

# **PURCHASE TERMS AND CONDITIONS OF ELECTRIC LAST MILE SOLUTIONS**

**Revised: September 13, 2021**

These Purchase Terms and Conditions apply to all purchase orders or any other document incorporating these Purchase Terms and Conditions issued by Electric Last Mile Solutions, Inc., or any of its subsidiaries or affiliates (“**ELMS**”).

## **1. OFFER AND ACCEPTANCE AND TERMS OF ORDER**

- A. Each purchase order, together with these Terms and Conditions (“**Terms**”), any delivery schedules or releases issued by ELMS, and any documents specifically referenced therein, (collectively, “**Order**”) is an offer to the Supplier identified on the Order for the purchase of goods and/or services (“**Supplier**”), and includes and is governed by the express terms contained in the Order, these purchase terms and conditions, and the terms contained in any addendum or supplement to the Order, any supplier manual provided by ELMS to Supplier, and other document incorporated by reference in the Order or in these Terms. Any expression of acceptance of the Order by Supplier, including Supplier’s commencement of (i) work on the goods subject to the Order (“**Goods**”) or shipment of the Goods, whichever occurs first, or (ii) performance of all or any portion of the services subject to the Order (“**Services**”), shall constitute an acceptance of ELMS’s offer. Any acceptance of the Order is strictly limited to and conditional upon Supplier’s acceptance of the Terms. Any proposal for additional or different terms or any attempt by Supplier to vary any of the Terms, whether in Supplier’s quotation form, acknowledgement form, invoice, correspondence or otherwise, shall be deemed material and is hereby objected to and rejected by ELMS, but any such proposal or attempted variance shall not operate as a rejection of the Order if Supplier accepts ELMS’s offer by commencement of work, shipment of the Goods or performance of the Services, or by other means acceptable to ELMS, in which case the Order shall be deemed accepted by Supplier without any additional or different terms or variations whatsoever.
- B. The Order does not constitute an acceptance of any prior offer or proposal by Supplier, and any reference in the Order to any such prior offer or proposal is solely to incorporate the description or specifications of the Goods and the Services in such offer or proposal, but only to the extent that such description or specifications are not directly in conflict with the description and specifications in the Order. If the Order is found to be an acceptance of any prior offer or proposal by Supplier, such acceptance shall be limited to the Terms. Any additional or different terms in such prior offer or proposal shall be deemed material and are hereby objected to and rejected by ELMS. ELMS may cancel all or any part of the Order at any time prior to ELMS’s actual knowledge of acceptance by Supplier.

## **2. ENTIRE AGREEMENT**

- A. The Order, together with these Terms and the attachments, manuals, guidelines, requirements, specifications, exhibits and supplements specifically referenced therein, constitutes the entire agreement between ELMS and Supplier and, except as otherwise

expressly stated in the Order, supersedes all prior agreements, orders, quotations, proposals and other communications relating to the subject matter hereof and there are no other understandings or agreements, verbal or otherwise, in relation hereto that exist between ELMS and Supplier.

- B. ELMS may modify purchase order terms and conditions from time to time by posting revised purchase order terms and conditions to ELMS's internet website (or such other website as may be directed through links available on such website) as specified on the face of this Order ("**ELMS's Website**") at electriclastmile.com (Supplier Terms and Conditions located at the bottom of the home page), prior to the date when any modified terms and conditions become effective. Such revised purchase order terms and conditions shall apply to all purchase order revisions/amendments and new Orders issued on or after the effective date thereof. Supplier shall be responsible to review ELMS's Website periodically.
- C. All supplier manuals, guidelines, procedures and requirements that are provided by ELMS or otherwise available on the ELMS Web Site at electriclastmile.com (together, the "**Supplier Manuals**"), as amended from time to time, are incorporated by reference. In the event of a conflict between any Supplier Manuals and these Terms, these Terms shall govern. ELMS may modify the Supplier Manuals or add additional Supplier Manuals by posting notice of such modified or new Supplier Manuals through links provided on the ELMS web site at least ten (10) days prior to any modified or new Supplier Manuals becoming effective. Supplier periodically shall review the ELMS web site and the Supplier Manuals. Supplier's continued performance under the Order without providing written notice to ELMS detailing Supplier's objection to any modified or new Supplier Manual prior to the effective date of such modified or new Supplier Manual will constitute Supplier's acceptance of such modified or new Supplier Manual.

### 3. DURATION AND QUANTITY

- A. Subject to ELMS's termination rights, including, without limitation, such rights set out in Articles 21, 22 and 23 ("**ELMS's Termination Rights**"), the Order is binding on ELMS and Supplier for the length of the production life of the vehicle program for which ELMS intends to incorporate the Goods or Services. Supplier acknowledges and assumes the risk of the vehicle program production life being cancelled or extended. Notwithstanding the foregoing, if an expiration date or time period is specified in the Order, the Order is binding until such expiration date or end of such time period, subject to ELMS's Termination Rights.
- B. Unless specifically waived in writing by an authorized representative of ELMS, Supplier's obligations with respect to service and replacement parts will survive the termination or expiration of the Order.
- C. If the Order does not specify the quantities, or specifies the quantities as "blanket order", "as released", "as scheduled", "as directed", "or in another similar way, then, Supplier shall supply ELMS's requirements for Goods in such quantities as identified by ELMS as firm material authorization releases, firm delivery schedules, or similar releases ("**Release**") that are transmitted to the Supplier during the term of the Order, and Supplier shall supply

all such Goods and Services on such dates and times, at the price and on the other terms specified in the Order. A new Release shall always replace the prior one. ELMS may require Supplier to participate in an electronic data interchange or similar program, at Supplier's expense, for notification of Releases and other information relating to the Order.

#### **4. DELIVERY AND PRODUCTION VOLUMES**

- A. Time is of the essence of the Order and within the whole supply chain. Supplier shall deliver the Goods in the quantities and on the delivery dates and times specified in the Order or Releases (as defined in 4.B below). Supplier shall immediately notify ELMS in writing if Supplier is unable to deliver the Goods in the quantities and on the delivery dates and times specified in the Order. Goods delivered in excess of the quantities or in advance of delivery dates or times specified in the Order shall be at Supplier's risk and may be returned to Supplier by ELMS, and all transportation charges both to and from the original destination shall be paid by Supplier. ELMS shall not be required to make payment for any Goods delivered to ELMS that are in excess of the quantities specified in the Order or Releases. ELMS may on notice to Supplier change the rate of scheduled shipments or direct temporary suspension of scheduled shipments, neither of which shall entitle Supplier to a modification of the price of the Goods or the Services covered by the Order.
- B. Unless otherwise expressly stated in the Order, ELMS shall not be required to purchase the Goods or the Services exclusively from Supplier.
- C. Supplier acknowledges the risk associated with lead times of various raw materials and/or components if they are beyond those provided in Releases. Supplier further accepts that any estimates or forecasts of production volumes or length of program, and shall not be binding upon ELMS. Unless otherwise expressly stated in the Order or the Release, ELMS makes no representation, warranty, guarantee or commitment of any kind or nature, whether express or implied to Supplier in respect of ELMS's quantitative requirements for the Goods or the Services or the term of supply of the Goods or the Services.
- D. From time to time and in connection with quotations, requisitions, and Orders, ELMS may provide Supplier with estimates, forecasts or projections of its future volume or quantity requirements for the Goods and Services and/or the term of a program ("**Projections**"). Projections, unlike a Release for a firm quantity, are not binding on ELMS. They also are not a commitment to a requirements contract. Supplier acknowledges that Projections, like any other forward-looking estimates, are based on a number of economic and business factors, variables and assumptions, some or all of which may change over time, and may or may not be accurate at the time they were made or at any later time. ELMS makes no representation, warranty, guaranty or commitment of any kind or nature, express or implied, regarding any Projections or other estimate, forecast or projection provided to Supplier, including as to its accuracy or completeness. Supplier accepts that Projections may not be accurate and that actual volume or duration could be less than or greater than the Projections. Supplier expressly accepts this risk and possible reward.

