



Terms And Conditions of Sale

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For the purposes of these Terms and Conditions of Sale, the term "contract" shall mean the agreement between Define Instruments Inc. ("Supplier") and the Buyer arising as a result of the Buyer's submission of an order for the Supplier's products ("Products"). Such contract shall be deemed to incorporate and be governed by these Terms and Conditions.

THESE TERMS AND CONDITIONS SHALL TAKE PRECEDENCE OVER ANY TERMS AND CONDITIONS WHICH APPEAR IN BUYER'S ORDER OR IN ANY DOCUMENTS INCORPORATED BY REFERENCE IN BUYER'S ORDER.

No term or condition of the Buyer's order additional to or different from these Terms and Conditions shall become part of the contract unless explicitly agreed to in writing by the Supplier. Retention by the Buyer of any Products delivered by the Supplier, or payment by the Buyer of any invoice rendered hereunder, shall be conclusively deemed acceptance of these Terms and Conditions. The Supplier's failure to object to any provision contained in any communication from shall not be construed as a waiver of these Terms and Conditions nor as an acceptance of any such provision.

1 Quotations:

Prices, specifications and dates for delivery referenced in the Supplier's quotations are for information purposes only and shall not be binding on the Supplier until all technical requirements have been agreed and the Supplier has accepted the Buyer's order.

Quotations terminate if not accepted by the Buyer within 30 days. All descriptions, illustrations and any other information relating to the Products contained in the Supplier's catalogs, brochures, price lists, advertising material and any sales or other particulars or literature are made by way of general description, are approximate only and for the general guidance and information of the Buyer. They shall not constitute warranties or representations by the Supplier, nor shall they form part of any contract.

2 Orders:

By submitting an order to the Supplier, the Buyer agrees to be subject to these Terms and Conditions of Sale in their entirety. All orders must be bona fide commitments showing definite prices and quantities and mutually agreed shipping dates. No order, whether or not submitted in response to a quotation by the Supplier, shall be binding upon the Supplier until accepted in writing by the Supplier.

3 Prices and Taxes:

Prices do not include federal, state or local taxes, including without limitation sales, use or excise taxes now or hereafter enacted, applicable to the Products sold in this transaction, which taxes may, in the Supplier's discretion, be added by the Supplier to the sales price or billed separately and which taxes shall be paid by the Buyer unless the Buyer provides the Supplier with any necessary tax exemption certificate.

4 Shipment and Delivery:

All Products will be shipped F.C.A. the Supplier's premises and may be so shipped in several lots. In the absence of specific instructions, the Supplier will select the carrier and ship "collect", but shall not be deemed thereby to assume any liability in connection with the shipment nor shall the carrier be construed to be the agent of the Supplier. The Buyer must provide its own insurance. Title and risk of loss or damage to all Products sold hereunder shall pass from the Supplier to the Buyer upon delivery by the Supplier to the possession of the carrier, provided that the Supplier reserves a purchase money security interest in the Products. Any claims for loss, damage or misdelivery thereafter shall be filed with the carrier.

All Products shall be deemed finally inspected and accepted within ten days after delivery unless notice of rejection is given in writing to the Supplier within such period. Acceptance shall constitute acknowledgment of full performance by the Supplier

of all obligations under the contract except as stated at Section 11 (Warranties).

5 Terms of Payment:

Each shipment shall be a separate transaction and the Buyer will be invoiced on date of dispatch. Unless otherwise stated on the Supplier's invoice, terms of payment shall be net thirty (30) days from date of invoice for credit account holders, and payment in advance for web orders. All invoiced amounts must be paid in full without deduction, withholding, setoff or counterclaim of any kind. The Supplier may, in its sole discretion require payment in advance, and, if such requirement is not met, may cancel the order or any part thereof and receive reasonable cancellation fees. If the Buyer fails to pay any payment due hereunder when due, the Supplier may recover, in addition to the payment, interest thereon at the rate of 1½% per month where lawful, otherwise the maximum lawful monthly interest rate, and reasonable attorney's fees.

6 Credits and Returns:

Products may only be returned to the Supplier after obtaining a Return Goods Authorization. Credit for return of Products is at the sole discretion of the Supplier. Determination of cause and liability for defective Products returned rests solely with the Supplier.

7 Security Interest:

The Buyer hereby grants to the Supplier a security interest in all Supplier Products sold to the Buyer as security for the due and punctual performance by the Buyer of all of its payment obligations hereunder. The Buyer authorizes the Supplier to take any and all action necessary to evidence and perfect said security interest including, without limitation, the filing of any financing statements, and the Buyer agrees to provide the Supplier with all information required to make any such filing.

