

# T-34

**Triumph Structures – Everett, Inc.  
423 Berry Way – Brea, CA 92821  
1415 75<sup>th</sup> Street SW – Everett, WA 98203  
Purchase Order Terms and Conditions  
Commercial, Capital Equipment (Fixed Price)  
(03-2011)**

## 1. DEFINITIONS AND EXPLANATIONS

### A. Definitions.

1. **“Acceptance Test”** means performance of the final inspection and testing, in accordance with the Specification, of all Equipment and associated Software at destination upon completion of (i) installation and adjustment of the Equipment and (ii) Software validation.
2. **“Buyer”** or **“Licensee”** means Triumph Structures – Everett, Inc. Operating as Triumph Structures – Brea & Triumph Structures – Everett.
3. **“Buyer Peculiar Tooling”** means that tooling designed to Buyer’s particular needs and use requirements for the Equipment, and which touches and adapts to Buyer’s parts, including, without limitation, handling fixtures, end effectors, adapters, part specific tools designed for the specific function of the Equipment.
4. **“Application Software”** means Software created especially to support and enable Buyer’s use of the Equipment to meet its specific needs. Application Software may include, without limitation, functional design, logic flow, algorithms, application programs, and support software used in any way to control, monitor/log machine or process data, data transfer of part programs and process data or diagnostics. Application Software does not include control firmware, operating systems, or commercial off-the-shelf software (“COTS”).
5. **“Drawing”** means the graphic and pictorial portions of this Order showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.
6. **“Equipment”** means the items listed on the Specification, attached to the Order, inclusive of all amendments as may be subsequently submitted from time to time by Buyer and accepted by Seller in accordance with the terms of this Order.
7. **“Order”** or **“Contract”** means the instrument of contracting including this Purchase Order and all referenced documents.
8. **“Parties”** means Buyer and Seller collectively.
9. **“Proprietary Information”** shall have the meaning given to it in Paragraph 44.A.
10. **“Seller,” “Licensor,” or “Contractor”** means the Party with whom Buyer is contracting.
11. **“Software”** shall have the meaning given to it in Paragraph 47.A below. Software shall be defined to include Application Software, except in Paragraphs 48.C and 48.D below.
12. **“Specification”** means that portion of the Order consisting of the written requirements for the Equipment, including materials, components, Software systems, standards and workmanship for the Work, and performance of related

services.

13. **“Technology”** shall have the meaning given to it in Paragraph 46.A below.
14. **“Work”** means the services related to design and manufacture of the Equipment, including labor, materials, supplies, appliances, preparation of supporting documentation for the Equipment, transportation, training or other things required, to be provided or performed by Seller and/or Seller’s subcontractors in order to fulfill the obligations and requirements of the Order.

B. Miscellaneous Word Explanation.

1. Whenever the words “as shown,” “as indicated” or “as detailed” or words of similar import are used, reference is being made to the drawings and/or specifications unless otherwise specifically provided.
  2. Unless otherwise specifically provided, whenever the words “as directed,” “as required,” “as permitted,” “approved,” “accepted,” “acceptance” or words of similar import are used, it means that specific direction, permission, approval or acceptance by Contour Aerospace Corporation is required before Seller proceeds further.
  3. The words “to provide” or “provide” means “to furnish and install” or “to provide complete and in place” unless otherwise specifically documented.
- C. Unless the context otherwise requires, words in the singular include the plural and the plural include the singular.
- D. Titles and paragraph headings used herein and in the Order are for convenient reference only and shall not affect the interpretation of any provision of the Order.

**2. ACCEPTANCE OF THIS ORDER**

This Order is Buyer’s offer to Seller. Seller’s acceptance is expressly limited to the written terms of this Order. No additional or different term shall be binding. Buyer hereby objects to any additional or different terms contained in Seller’s acceptance. Any of the following acts by Seller shall constitute acceptance:

- A. Signing and returning a copy of this Order;
- B. Commencing performance of any effort required to complete this Order;
- C. Informing Buyer of commencement of any effort required to complete this Order; or
- D. Shipping of any Equipment or components thereof in performance of this Order.

**3. SCHEDULE PROGRESS AND OVERTIME**

- A. Prior to commencing Work, or within such further time after commencing as Buyer may allow, Seller shall prepare and submit, for Buyer’s approval, a practicable and feasible schedule for the Work. Seller shall update the schedule weekly or as otherwise provided in the Specification and promptly submit each revision thereof to Buyer for approval.
- B. Unless otherwise required in the Specification, at the end of each week or as requested by Buyer, Seller shall submit to Buyer three copies of a progress report showing the actual progress of the Work in comparison with the items on the approved schedule.
- C. Seller shall prosecute the Work in accordance with the approved schedule. Failure to do so shall be evidence that Seller is failing to prosecute the Work with such diligence to ensure completion within the time specified in this Order and may result in termination in accordance with the provisions of the “Termination for Default” clause herein.

- D. Seller shall furnish sufficient personnel and equipment, and shall work such hours, including night shift, overtime operations and Sunday and holiday work, as may be necessary to ensure completion of the Work in accordance with the approved schedule. If Seller falls behind such schedule, Seller shall take all necessary action to improve its progress and Buyer may require Seller to increase the number of shifts, overtime operations, and days of work, including Saturdays, Sundays and holidays, all without additional cost to Buyer. This clause is in addition to Buyer's other remedies.
- E. Time is of the essence in the performance of this Order. If at any time it appears to Seller that it will not meet any of the schedules or the scheduled completion date of the Work for any reason, Seller shall promptly notify Buyer in writing of the reasons for the delay and the estimated time or duration of such delay. Seller further shall provide to Buyer Seller's plan to eliminate the cause of the delay and, to the extent possible, its plan to recover lost time. The notification requirements, herein, shall not in any way be construed as relieving Seller of any liability for breach of contract by reason of any delay in performance.

**4. DELIVERY, TITLE AND RISK OF LOSS**

- A. Unless otherwise specified in this Order, make all shipments Free on Board ("FOB") Buyer's Receiving dock identified on the face of this Order, with Seller bearing all costs and risk of loss until the Equipment is unloaded. Risk of any loss and/or damage to the Equipment occurring before unloading at the delivery point specified shall be Seller's responsibility. Title shall pass to Buyer upon acceptance at Buyer's plant, following installation; however, passing of title shall not relieve Seller of any other obligations under this Order.
- B. Specific delivery and completion dates are set forth in the Purchase Order.

**5. ORDER PERFORMANCE**

Seller shall perform all Work required in strict accordance with the drawings, specifications and other provisions and requirements of the Order within the period of time specified and at the price(s) set forth in the Order.

**6. INSPECTION, ACCEPTANCE AND REJECTION**

- A. Factory Inspection. Prior to shipment and with a Buyer representative present, Seller shall conduct a pre-shipment inspection pursuant to requirements set forth in the Specification.
- B. Acceptance Test. All Equipment and associated Software are subject to final inspection and acceptance at destination, notwithstanding the FOB point or any payment or prior inspection at source. Upon completion of installation and adjustment of the Equipment, Seller shall notify Buyer's onsite representative that the Equipment is installed and ready for acceptance testing and Software validation. Seller shall promptly commence the Acceptance Test procedure and Software validation in accordance with Specification.
- C. Provisional Acceptance. If the Acceptance Test identifies areas of non-conformance to the performance specifications that, in Buyer's unilateral commercial judgment, do not materially impair Buyer's use of the Equipment in the short term, Buyer may certify its provisional acceptance of the equipment.
  - 1. If Buyer provisionally accepts the Equipment or Software, Buyer shall itemize in