#### **5. LABELLING, PACKING AND SHIPMENT**

- A. The Goods are to be suitably prepared for shipment and must be labeled, packed and shipped in accordance with the applicable trade standards, national, state, provincial and local laws and regulations pertaining to product content and warning labels, including without limitation the U.S. Toxic Substances Control Act and the European Union directive 2000/53/EC. If recyclable packaging is sent back to the Supplier, ELMS shall be entitled to claim reimbursement to the value of the packaging. If the Goods are not shipped in accordance with specifications mentioned above, Supplier shall pay or reimburse ELMS for any excess costs occasioned thereby.
- B. Unless otherwise expressly stated in the Order, Supplier shall not charge ELMS for labelling, packing, boxing or crating.

## **6. DELAYS IN DELIVERY**

- A. If Supplier fails or refuses to proceed with the Order or fails to deliver the Goods within the delivery dates and times specified in the Order or the Release, ELMS may, without limiting or affecting its other rights or remedies available hereunder or at law, cancel the remaining balance of the Order or Release. In addition, if Supplier fails to meet the delivery dates or times of the Goods, other than by reason of Force Majeure, ELMS may, without limiting or affecting its other rights or remedies available hereunder or at law, direct expedited shipment and/or incur premium freight or transportation costs, and Supplier shall pay upon demand all excess costs incurred thereby, including additional handling charges and other related expenses resulting there from. Supplier shall be responsible for all other direct, consequential, and incidental damages incurred by ELMS as a result of Supplier's failure to meet the delivery dates or times, other than by reason of Force Majeure, including the cost of any line shutdown and the cost of obtaining goods from an alternate source. ELMS's actions in obtaining substitute or replacement products shall not limit the rights and remedies available hereunder or at law.
- B. In the event that Supplier discovers any fact which may, or could with the passage of time, result in any delay, Supplier will immediately advise ELMS of such fact and use its best endeavors to take all measures and precautions to reduce the effect of such delay. In addition, at any time, at ELMS's request, Supplier will furnish to ELMS such information as ELMS may request concerning matters which could result in delays and assurance or contingency plans with respect to those matters. Supplier shall notify ELMS immediately of any actual or potential labor dispute delaying or threatening to delay timely performance of an Order or a Release and will include all relevant information.

## **7. TRANSPORTATION CHARGES, CUSTOMS DUTIES AND TAXES**

- A. Unless otherwise expressly agreed in writing, all Goods shall be delivered by Supplier "DDP" (according to the INCOTERMS in their recent version) at ELMS's plant, or the delivery location otherwise specified on the face of the Order.

- B. Unless otherwise expressly agreed in writing, all prices shall be deemed to include customs duties and expenses, tariffs and all federal, provincial, state and local taxes (including all import taxes, excise taxes and sales taxes) applicable to the manufacture, sale, importation, exportation, or otherwise arising from provision of the Goods or the Services.
- C. Unless ELMS instructs otherwise, the Goods shall be shipped in a manner that permits the lowest transportation rates to apply and adequately protects the quality of the Goods. Supplier shall reimburse ELMS for all expenses, including damage to the Goods, incurred due to improper packing, marking, or loading. The risk of loss or damage in transit shall be upon Supplier, except where shipment is by ELMS's vehicle, in which case the risk of loss or damage shall pass to ELMS upon completion of loading. Shipments in excess of those set forth in this Order, Release, or authorized by ELMS may be returned to Supplier at Supplier's expense, and ELMS may debit Supplier for the cost of such returns. ELMS may change shipping schedules or direct temporary suspension of such scheduled shipments. Upon submission of proper invoices, ELMS shall process such invoices for payment. All cash discounts shall be computed from the date of receipt by ELMS of a final invoice or receipt of the Goods, whichever occurs later. Cash discounts shall be based on the full amount of the invoice, less freight charges and taxes if itemized separately on the invoice.

## **8. DOCUMENTATION AND CUSTOMS**

- A. Packing slips (which shall accompany the Goods), shipping documents, bills of lading, and other related documentation shall be mailed and/or sent electronically on the shipment date, and must show the Order number, vendor, and item and reference numbers. For each international shipment, Supplier shall include a customs valuation invoice (using the value set forth in the Order), with a master packing slip and shall furnish all other required export/import documents. Export and trade credits shall belong to ELMS. Supplier shall furnish: (i) all documents required to obtain export credits and customs drawbacks; (ii) certificates of origin of the materials and Goods and Services provided and the value added in each country; (iii) all trade related documents; (iv) all required export licenses or authorizations; and (v) any other documents requested by ELMS or any of its customers. Supplier warrants that the contents of such documents shall be true and accurate. Supplier shall indemnify ELMS for any damages, including but not limited to duties, interest and penalties, arising from a false or inaccurate statement.
- B. Supplier shall provide ELMS with all such support as may be necessary to enable ELMS to reduce or minimize its liability to customs duties.
- C. For any and all questions and instructions arising out of or required in connection with customs and declaration of origin, Supplier shall contact ELMS's respective customs department.
- D. Supplier shall ensure and observe legal policies and conditions. Supplier shall, on ELMS's request, provide evidence by certificates or statements (e.g. Security Declaration for Authorized Economic Operators AEO, Compliance statement regarding CTPAT initiative).

- E. Supplier shall inform ELMS of any export restrictions applicable in the country of manufacturing and/or dispatching of the Goods and Tooling. Supplier shall inform ELMS if the Goods and Tooling are subject to any export/re-export license under U.S. law and regulations. If Supplier is located in the European Union, Supplier shall inform ELMS about any obligation to obtain an export license with respect to dual use goods as well as munitions subject to the European export control restrictions and the national codifications of the export control restrictions. Supplier shall advise ELMS about the classification number applicable (e.g. ECCN - Export Control Classification Number for US products, "AL-Number" for Goods listed in the German Export Control List, etc.) and any license exceptions available for the Goods and Tooling. Supplier shall provide information directly to ELMS AG's department of customs and export control.

## **9. CHANGES**

- A. Goods supplied or Services performed by the Supplier to ELMS shall be state-of-the-art, in particular ELMS part drawings and CAD data in their respective last valid index version, in compliance with the specifications given by ELMS and indicated in the Order. The Supplier shall also be responsible for ensuring that the delivered Goods are suitable for the use intended by ELMS and ELMS's customer.
- B. ELMS reserves the right at any time to direct changes, or cause Supplier to make changes, to the Goods or Services under any Order including, but not limited to, changes in the design (including drawings and specifications), processing, methods of packaging and shipping and the date or place of delivery of the Goods or Services covered by the Order or to otherwise change the scope of the work covered by the Order including work with respect to such matters as inspection, testing or quality control, and Supplier agrees to promptly make such changes. Any such changes shall be deemed not to affect the time for performance or cost under the Order unless (i) Supplier provides ELMS with written notice of a claim for adjustment to time for performance or cost within ten (10) days after ELMS's notice to Supplier of the change and (ii) after auditing such claim, ELMS determines that an adjustment (up or down) is appropriate. Any such claim by Supplier for adjustment to time for performance or cost under an Order must be solely and directly the result of the change directed by ELMS and any notice of such claim shall be effective only if accompanied by all relevant information sufficient for ELMS to verify such claim. In addition, ELMS shall have the right to audit all relevant records, facilities, work or materials of Supplier to verify any claim Supplier shall consider and advise ELMS of the impact of a design change on the system in which the Goods or Services covered by the Order are used. Nothing in this paragraph shall excuse Supplier from performing under the Order as changed pending resolution of any claim by Supplier for adjustment to time or cost.
- C. Without the prior approval of ELMS on the face of an Order amendment or in a Signed Writing, Supplier shall not make any changes to any Order or the Goods or Services covered by the Order, including, without limitation, changing (i) any third party supplier to Supplier of services, raw materials or goods used by Supplier in connection with its performance under the Order, (ii) the facility from which Supplier or such supplier operates, (iii) the price of any of the Goods or Services covered by the Order, (iv) the nature, type or quality of any services, raw materials or goods used by Supplier or its

suppliers in connection with the Order; (v) the fit, form, function, appearance, performance of any Goods or Services covered by the Order; or (vi) the production method, or any process or software used in the production or provision of any Goods or Services under the Order. Any changes by Supplier to any Order or the Goods or Services covered by the Order without the prior approval by ELMS on the face of an Order amendment or in a Signed Writing shall constitute a breach of the Order.

