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## Section 8 : GENERAL TERMS AND CONDITIONS

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### 861. GENERAL TERMS AND CONDITIONS.

#### FIXED PRICE DEPARTMENT OF DEFENSE CONTRACT.

#### DEVELOPMENT OF COMPLEX EQUIPMENT. (10/96).

##### 1. FORMATION OF THE CONTRACT

If Buyer and Seller have agreed upon the terms and conditions of this contract, this purchase order is Buyer's acceptance of Seller's offer and the remainder of this Article does not apply. Otherwise, this purchase order is Buyer's offer to Seller, and acceptance by Seller is limited to the terms of this offer. Buyer objects to any additional terms stated in Seller's acceptance. Acceptance may be by prompt written acknowledgment or by beginning performance.

##### 2. MODIFICATIONS

None of the terms and conditions of this contract may be contradicted, modified, supplemented, explained, waived or rescinded except as provided in this contract or in a written agreement signed by both parties. Only an Buyer purchasing representative may sign on behalf of Buyer.

##### 3. INSPECTIONS

(A) Seller will provide and maintain an inspection system acceptable to Buyer and the Government covering goods and services under this contract and will tender only goods that have been inspected and found to conform to this contract's requirements. Seller will keep records evidencing inspections and their results, and will make these records available to Buyer and the Government during contract performance and for three years after final payment.

(B) Buyer and the Government may inspect and test all goods and services under this contract. Such inspections and tests, to the extent practicable, may occur at all times and places, including the period and place of manufacture or performance, and in any event, before acceptance. Buyer and the Government will perform any inspections and tests in a manner that will not unduly delay the work.

(C) If Buyer or the Government performs an inspection or test on the premises of Seller or its subcontractor, Seller will furnish, and require its subcontractor to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as may be otherwise provided in this contract, Buyer or the Government will bear the expense of inspections or tests made at other than Seller's or Seller's subcontractor's premises; provided, that in case of rejection, Buyer and the Government will not be liable for any reduction in the value of samples inspected or tested.

##### 4. QUALITY CONTROL

Seller will provide and maintain a quality control system acceptable to Buyer and the Government for the goods and services purchased under this contract, and Seller, will permit Buyer and the Government to review procedures, practices,

processes, and related documents to determine such acceptability.

## 5. RELIANCE

Seller acknowledges that it is and that Buyer relies upon Seller as an expert, fully competent in all phases involved in designing, producing, testing, developing, tooling, manufacturing, modifying, altering, reconditioning, and stocking the goods, and in training or providing any services under this contract. Seller will not deny any responsibility or obligation to Buyer on the grounds that any such phase was approved or reviewed by Buyer or on the grounds that Buyer provided drawings to Seller.

## 6. SPECIFICATION RESPONSIBILITY

(A) This contract's specifications are performance specifications for the goods and services under this contract. If goods delivered or services performed do not meet or exceed the performance specifications, Seller will re-design the goods or re-perform the services and make changes to all affected technical data and computer software required by this contract, all at no increase in contract price. Re-designed goods, re-performed services, and corrected technical data and computer software are subject to this article. Buyer's review or approval of Seller's drawings or design, at any stage of development or production, does not relieve Seller of its obligations under this Article.

(B) Seller assumes all risks of impossibility of performance and commercial impracticability.

(C) In the development of goods under this contract, Seller has anticipated reasonable variances in, amplifications and refinements of, and modifications to the specifications, drawings and design of the goods. Until the goods have completed all testing required by this contract and Seller has received Buyer's written approval of test results, the risk that the specifications, drawings or design of goods may reasonably be varied, amplified, refined or modified has been allocated to Seller and the fixed price of this contract is based on that allocation. Seller will not submit a claim for, and will not be entitled to, an adjustment of the contract price or the delivery schedule pursuant to this contract's Changes clause for any such variance in, amplification or refinement of, or modification to drawings, design or specifications.