- writing those areas in which the Equipment or Software has failed to perform acceptably. Seller shall acknowledge the list and provide to Buyer a written schedule for the correction of the non-conformances and complete the corrections at Seller's cost. Seller acknowledges that time is of the essence with respect to correction of the non-conformances.
2. Buyer shall have the right to withhold payment of any funds normally due upon Final Acceptance of the Equipment and Software. Buyer shall determine the amount to be withheld. The amount withheld shall be commensurate with the reduced value of the Equipment or Software attributable to non-conformance to the performance specifications.
  3. Seller shall notify Buyer when Seller has corrected the identified non-conformances and, if Buyer so elects, the Acceptance Test shall be repeated in its entirety.
  4. If Seller fails to meet the completion date for correction of the listed non-conformances, Buyer may, at its option, revoke its provisional acceptance of the Equipment and proceed under remedies provided in Paragraph E below.
- D. Final Acceptance. Final Acceptance of the Equipment, Software, and Work shall be subject to the following conditions:
1. Receipt and installation of the Equipment;
  2. Successful completion of the Acceptance Test and Software Validation (as applicable); and
  3. Receipt by Buyer of the required operating and installation data, Software documentation, training materials and any other documentation required by the Specification.
- E. Rejection. If the Equipment or any components or parts thereof are defective in material or workmanship or otherwise not in conformity with the requirements of this Contract, then at Buyer's option and at Seller's cost, Seller shall remove the Equipment, part(s), component(s), accessory(s), etc. for correction, or, with Buyer's consent, shall correct them in place. If Seller fails to promptly make the required corrections, Buyer may:
1. Replace the defective Equipment, part(s), component(s), accessory(s), etc. by separate contract or otherwise and charge Seller the total cost incurred by Buyer;
  2. Accept delivery of the defective Equipment or defective part(s), component(s), accessory(s), etc. and negotiate a decrement to the Contract Price, based on the decrement in value to the Equipment as delivered; or
  3. Terminate this Contract for default pursuant to the Termination for Default clause.
7. QUALITY REQUIREMENTS The sellers shall assure at time of delivery the product purchased by the Buyer meets all manufactures claims of form, fit & function.
- A. Product complies with all applicable Statutory and Regulatory Agency Requirements. Including Safety.
  - G. Products purchased by the Buyer shall not be substituted for another brand or manufacture, without the prior Buyer notification.

**8. BUYER OPERATIONS**

Seller shall schedule all Work performed by Seller upon Buyer's premises so as to avoid interruption of normal Buyer business operations.

**9. INVOICE**

Seller shall submit a separate invoice for Work Performed at the completion of each milestone, as identified in the Order. Seller shall include in the invoice the following information taken from Buyer's Purchase Order, as applicable: Purchase Order number, item number, description of Work Milestone designation for the Work completed, price agreed for completion of the specified Milestone. Invoices shall be accompanied by such evidence in support thereof as may reasonably be required by Buyer. Seller's invoice shall also include: Seller's phone number and address, invoice number, and date prepared. If Seller's "remit to" address is different than the address indicated on the Purchase Order, clearly identify the "remit to" address on the invoice.

**10. PRICE WARRANTY**

Seller warrants that its price for the Equipment and Work does not exceed the price charged by Seller to any other customer purchasing the same or similar Equipment or Work in like or smaller quantities under similar conditions. Seller agrees to reimburse Buyer promptly upon the discovery of a violation of that principle in the amount of the difference between the lower price charged and that charged Buyer.

**11. PAYMENT**

Buyer shall pay all invoices net thirty days upon receipt of a correct invoice, unless otherwise specified on the face of the Order. Milestone payment due dates, including discount periods, if any, will be calculated from the date the Milestone is completed or the Buyer receives a correct invoice, whichever is later.

**12. SETOFFS**

Any amounts owing to Buyer by Seller may be set off against amounts otherwise due to Seller under this or any other Buyer Order.

**13. PAYMENT FOR LABOR, MATERIAL, AND WAIVER OF LIENS**

- A. Seller shall be responsible for the prompt payment of all persons who perform labor upon or furnish services, materials, equipment, supplies or other items used, or to be used, in the performance of the Work called for by this Order.
- B. If Seller fails to pay any of its subcontractors and Seller's failure to pay jeopardizes the completion of the Work within the time specified in this Order, then Buyer, upon notice to Seller, may make payment directly to any such subcontractor in accordance with the actual subcontract price for work performed under this Order. To the extent Buyer makes such direct payments to a subcontractor on Seller's behalf, payments made or to be made to Seller or both, shall be adjusted and any refund due Buyer as a result of such adjustment shall be promptly paid.
- C. Seller shall defend, indemnify and hold harmless Buyer from all claims, demands, causes of action or suits, of whatever nature, by third parties including Seller's subcontractors, arising out of the services, labor and materials furnished by Seller or its

subcontractors.

#### **14. FINAL PAYMENT**

Buyer shall pay the amounts due Seller under this Order; provided, however, that Buyer may retain from any payment, until the claim involved is settled, such an amount as may reasonably be necessary to protect Buyer from loss on account of any lien, claim, suit or action for which Seller is responsible under this Order, or any claim Buyer may have against Seller in connection with this Order. Final payment under this Order shall be made upon:

- A. Final acceptance by Buyer of all Work called for by this Order; and
- B. Submission by Seller, if requested, of an affidavit, together with receipts, releases or other satisfactory evidence in support thereof, stating that all payments and claims for which Seller is responsible hereunder have been made or settled, except as specifically listed therein.

#### **15. WARRANTY**

- A. Seller warrants that all Work performed and all Equipment furnished under this Order will be free from defects in workmanship, material and design (excluding any defect in any design furnished by Buyer) and will conform to the requirements of the Order.
- B. With respect to Software, Seller also warrants that:
  - 1. All Software will be free of viruses or any other programmed device that could impair Buyer's use of the Software or the Equipment on which the Software resides;
  - 2. The media on which the Software is provided shall be free of defects in material and workmanship;
  - 3. The Software shall possess all material functions and features contemplated by the supporting documentation;
  - 4. The Software shall be compatible with the operating system, application programs, computing equipment and networks contemplated by the documentation; and
  - 5. Seller hereby agrees to pass through or assign to Buyer any third party's warranty that Seller receives in connection with any Software provided to Buyer.
- C. Buyer shall give Seller written notice of any defect or nonconformance within one year (or such longer warranty period as may be specified elsewhere in this Order) after final acceptance by Buyer of all Equipment and Work required by this Order. This one year limitation shall not apply to breach of warranty resulting from latent defects, gross negligence, fraud, or such gross mistakes as amount to fraud, provided that Buyer shall give notice within thirty (30) days after Buyer knows that such a breach has occurred. In Buyer's written notice, or within thirty (30) days thereafter, Buyer shall, at its sole discretion, direct Seller to correct, or not to correct the defect or nonconformance.
  - 1. Seller shall comply with any direction given by Buyer. If Buyer's direction is to correct, Seller, within forty-eight (48) hours after receipt of Buyer's direction and at no cost to Buyer, shall correct the defect or nonconformance and remedy any damage to other parts of the Work or any other property, resulting from such defect or nonconformance. This warranty shall then continue as to any corrected Work for one year (or such longer warranty period as may be specified elsewhere in this Order) after acceptance by Buyer of the correction. In addition, if the

direction is not to correct or if the defect cannot be fully corrected and Buyer is willing to accept less than total correction, Seller shall promptly repay to Buyer such portion of the Order as Buyer determines to be equitable under the circumstances.

2. If Seller fails to comply with Buyer's timely direction to correct any defect or nonconformance, Buyer may correct the defect or secure correction of the defect and recover from Seller the cost thereof.
- D. The rights and remedies of Buyer provided in this clause are in addition to and do not limit any rights and remedies afforded to Buyer by any other clause of this Order or by law.