## **10. PRICE**

- A. Prices charged for Goods and Services listed on the Order are not subject to increase, including specifically, but without limitation, any increase based upon changes in currency fluctuations, raw material, taxes, tariffs or duties, transportation costs, component pricing, labor or overhead, unless specifically agreed to by ELMS on the face of a Order amendment or in a signed writing.
- B. Supplier warrants that the prices for the Goods and the Services are, and shall ensure that such prices remain, not less favorable to ELMS than the prices currently extended to any other customer of Supplier for the same or substantially similar goods or services in the same or substantially similar quantities and delivery requirements.
- C. Supplier shall ensure that the Goods and the Services remain competitive, in terms of price, technology and quality, with substantially similar goods and services available to ELMS from other suppliers.
- D. Supplier warrants that the prices in the Order shall be complete, and no surcharges, premiums or other additional charges of any type shall be added, without ELMS's prior written consent. Supplier expressly assumes the risk of any event or cause (whether or not foreseen) affecting such prices, including any foreign exchange rate changes, increases in raw materials costs, inflation, increases in labor and other manufacturing costs.

## **11. INVOICING AND PAYMENT TERMS**

- A. Unless otherwise agreed, payment shall be made within 60 days net. Periods shall commence on receipt of Goods and/or Services as stated in the Order and an invoice in proper and verifiable form is available. In the event that deliveries are accepted early, however, the period shall commence on the agreed delivery date at the earliest. Payments will be made in the currency expressly stated in the Order: If no such currency is noted, payment will be made in U.S. Dollars. Payment will be made by bank transfer on or before the due date unless otherwise expressly agreed by ELMS, and Supplier agrees to accept payment by electronic funds transfer. The Supplier further declares that it is able and willing to participate in a credit note procedure upon ELMS'S request. If a payment date falls on a non-business day, payment will occur on the following business day.
- B. If requested by ELMS, Supplier will provide ELMS with Advance Shipping Notices ("ASNs") and otherwise comply with ELMS shipping and invoicing requirements. Failure to do so by the Supplier may delay payment to the Supplier.

- C. All invoices and/or ASNs must reference the Order number, Order amendment or Release number, ELMS's part number, Supplier's part number where applicable, quantity of pieces in shipment, number of cartons or containers, Supplier's name and number, and bill of lading number, before any payment will be made for Good or Services. In addition, no invoice may reference any term separate from or different than these Terms or the terms that appear on the face of the Order. ELMS reserves the right to return all invoices or related documents submitted incorrectly. Payment terms will commence upon the receipt and input of a correct invoice or ASN into ELMS's invoicing system. Any payment by ELMS of a nonconforming invoice is not an acceptance of any non-conforming elements or terms on such invoice.
- D. ELMS shall not be liable to Supplier for any delay in payment, or any other damages, resulting from Supplier's failure to comply with ELMS's shipping and invoicing requirements.

## **12. SET-OFF, RECOUPMENT**

- A. In addition to any right of set-off or recoupment provided by law, all amounts due to Supplier will be considered net of indebtedness of Supplier and its subsidiaries and affiliates to ELMS and its subsidiaries and affiliates. ELMS shall have the right to set-off against or recoup from any payment or other obligation owed to Supplier, in whole or in part, any amounts due to ELMS or its affiliates or subsidiaries from Supplier or its affiliates or subsidiaries. ELMS will provide Supplier with a statement describing any offset or recoupment taken by ELMS.
- B. If an obligation of Supplier or any of its subsidiaries or affiliates to ELMS or any of its subsidiaries or affiliates is disputed, contingent or unliquidated, ELMS or any of its subsidiaries or affiliates may defer payment of all or any portion of the amount due until such obligation is resolved. Without limiting the generality of the foregoing and by way of example only, in the event of a bankruptcy of Supplier, if all of the Orders between ELMS and Supplier have not been assumed, then ELMS may defer payment to Supplier, via an administrative hold or otherwise, for Goods and Services against potential rejection and other damages.

## **13. WARRANTIES**

- A. **“Warranty Period”** shall mean, for each of the Goods or Services provided, the time period beginning on the later of the day of first use of the Goods or Services by ELMS or acceptance by ELMS, and continuing until the later of: (i) 36 months; (ii) the period provided under applicable law; or (iii) the new vehicle warranty period offered to retail purchasers in the country in which the vehicles are sold. Supplier may contact ELMS's representative for information regarding those countries in which vehicles incorporating the Goods and Services will be sold.
- B. Supplier expressly warrants and guarantees to ELMS that, for the duration of the Warranty Period, the Goods and the Services, including any special tools, dies, jigs, fixtures, patterns, machinery and equipment, that are delivered or provided to ELMS for the performance of the Order and/or are or become the property of ELMS shall: (i) conform to all drawings,



specifications, samples and other descriptions furnished, specified or adopted by ELMS; (ii) comply with all applicable laws, regulations, rules, codes and standards of the jurisdictions in which the Goods or the Services, and the products containing the Goods and Services, are to be sold, including without limitation the National Traffic and Motor Vehicle Safety Act, United States motor vehicle safety standards and European Union Directive 2000/53/EC; (iii) be merchantable; (iv) be free from any defects in design, to the extent furnished by Supplier or any of its subcontractors, agents or suppliers, even if the design has been approved by ELMS; (v) be free from any defects in materials and workmanship; (vi) be fit, sufficient and suitable for the particular purposes for which ELMS intends to use the Goods or the Services, including, but not limited to, the specified performance in the component, system, subsystem and vehicle location and the environment in which they are or may be expected to perform; (vii) be free of all liens, claims and encumbrances whatsoever. For the purposes of clause vi above; (vii) all Services shall be performed in a competent, workmanlike manner; (viii) the Goods shall be manufactured, and the Services performed, in accordance with all applicable federal, state, and local laws, regulations, industry standards or other standards, labeling, transporting, licensing approval or certification requirements in the United States or any other country where the Goods and Services will be sold or used; and (ix) Supplier has complied with QS 9000, ISO 14001, IATF 16949, PPAP, APQP, and end of life vehicle reporting and other requirements, as well as international softwood standards, including USDA Regulations on Wood Packaging Material Imports, in fulfilling this Order and all other Orders. Supplier acknowledges that Supplier knows the particular purpose for which ELMS intends to use the Goods or the Services. Supplier further expressly warrants that, unless otherwise expressly stated in the Order, the Goods are manufactured entirely with new materials and none of the Goods is, in whole or any part, governmental or commercial surplus or used, remanufactured, reconditioned or of such age or condition so as to impair its fitness, usefulness or safety. The warranties in this subparagraph, together with other warranties set forth in these Terms, are referred to as the **“Supplier’s Warranties.”**

- C. It is the intent of both Supplier and ELMS that the warranty obligations and other requirements ELMS has to its end customer shall flow through ELMS to Supplier to the extent that they do not conflict with the terms of the Order. To the extent that Supplier does not meet the applicable warranty obligations and requirements of ELMS’s customer, Supplier agrees, notwithstanding any such conflict, to indemnify and hold harmless ELMS from any and all claims and demands from ELMS’s customer relating to any actual or alleged problem or issue with the Goods or Services sold by Supplier under any Order or the manner in which Supplier has supplied such Goods and Services under the Order.
- D. The Supplier’s Warranties are available to, and for the benefit of, ELMS, its subsidiaries and affiliates, their respective successors and assigns, and end-users of products containing the Goods or the Services.
- E. Supplier shall indemnify and hold ELMS and its their respective representatives, employees, agents, customers, invitees, subsidiaries, affiliates, successors and assigns, harmless from and against all liabilities, claims, demands, losses, costs, damages and expenses of any nature or kind (including consequential and special damages, personal injury, property damages, lost profits, recall or other field service action costs, production interruption costs, inspection, handling and reworking charges, professional and other legal

fees, and other costs associated with ELMS's administrative time, labor and materials) arising from or as a result of: (i) any breach the Supplier's Warranties; and (ii) any other acts, omissions or negligence of Supplier or of any of its subcontractors or suppliers in connection with Supplier's performance of its obligations under the Order. No limitations on ELMS's rights or remedies in any of Supplier's documents shall operate to reduce or exclude such indemnification.