## 7. DELIVERY

Notwithstanding any course of dealing or usage of trade, Seller will strictly adhere to the delivery and completion schedules specified in this contract. If, at any time, Seller believes it may be unable to comply with the delivery or completion schedules, Seller will immediately notify Buyer in writing of the probable length of any anticipated delay and the reasons for it, and will provide Buyer with a written recovery schedule. Seller will continue to notify Buyer of any material change in the situation. If Seller fails to deliver goods within the delivery schedule, Buyer may require Seller to ship goods, at Seller's expense, by air freight or expedited routing.

## 8. DELIVERY OF GOODS WITH SHORTAGES OR DEFICIENCIES

If Seller fails to deliver conforming goods within the delivery schedule and Buyer determines that it is necessary for Seller to deliver goods with known nonconformities or goods that have not successfully completed testing required by this contract, Seller will deliver such goods at the direction of Buyer in accordance with the following:

(A) Seller will, at no increase in contract price, promptly complete all required testing and correct all nonconformities (i) identified at the time Buyer directs Seller to deliver the goods; or (ii) discovered during required testing. Seller will correct nonconformities at Seller's plant, Buyer's plant or a Government facility, at Buyer's election. If goods are returned to Seller for correction, Seller will pay all transportation costs.

(B) Buyer may elect to have nonconformities corrected by Buyer or the Government rather than by Seller. If Buyer so elects, Seller will deliver to Buyer or the Government, at no increase in contract price, kits or raw material necessary to correct the nonconformities, and the parties will equitably adjust the contract price to account for work not performed by Seller. Seller will pay all transportation costs of kits or raw material.

(C) Buyer will pay Seller for goods delivered pursuant to this Article, but may withhold an equitable portion of the contract price until Seller completes testing and corrects nonconformities as required by this Article. Notwithstanding Article 9, Buyer will accept or give notice of rejection of such goods within 90 days of Seller's completion of testing and correction of nonconformities required by this Article.

(D) Before delivering goods pursuant to this Article, Seller will notify Buyer of any known or suspected risks of using such goods before completion of testing or correction of known or suspected nonconformities.

## 9. ACCEPTANCE AND REJECTION

(A) Buyer will accept or give notice of rejection of goods delivered and services performed within 90 days of receipt of goods or completion of services. Acceptance is not conclusive as to latent defects, fraud, or gross mistakes amounting to fraud. Inspection does not constitute acceptance.

(B) *Goods.* If Seller tenders nonconforming goods, Buyer may, at its option, require Seller to replace or correct the goods, at no increase in contract price. Seller will not tender for acceptance corrected or rejected goods without disclosing the former rejection or requirement for correction, and, when required, will disclose the corrective action taken. Unless Seller corrects or replaces nonconforming goods within the delivery schedule, Buyer may require their delivery and make an equitable price reduction.

(C) *Services.* If services do not conform with contract requirements, Buyer may require Seller to perform the services again in conformity with contract requirements, at no increase in contract price. When the defects in services cannot be corrected by re-performance, Buyer may (i) require Seller to take necessary action to ensure that future performance conforms to contract requirements; and (ii) reduce the contract price to reflect the reduced value of the services performed.

## 10. WARRANTY

(A) *Goods.* Seller warrants that all goods furnished under this contract will be free from defects, will conform with all requirements of this contract, and, to the extent not manufactured pursuant to designs furnished by Buyer, will be free from defects in design. Any goods corrected or replaced will be covered by this warranty.

(B) *Services.* Seller warrants that all services performed under this contract will be free from defects and will conform to the requirements of the contract. Any services corrected or reperfomed will be covered by this warranty.

(C) Seller's warranties run to Buyer and its customer.

(D) Notwithstanding the mean time between failure requirements specified for any goods, Buyer may require Seller to perform a failure free warranty service on failed goods, including random failures. Seller will furnish all labor, materials, parts, testing and associated effort required to repair or replace, at Seller's option, any failed goods and redeliver such goods to Buyer or its customer within 30 days of Seller's receipt of such goods.