**16. DISPUTES AND WAIVER OF RIGHT TO A JURY TRIAL**

- A. This Order and any dispute arising under or in connection with it shall be governed by and interpreted in accordance with the substantive laws of the State from which the Order is placed, except for that State's laws on conflicts of law.
- B. Any dispute that may arise under or in connection with this Order with respect to the rights, duties, or obligations of the Parties shall be reduced to writing and submitted for resolution to ascending levels of management of the respective Parties up to the Senior Executive of the Materiel or Procurement organization placing the Order, and Seller's equivalent executive level.
- C. Any dispute that cannot be resolved to both Parties' mutual satisfaction, after good faith negotiations, within ninety (90) calendar days from the date the written claim is received by the other Party, or such additional time as the Parties agree upon, in writing, either Party may bring suit in federal or state court.
- D. Unless otherwise agreed to in writing by the Parties, venue and jurisdiction for all legal proceedings of any kind or nature brought to enforce any provisions of this Order shall lie within the State from which the Order was issued.
- E. Pending any prosecution, appeal, or final decision referred to in this clause, or the settlement of any dispute arising under this Order, Seller shall proceed diligently, as directed by Buyer, with performance of the Order.
- F. **WAIVER OF RIGHT TO A JURY TRIAL.**

**TO THE MAXIMUM EXTENT PERMITTED BY LAW, BUYER AND SELLER HEREBY WAIVE THEIR RIGHT TO TRIAL BY JURY OF ANY CAUSE OF ACTION, CLAIM, COUNTERCLAIM OR CROSS-COMPLAINT IN ANY ACTION, PROCEEDING OR HEARING BROUGHT BY EITHER SELLER AGAINST BUYER OR BUYER AGAINST SELLER ON ANY MATTER WHATSOEVER ARISING UNDER, RELATING TO, OR IN ANY WAY CONNECTED WITH THIS ORDER, THE RELATIONSHIP OF SELLER AND BUYER OR ANY CLAIM OF INJURY OR DAMAGE, OR THE ENFORCEMENT OF ANY REMEDY UNDER ANY LAW, STATUTE OR REGULATION NOW OR HEREAFTER IN EFFECT.**

**17. RESPONSIBILITY FOR CLAIMS/INDEMNITY**

- A. Seller shall defend, indemnify and hold harmless Buyer, its officers, agents and employees from any loss or liability by reason of property damage, personal injury or death arising out of Seller's presence on premises of Buyer or its customer, except when

the loss or liability arises solely out of Buyer's fault or negligence. Seller and its subcontractors shall, at their sole cost and expense, maintain the following insurance coverage in the minimum limits indicated:

1. Commercial General Liability - \$2,000,000 combined single limit. Coverage shall include but not necessarily be limited to, premises and operations, products and completed operations and contracts.
  2. Automobile Liability - \$2,000,000 combined single limit, covering all owned, hired and non-owned vehicles.
  3. Workers' Compensation and Employers' Liability – The workers' compensation insurance coverage shall be as required by the laws of the jurisdiction where the work is performed. The Employers' Liability insurance limit shall be \$1,000,000.
- B. All insurance required as a part of this Order shall be in at least the minimum amounts specified above, shall be placed with insurance companies which are authorized to do business under the laws of the state in which the work is performed and shall be in a form reasonably acceptable to Buyer. All insurance shall contain a provision prohibiting cancellation of material revision except upon at least thirty (30) days prior written notice to Buyer.
- C. Evidence that the required insurance is in place shall be provided by the Seller in the form of insurance certificates. Each insurance certificate, except for workers' compensation, shall provide that Buyer is named as an additional insured with waiver of subrogation for each required insurance coverage.
- D. Before any activity that is the subject of this Order is begun, Seller shall provide to Buyer the insurance certificates, as evidence that the required insurance is in place. Renewal insurance certificates, if applicable, shall be provided to Buyer at least fifteen (15) days prior to the expiration date of the insurance under each required coverage.
- E. Seller shall maintain such insurance in full force and effect at all times until the Work called for by this Order has been completed and finally accepted by Buyer and all the operations at the site, including removal of equipment, materials, supplies, etc. and clean-up operations have been concluded.

## **18. LABOR DISPUTES**

Whenever Seller has knowledge that any actual or potential labor dispute is delaying or threatens to delay timely performance of this Order, Seller shall immediately give notice to Buyer including all relevant information. Seller agrees to insert the substance of this clause, including this sentence, in any lower-tier subcontract where a labor dispute might delay timely performance of this Order.

## **19. OFFSET COMMITMENT**

This clause shall only apply to Orders in excess of \$50,000.00.

- A. Definition: "Offset" means the obligations that Buyer undertakes, in order to market or sell its products, to assist a customer country in reducing any trade imbalance caused by its purchase of Buyer's products or to meet other customer country national objectives.
- B. Notwithstanding that this Order is or is not made in direct support of a foreign sale, Seller agrees that it is obligated to support Buyer's Offset commitments as a condition of this Order.
- C. The offset credits arising out of or resulting from, directly or indirectly, this Order are for

the exclusive use of Buyer and may be used by Buyer and any of its affiliates and subsidiaries to fulfill all past, present and future Offset obligations. In addition, Seller agrees to identify and retain for Buyer's use any rights to offset credits generated by its suppliers and subcontractors arising out of or resulting from this Order.

- D. Seller shall provide a copy of each Order or Subcontract placed with a foreign source under this Order in support of Buyer's rights to offset credit.
- E. Seller shall execute all necessary documents to evidence Buyer's right to use or assign any offset credits.

## **20. CODES AND STANDARDS**

Material and workmanship specified by reference to codes or standards shall, unless otherwise specified, comply with the latest revision of codes or standards as in effect on the date of the Order.

## **21. LOCATION OF WORK, SITE INVESTIGATION AND REPRESENTATIONS**

(This clause shall apply if the Order or Specification requires Seller to install the Equipment at a site owned, leased, or otherwise controlled by Buyer).

- A. Work, under this Order, relating to the installation of Equipment shall be performed at such place or places as shall be designated in the Order and at such other place or places as may be necessary. Seller acknowledges satisfaction as to the nature and location of the Work and the general and local conditions, particularly those bearing upon: (1) transportation; (2) disposal; (3) handling and storage of materials; (4) availability of labor; (5) security requirements; (6) water; (7) electric power and other utilities; (8) roads; (9) equipment and facilities needed prior to and during prosecution of the Work; and (10) all other matters which can, in any way, affect the Work or the cost thereof under this Order. Any failure by Seller to become acquainted with all available information concerning these conditions shall not relieve Seller from responsibility for properly estimating the difficulty or the cost of successfully completing the Work.
- B. Buyer assumes no responsibility for any understanding or representation made by any of its employees, agents or representatives during, or prior to, execution of this Order, unless such understanding or representation by Buyer is expressly stated in this Order.

## **22. BUYER-FURNISHED SPECIFICATIONS, DRAWINGS AND OTHER DOCUMENTS**

- A. Intent. The drawings, specifications, provisions, exhibits and other documents of this Order are complementary and shall be construed as a whole. Anything mentioned in the specifications shall have the same effect as if shown or mentioned in both drawings and specifications. Except as otherwise provided herein, the intent of the drawings and specifications, provisions, exhibits and other documents of the Order, as a whole, is to require Seller to furnish all labor, materials, equipment, tools, plant, transportation and other items necessary for the proper execution and completion of the Work.
- B. Discrepancies. Seller shall carefully study and compare all Order documents, with each other and with other information provided by Buyer, and if Seller believes the documents contain errors, omissions, or inconsistencies (hereinafter "Discrepancies") or has questions on the meaning of the documents, Seller shall immediately submit a written request for clarification to Buyer, citing as necessary, the drawings, figures, provisions, exhibits, or specifications that Seller determines may be discrepant. Buyer shall provide

written clarification, which shall include, if necessary, release of a clarifying revision to the discrepant documents. Any work performed by Seller before receipt from Buyer of clarification or resolution of a discrepancy shall be performed at Seller's expense and risk.