8 Contingencies:

The Supplier shall not be liable for any delay in delivery or for non-delivery, in whole or in part, caused by the occurrence of any contingency beyond the control of the Supplier, including, by way of illustration but not limitation, war (whether an actual declaration thereof is made or not), sabotage, insurrection, riot or other act of civil disobedience, act of a public enemy, failure or delay in transportation, act of any government or any agency or subdivision thereof, judicial action, labor dispute, accident, fire, explosion, floods, storm or other act of God, shortage of labor, fuel, raw material or machinery or technical failure where the Supplier has exercised ordinary care in the prevention thereof. If any such contingency occurs, the Supplier may allocate production and deliveries among the Supplier's customers.

9 Product Changes:

The Supplier may modify specifications provided the modifications do not adversely affect the performance of the Products to be supplied under the contract. In addition, the Supplier may furnish suitable substitutes for materials unobtainable because of priorities or regulations established by government authority, or nonavailability of materials from suppliers.

10 Software:

The Supplier shall at all times have and retain title and full ownership of all software, firmware programming routines, and documentation thereof supplied by the Supplier for use with the Products, and of all copies thereof made by the Buyer (collectively "software"). The Supplier grants the Buyer a non-exclusive and non-transferable license to use such software solely for use with the Products. The Buyer shall take all reasonable steps to protect the Supplier's proprietary interest in the software and shall not transfer or otherwise provide the software to any third party. All intellectual property rights are reserved.

11 Product Warranties; Limitations; Exclusions:

A The Supplier warrants that all Products shall be free from defects in material and workmanship under normal use for a period of five years from the date of shipment. The Supplier does not warrant that operation of its Software will be completely uninterrupted or error free or that all program errors will be corrected. The Buyer shall be responsible for determining that a Product is suitable for the Buyer's use and that such use complies with any applicable local, state or federal law.

Provided that the Buyer notifies the Supplier in writing of any claimed defect in the Products immediately upon discovery, and any such Products are returned to the original shipping point, transportation charges prepaid, within the warranty period, and upon examination the Supplier determines to its satisfaction that such Products are defective in material or workmanship, the Supplier shall, at its option, repair or replace the Products, shipment to the Buyer prepaid. The Supplier shall have reasonable time to make such repairs or to replace such Products. Any repair or replacement of Products shall not extend the warranty period.

This warranty is limited to five years, without regard to whether any claimed defects were discoverable or latent on the date of shipment. The warranty covers only defects arising out of the manufacture of the Products and not defect caused by other circumstances, including, but not limited to accident, misuse, unforeseeable use, neglect, alteration, improper installation, improper adjustment, improper repair, or improper testing. In addition and without limiting the foregoing, the Supplier shall not be responsible for any Buyer custom software or firmware, configuration information, or memory data contained in, stored on, or integrated with any products returned to the Supplier pursuant to this warranty.

B If the Buyer shall fail to pay when due any portion of the purchase price or any other payment required from Buyer to Supplier under this contract or otherwise, all warranties and remedies granted under this Section 11 may, at the Supplier's option, be terminated.

C THE FOREGOING WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER REPRESENTATIONS, WARRANTIES AND COVENANTS, EXPRESS OR IMPLIED, WITH RESPECT TO THE PRODUCTS AND ANY DEFECTS THEREIN OF ANY NATURE WHATSOEVER, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THE SUPPLIER SHALL NOT BE LIABLE FOR, AND THE BUYER ASSUMES ALL RISK OF, ANY ADVICE OR FAILURE TO PROVIDE ADVICE BY THE SUPPLIER TO THE BUYER REGARDING THE PRODUCTS OR THE BUYER'S USE OF THE SAME.

UNDER NO CIRCUMSTANCES SHALL THE SUPPLIER BE LIABLE TO THE BUYER UNDER ANY TORT, NEGLIGENCE, STRICT LIABILITY, OR PRODUCT LIABILITY CLAIM, AND THE BUYER AGREES TO WAIVE SUCH CLAIMS. THE SUPPLIER'S SOLE AND EXCLUSIVE LIABILITY, AND THE BUYER'S SOLE AND EXCLUSIVE

REMEDY, FOR ANY NONCONFORMITY OR DEFECT IN THE PRODUCTS OR ANYTHING DONE IN CONNECTION WITH THIS CONTRACT, IN TORT (INCLUDING NEGLIGENCE), CONTRACT, OR OTHERWISE, SHALL BE AS SET FORTH IN SUBSECTION 11A HEREOF AS LIMITED BY SUBSECTION 11B HEREOF.