(E) If Seller breaches this warranty, Buyer may, at no increase in contract price -- (i) Require Seller to promptly repair or replace, at Seller's election, defective or nonconforming goods; (ii) Require Seller to promptly furnish materials or parts and installation instructions required to successfully accomplish the correction of defective or nonconforming goods, and

equitably reduce the contract price to account for the cost of removal and installation; (iii) Require Seller to promptly redesign defective or nonconforming goods not manufactured pursuant to designs furnished by Buyer and require Seller to promptly repair or replace goods manufactured in accordance with such defective design; (iv) Require Seller to promptly correct or reperform, at Seller's election, defective or nonconforming services; or (v) Equitably reduce the contract price.

(F) If Buyer returns goods to Seller for repair or replacement, Buyer may withhold, from any sums owed Seller under this or any other contract, the contract price for such goods until such goods have been repaired or replaced and returned to Buyer.

(G) Seller's warranties will not be voided by any repair of goods performed by qualified personnel in accordance with Seller's written maintenance procedures.

(H) Notwithstanding any disagreement regarding the existence of a breach of this warranty, Seller will comply with Buyer's direction to (i) repair or replace, at Seller's election, the goods or (ii) furnish materials or parts and installation instructions required to successfully repair the goods. If it is later determined that Seller did not breach this warranty, the contract price will be equitably adjusted.

## 11. CHANGES

(A) Buyer may, at any time, by written order signed by its authorized purchasing representative, and without notice to sureties, if any, make changes within the general scope of this contract in any one or more of the following: (i) drawings, designs, or specifications; (ii) method of shipment or packing; (iii) place of inspection, delivery or acceptance; (iv) description of services to be performed; (v) time of performance of services (i.e., hours of the day, days of the week, etc.); or (vi) place of performance of services. Buyer may at any time, by written order signed by its authorized purchasing representative, and without notice to sureties, if any, extend the delivery schedule of goods to be delivered or services to be performed under this contract.

(B) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the contract price, the delivery schedule, or both, will be equitably adjusted, and the parties will modify the contract in writing.

(C) Unless otherwise agreed in writing, Seller must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written change order. However, Buyer may consider any claim regardless of when asserted. If Seller's proposal includes the cost of property made obsolete or excess by change, Buyer will have the right to prescribe the manner of the disposition of the property. Buyer may examine any of Seller's pertinent books and records to verify the amount of Seller's claim.

(D) If Seller believes that Buyer has directed a change that entitles Seller to an adjustment of the price or delivery schedule pursuant to this Article, Seller will notify Buyer within 30 days of Seller's receipt of such direction unless Seller has received a written order, signed by an Buyer purchasing representative, referencing the Changes clause of this contract.

(E) Notwithstanding any dispute under this Article, Seller will proceed with performance of the contract as changed.

## 12. EFFECT OF CHANGES ON OPTIONS

(A) If (i) any change will cause an increase or decrease in the cost of or the time required for, performance, of any part of the work of any unexercised option under this contract, whether or not changed by the order and (ii) the change entitles Seller to an adjustment of the price or delivery schedule pursuant to this contract's Changes clause, Seller will notify Buyer in writing within 30 days after Buyer directs the change. The notice will describe the nature and estimated amount of any increase or decrease. Failure to submit a notice to Buyer within 30 days after receiving the order will constitute a waiver of Seller's right to any adjustment in option price or delivery schedule caused by such damage.

(B) If Seller has given timely notice pursuant to paragraph (A), Buyer and Seller will negotiate an equitable adjustment in the option price, the delivery schedule, or both, and the parties will modify this contract in writing. Buyer may examine any of Seller's pertinent books and records to verify the amount of Seller's claim. Seller and Buyer will seek to negotiate the adjustment before option exercise. However, Buyer may exercise any option before adjustment and Seller will perform the option as exercised, including performance of the change work. Failure to agree upon an adjustment will be a dispute.