- C. Other documents. Buyer may furnish, from time to time, such other detail drawings, specifications and documents as it may consider necessary. All drawings, specifications, data, information and other documents furnished by Buyer to Seller, in the performance of this Order, shall remain the property of Buyer.
- D. Applicability and Versions. All lists, rules, regulations and standards referred to in this Order are recognized as requirements of this Order. When American Society of Testing Materials (ASTM) Specifications are referred to, it is understood to mean that these ASTM specifications shall be the latest ASTM specifications.

### **23. SELLER-FURNISHED DOCUMENTS**

- A. Promptly after completion of all Work, and as a condition precedent to final payment, Seller shall deliver to Buyer all drawings and other documents required by the Specification showing the "as-built" condition.
- B. In the event of termination for either convenience or default, Seller shall deliver to Buyer a complete set of all drawings, specifications and other documents relating to the Work and developed by Seller in the performance of the Work prior to termination of the Work, including preliminary versions of drawings, specifications and other documents that have not been completed.
- C. Buyer shall have rights in drawings, plans, specifications and other documents as set forth in the Patents and Inventions clause of these terms and conditions.

### **24. SUBCONTRACTS**

- A. All Work performed by Seller upon Buyer's premises shall be accomplished with Seller's own employees, except when Buyer's prior written approval is obtained. Subcontractors and others shall be used only on Work for which they are proposed by Seller and accepted, in writing, by Buyer.
- B. Seller shall, two months prior to scheduling any subcontractor to enter upon Buyer's premises for the purpose of performing Work, furnish, in writing, to Buyer's Purchasing Representative, a complete list of all subcontractors to be used in performance of the Work showing subcontractors' names, addresses, phone numbers, trade and license numbers. This Order shall be clearly referenced on the submittal.
- C. Seller shall remain fully responsible for all Work covered by this Order, whether or not said Work is subcontracted.
- D. Neither consent by Buyer to any subcontract, nor any provision thereof, shall be construed to be a determination of acceptability of any subcontract price or of any amount paid under any subcontract, or to in any way relieve Seller of any responsibility for performing this Order. Seller shall be fully liable to Buyer for acts and omissions of all subcontractors, of every tier, and their respective agents, representatives and employees.

### **25. SUSPENSION OF WORK**

- A. Buyer may, by written notice, expressly referring to this clause, signed by Buyer's

Authorized Purchasing Representative, direct Seller to suspend, delay or interrupt all, or any part of, the Work for such period of time as may be appropriate for the convenience of Buyer.

- B. If the performance of all or any part of the Work is suspended, delayed or interrupted, for an unreasonable period of time, by an act of Buyer in administering this Order, or by Buyer's failure to act within the time specified in this Order (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance (excluding profit) caused by such unreasonable suspension, delay or interruption and the Order modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay or interruption to the extent (1) that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of Seller or its subcontractors, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this Order.
- C. Except as may be otherwise provided herein, no claim under this clause shall be allowed (1) for any costs incurred more than twenty (20) days before Seller shall have notified Buyer in writing of the act, or failure to act, involved, and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay or interruption, but not later than the date of final payment under this Order.

## **26. BUYER AUTHORIZATION**

- A. Buyer's Authorized Purchasing Representative has sole authority to make contractual commitments on behalf of Buyer, to provide contractual direction, and to change contractual requirements as defined in this Order.
- B. Buyer's representatives other than Buyer's Authorized Purchasing Representative may release to Seller information applicable to this Order. If information so provided to Seller changes the contractual requirements and/or performance of this Order, Seller shall not act on that information and it shall not be contractually effective until Seller receives written contractual direction to act from Buyer's Authorized Purchasing Representative.

## **27. CHANGES**

- A. Buyer may, at any time, without notice to sureties and assignees, if any, by a written notice, which expressly refers to this clause, make any change in the Work within the general scope of the Order, including but not limited to changes:
  - 1. In the specifications (including drawings and designs);
  - 2. In the method or manner of performance of the Work;
  - 3. In Buyer-furnished facilities, equipment, services, or site; or
  - 4. Directing acceleration or deceleration in the performance of the Work.Upon receipt of any notice issued pursuant to this Paragraph 26.A, Seller immediately shall proceed in accordance with such notice.
- B. Any other written or oral order (which terms, as used in this paragraph 26.B, shall include direction, instruction, interpretation or determination) from Buyer's Authorized Purchasing Representative which causes any such change, shall be treated as a change order under this clause; provided, Seller gives Buyer written notice stating the date,

circumstances and source of the order and that Seller regards the order as a change order. Any effort performed by Seller before receipt from Buyer's Authorized Purchasing Representative of a written or an oral Order shall be performed at Seller's expense and risk.

- C. Except as provided in Paragraphs A and B of this Clause, no order, statement or conduct of Buyer, Buyer's Authorized Purchasing Representative, or of any inspector, engineer, or employee of Buyer shall be treated as a change hereunder, or entitle Seller to an equitable adjustment hereunder.
- D. If any change under this Changes Clause causes an increase or decrease in Seller's cost of, or time required for the performance of any part of the Work under this Order, an equitable adjustment shall be made and the Order modified in writing accordingly.
- E. Ordinarily a notice will not be issued under Paragraph A of this Clause 26 until the Parties have agreed upon the final and entire equitable adjustment, if any, to be made on account of the notice, and the agreed adjustment will be set forth in the Order. If Buyer deems it necessary, Buyer may issue a notice pursuant to Paragraph A of this Clause 26 before agreement has been reached; notwithstanding any dispute or delay in reaching agreement, Seller shall immediately proceed in accordance with any such notice. No such notice shall be construed as an admission by either party that the notice changes the requirements of the Order nor prejudice the rights of either Party with respect to the adjustment, if any, that either Party may be entitled to on account of the notice.
- F. If Seller intends to assert a claim for an equitable adjustment under this Clause, then, within thirty (30) days after receipt of any written notice issued pursuant to Paragraph A of this Clause 26, which does not set forth the agreed adjustment, or within thirty (30) days after receiving any written or oral order under Paragraph B of this Clause 26, Seller shall submit to Buyer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by Buyer in writing. The statement of claim hereunder may be included in the notice under Paragraph B of this Clause 26.
- G. No claim by Seller for an equitable adjustment hereunder shall be allowed if asserted after final payment under this Order.

## **28. UTILITIES**

Unless otherwise provided in this Order, Buyer shall furnish all water, electric current, and other utilities as may be required for the performance of all Work performed by Seller upon Buyer's premises.

## **29. UTILITY SHUT-OFF**

If Seller requires the temporary shut-off of any utility upon Buyer's premises (which term, as used herein shall include all supply, disposal, distribution and communication systems, and all similar facilities); Seller shall notify Buyer at least twenty-four (24) hours in advance of the time Seller requires the shut-off. Seller shall then perform the Work requiring the shut-off on such days and at such hours as Buyer may direct. Regardless of the days or hours established by Buyer, no extra compensation will be provided for such work.

**30. SELLER'S EMPLOYEES**

Buyer may, by a written order signed by Buyer's Authorized Purchasing Representative, require Seller to remove from Buyer's premises any employee, agent or representative of the Seller, or any of its subcontractors, Buyer deems incompetent, careless or otherwise objectionable. Seller shall remove such employee, agent or representative from Buyer's premises immediately.

**31. PLANT SECURITY**

If this Order requires Seller's personnel to enter Buyer's or Buyer's customer's premises, Seller agrees to have its personnel, engaged in the performance of Services hereunder, report to Buyer's plant and follow site-specific rules for plant access. At the Everett site, all visitors must register at the reception desk; at the Brea site, all visitors must register at the guard post. Visitors must present a Government-issued photographic identification document, proof of citizenship and/or company affiliation, upon request. Seller further agrees to abide by and comply with, and require its Employees to abide by and comply with, such rules and regulations pertaining to plant security as may be prescribed by Buyer.