THIS EXCLUSIVE REMEDY SHALL NOT HAVE FAILED OF ITS ESSENTIAL PURPOSE (AS THAT TERM IS USED IN THE UNIFORM COMMERCIAL CODE) PROVIDED THAT THE SUPPLIER REMAINS WILLING TO REPAIR OR REPLACE DEFECTIVE PRODUCTS (AS DEFINED IN SUBSECTION 11A) WITHIN A COMMERCIALY REASONABLE TIME AFTER RECEIVING SUCH PRODUCTS. THE BUYER SPECIFICALLY ACKNOWLEDGES THAT THE SUPPLIER'S PRICE FOR THE PRODUCTS IS BASED UPON THE LIMITATIONS OF THE SUPPLIER'S LIABILITY AS SET FORTH IN THIS CONTRACT.

12 Patents:

The Supplier shall defend any suit or proceeding brought against the Buyer to the extent that it is based on a claim that any Products manufactured by the Supplier infringe in construction or design a United States patent, and shall indemnify the Buyer against all costs, damages and expenses finally awarded against the Buyer provided that the Buyer notifies the Supplier promptly in writing of any such claim and gives the Supplier full and complete authority, information and assistance for the defense of such claim and provided further that the Supplier shall have sole control of the defense and of the negotiations for settlement, if any, of such claim.

If any such Products are held in construction or design directly to infringe any United States patent and the use of said Products is enjoined, or in case any Products may, in the opinion of the Supplier, be held to infringe, the Supplier may, at its expense and option, either:

- A Procure for the Buyer the right to continue using said Products, or
- B Replace said Products with a suitable noninfringing product, or
- C Suitably modify said Products, or
- D Refund the purchase price of said Products, less depreciation at twenty percent (20%) per year, and accept its return

The Supplier shall not be liable for any cost or expense incurred without the Supplier's written authorization. The Supplier shall not be obligated to defend or be liable for costs and damages if the infringement arises out of compliance with the Buyer's specification or from a combination with or an addition to Products not manufactured or developed by the Supplier or a modification of the Products after delivery or the use of Products beyond that established by the Supplier or approved in writing by the Supplier.

THE FOREGOING STATES THE ENTIRE LIABILITY OF THE SUPPLIER, AND THE EXCLUSIVE REMEDY OF THE BUYER, WITH RESPECT TO ANY ALLEGED PATENT INFRINGEMENT BY THE SAID EQUIPMENT.

13 Limitation of Liability and the Buyer Indemnity:

IN NO EVENT, REGARDLESS OF THE FORM OF ACTION, SHALL THE SUPPLIER BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL LOSSES OR DAMAGES ARISING OUT OF THE SALE OF ITS PRODUCTS TO THE BUYER OR ARISING OUT OF ANYTHING DONE IN CONNECTION WITH THE CONTRACT, INCLUDING, BUT NOT LIMITED TO, LOSSES OR DAMAGES ARISING OUT OF CLAIMS FOR LOSS OF USE, BUSINESS, GOODWILL, OR PROFITS, AND CLAIMS ARISING OUT OF THIRD PARTY ACTIONS, REGARDLESS OF WHETHER SUCH THIRD PARTY ACTIONS, OR ANY OTHER CLAIMS, LOSSES, OR DAMAGES, WERE REASONABLY FORESEEABLE TO THE BUYER OR THE SUPPLIER. THE BUYER'S EXCLUSIVE REMEDY ARISING OUT OF ITS PURCHASE AND USE OF THE SUPPLIER'S PRODUCTS, OR ARISING OUT OF ANYTHING DONE IN CONNECTION WITH THE CONTRACT, SHALL BE FOR DAMAGES AND NO CLAIM OR CLAIMS OF ANY KIND, WHETHER BASED UPON CONTRACT, WARRANTY, TORT (INCLUDING, BUT NOT

LIMITED TO, NEGLIGENCE, WARRANTY AND STRICT LIABILITY), STATUTORY OR REGULATORY PROVISIONS, INDEMNITY, CONTRIBUTION, OR OTHERWISE, SHALL BE GREATER IN AMOUNT IN AGGREGATE THAN THE PURCHASE PRICE OF THE PRODUCTS IN RESPECT OF WHICH DAMAGES ARE CLAIMED.

The Buyer shall indemnify and hold harmless the Supplier, its officers, agents, employees, subsidiaries, parents, affiliates and insurers from and against any and all liabilities, damages, losses, claims, lawsuits, including costs and expenses in connection therewith, for death or injury to any persons or loss of any property whatsoever, caused in any manner by the Buyer's possession, use or operation of Products.