### 13. INVOICE AND PAYMENT

(A) For each shipment of goods or completed item of services, Seller will submit an original invoice marked "original" and one copy marked "copy" to the appropriate Buyer Accounts Payable Department. Taxes, if any, must be separately itemized. Purchase Order number and line item number must appear on all invoices, shipping documents, quality certificates, and packing sheets.

(B) Determination of payment due date, whether under net or discount terms, will be based on the latest of (i) the date goods are received or services performed; (ii) the date provided in this contract for receipt of goods or completion of services, or (iii) the date an accurate invoice is received.

(C) Payment will be deemed to have been made when deposited in the mail.

### 14. TERMINATION FOR CONVENIENCE

Buyer may terminate performance of work under this contract in whole or, from time to time, in part under the provisions of FAR 52.249-2 (Termination for Convenience of the Government), in effect on the date of this contract, which clause is incorporated by reference, except for paragraphs (c) and (i). "Contractor" means Seller, and "Government" and "Contracting Officer" mean Buyer. The period for submitting Seller's termination settlement proposal is reduced to six months and for requesting an equitable adjustment to forty-five (45) days.

### 15. CANCELLATION FOR DEFAULT

(A) Buyer may, by written notice of default to Seller, cancel this contract in whole or in part (i) if Seller fails to deliver goods or to perform services within the time specified by this contract or any written extension; (ii) if Seller fails to perform any other provision of this contract or fails to make progress, so as to endanger performance of this contract, and, in either of these two circumstances, does not cure the failure within 10 days after receipt of notice from Buyer specifying the failure; or (iii) in the event of Seller's suspension of business, insolvency, appointment of a receiver for Seller's property or business, or any assignment, reorganization, or arrangement by Seller for the benefit of its creditors.

(B) Seller will continue work not canceled.

(C) If Buyer cancels this contract in whole or in part, Buyer may require Seller to transfer title and deliver to Buyer, as directed by Buyer, any (i) completed goods, and (ii) any partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively, "manufacturing materials") that Seller has specifically produced or acquired for the canceled portion of this contract. Upon direction from Buyer, Seller will also protect and preserve property in its possession in which Buyer or the Government has an interest.

(D) Buyer will pay the contract price for goods or services accepted. Payment for manufacturing materials accepted by Buyer and for the protection and preservation of property will be at a price determined in accordance with Article 14 (Termination for Convenience), except that Seller will not be entitled to profit. Buyer may withhold from any amount due under this contract any sum Buyer determines to be necessary to protect Buyer or the Government against loss because of

outstanding liens or claims of former lien holders.

(E) If, after cancellation, it is determined that Seller was not in default, the rights and remedies of the parties will be as if the contract had been terminated in accordance with Article 14 (Termination for Convenience).

## 16. Buyer PROPERTY

Seller will clearly mark, maintain an inventory of, and keep segregated or identifiable all Buyer property and all property to which Buyer acquires an interest by virtue of this contract. Seller assumes all risk of loss, destruction, or damage to such property while in Seller's possession, custody, or control, and will not use such property other than in performance of this contract without Buyer's written consent. Seller will notify Buyer if Buyer property is lost, damaged, or destroyed. As directed by Buyer, upon completion, termination, or cancellation of this contract, Seller will deliver such property, to the extent not incorporated in delivered end products, to Buyer in good condition subject to ordinary wear and tear and normal manufacturing losses. Nothing in the Article limits Seller's use in direct dealings with the Government of property in which the Government has a vested interest.

## 17. NONDISCLOSURE

Neither party will, without the prior written consent of the other, reproduce, use, or disclose to any employee or third party any proprietary information or data furnished by the other party, except as required to perform this contract. Any information or data must be clearly marked as proprietary to qualify for nondisclosure. This restriction does not apply to information or data: (i) in the public domain through no breach of this contract by the recipient; (ii) otherwise known to the recipient at the time of receipt without restrictions as to use or disclosure; or (iii) acquired by the recipient from a source, other than the disclosing party, that has the right to disclose such information to the recipient.