**32. SELLER'S WORK AREA ON BUYER'S PREMISES**

- A. Seller shall confine all its operations, including storage; vehicle parking; and the movement of materials; equipment; and workmen, to the areas specified, or approved by Buyer; provided, however, at Buyer's option, premises adjacent to the site may be made available for use by Seller without cost whenever such use will not interfere with other use or purposes of Buyer and Buyer gives its written consent.
- B. Materials and equipment shall be neatly and safely stored with the least possible interference to existing traffic lanes.

**33. MATERIAL AND WORKMANSHIP**

- A. Unless otherwise specifically provided in this Order, all material (which term, as used in this Order, shall include all materials, equipment and other items incorporated or to be incorporated in the Work covered by this Order) shall be new and of the most suitable grade for the purpose intended.
- B. Whenever the specifications, drawings, or other documents furnished by Buyer indicate or specify by patent or proprietary material name or manufacturers' name, such material or process shall generally be deemed to be required and "NO SUBSTITUTIONS" shall be made without the express written approval of Buyer. Nevertheless, with regard to materials that qualify as "Or Equal", Seller may request, and Buyer may authorize, use of such "Or Equal" materials, in writing. If Seller, or its subcontractors at any tier, uses materials, supplies, goods or processes neither permitted by the specifications, drawings, or other documents nor authorized in writing by Buyer's Authorized Representative, Seller shall be obligated to remove and replace such materials, at the request of Buyer, at no cost to Buyer. This Clause is in addition to Buyer's other remedies as provided herein.
- C. When required by this Order or when requested by Buyer, Seller shall promptly furnish to Buyer, for approval, full information concerning, and samples of, the material to be incorporated in the Work. Material installed or used without required approval shall be at risk of subsequent rejection.

- D. Approval by Buyer of material shall not relieve Seller of any warranty with respect thereto or any obligation or liability in connection with this Order.
- E. All Work under this Order shall be performed in a skillful and workmanlike manner.

**34. PROTECTION OF PROPERTY**

At all times when Seller is performing Work on Buyer's premises, Seller shall use suitable precautions to prevent damage to Buyer property or the property of third parties. If any such property is damaged by any negligent act or omission of Seller, or its subcontractors, or any of their respective agents or employees in connection with the performance of this Order, Seller shall, at no cost to Buyer, promptly and equitably reimburse the owner of such property for such damage or repair or otherwise make good the same to Buyer's satisfaction. If Seller fails to do so, Buyer may do so and charge to or otherwise recover from Seller the cost thereof. This Clause shall not be construed to relieve Seller of, or limit, Seller's liability under any other provision of this Order for loss or destruction of or damage to any property.

**35. PROTECTION OF WORK AND MATERIAL**

At all times when Seller is performing Work on Buyer's premises, Seller shall protect from damage or deterioration all Work performed and all materials, equipment and other items incorporated, or to be incorporated, therein. All reasonable requests of Buyer to enclose or otherwise protect such property shall be complied with promptly at no cost to Buyer.

**36. SALVAGE AND CLEAN UP**

Upon completion of the Work and before final acceptance, Seller shall, at no additional cost or expense to Buyer unless otherwise specified herein or authorized by Buyer, remove from the site all equipment, debris, surplus materials, hazardous materials and temporary construction, and leave the premises in a broom-clean, neat and workmanlike condition.

**37. RESTORATION OF EXISTING IMPROVEMENTS**

Unless otherwise specified, all existing structures and other improvements altered or removed by Seller in the performance of the Work shall be appropriately repaired, replaced or otherwise restored by Seller at no additional cost to Buyer. The quality of the restoration shall be as good as existing structures and meet the approval of Buyer.

**38. SAFETY ON BUYER'S PREMISES**

- A. At all times Seller shall use suitable safety precautions, including, as a minimum, those safety precautions specified elsewhere in this Order or as may be required by Buyer's Safety Rules and Standards in order to prevent injury to workmen and all other persons who may be on or about Buyer's premises. Such safety precautions shall include, but not be limited to, the use of proper materials, tools, mechanical and automotive equipment and the erection and maintenance of barricades, signs, flags, lights and other safeguards. Any barricades used shall be equipped with an electric, flasher type light approved by Buyer.
- B. If, because of the site area, safety permits are required by Buyer's Safety Rules and Standards, Seller shall obtain proper permits or clearance in writing from Buyer's Safety Office. Any previous approvals granted under any other contracts shall not be valid for the purpose hereof.

- C. Seller shall also comply with all applicable rules, regulations and orders of the Occupational Safety and Health Act of 1970 (P.L. 91-596, 29 USC 651-678), as amended, and all applicable safety laws, rules, regulations and orders of the United States and the state wherein the Work is being performed. Seller hereby indemnifies and holds Buyer harmless from and against any noncompliance by Seller with any of the above laws, rules, regulations and orders as may be applicable.

**39. FIRE PROTECTION**

- A. Seller shall provide adequate fire extinguishing equipment including, as a minimum, portable extinguishers suitable for the types of hazards involved and any other extinguishers specified herein or required by Buyer.
- B. Welding, cutting and other open flame operations shall be performed only after obtaining a permit, if required by Buyer (daily permits may be required), and only under conditions approved by Buyer.
- C. Smoking shall be confined to areas free from fire hazards and any smoking regulations in effect in any area where Work is being performed shall be strictly observed.

**40. HAZARDOUS MATERIAL**

- A. If this Order involves the transport or use of any hazardous material on Buyer's premises, packaging and shipment of such material must be made in accordance with the Hazardous Materials Regulations Title 49 CFR, Occupational Safety and Health Administration Regulation, Title 29 CFR. As a condition of this Order, Seller shall provide to Buyer a Materials Safety Data Sheet (MSDS). Seller must submit the most current MSDS available. Unless there are changes affecting the characteristics and composition of the hazardous material previously reported, only one submission to Buyer is required. An MSDS from the manufacturer will satisfy these requirements; however, in no event shall the MSDS bear an issue date earlier than twenty-four (24) months before the date of submission.
- B. The warning label required on hazardous material by 29 CFR 1910.1200 shall not be obscured by other stamps or labels. When an MSDS is required, Seller shall mail it separately to the address on the face of this Order to the attention of the Safety Manager.
- C. By acceptance of this Order, Seller certifies: (1) compliance with this Clause; (2) an up to date MSDS will be submitted prior to delivery or use of any hazardous material on Buyer premises; or (3) that no hazardous material will be delivered or used, as applicable.

**41. ENVIRONMENTAL REQUIREMENTS**

- A. Seller shall, in the performance of this Order, comply with all environmental requirements imposed by federal, state, and local statutes, regulations, ordinances or rules, including, but not limited to, those environmental requirements specified elsewhere in this Order as being applicable to the state in which this Order is to be performed.
- B. Notwithstanding that the Order may require the use of paints or coatings which do not meet state or district requirements for reduced volatile organic compounds ("VOCs"), Seller must comply with all federal, state and local regulatory requirements respecting

air quality and emission limitations. It remains Seller's responsibility to meet the requirements for reduced VOCs even where to do so will require the use of engineering controls or other special painting equipment.