- F. In the event that ELMS voluntarily or pursuant to a government mandate, makes an offer to owners of vehicles (or other finished products) on which the Goods and Services, or any parts, components or systems incorporating the Goods and Services, are installed to provide remedial action to address a defect or condition that relates to motor vehicle safety or reliability or the failure of the vehicle to comply with any applicable law, safety standard or guideline, whether in connection with a recall campaign or other customer satisfaction or corrective service action (a "**Remedial Action**"), the Warranty Period shall continue for such time period as may be dictated by ELMS or the federal, state, local or foreign government where the Goods and Services are used or provided and Supplier shall fully comply with the requirements of this Order.
- G. Notwithstanding the expiration of the Warranty Period, Supplier shall nonetheless be liable for costs and damages associated with any Remedial Action to the extent that such Remedial Action is based upon a reasonable determination (including by use of statistical analysis or other sampling methodology) that the Goods and Services fail to conform to the warranties set forth in the Order. Where applicable, Supplier shall pay all reasonable expenses associated with determining whether a Remedial Action involving the Goods and Services is necessary. ELMS and Supplier agree that any Remedial Action involving the Goods and Services shall be treated separately and distinctly from similar Remedial Actions of other goods of Supplier; provided that such separate and distinct treatment is lawful and Supplier shall in no event fail to provide at least the same protection to ELMS on such Goods and Services as Supplier provides to its other customers in connection with such similar Remedial Actions.

#### **14. DEFECTIVE OR NON-CONFORMING GOODS OR SERVICES**

If any of the Goods or the Services fail to meet the Supplier's Warranties, in addition to all other rights and remedies available by contract and applicable law:

- A. ELMS shall have the right, in addition to exercising all other rights ELMS may have under the Uniform Commercial Code and any other applicable statutes or law, to take the following actions, at ELMS's option: (i) retain the defective Goods and Services in whole or in part with an appropriate adjustment in the price for the goods; (ii) require Supplier to repair or replace the defective Goods and Services in whole or in part at Supplier's sole expense, including all shipping, transportation, and installation costs; (iii) correct or replace the defective Goods and Services with similar items and recover the total cost relating thereto from Supplier, including the cost of product recalls; or (iv) reject the defective Goods and Services.
- B. Supplier shall, upon notice thereof from ELMS at any time, promptly repair, replace or otherwise satisfactorily deal with the same in a manner acceptable to ELMS, all at

Supplier's expense and without limiting or affecting ELMS's other rights or remedies available hereunder or at law. The rights and remedies reserved to ELMS will be cumulative with and in addition to all other or legal equitable remedies. Supplier will reimburse ELMS for any incidental, consequential or other damages – including lost profits – caused or required by Supplier's breach of Supplier's Warranties or by defective or non-conforming Goods, including without limitation costs expenses and losses incurred directly or indirectly by ELMS: (i) in inspecting, storing, sorting, reworking, repairing or replacing such Goods; (ii) resulting from production interruptions; (iii) conducting or participating at recall campaigns, field service actions or other corrective service actions; or (iv) resulting from personal injury, including death, of property damage caused by such Goods. The Supplier's Warranties shall also apply to such repaired, replaced or otherwise satisfactorily dealt with the Goods or the Services.

- C. Without limiting or affecting ELMS's other rights or remedies available hereunder or at law, cancel the Order as to the particular Goods or Services and/or cancel the then remaining balance of the Order.
- D. After notice to Supplier, all defective or non-conforming Goods shall be held at Supplier's risk. ELMS may, and at Supplier's direction shall, return such defective or non-conforming Goods to Supplier at Supplier's risk, and Supplier shall promptly pay, upon ELMS's demand, all transportation and other applicable charges, both to and from the original destination.
- E. Any payment made by ELMS for defective or non-conforming Goods or Services shall be refunded by Supplier, except to the extent that Supplier promptly replaces or corrects the same at Supplier's expense.

## **15. INSPECTION AND QUALITY CONTROL**

- A. ELMS shall have the right (but not the obligation) to inspect, to review work progress, and to test all Goods and Services, special tooling, materials and workmanship to the extent practicable at all times and places during the period of manufacture. If any Goods and Services are defective in material or workmanship or otherwise not in conformity with the requirements of any Order, ELMS shall have the right, notwithstanding payment, any prior inspection or test, custom or usage of trade, either to reject them or to require their correction by and/or at the expense of Supplier promptly after notice.
- B. Supplier will conform to the quality control and other standards and inspection systems of ELMS and (as applicable) its customers, including without limitation quality control policies, ISO 9001:2000 or ISO/TS 16949:2002 quality certification and ISO 14001 environmental certification including registration. Supplier will also participate in supplier quality and development programs of ELMS. Supplier agrees to meet the full requirements of industry Production Part Approval Processes (PPAP) as specified by ELMS and agrees to present this information to ELMS upon request, at the level requested. Supplier shall ensure that all and any of its sub-contractors are contractually bound to comply with the terms of this Paragraph.

## **16. INTELLECTUAL PROPERTY**

- A. All Goods and Services, including, but not limited to, any idea, invention, concept, design, prototype, product configuration, process, technique, procedure, system, plan, model, program, software or code, data, specification, drawings, diagram, flow chart, documentation, or the like that are created in the course of performing any Order and any associated intellectual property rights therein are the sole and exclusive property of ELMS. Supplier agrees that all works of authorship created by Supplier in connection with each Order are “works made for hire” on behalf of ELMS as that term is used in connection with the U.S. Copyright Act. The term “**intellectual property**” as used herein means all patents, patent applications, patentable subject matter, copyrights, copyrightable subject matter, work of authorship, derivative works, trademark, trade name, trade dress, trade secrets, know-how, and any other subject matter, material, or information that is considered by ELMS to be proprietary or confidential and/or that otherwise qualifies for protection under any law providing or creating intellectual property rights, including the Uniform Trade Secrets Act.
- B. Supplier hereby assigns to ELMS ownership of all right, title, and interest in the Goods and Services, and any associated intellectual property, and further agrees to cooperate with ELMS and to assist in the preparation and execution of all documents relating to any effort by or on behalf of ELMS to apply for, obtain, maintain, transfer, or enforce any intellectual property right related to the Goods and Services at the request and expense of ELMS.
- C. Supplier expressly warrants that the Goods and Services shall not incorporate any intellectual property (including copyright, patent, trade secret, mask work, or trademark rights) of any third party, and further agrees that Supplier shall not disclose to ELMS any confidential information, including any trade secrets, of any third party.
- D. Supplier shall indemnify, defend and hold ELMS, and ELMS’s affiliated companies harmless from and against all liabilities, costs, damages, claims and expenses (including court costs and legal expenses and any settlement of such claim or action) incurred by ELMS in respect of any claim or action brought by any third party against ELMS that the Goods or their use by ELMS or ELMS’s customer infringe the intellectual property rights of such third party. Notwithstanding the foregoing, Supplier shall not be liable to the extent that the infringement results from the manufacture of the Goods in solely accordance with designs received from ELMS and Supplier taking the level of care that is customary in the industry could not have known that following these instructions would result in an infringement of a third party’s intellectual property right.
- E. In the event of a claim of infringement of any third party rights that is communicated to Supplier, Supplier shall take the needed steps to insure for ELMS a non-infringing source of supply, which may involve securing the needed licenses (if any), redesign of the product (subject to any agreed requirements and qualification obligations), or other steps Supplier deems necessary to ensure that a non-infringing product is delivered to ELMS.