## 18. DELEGATION AND SUBCONTRACTING

Without Buyer's written consent, Seller will not delegate any duty of performance, or subcontract for the design, development or procurement of any substantial portion of goods or services under this contract. This clause does not limit Seller's purchases of standard commercial supplies or raw materials.

## 19. SPARES, SUPPORT EQUIPMENT AND FOLLOW ON

(A) Buyer may order spares or support equipment for any goods to be delivered under this contract. For subsequent fiscal years, Buyer may order additional quantities of any goods under this contract.

(B) As promptly as reasonably possible, but in any event within 90 days of Buyer's written request, Seller will deliver to Buyer a written, fully supported price proposal for any goods ordered pursuant to this Article. Unless Buyer and Seller are able to agree upon all contract terms within the time necessary to meet the schedule of Buyer's prime contract, Seller will accept a maximum price order for any such goods, subject to negotiation of a fair price not to exceed the maximum price, reasonable delivery schedule, and mutually acceptable terms and conditions.

## 20. DISPUTES

(A) Buyer and Seller will explore resolution of any dispute that arises under or is related to this contract through negotiation or alternative dispute resolution ("ADR") techniques. However, if either Seller or Buyer believes that the dispute is not suitable for ADR, or if ADR techniques do not produce satisfactory results, either Seller or Buyer may proceed in accordance with its rights under this Article.

(B) Any dispute which arises under or is related to this contract and which relates to a matter that gives Buyer recourse against the Government under the prime contract or applicable law may be resolved, at Buyer's option, in accordance with the Disputes clause of the prime contract as follows: (i) Seller will give Buyer a fully supported written claim concerning any such dispute within one year after the claim accrues, but in no event later than final payment under this contract, or be barred from any remedy for such claim. (ii) Seller will cooperate fully with Buyer in prosecuting any such dispute and will be bound by the outcome unless (a) Buyer does not afford Seller an opportunity to participate in the conduct of the dispute; (b) without Seller's written consent, Buyer settles or takes other action to prejudice Seller's rights in the dispute; or (c) Buyer, having decided to discontinue its own prosecution of the dispute, does not afford Seller an opportunity to continue to prosecute the dispute in Buyer's name. Buyer and Seller will bear their own costs of prosecuting any such dispute. (iii) If Buyer elects not to proceed in accordance with this paragraph, the dispute will be decided in accordance with paragraph (C). (iv) Nothing in this contract grants Seller a direct right of action under the Disputes clause of the prime contract.

(C) Any other dispute that arises under or is related to this contract will be decided by a court of competent jurisdiction.

(D) Pending final resolution of any dispute arising under or related to this contract, Seller will proceed with performance of this contract in accordance with Buyer's instructions.

## 21. APPLICABLE LAW

This contract will be governed by and construed in accordance with the law of the state of Missouri with no consideration given to the State's conflict of laws rules, regardless of the places of execution or performance of this contract.

## 22. RIGHTS AND REMEDIES

The rights and remedies of the parties set forth in this contract are cumulative and in addition to any other rights or remedies that they may have at law or in equity. Buyer may offset any damages resulting from a breach of any contract between Buyer and Seller against the price due under any other such contract. Goods ordered under this contract are unique within the meaning of section 2-716 of the Uniform Commercial Code.

## 23. COMPLIANCE WITH STATUTES AND REGULATIONS

Seller will comply with all applicable statutes and government rules, regulations, and orders.

## 24. PRECEDENCE

If the various parts of this contract are inconsistent, the following order of precedence will apply: (i) special terms and conditions; (ii) the terms and conditions in this form; (iii) specifications; (iv) all other attachments incorporated in this contract by reference.