#### **42. COMPLIANCE WITH LAWS**

- Seller warrants that it shall comply with all applicable Federal, State and local laws, rulings, and regulations and all lawful orders, rules and regulations thereunder, including but not limited to social security and income tax withholding laws, workmen's and unemployment compensation laws, safety and fire protection standards, and building codes, and Seller shall defend, protect, indemnify and hold Buyer harmless from and against all claims, suits and actions arising from any failure of Seller or any of Seller's subcontractors so to do during the performance of this Order.
- A.** On all Seller's invoices or statements or in any other form satisfactory to Buyer, Seller shall submit certification of compliance with all applicable requirements of Sections 6, 7 and 12 of the Fair Labor Standards Act (29 USC 201-219) as amended and of regulation and orders of the U.S. Department of Labor issued under Section 14 thereof.
  - B.** This purchase order is subject to Executive Order 11246, as amended, the Rehabilitation Act of 1973, as amended, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, the Veterans Employment Opportunities Act of 1998, and their implementing regulations, to the extent required by law. 41 CFR §§ 60-1.4, 60-741.5, and 60-250.5 are incorporated herein by reference, if legally required. Seller shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin.
  - C.** Unless otherwise waived and without limiting the generality of the foregoing, Seller shall obtain and pay all necessary licenses and permits in connection with the performance of this Order all without additional cost or charge to Buyer.

#### **43. EXPORT AND IMPORT COMPLIANCE**

All exports of technical data or technology from the United States and any subsequent re-export from or transfers within a non-U.S. country shall comply with the laws and regulations of the United States relating to exports, re-export, transfers and foreign transactions, including, but not limited to, the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR).

#### **44. TAXES**

- A.** Unless this Order specifies otherwise, the price of the Equipment includes, and Seller is liable for and shall pay, all taxes, impositions, charges, exactions and duties imposed on Seller, or otherwise assessed against Seller, in connection with the performance by Seller of this Order, except for sales or use taxes assessed by any United States governmental authority or subdivision thereof on sales to Buyer ("Sales Taxes") which Buyer hereby specifically agrees to pay. Sales Taxes shall be separately stated on Seller's invoices. Prices shall not include any taxes, impositions, charges, exactions or duties for which Buyer has furnished a valid exemption certificate or other evidence of exemption.
- B.** In the event that any taxing authority has claimed or does claim payment for Sales Taxes, Seller shall promptly notify Buyer, and Seller shall take such action as Buyer

may reasonably request to pay or protest such taxes or to defend against such claim. If Seller or Buyer is successful in defending such claim, the amount of such taxes recovered by Seller, which had previously been paid by Seller and reimbursed by Buyer or paid directly by Buyer, shall be promptly refunded to Buyer.

- C. If any Sales Taxes paid by Buyer are subject to rebate or reimbursement, Seller shall take such actions as Buyer may reasonably request to secure such rebates or reimbursement and shall promptly refund to Buyer any amount recovered.

**45. TREATMENT OF PROPRIETARY INFORMATION**

- A. "Proprietary Information" means all information or data, whether recorded in tangible or electronic form, that is related to or used in the performance of this Order, including, without limitation, technical information in the form of designs, drawings, concepts, requirements, specifications, Software, Software documentation, interfaces, components, processes, disclosure reports, project reports, process descriptions and definitions that is identified in writing at the time of disclosure as proprietary and marked with an appropriate legend, marking or stamp identifying the information or data as proprietary to the Party disclosing the information.
- B. Seller agrees to keep confidential and not to disclose to any other person any Proprietary Information received from Buyer in connection with this Order. Seller further agrees to use Proprietary Information only for purposes necessary for performing this Order, without first obtaining Buyer's written authorization.
- C. Seller may disclose Proprietary Information to its subcontractors as required for the performance of this Order, provided that each subcontractor first assumes by written agreement the same obligations imposed on Seller under this Order relating to such Proprietary Information.
- D. All documents and other tangible media (excluding Equipment) containing or conveying Proprietary Information and transferred in connection with this Order, together with any copies thereof, are and remain the property of Buyer.
- E. Neither the existence of this Order nor the disclosure of Proprietary Information or any other information hereunder, shall be construed as granting expressly by implication, by estoppels or otherwise, a license under any invention or patent now or hereafter owned or controlled by Buyer, except as specifically set forth herein.
- F. Seller's obligations with respect to Proprietary Information disclosed hereunder prior to the performance in full, termination, or cancellation of this Order shall not, except as expressly set forth herein, be affected by such performance in full, termination, or cancellation.
- G. In the event Buyer and Seller enter or have entered into a Nondisclosure Agreement that addresses the subject matter of this Order, the Nondisclosure Agreement shall supersede this Clause 44.

**46. RIGHTS IN COPYRIGHTS**

Seller is providing to Buyer training materials, technical manuals and other documentation, concerning the Equipment being delivered, that Buyer will need to support its use of the Equipment. Buyer acknowledges that Seller retains any copyright to which these written materials are subject. Seller hereby grants to Buyer a paid-up, royalty free, non-exclusive license to copy or otherwise reproduce these materials for internal use as Buyer deems necessary to permit operator training, and use of the Equipment for Buyer's purposes.

**47. PATENTS, INVENTIONS, TRADE SECRETS**

- A Buyer and Seller each shall retain all rights, title and interest to any patents, inventions (whether patented or not), trade secrets and know how (collectively referred to herein as "Technology") developed by each prior to or outside of the performance of this Order.
- B. Equipment Under this Order, Seller has designed and built the Equipment to Buyer's Specification provided to Seller and as represented in the engineering specifications, designs, drawings and other documents produced by Seller.
  - 1. Except as otherwise provided in this Order and in this Clause, the Seller shall retain all rights, title and interest in the Technology relating to the Equipment developed by Seller under this Order.
  - 2. Seller hereby grants to Buyer a paid-up, royalty free, non-exclusive, worldwide license to use the engineering and design data (in whatever form, whether paper, Mylar, or electronic media) relating to the Equipment or Work to meet Buyer's internal needs, including maintenance and repair of the Equipment or Work, and to make or have made Buyer Peculiar Tooling, replacement parts, components, and alterations, additions or other modifications to the Equipment or Work to support Buyer's use of the Equipment or Work in the manufacture of Buyer's products.

**48. SOFTWARE**

- A. The Equipment may be designed to operate with or require software to enable its operations. Any software, whether in machine readable or human readable form, and all accompanying software data and documentation furnished to Buyer pursuant to this Order (the "Software") and whether installed in the equipment or designed to be operated from a separate computer, shall be subject to the license rights and restrictions set forth in Clause 48 below.
- B. Seller shall ensure, unless otherwise specified in this Order, the Software in connection with this Order shall be the latest production version of the Software practicable for use under this Order taking into consideration the Order and delivery date(s) of this Order, and that the Software shall include the most recent attachments, definitions, improvements, enhancements, additions and/or modifications thereto.

#### **49. RIGHTS AND LICENSES IN SOFTWARE**

- A. Any Software claimed to be covered by a patent, a patent application, or a copyright must be clearly marked with a federal copyright or patent notice. Any Software claimed to contain any proprietary information must be clearly marked with a proprietary legend. No restrictions shall apply to reproduction, use, display, performance, distribution, or disclosure of any Software not clearly marked with a federal patent or copyright notice or a proprietary legend.
- B. Seller may propose the use in Equipment of third party Software that includes unique requirements requiring one or more exceptions to the terms and conditions of this Order, or related documents. One such example is commercial off-the-shelf (“COTS”) software requiring transfer of end user license agreements (“EULA’s”). Buyer grants Seller the right to incorporate such third party software into Equipment; provided, under no event will Buyer be required to execute EULA’s or to engage in any direct dealings with third party software owners or licensors.
- C. Seller may propose the use in Equipment of Application Software that Seller, either alone or with others, authors or creates. Buyer grants Seller the right to incorporate such Application Software into Equipment; provided, Seller furnishes to Buyer all source code and associated documentation used in any way to control, debug and/or repair the machine, or correct machine-related problems (including without limitation the man-machine interface, CNC, PLC, motion control modules, drive configuration, IP addressable cameras) and provided the Application Software and source code is furnished subject to the rights and licenses set forth below.
- D. Seller hereby grants Buyer a paid-up, royalty free, perpetual, world-wide, non-exclusive license to use the Software delivered under this Order as Buyer may deem necessary and appropriate to support its ownership and use of the Equipment and Work. The license to Buyer includes the following rights:
  - 1. Seller’s license to Buyer includes the rights to reproduce the Software, Application Software, Application Software source code and Software documentation to support its internal operations for all purposes for which the Equipment is used, for disaster recovery and for archival purposes; provided, all copies made by Buyer shall retain any copyright, patent, and or proprietary markings placed by Seller on all readable reproductions of the Software. To the extent that the Software is used on separate computers and not directly with the Equipment, Buyer shall have the right to reproduce and use the Software on any computer at any facility location, provided such use is to support Buyer’s internal operations.
  - 2. Seller’s license to Buyer includes the right to modify or have modified for Buyer’s own use any Software, Application Software, Application Software source code and Software documentation whether copyrighted, patented, or proprietary and Buyer also may merge the Software into other data (including software) to form an updated, derivative or collective work. Buyer shall be the sole owner of all modifications made by or on behalf of Buyer and shall be the owner of all rights therein including those rights granted by the federal copyright law to the author of such updated, derivative or collective work, provided, however, that any of Seller’s original software or other data contained in the updated, derivative or collective work shall continue to be subject to the applicable restrictions in this Clause 48.