## **17. LICENSE**

- A. In the event that the Goods or Services incorporate any background intellectual property owned by Supplier, or any third-party intellectual property, Supplier shall specify any and

all intellectual property rights known or becoming known to him, which are used in the design or manufacture of, or which otherwise affect or relate to the Goods or the Services.

- B. Supplier grants to ELMS an irrevocable, non-exclusive, royalty-free, worldwide license with the right to grant sublicenses to affiliates to use any technical information, know how, copyrights, and patents, or other intellectual property owned or controlled by Supplier or its affiliates to make, have made, use, sell, and import any Goods or Services provided by Supplier under an Order. Such license shall be effective from the first delivery under the Order.

## **18. CONFIDENTIALITY AND NON-DISCLOSURE**

- A. Supplier acknowledges and agrees that it will be obligated to maintain the secrecy and confidentiality of all information disclosed by ELMS to Supplier during the course of work under any Order (“**Confidential Information**”), including, but not limited to, any information regarding ELMS or its business or its customers, the existence and terms of any Order, and any drawings, specifications, or other documents prepared by either party in connection with any Order. Supplier agrees that it will not disclose Confidential Information to or use Confidential Information with or for the benefit of itself or any third party without prior written authorization from ELMS. Supplier also agrees to adopt measures to protect the secrecy and confidentiality of Confidential Information that are reasonable under the circumstances. Confidential Information shall not include any information that (i) was in the possession of Supplier before receipt from ELMS; (ii) is or becomes available to the public through no fault of Supplier; or (iii) is received by Supplier in good faith from a third party having no duty of confidentiality to ELMS. The burden of proofing for such aforementioned exception shall be borne by the Supplier.
- B. The obligations of Supplier with respect to Confidential Information shall remain in effect during the time that any Confidential Information is considered by ELMS to be secret or confidential or otherwise qualify for protection under the Uniform Trade Secrets Act. At the request of ELMS, Supplier will return to ELMS all materials (in any form) that include, incorporate, or otherwise Confidential Information of ELMS.
- C. Unless otherwise agreed in writing, all information provided by Supplier to ELMS in connection with an Order shall be disclosed on a non-confidential basis, and ELMS shall have no duty to maintain the secrecy or confidentiality of such information.

## **19. COMPLIANCE WITH LAWS**

- A. Supplier and any Goods or Services supplied by Supplier, shall comply with all applicable laws, including rules, regulations, orders, conventions, ordinances and standards, including without limitation (i) in relation to the manufacture, labelling, transport, import, export, licensing, approval of certification of the Goods or Services, and (ii) laws relating to environmental matters, hiring, wages, hours and conditions of employment, international prohibitions on child labor, subcontractor selection, discrimination, occupational health or safety and motor vehicle safety.

- B. All materials used by Supplier in the Goods or Services or their manufacture will satisfy current governmental and safety constraints on restricted, toxic and hazardous materials as well as environmental, electrical and electromagnetic considerations that apply to the country of manufacture, sale or destination.

## **20. INSURANCE**

- A. Supplier shall procure and maintain at its sole expense insurances with reputable and financially responsible insurance companies, which adequately cover Supplier's liability against ELMS and third parties. ELMS, in its sole discretion, may determine the sufficiency of such insurance coverage. ELMS is entitled to require certain insurance coverages and amounts to be taken out by Supplier. Supplier shall provide to ELMS certificates of such insurances and renewals thereof signed by the issuing company or agent or other information respecting such insurance at any time promptly upon ELMS's request.
- B. ELMS's examination of, or failure to request or demand any evidence of insurance hereunder, shall not constitute a waiver of any requirement of this Paragraph and the existence of any insurance shall not limit Supplier's obligation under any provision hereof.

## **21. TERMINATION FOR CONVENIENCE UPON NOTICE**

- A. In addition to any other rights of ELMS to cancel or terminate the Order, ELMS may, at its option and in its sole discretion, terminate all or any part of the Order at any time and for any reason, and notwithstanding the existence of any event of Force Majeure, upon written notice to Supplier. Upon receipt of notice of termination, and unless otherwise directed by ELMS, Supplier will: (i) promptly terminate all work under the Order on the effective date of termination; (ii) transfer title and deliver to ELMS the finished Goods, the work in process, and the parts and materials that Supplier reasonably produced or acquired according to quantities ordered by ELMS and that Supplier cannot use in producing goods for itself or for others; (iii) verify and settle any claims by subcontractors for actual costs incurred directly as a result of the termination and ensure the recovery of materials in subcontractors' possession; (iv) take actions reasonably necessary to protect property in Supplier's possession in which ELMS has an interest until disposal instruction from ELMS has been received; and (v) upon ELMS's request, cooperate with ELMS in Transition Support (as subsequently defined in these Terms).
- B. Upon termination by ELMS under this Section, ELMS will be obligated to pay only the following amounts, without duplication: (i) the price for all finished Goods or Services in the firm quantities ordered by ELMS that conform to the Order for which Supplier has not been paid; (ii) Supplier's reasonable actual cost of merchantable and useable work-in-process and the parts and materials transferred to ELMS; (iii) Supplier's reasonable actual costs of settling claims regarding its obligations to its subcontractors required under the Order, to the extent directly caused by the termination, but limited to the amount of the firm quantities of finished Goods and raw materials/components specified in Releases issued by ELMS and then currently outstanding; (iv) Supplier's reasonable actual cost of carrying out its obligation under subparagraph 21.A, if applicable, amounts due in connection with Transition Support (as subsequently defined in these Terms).

- C. Notwithstanding any other provision, ELMS will have no obligation for and will not be required to pay Supplier, directly or on account of claims by Supplier's subcontractors, for loss of anticipated profit, capital expenditures, unabsorbed overhead, interest on claims, product development and engineering costs, tooling, facilities and equipment rearrangement costs or rental, unamortized capital or depreciation costs, finished goods, work-in-process or raw materials that Supplier fabricates or procures in amounts exceeding those authorized in the Releases, or general administrative burden charges from termination of the Order, except as otherwise expressly agreed in a separate Order issued by ELMS. ELMS's obligation upon termination under this Section will not exceed the obligation ELMS would have had to Supplier in the absence of termination.
- D. Supplier will furnish to ELMS, within one month after the date of termination, its proven termination claim, which will consist exclusively of the items of ELMS's obligation to Supplier that are expressly permitted by this Paragraph 21. ELMS will have no obligation for payment to Supplier under this Paragraph 21 if ELMS terminates the Order or portion thereof because of a default or breach by Supplier, and any termination shall be without prejudice to any claims which ELMS may have against Supplier.
- E. ELMS's rights to terminate the Order as established in any applicable provision of these Terms may be exercised by ELMS, without the need for judicial involvement or declaration.

## **22. TERMINATION UPON SUPPLIER'S DEFAULT OR CHANGE OF CONTROL**

- A. ELMS may terminate the Order, in whole or in part, for default occasioned by Supplier's: (i) breach of any terms of the Order; (ii) failure to perform in accordance with the requirements of the Order; or (iii) failure to make progress so as to endanger timely and proper delivery of the Goods or completion of the Services and, in each such case, Supplier does not correct such breach or failure within twenty (20) days (or such shorter period of time as ELMS may determine, if commercially reasonable under the circumstances) after receipt of written notice from ELMS specifying such breach or failure. Supplier shall be liable for all costs, damages and expenses caused by or resulting from its default under the Order.
- B. ELMS may terminate the Order, in whole or in part, in the event of a change of control of Supplier. For the purposes of the Order, a "change of control" includes: (i) any sale, lease or exchange of a substantial portion of Supplier's assets used in connection with Supplier's performance of its obligations under the Order; (ii) any sale or exchange of a sufficient number of shares of Supplier, or of any affiliate that controls Supplier, to effect a change in management of Supplier; or (iii) the execution of a voting or other agreement of control in respect of Supplier, or of any affiliate that controls Supplier. Supplier shall notify ELMS in writing within ten (10) days of any change of control of Supplier, and ELMS may terminate the Order by giving written notice to Supplier at any time up to sixty (60) days after ELMS's receipt of Supplier's notice of change of control.
- C. Any termination under this Paragraph 22 shall be without liability to ELMS, except for the Goods delivered or the Services performed by Supplier and accepted by ELMS.