14 Proprietary Information:

The Buyer represents that it has adopted reasonable procedures to protect Proprietary Information, as defined hereafter, including binding agreements with employees and consultants to prevent unauthorized publication, disclosure or use of such during or after the term of their employment by or services for the Buyer. The Buyer shall not use Proprietary Information except as required for the use of the Products, shall not disclose Proprietary Information to any third party, and shall not transmit any documents or copies thereof containing Proprietary Information to any third party, except as may be authorized in writing by the Supplier.

This Section 14 shall survive termination of the contract. "Proprietary Information" shall mean information or data of the Supplier, or a third person to whom the Supplier owes obligations of confidentiality, and which is furnished or to be furnished to the Buyer in written, graphic or machine-readable form and is marked proprietary or confidential. Where copies or alternative forms of information or data are received from the Supplier, such information or data shall be considered Proprietary Information if at least one of said copies or alternative forms is marked proprietary or confidential.

This Section 14 shall not apply to information which the Buyer demonstrates was rightfully in the Buyer's possession without any obligation to protect the confidentiality thereof prior to receipt from the Supplier or information which the Buyer demonstrates is or has become available to the public or general knowledge in the industry otherwise than through the fault of the Buyer.

15 Force Majeure:

Notwithstanding anything to the contrary in these Conditions, the Supplier shall not be liable to the Buyer for any loss or damage which may be suffered by the Buyer as a direct or indirect result of the supply of Products being prevented, delayed or rendered uneconomic by reason of circumstances or events beyond the Supplier's reasonable control. If, due to such circumstances or events the Supplier has insufficient stock to meet all of its commitments, the Supplier may apportion available stock between its customers at its sole discretion.

16 Rescheduling and Cancellation:

Orders accepted by the Supplier may be cancelled or rescheduled by the Buyer only with the written consent of the Supplier (which consent the Supplier may withhold for any reason) and upon payment of the Supplier's then-current cancellation or rescheduling charges. The Supplier shall have the right without penalty or payment to cancel any order accepted:

- A If the Buyer fails to make any payment when due to the Supplier under the contract or any other contract, or
- B If any act or omission of the Buyer delays the Supplier's performance, or
- C If the Buyer violates any of these Terms and Conditions

In the event of such cancellation the Supplier shall be entitled to receive reimbursement for its reasonable and proper cancellation charges.

17 Non-Waiver; Remedies:

No waiver of any breach of these Terms and Conditions shall constitute a waiver of any prior or subsequent breach of any similar or dissimilar provision or a modification of the contract. All Supplier rights and remedies, whether evidenced hereby or by any other contract or document, shall be cumulative and nonexclusive and may be exercised singularly or concurrently.

18 Actions to Recover Damages:

Prior to commencement of any legal proceedings, the Buyer and Supplier shall meet at a senior level to attempt to resolve differences. Notwithstanding any attempts to resolve differences or negotiations regarding such differences, any action brought by the Buyer against the Supplier arising out of this contract or the Buyer's purchase and use of the Products must be commenced within one year after such action accrues and in no event later than two years after date of shipment of such Products.

19 Export:

Regardless of any disclosure made by the Buyer to the Supplier of the ultimate destination of Supplier Products, the Buyer shall not transfer, export or re-export either directly or indirectly any Supplier product, or any system incorporating said product either in contravention of statute or regulation or without first obtaining all required licenses and permits from the United States Department of Commerce and any other relevant agencies or departments of the United States government.

20 Insolvency of the Buyer:

- A If the Buyer becomes insolvent, has a receiver, administrative receiver, administrator or manager appointed of the whole or any part of its assets or business, makes any composition or arrangement with its creditors, takes or suffers any similar action in consequence of debt or any order of resolution is made for its dissolution or liquidation (other than for the purpose of solvent amalgamation or reconstruction) or carries out or undergoes any analogous act or proceedings under an applicable law; or
- B If the Buyer ceases, or threatens to cease to carry on business **then**, without prejudice to any other right or remedy available to the Supplier, the Supplier may treat any Contract as repudiated and/or withhold any further supply of Products without any liability to the Buyer and, if any Products have been supplied but not paid for, the price or fees shall become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.

21 Assignment:

The contract shall be binding upon and inure to the benefit of the parties and their respective legal representatives, successors and permitted assigns. The contract is personal to the Buyer, and the Buyer may not assign any of its rights or delegate any of its obligations thereunder, in whole or in part, without the prior written consent of the Supplier which may be withheld for any reason.

22 Complete Agreement; Modifications:

This contract constitutes the entire agreement between the parties relating to the sale of the Products and no addition to or modification of any provision of said agreement shall be binding upon Supplier unless agreed in writing by Supplier.

23 Notices:

All notices given under the contract shall be in writing, mailed by first class mail, certified or registered, or delivered by hand to the address of the other party set forth in the quotation or to such other address as such party may designate from time to time by such notice, and shall take effect when received.