3. Modifications to the Software, Application Software, Application Software source code and Software documentation and other data pursuant to Paragraph D.2 of this Clause 48 may be made by consultants or other independent contractors to Buyer provided that, as a condition of their work, such consultants or independent contractors shall be required to protect all Proprietary Information in accordance with this Paragraph and Buyer's Non-Disclosure Agreement with Seller, and provided that such consultants or other independent contractors shall not be granted any separate license to use the Software, Application Software, Application Software source code and Software documentation for their own purposes.
  4. If the Equipment should be sold or assigned to another party, Buyer shall have the unrestricted right to assign its license to the new owner of the Equipment.
- E. Buyer shall use its reasonable efforts not to display publicly and not to disclose, provide or otherwise make any proprietary Software and Software documentation available to persons other than employees and agents of Licensee or its parent or subsidiaries without obtaining the prior written consent of Licensor; provided, however, that neither Licensee nor its parent or subsidiaries nor any of its or their employees or agents shall have any liability and all restrictions shall be removed from any information in such software or other data to the extent that:
1. The breach of the restriction occurs notwithstanding the use by Licensee of the same degree of care that Licensee uses to protect its own similar proprietary data; or
  2. The information is now or hereafter becomes generally available to the public; or
  3. The information has been or is hereafter independently developed by Licensee, its parent and/or subsidiaries; or
  4. The information is now or hereafter becomes available to Licensee or any of its parent and/or subsidiaries from another source without any breach of the restrictions contained in this Paragraph 48.E; or
  5. The information is provided by Licensor to any third party without restrictions similar to those contained in this Paragraph 48.E or such restrictions upon the third party have expired; or
  6. The information is not clearly marked with a Licensor proprietary legend.
- F. For the purposes of this Order, the term "reasonable efforts" shall mean that Licensor's proprietary/confidential information shall be preserved, maintained, and managed in accordance with the same policies and procedures by which Licensee protects its own proprietary/confidential Software.

**50. PATENT, TRADEMARK, AND COPYRIGHT INDEMNITY**

- A. Seller warrants that the Work, Software, and Equipment do not infringe upon or violate any patent, copyright or trade secret. Seller shall defend and hold harmless, at its expense, any action or demand brought against Buyer, Buyer's officers, agents, employees, parent and customers to the extent that it is based on a claim that the Software infringes a patent, copyright or trade secret and will pay any and all costs and damages incurred by the Buyer, including reasonable attorney fees which are attributable to such claim; provided, Buyer notifies Seller promptly in writing of the claim and allows Seller to fully control the defense and any settlement of such claim and provided any such settlement does not require Buyer to pay any monetary or other type of compensation of any kind to the Seller, claimant, or any other party. Buyer hereby agrees to reasonably participate in the defense of such claim if reasonably necessary and requested to do so by Seller, subject to Seller paying all of Buyer's reasonable expenses associated with such participation. Buyer may appear through counsel at Seller's expense. Seller may, as part of its defense of Buyer, at Seller's option and expense, obtain such licenses as may be deemed necessary to remove any such infringement. Buyer agrees to cooperate with Seller in any such defenses as may be undertaken by Seller. Buyer's acceptance of the Work, Software and Equipment shall not be construed to relieve Seller of any obligation hereunder.
- B. Seller's obligation to indemnify shall not apply to any infringement arising from the use or sale of Equipment, Software, or Work in combination with products not delivered by Seller if such infringement would not have occurred from the use or sale of such Equipment, Software, or Work solely for the purpose for which they were designed or sold to Buyer.

**51. RESPONSIBILITY FOR CLAIMS**

Seller shall defend, protect, indemnify and hold Buyer harmless from and against all claims, suits and actions arising from any negligent act or omission of Seller or any of its subcontractors, of any tier, or any of their respective agents or employees in connection with the performance of this Order.

**52. INDEPENDENT CONTRACTOR**

Seller shall perform the Work as an independent contractor and at its sole risk and responsibility. Employees and subcontractors engaged in Seller's services hereunder shall not be in any sense employees or subcontractors of Buyer, but shall be employees and subcontractors of Seller during the period of this Order and shall be subject to the rules and regulations and management of Seller. Seller shall not act in any sense as agent or representative of Buyer. Seller shall establish and enforce rules and regulations for its employees and subcontractors while on the Work site, including all security, hazardous material and safety regulations as herein provided.

**53. TITLE TO EQUIPMENT AND WORK**

Title to the completed Equipment and to the Work shall vest in Buyer upon installation thereof at Buyer's site, and Seller shall deliver to Buyer all necessary indicia of ownership relating thereto.

**54. COMPOSITION OF SELLER**

If Seller is comprised of more than one legal entity, each such entity shall be jointly and severally liable under this Order.

**55. ASSIGNMENT**

No assignment of any rights or delegation of any duties under this Order shall be binding upon Buyer until its written consent thereto has been obtained, except Seller may assign rights to monies due, or to become due, providing it advises Buyer in writing of such assignments.

- A. Seller shall not assign any of its rights under this Order without Buyer's prior, written consent, except as specifically stated in this Clause. Seller may assign to a bank, trust company, or other financing institution including any Federal lending agency, claims for money due or to become due to Seller from Buyer under this Order, provided:
  - 1. The assignment is limited to one party, covers all amounts payable under the order and not already paid, is not subject to further assignment, and is made specifically subject to reduction and setoff or recoupment for any present or future claim or claims or indebtedness which Buyer may have against Seller;
  - 2. Seller furnishes to Buyer written notice of assignment and a true copy of the instrument of assignment.
- B. Buyer may make direct settlements or adjustments in price, or both, with Seller under the terms of this Order notwithstanding any assignment of claims for money due or to become due under this Order and without notice to the assignee.

**56. TERMINATION FOR CONVENIENCE**

- A. Buyer may terminate this Order in whole or, from time to time in part if Buyer determines that a termination is in its interest. Buyer shall terminate by delivering to Seller a Notice of Termination specifying the extent of termination and the effective date.
- B. After receipt of a Notice of Termination, and except as directed by Buyer, Seller shall immediately, as to the terminated portion of this Order, promptly stop work, notify subcontractors to stop work, and protect property in Seller's possession in which Buyer has or may acquire an interest.
- C. In the event of termination, the Order shall be amended and Seller paid:
  - 1. The actual costs incurred up to and including the date of termination which, using recognized accounting practices, are properly allocable to, or apportionable under the terminated portion of the Order; this will include costs to subcontractors which are so allocable.
  - 2. Reasonable termination expenses.
  - 3. A fair and reasonable profit, determined by Buyer; however, if it appears that Seller would have sustained a loss on the entire Order had it been completed, Buyer shall allow no profit and shall reduce the amount paid to reflect the indicated rate of loss.
- D. In no event shall payment to Seller exceed the total Order price as reduced by the amount of payments previously made and the Order price of work not terminated, nor shall Buyer be liable for incidental, special, or consequential damages arising out of the termination. Seller shall submit its termination claim to Buyer within three (3) months after the effective date of the termination, unless otherwise directed by Buyer.
- E. The cost principles and procedures of Part 31 of the U.S. Federal Acquisition

Regulations, in effect on the date of this Order, shall govern all costs claimed, agreed to, or determined under this Clause. The U.S. Federal Acquisition Regulations may be accessed electronically at: <http://farsite.hill.af.mil> or <http://www.arnet.gov/far>.