## 23. TERMINATION UPON INSOLVENCY

Either party may terminate the Order, without liability to the other party: (i) in the event of the insolvency, bankruptcy, reorganization, arrangement, receivership or liquidation by or against the other party; (ii) in the event that the other party makes an assignment for the benefit of its creditors or ceases to carry on business in the ordinary course; or (iii) if a receiver is appointed in respect of the other party or all or part of its property (collectively, an “Insolvency Event”). In the event of such termination, the other party shall be liable for all costs, damages and expenses suffered by the party that terminates the Order. Any such termination shall not affect the entitlement of ELMS with respect to the ELMS Property.

## 24. TRANSITION OF SUPPLY

- A. In connection with ELMS’s termination or non-renewal of the Order, or ELMS’s other decision to source the Goods and/or the Services from any alternate supplier(s), Supplier will cooperate with ELMS in the transition of supply of the Goods and/or the Services, including the following: (i) Supplier will continue production and delivery of all Goods and/or Services as ordered by ELMS, at the prices and other terms stated in the Order, without premium or other condition, during the entire period reasonably needed by ELMS to complete the transition to the alternate supplier(s), such that Supplier’s action or inaction causes no interruption in ELMS’s ability to obtain the Goods and/or Services as needed; (ii) at no cost to ELMS, Supplier will promptly provide all requested information and documentation regarding and access to Supplier’s manufacturing process, including on-site inspections, bill-of-material data, tooling and process detail and samples of the Goods and/or Services and components; and (iii) subject to Supplier’s reasonable capacity constraints, Supplier shall provide special overtime production, storage and/or management of extra inventory of the Goods, extraordinary packaging and transportation and other special services (collectively, “**Transition Support**”) as expressly requested by ELMS in writing.
- B. If the transition of supply occurs for reasons other than ELMS’s termination of the Order as stated in these Terms, ELMS shall, at the end of the transition period, pay the reasonable, actual cost of Transition Support as requested by ELMS and incurred by Supplier, provided that ELMS has approved Supplier’s estimate of such costs prior to Supplier incurring such amounts.

## 25. SERVICE AND REPLACEMENT PARTS

- A. For 15 years after termination of Supplier’s supply of the Goods for ELMS’s series production, or for such other period of time as ELMS shall require in writing, Supplier shall sell to ELMS 100% of ELMS’s requirements for Goods for use as service or replacement parts at the prices then specified in the last Order for current model production plus any actual net cost differential for required unique packaging, shipping and handling. If a dispute arises between Supplier and ELMS regarding the price of service or replacement parts under this paragraph, Supplier shall continue to supply ELMS’s requirements for service and replacement parts at the production prices set forth in the Order pending resolution of such dispute.



- B. Supplier shall impose corresponding obligations on its sub-suppliers in order to enable Supplier to meet its obligations to ELMS for service and replacement parts.
- C. ELMS and ELMS's affiliated companies shall be entitled to purchase Goods used as service or replacement parts directly from Supplier's sub-contractors or from any other third party.
- D. Unless otherwise expressly agreed in writing by an authorized representative of ELMS or ELMS removes tooling from Supplier necessary for the production of service parts, Supplier's obligations under this Article 25 shall survive termination or expiration of the Order for any reason.

## **26. SUBCONTRACTS**

Supplier shall in general ensure that the terms of its contracts with its sub-suppliers and sub-contractors provide ELMS with all of the rights specified in the Order and the Terms.

## **27. ASSIGNMENT**

Each Order is issued to the Supplier in reliance upon Supplier's personal performance of the duties imposed. Supplier agrees not to, in whole or in part, assign this Order or delegate the performance of its duties without the written consent of ELMS. Any such assignment or delegation without the previous written consent of ELMS, shall be void and, at the option of ELMS, shall effect a cancellation of this Order. Unless expressly agreed otherwise in writing by ELMS, any consent by ELMS to an assignment shall not be deemed to waive ELMS's rights against Supplier under the Order or to relieve Supplier from its liability and obligations under the Order. ELMS shall have the right to assign any benefit or obligation under this Order to any third party upon notice to Supplier.

## **28. REMEDIES**

- A. The remedies reserved in the Order shall be cumulative and not alternative and may be exercised separately or together, in any order or combination, and are in addition to any other remedies provided for or allowed by law, at equity or otherwise.
- B. Supplier expressly acknowledges and agrees that any failure of Supplier to deliver the Goods on the delivery dates and times as specified in the Order will cause irreparable harm to ELMS and that ELMS shall be entitled to equitable relief, including injunction, in such event.
- C. Any proceeding or action initiated by Supplier against ELMS for breach of contract or any other act or omission (including tort) arising from or in any way related to the Order must be commenced within one (1) year from the date the breach, act or omission giving rise to Supplier's claim occurs, regardless of Supplier's knowledge of such breach, act or omission or of its consequences.

- D. IN NO EVENT SHALL ELMS BE LIABLE TO SUPPLIER FOR ANTICIPATED PROFITS OR FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES. WITHOUT LIMITING THE FOREGOING, THE PARTIES FURTHER AGREE THAT:
- i. WITH RESPECT TO A CLAIM ARISING OUT OF OR IN CONNECTION WITH THE TERMINATION OF THIS AGREEMENT OR ANY ORDER, SUPPLIER'S DAMAGES, IF ANY, SHALL BE LIMITED TO THE DAMAGES SET FORTH IN THE TERMINATION CLAIMS PARAGRAPH OF THESE TERMS; AND
  - ii. WITH RESPECT TO ALL OTHER CLAIMS, SUPPLIER'S DAMAGES SHALL BE LIMITED TO THE LESSER OF: (a) THE VALUE OF PRODUCTS PURCHASED BY ELMS FROM SUPPLIER IN THE THREE MONTHS IMMEDIATELY PRECEDING THE ALLEGED BREACH; OR (b) \$100,000.

## 29. FORCE MAJEURE

- A. Any delay or failure of either party to perform its obligations will be excused if and to the extent that the party is unable to perform specifically due to an unforeseeable event or occurrence beyond its reasonable control and without its fault or negligence, such as: acts of God; restrictions, prohibitions, priorities or allocations imposed or actions taken by a governmental authority (whether valid or invalid); embargoes; fires; floods, earthquakes, explosions; natural disasters; riots; wars; sabotage; inability to obtain power; or court injunction or order (each, an event of "**Force Majeure**"). Written notice of such delay, including the anticipated duration of the delay, must be given by the nonperforming party within two (2) days of the Force Majeure event.
- B. Any delay or failure that Supplier can overcome through additional planning, efforts or expenditures (including, but not limited to, the use of expedited shipping or overtime) shall not be excused due to an event of Force Majeure. Supplier shall be obligated, at its own expense, to undertake such measures as may be necessary to overcome any such failure or delay. The change in cost or availability of materials or components based on market conditions, supplier actions, or contract disputes or any labor strike or other labor disruption applicable to Supplier or any of its subcontractors or suppliers, will not excuse Supplier's performance (under theories of force majeure, commercial impracticability or otherwise), and Supplier assumes these risks. As soon as possible (but no more than one full business day) after the occurrence, Supplier will provide written notice describing such delay and assuring ELMS of the anticipated duration of the delay and the time that the delay will be cured.
- C. During such delay or failure to perform by Supplier, ELMS may at its option: (i) purchase Goods from other sources and reduce its schedules to Supplier by such quantities, without liability to Supplier; (ii) require Supplier to deliver to ELMS at ELMS's expense all finished Goods, work in process and parts and materials produced or acquired for work under the Order; or (iii) have Supplier provide Goods or Services from other sources in quantities and at a time requested by ELMS and at the price set forth in the Order. In addition, Supplier at its expense will take all necessary actions to ensure the supply of Goods or Services to ELMS for a period of at least 30 days during any anticipated labor

disruption or resulting from the expiration of SUPPLIERS labor contracts. Otherwise, ELMS may terminate the Order without liability and Supplier shall reimburse ELMS for costs associated with the termination.

