intellectual property, although the parties may provide for such a license in a separate written agreement.

#### **17. Changes.**

17.1 Each party may at any time propose changes in the schedule or scope of Products in the form of a draft change order. Some changes requested by Buyer may require analytical or investigative work to evaluate the change, and this evaluation work may be charged to Buyer at prevailing rates. The parties may mutually agree on the length of time within which a decision shall be made regarding the change. Seller is not obligated to proceed with the changed schedule or scope until both parties agree to such change in writing. If mutually agreed, the changes will be documented in a written document signed by representatives of each party who have actual authority to legally bind Buyer or Seller, along with any equitable adjustments in the Contract Price or schedule, changes in applicable laws, rules and regulations shall be treated as a change within the meaning, and subject to the requirements, of Article 17. Unless otherwise agreed by the parties, pricing for additional work arising from changes in laws, rules and regulations shall be at time and material rates.

17.2 All Products delivered shall conform to Seller's part or version number specified or (at Seller's option) its equivalent or the superseding number subsequently assigned by Seller. If the number ordered is no longer available, Seller is authorized to ship a valid interchangeable Product without notice to Buyer.

**18. Quality.** The quality control exercised by Seller in its manufacture of Products shall be in accordance with Seller's normal quality control policies, procedures, and practices.

#### **19. General Clauses.**

19.1 Products sold by Seller are not intended for use in connection with any nuclear facility or activity without the written consent of Seller. Buyer warrants that it shall not use or permit others to use Products for such purposes, unless Seller agrees to the use in writing. If, in breach of this, any such use occurs, Seller (and its parent, affiliates, suppliers and subcontractors) disclaims all liability for any nuclear or other damages, injury or contamination, and in addition to any other legal or equitable rights of Seller, Buyer shall



indemnify and hold Seller (and its parent, affiliates, suppliers and subcontractors) harmless against any such liability. If Seller agrees in writing to any such use, the parties shall agree upon special terms and conditions that provide Seller protections against nuclear liability and which are acceptable to Seller under the then current laws that apply.

19.2 Seller may assign or novate its rights and obligations under the Contract, in part or in whole, to any of its affiliates or may assign any of its account receivables under this Contract to any third party without Buyer's consent, and may subcontract portions of the work, so long as Seller remains responsible for it. Buyer agrees to execute any documents that may be necessary to effect Seller's assignment or novation. The delegation or assignment by Buyer of any or all of its duties or rights under the Contract without Seller's prior written consent shall be void.

19.3 Buyer shall notify Seller immediately upon any change in the ownership of more than fifty percent (50%) of Buyer's voting rights or in Buyer's controlling interest. If Buyer fails to do so or Seller objects to the change, Seller may (a) terminate the Contract, (b) require Buyer to provide adequate assurance of performance (including but not limited to payment), or (c) put in place special controls regarding Seller's Confidential Information.

19.4 During the Contract term and for a period of one (1) year after expiration or termination thereto, Buyer agrees not to directly or indirectly solicit, induce, or hire any of Seller's employees, whether or not working on a Buyer Site.

19.5 If any Contract provision is found to be void or unenforceable, the remainder of the Contract shall not be affected. The parties will replace any such void or unenforceable provision with a new provision that achieves substantially the same practical or economic effect and is valid and enforceable.

19.6 The following Articles shall survive termination or cancellation of the Contract: 2, 3, 4, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 18 and 19.

19.7 The Contract represents the entire agreement between the parties. No modification, amendment, rescission or waiver shall be binding on either party unless agreed in writing by the parties' authorized representatives.

19.8 For direct and indirect U.S. government contracts or contracts funded in whole or in part by the American Recovery and Reinvestment Act (ARRA) only, all Products provided by Seller shall be considered "commercial items" as defined in FAR Part 2, 2.101 and in accordance with FAR 52.244-6. To the full extent permitted under FAR Part 12, the terms and conditions of FAR 52.212-4 are replaced by the Terms and Conditions set forth in this Contract. Therefore, no governmental contracting provisions, standards or requirements, including without limitation those relating to cost accounting and the Truth-in-Negotiations Act, shall apply except those expressly accepted in writing by Seller. If the reasonableness of the price cannot be established, if cost or pricing data is required for any other reason, or if Products cannot be considered "commercial items" or if the Contract is funded in whole or part by ARRA funds and Buyer has not so notified Seller in writing prior to Seller agreeing to the transaction, Seller may cancel the Contract without liability and be reimbursed for work performed to date.

19.9 This Contract may be executed in multiple counterparts that together shall constitute one agreement.

19.10 Except as provided in Article 8 and in 19.1 above regarding nuclear use, this Contract is for the benefit of the parties and not for any third party.

19.11 Seller and Buyer, expressly intending that no employment, partnership, or joint venture relationship is created by the Contract, hereby agree as follows: (i) neither Buyer nor anyone employed by or acting for or on behalf of Buyer shall ever be or be construed as an employee of Seller, and Seller shall not be liable for employment or withholding taxes respecting Buyer or any employee of Buyer; (ii) Seller shall be free to contract with, and provide Seller's products and services to, parties other than Buyer during the term of the Contract; (iii) Buyer shall not make any commitment or incur any charge or expense in the name of Seller; and (iv) Buyer expressly acknowledges and agrees that except to the extent expressly provided herein, neither Buyer nor anyone employed by or acting for or on behalf of Buyer shall receive or be entitled to any consideration, compensation or benefits of any kind from Seller, including without limitation, pension, profit sharing or similar plans or benefits, or accident, health, medical, life or disability insurance benefits or coverages.