- F. Unless otherwise provided in this Order, Seller shall maintain all records and documents relating to the terminated portion of this Order for three (3) years after final settlement. This includes all books and other evidence bearing on Seller's costs and expenses under this Order. Seller shall make these records and documents available to Buyer, at Seller's office, at all reasonable times, without any direct charge. If approved by Buyer, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

#### **57. ADEQUATE ASSURANCE OF PERFORMANCE**

- A. If at any time Buyer has reasonable grounds for insecurity whether Seller's performance will be full, timely, and continuing in accordance with the requirements of this Order, Buyer may request, by notice to Seller, satisfactory assurances in writing that Seller is able and willing to perform all of its respective obligations under this Order.
- B. Seller shall provide with its assurances of performance any information, reports, or other materials, prepared by Seller as Buyer may reasonably request. Upon Buyer's request and as soon as practicable, Seller shall make available employees, including members of Seller's senior management, to meet with Buyer to discuss those assurances of performance.
- C. If Seller does not provide adequate written assurances within fifteen (15) days of Buyer's notice and request, Buyer may, at its option, treat this Order as breached by Seller, or as terminated in accordance with Clause 57 below.

#### **58. TERMINATION FOR DEFAULT**

- A. Except as provided in Paragraph 57.C below, Buyer may terminate all or any part of this Order, by written notice of default to Seller if Seller:
  - 1. Fails to perform a material requirement of the Order and does not cure that failure within a period of 30 days after receipt of notice from Buyer specifying Seller's failure to perform, which failure to perform may include (by way of example and not by way of limitation) failure to perform or comply with any obligation pertaining to or contained in:
    - a. Specifications, statement of work, quality standards, codes, and other Contract requirements relating to manufacture or delivery of Equipment, Software or Work;
    - b. Use, protection and control of Proprietary Information or other Buyer-owned property;
    - c. Environmental, safety, health or security;
    - d. Any law, statute, regulation, court order or ruling; or
    - e. Maintaining required insurance coverage's.
  - 2. Fails to complete the Work or deliver and install the Equipment and any Software within the time specified in this Order;
  - 3. Refuses or fails to prosecute the Work, or any separable part thereof, with such diligence as will ensure its completion within the time specified in this Order;
  - 4. Fails to cure a non-conforming delivery in accordance with Clause 6, entitled

- Inspection, Acceptance and Rejection, Paragraph E, of these terms and conditions;
5. Fails to provide adequate assurances of performance in accordance with the Adequate Assurance of Performance Clause herein; or
  6. Becomes insolvent or makes a general assignment for the benefit of creditors, or files or has filed against it a petition of bankruptcy or for reorganization, or pursues any other remedy under any other law relating to relief for debtors, or in the event a trustee or receiver is appointed for Seller's property or business.
- B. Remedies:
1. If Buyer terminates this Order for default, it may take over the Work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the Work such materials, tools, plans and other documents as may be necessary therefore.
  2. Whether or not Seller's right to proceed with the Work is terminated, Seller and its sureties shall be liable for any damage to Buyer resulting from Seller's refusal or failure to complete the Work within the specified time or in accordance with the requirements of this Order, including the difference between the price for the Work to be performed and Equipment to be delivered under this Order and the reasonable aggregate additional expense paid or incurred by Buyer to complete, or to contract with others to complete, the Work and Equipment.
- C. Seller shall not be liable to Buyer for resulting damage if and to the extent:
1. Any delay in the completion of the Work arises from unforeseeable causes beyond the control and without the fault or negligence of Seller, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of Buyer, acts of another contractor in the performance of a contract with Buyer, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather or delays of subcontractors arising from unforeseeable causes beyond the control and without the fault or negligence of both Seller and such subcontractors; and
  2. Seller, within ten (10) days after the beginning of any such delay, or within such further period before final payment under this Order as Buyer may allow in writing, notifies Buyer in writing of the cause of the delay.
- D. If, after notice of termination issued pursuant to this Clause, it is determined for any reason that Seller was not in default under the provisions of this Clause, or that the delay was excusable under the provisions of this Clause, the rights and obligations of the Parties shall be the same as if the notice of termination had been issued pursuant to the Termination for Convenience Clause hereof.
- E. The rights and remedies of Buyer provided in this Clause are in addition to any other rights and remedies provided by law, or equity, or under this Order. The term subcontractors mean subcontractors at any tier.
- F. Seller shall promptly transfer and deliver, and cause each of its subcontractors to transfer and deliver, any or all materials, tools, plans and other documents as may be necessary to prosecute the Work to completion to Buyer or Buyer's designee notwithstanding any event or circumstance whatsoever, including, without limitation, any claim or dispute Seller may assert in connection with such termination. Seller shall complete any and all transfers in an expeditious and orderly manner and will take such

other steps to assist Buyer or Buyer's designee as Buyer may reasonably request in good faith, all for the purpose of maintaining, or attempting to maintain as nearly as may be possible, completion of the Work or delivery of the Equipment in accordance with Buyer's schedule. Such transfer and delivery to Buyer of the above shall be at no cost to Buyer; however, Buyer shall take into consideration in mitigation of any claims by Buyer for damages as a result of the Event of Default all materials, tools, plans and other documents transferred. Seller hereby authorizes Buyer, its representatives, or its designee to enter upon its or any of its subcontractors' premises at any time during regular business hours, upon reasonable advance written notice, for the limited purpose of taking physical possession of any or all of the aforesaid items. At the request of Buyer, Seller shall promptly provide to Buyer a detailed list of such items, including the location thereof, and shall catalog, crate, package, mark and ship such items expeditiously and in an orderly manner and otherwise in the manner reasonably requested by Buyer, which request may specify incremental or priority shipping of certain items. Seller shall, if instructed by Buyer, store or dispose of any or all of the aforesaid items in any reasonable manner requested by Buyer.

**59. ORDER OF PRECEDENCE**

Any conflict or inconsistency between or among any parts of the Order, shall be resolved by giving precedence in the following order:

- A. Typed Purchase Order;
- B. Purchase Order Terms and Conditions;
- C. Specification;
- D. Drawing; and
- E. Other Referenced Documents.

**60. NONWAIVER**

Acceptance or acquiescence in a course of performance rendered under this Order shall not be relevant to determine the meaning of this Order, even though the accepting or acquiescing Party has knowledge of the nature of performance and opportunity for objection.

**61. SUCCESSORS OR PARTIES**

This Order is binding on the Parties, their respective legal representatives, trustees, successors and assigns.

**62. PARTIAL INVALIDITY**

If any provision of this Order is or becomes void or unenforceable by force or operation of law, all other provisions shall remain valid and enforceable.

**63. MODIFICATION**

No modification of this Order (including any additional or different terms in Seller's acceptance) shall be binding on Buyer unless agreed to in writing and signed by Buyer's duly authorized Purchasing Representative.

**64. NONWAIVER**

Buyer's failure at any time to enforce any provision of any Order shall not constitute a waiver of such provision or prejudice Buyer's right to enforce such provision at any subsequent time.

**65. COMPLETE AGREEMENT**

This Order is intended by the Parties as a final expression of their agreement and is the complete and exclusive statement of all terms and conditions of agreement.