- D. If requested by ELMS, Supplier shall, within five (5) days of such request, provide adequate assurance that the delay will not exceed such period of time as ELMS deems appropriate. If the delay lasts more than the time period specified by ELMS, or Supplier does not provide adequate assurance that the delay will cease within such time period, ELMS may, among its other remedies, immediately cancel this Order and all outstanding Releases issued pursuant thereto, without liability. Additionally, Supplier shall reimburse ELMS for any increase in price or costs of any nature that ELMS incurs or is required to pay to, or in connection with, a substitute supplier in order to obtain the Goods and Services and to meet production requirements.

### **30. WAIVER**

Either party's failure to insist on the performance by the other party of any Term or failure to exercise any right or remedy reserved in the Order, or either party's waiver of any breach or default hereunder by the other party shall not, thereafter, waive any other terms, conditions, rights, remedies, breaches or defaults, whether of the same or a similar type or not.

### **31. MODIFICATIONS**

No modification of the Order, including any waiver of or addition to any of the Terms, shall be binding upon ELMS, unless made in writing and signed by ELMS's authorized representative.

### **32. TORT OBLIGATIONS**

ELMS's rights and Supplier's obligations under the Order shall not limit in any way whatsoever Supplier's common-law tort obligations or ELMS's right to sue in tort in addition, or as an alternative, to suing in contract.

### **33. RELATIONSHIP OF THE PARTIES**

Supplier and ELMS are independent contracting Parties and nothing in the Order shall make either party the agent or legal representative of the other for any purpose whatsoever, nor does the Order grant either party any authority to assume or to create any obligation on behalf of or in the name of the other. None of the persons engaged by Supplier in the performance of its obligations under the Order shall be considered as employees of ELMS.

### **34. SEVERABILITY**

If any provision of the Order is invalid or unenforceable under any statute, regulation, ordinance, executive order or other rule of law, such provision shall be deemed reformed or deleted, as the case may be, but only to the extent necessary to comply with such statute, regulation, ordinance, order or rule, and the remaining provisions of the Order shall remain in full force and effect.

### 35. NOTICES

Except as otherwise expressly stated in the Order, any notice given or other communication sent under the Order shall be in writing and shall be properly delivered to its addressee by hand, prepaid courier, registered mail, e-mail (receipt confirmed) or facsimile (receipt confirmed) at the applicable address noted on the face of the Order. Any notice or communication given as provided herein shall be deemed to have been received at the time of its delivery if delivered by hand, on the business day following its dispatch if transmitted by courier, e-mail or facsimile or on the third business day following its mailing if transmitted by registered mail. Either party may notify the other party, in the manner provided for herein, of any change of address, for the purpose of giving notices or sending communications under the Order.

### 36. TOOLING AND OTHER ELMS PROPERTY

- A. Unless otherwise expressly stated in the Order, Supplier shall supply at its own expense all materials, equipment, tools, jigs, dies, fixtures, patterns, drawings, specifications, samples and facilities required to perform the Order (the “**Supplier’s Property**”). Supplier grants ELMS an irrevocable option to take possession of and title to the Supplier’s Property that is special for the production of the Goods, upon payment to Supplier of its net book value less any amounts that ELMS has previously paid to Supplier for the cost of such items; provided, however, that this option shall not apply if the Supplier’s Property is used to produce goods that are the standard stock of Supplier or if a substantial quantity of similar goods are being sold by Supplier to others.
- B. Notwithstanding any other provision, Supplier expressly acknowledges and agrees that: (i) all materials, parts, components, assemblies, tools, jigs, dies, fixtures, patterns, drawings, specifications and samples, including any replacements thereof and any special tooling produced by Supplier for the performance of its obligations under the project (“**Tooling**”), that are furnished to Supplier or specifically paid for, in whole or in part, by ELMS; and (ii) all of the Goods that have been paid for, in whole or in part, by ELMS, whether or not ELMS has exercised its rights of inspection in respect thereof shall be the property of ELMS (all items in clauses (i) and (ii) above, collectively the “**ELMS Property**”).
- C. All ELMS Property shall be held by Supplier on a bailment basis and remain the property of, with both title and the right of possession in, ELMS and without limitation to any rights and remedies available hereunder or at law. At the ELMS’s request, the Parties shall enter into a separate bailment agreement regarding ELMS’s Property.
- D. While the ELMS Property is within Supplier’s custody or control and while in the custody or control of Supplier’s, contractors or agents, Supplier will: (i) properly house and maintain the ELMS’s Property on Supplier’s premises; (ii) not use the ELMS’s Property for any purpose other than for performance under the Order; (iii) prominently mark the ELMS’s Property as property of ELMS; (iv) refrain from commingling the ELMS’s Property with the property of Supplier or with that of a third party; (v) adequately insure the ELMS’s Property against loss or damage, including but not limited to maintaining full fire and extended coverage insurance for replacement value and naming ELMS as an additional insured; (vi) take reasonable steps to ensure that the ELMS’s Property does not become subject to any liens or other claims; and (vii) not move the ELMS’s Property to

another location whether owned by Supplier or a third party, without the prior written consent of ELMS. ELMS will have the right to enter Supplier's premises at reasonable times to inspect the ELMS's Property and Supplier's records pertaining thereto. Supplier expressly waives and releases, and agrees not to file or otherwise assert or prosecute or suffer to permit any statutory, equitable or other liens, including but not limited to equitable or other liens, including but not limited to any molder liens, tool liens, builder liens and the like, that Supplier has or might have on or in connection with the ELMS's Property for all work, including but not limited to, designing, manufacturing, improving, maintaining, servicing, using, assembling, fabricating or developing the ELMS's Property.

- E. Supplier shall promptly notify ELMS of the location of the ELMS Property, if any are located at any place other than Supplier's facility. Unless otherwise expressly stated, Supplier shall maintain accounting and property control records for the ELMS Property in accordance with sound industrial practices. Supplier undertakes, at Supplier's expense, to maintain the ELMS Property in good condition and to repair within the lifetime and/or until the agreed output quantity has been reached, and shall replace any of the ELMS Property if, as and when necessary or reasonably required. ELMS does not provide any warranties with respect to the ELMS Property. Upon completion or termination of the project, Supplier shall retain on a bailment basis for ELMS, as aforesaid, the ELMS Property still then in the physical possession of Supplier, at Supplier's expense, until disposition directions are received from ELMS.
- F. Supplier shall use the ELMS Property solely for the purpose of performing its obligations under the project. ELMS Property, while in Supplier's custody or control and while in the custody or control of Supplier's subsuppliers, contractors or agents, shall be marked and adequately identified as the ELMS Property, and to the extent possible, will be isolated from Supplier's property.
- G. Upon receipt of ELMS's demand or disposition directions, Supplier shall, at ELMS's expense, immediately prepare the ELMS Property for shipment and shall deliver it to such locations as may be specified by ELMS. ELMS Property shall be in no less than the same condition as originally received by Supplier, reasonable wear and tear excepted. If ELMS so requests, Supplier shall grant ELMS access to Supplier's premises during normal working hours for the purpose of inspecting or removing the ELMS Property.
- H. Supplier expressly waives and releases, and agrees not to file or otherwise assert or prosecute or suffer to permit any statutory, equitable or other liens, including but not limited to equitable or other liens, including but not limited to any molder liens, tool liens, builder liens and the like, that Supplier has or might have on or in connection with the ELMS's Property for all work, including but not limited to, designing, manufacturing, improving, maintaining, servicing, using, assembling, fabricating or developing ELMS's Property. Supplier hereby agrees to indemnify, defend and hold harmless ELMS from and against any loss, liabilities, costs, expenses, suits, actions, claims and all other obligations and proceedings, including without limitation all attorney's fees and all other cost of litigation that are in any way related to releasing, terminating or otherwise removing all such liens placed on the ELMS's Property. Supplier will assign to ELMS any claims Supplier has against third parties with respect to ELMS's Property.

- I. Supplier acknowledges and agrees that: (i) ELMS may not be the manufacturer of the ELMS's Property nor the manufacturer's agent nor a dealer therein; (ii) ELMS is bailing the ELMS's Property to Supplier for Supplier's benefit; and (iii) Supplier has inspected the ELMS's Property and is satisfied that the ELMS's Property is suitable and fit for its purposes; and (iv) ELMS HAS NOT MADE AND DOES NOT MAKE ANY WARRANTY OR REPRESENTATION WHATSOEVER, EITHER EXPRESS OR IMPLIED, AS TO THE FITNESS, CONDITION, MERCHANTABILITY, DESIGN OR OPERATION OF THE ELMS'S PROPERTY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE. ELMS shall not be liable to Supplier for any loss, damage, injury or expense of any kind or nature caused, directly or indirectly, by the ELMS's Property, including, without limitation, its use or maintenance, or its repair, service or adjustment, or by any interruption of service or for any loss of business whatsoever or howsoever caused, including, without limitation any anticipatory damages, loss of profits or any other indirect, special or consequential damages. Supplier shall assume all risk of death or injury to persons or damage to property arising from use of the ELMS's Property.
- J. Supplier authorizes ELMS to file a UCC-1 financing statement or similar document with the appropriate filing authority to give notice of ELMS's ownership interest in the ELMS's Property. Failure to file a financing statement will not alter or amend ELMS's ownership rights to the ELMS's Property Supplier shall provide ELMS, upon ELMS's request, with a written inventory of all ELMS's Property.

### **37. RIGHTS TO AUDIT, ENTRY, RECLAMATION, AND INSPECTION**

- A. ELMS shall have the right at any reasonable time to examine all relevant documents, records, materials, equipment, tooling and Goods in the possession or under the control of Supplier relating to any of Supplier's obligations under an Order. Supplier agrees to reasonably cooperate in any such audit request by ELMS.
- B. ELMS shall have the right to enter Supplier's facility during normal business hours or, in the event of a Supplier shutdown, at reasonable times, to inspect the facility, Goods or Services, materials and any property of ELMS covered by each Order. ELMS's inspection of the Goods or Services, whether during manufacture, prior to delivery or within a reasonable time after delivery, shall not constitute acceptance of any work in process or finished Goods or Services.
- C. Without the necessity of a court order, ELMS may enter upon Supplier's premises and remove property belonging to ELMS, including, without limitation, ELMS's Property and other goods, inventory or Supplier's Property that has been or is agreed to be sold to ELMS under the Order.

### **38. INDEMNIFICATION**

- A. Supplier shall indemnify and hold harmless ELMS and its affiliated companies, their directors, officers, employees, invitees, agents and customers (“**Indemnitees**”) from and against all liability, demands, claims, losses, costs, actions, judgments, fines, penalties, damages and expenses, including reasonable attorney’s fees (collectively, “**Liabilities**”) incurred by Indemnitees by reason of or on account of any breach of this Order, warranty claims, product recall claims, product liability claims, injuries to persons, including death, or damage to property caused by Supplier, its employees, agents, subcontractors, or in any way attributable to the performance of Supplier, its employees, agents, or invitees; provided, however, that Supplier’s obligation to indemnify Indemnitees shall not apply to any Liabilities solely arising from ELMS’s negligence. Supplier waives the application of the doctrine of comparative negligence and other doctrines that may otherwise allocate the liability covered by Supplier’s indemnity. This indemnification obligation shall be in addition to Supplier’s warranty obligations.
- B. Within a reasonable time of becoming aware of any actual or potential Liabilities, ELMS shall notify Supplier. Supplier, at ELMS’s option and at Supplier’s expense, will undertake defense of such actual or potential Liabilities through counsel approved by ELMS. Provided, however, that Supplier shall first obtain authorization from ELMS before settlement is made of the actual or potential Liabilities if the terms of such settlement could materially adversely affect ELMS, including any terms which admits the existence of a defect in Goods and Services or a failure of ELMS to fully and faithfully perform its obligations. In the alternative, ELMS may elect to undertake defense of such Liabilities to the extent it is asserted against ELMS, and Supplier shall reimburse ELMS on a monthly basis for all expenses, attorney fees, and other costs incurred by ELMS.

### **39. BATTLE OF THE FORMS NOT APPLICABLE**

The Parties have agreed and it is their intent that the battle of the forms as described in Section 2-207 of the Uniform Commercial Code shall not apply to these Terms or to any invoice or acceptance form from ELMS relating to these Terms. It is the Parties’ understanding that these Terms shall exclusively control the relationship of the Parties, even in the event of any discrepancy between any invoice or acceptance form sent by Supplier to ELMS.

### **40. GOVERNING LAW AND JURISDICTION**

- A. The terms of any Order (including these Terms) shall be governed by and construed in accordance with the laws of the State of Michigan. The applicability of the United Nations Convention for the Sale of Goods (CISG) is hereby expressly excluded. Subject to subparagraph 40.B below, Supplier consents to the exclusive jurisdiction of the appropriate state court in Oakland County, Michigan or, if original jurisdiction can be established, in the federal court in the U.S. District Court for the Eastern District of Michigan, Southern Division, for any legal or equitable action or proceeding arising out of, or in connection with, each Order. Supplier expressly waives any and all objections to venue in such courts.
- B. ELMS may, upon written notice to Supplier, require that any dispute be submitted to be fully and finally determined through binding arbitration with the American Arbitration Association (“AAA”), under the then current rules and procedures of the AAA. Unless otherwise agreed by the parties, the Arbitration will be conducted in Michigan, in English,

before a single arbitration. The decision of the arbitrator shall be final and shall be binding on all parties and any party may apply for enforcement of any arbitral award in the appropriate courts.

#### **41. LABOR DISPUTES**

Supplier shall notify ELMS in writing of any actual or potential labor dispute delaying or threatening to delay timely performance of this Order. Supplier shall notify ELMS in writing six (6) months in advance of the expiration of any current labor contracts. Supplier shall deliver a supply of finished Goods or Services at least thirty (30) days prior to the expiration of any such labor contract, in quantities and for storage at sites designated by ELMS.

#### **42. DATA SECURITY**

For purposes of this Section, “**ELMS Data**” means all data, content, material, Confidential Information and other information provided by ELMS to Supplier or otherwise transmitted to Supplier for use in connection with this Order. Supplier will maintain and enforce information and data privacy and security procedures with respect to its access, use and storage of all ELMS Data that: (a) are at least equal to industry standards taking into consideration the sensitivity of the relevant ELMS Data, and the nature and scope of the Goods and Services to be provided; (b) are in accordance with ELMS’s reasonable security requirements; (c) comply with all applicable international, foreign, federal, state and local laws, statutes, rules, orders and regulations; and (d) provide reasonably appropriate administrative, technical, and physical safeguards to protect against accidental or unlawful destruction, loss, alteration or unauthorized disclosure, access or use of ELMS Data. Without limiting the generality of the foregoing, Supplier will take all reasonable measures to secure and defend its location and equipment against anyone who may seek, without authorization, to modify or access Supplier systems or the information found therein without consent.

#### **43. ELECTRONIC COMMUNICATIONS**

Supplier shall comply with any method of electronic communication specified by ELMS, including requirements for electronic funds transfer, Order transmission, production Releases, electronic signature, and communication.

#### **44. CONSULTING**

To the extent that this is a Order which includes services or consulting services, Supplier hereby assigns to ELMS all rights, title and interest in and to any and all ideas, inventions, improvements, materials, copyrightable material, drawings, documents or the like, conceived or made by Supplier as a result of or relating to work done or services performed for ELMS pursuant to this Order. Such assignment includes all proprietary rights appurtenant thereto, and Supplier will execute any documents necessary to confirm such assignment.