

**Midwest Energy Resources Company Terms and  
Conditions For Material Purchases**

**1. DEFINITIONS**

The following terms shall have the following meanings:

- A. *Agreement* means these Terms and Conditions, the document called the Purchase Order and/or Contract as executed by the parties, and all of the documents listed in the Purchase Order and/or Contract which are specifically incorporated into this Agreement.
- B. *Buyer* is Company's purchasing representative whose name appears on the face of the Purchase Order and/or Contract and who is the only Company representative authorized to issue Change Orders.
- C. *Company* means the DTE Energy entity stated on the first page of the Purchase Order and/or Contract.
- D. *Change Order* is the document issued by Buyer that alters, amends or modifies the Agreement.
- E. *Seller* means the person or legal entity with whom Company has entered into the Agreement.
- F. *Materials* means the materials, goods, equipment, stock, other tangible items or non-stock, and/or services covered by the Agreement, and includes all parts, portions, items, attachments, repairs, replacements and substitutions thereof.

**2. ENTIRE AGREEMENT**

- A. The Purchase Order and/or Contract, together with these Terms and Conditions and all documents referenced and specifically incorporated into the Purchase Order and/or Contract are the entire agreement between the Parties. No modification of the Agreement shall be effective unless by a Change Order issued by Buyer. Any agreements, negotiations or understandings of the Parties prior or contemporaneous to the date of the Agreement, whether written or oral, are superseded hereby.
- B. Any document submitted by Seller (including any Seller document referenced in the Agreement) is used solely for the purpose of describing the Materials and, to the extent containing any terms in addition to or inconsistent with the terms of the Agreement, or a rejection of any terms of the Agreement, shall be deemed to be a counter offer to Company and shall not be binding upon Company unless specifically accepted in writing by Buyer. In the absence of written acceptance of such counter offer by Company, commencement of performance by Seller shall be deemed to be an agreement by Seller to perform in accordance with the terms of the Agreement and an acceptance hereof, notwithstanding any prior dealings or usage of trade.

**3. SCOPE OF SALE AND PURCHASE**

Seller agrees to sell to Company the Materials identified on the Purchase Order and/or Contract at the stated price, quantity, ship to location and specifications. Company is not obligated to purchase any minimum quantity or dollar amount of Materials from Seller.

**4. TERM OF AGREEMENT**

This Agreement shall be effective and terminate on the dates specified in the Purchase Order and/or Contract.

**5. DELIVERY OF MATERIALS**

- A. All Materials shall be delivered according to the time period stated in the Purchase Order and/or Contract. Time is of the essence for this Agreement and Seller shall at all times achieve one hundred percent (100%) on-time delivery.
- B. In the event Seller delivers the Materials prior to their scheduled delivery date, Company may, at its option, (a) refuse to accept the Materials and return them at Seller's expense or (b) accept the

Materials but defer payment until the time when payment would have been due had the Materials been shipped according to schedule.

C. If delivery of the Materials is not completed by the time period stated in the Agreement, Company reserves the right, without liability and in addition to other rights and remedies, to cancel this Agreement by notice effective upon receipt by Seller as to stated quantities of Materials not yet delivered and to purchase substitute Materials from third parties at Seller's expense.

**6. INSPECTION AND ACCEPTANCE OF GOODS**

- A. Seller shall provide and maintain a quality assurance system which shall assure that all Materials delivered to Company conform to Company's requirements as specified in the Agreement, whether manufactured or processed by Seller or by Seller's suppliers. Seller shall maintain adequate records of all inspections and tests that shall indicate the nature and number of observations made, the number and type of nonconforming or defective Materials, the quantities approved and rejected, and the corrective action taken. Such records shall be made available to Company at all times and, unless otherwise agreed to by Company, shall be retained by Seller for a period of at least five (5) years.
- B. Notwithstanding payment, passage of title or prior inspection or testing, all Materials are subject to final inspection and acceptance or rejection by Company. At all reasonable times during the period of Seller's performance under the Agreement, including the period of manufacture, Company may inspect and/or test the Materials to be furnished under the Agreement at the locations where the work is being performed, including those of Seller's suppliers and Seller shall provide, without additional charge, reasonable facilities and assistance for safe and convenient inspection and testing. Company may conduct one hundred percent (100%) inspection of the Materials or any lot of the Materials or, at Company's option, Company may select and inspect samples thereof, and Company shall have the right to reject all or any portion of the Materials if any such inspection reveals that any materials are defective or nonconforming. Neither Seller nor Seller's suppliers shall change the location where the Materials are being manufactured, without the prior written consent of Buyer.

C. The parties agree that in the event any Materials delivered pursuant to the Agreement are nonconforming in any manner, Company may, in addition to all other remedies available, either itself or through others, rework, correct or otherwise alter any such Materials for the purpose of making them conforming or less nonconforming; and all reasonable costs, charges and expenses associated therewith shall be the responsibility of Seller and may be deducted by Company from any amount due Seller. The parties further agree that Company may return to Seller, or dispose of without any liability to Seller, any nonconforming Materials that are delivered to Company and not rendered conforming through Company's efforts (although Company shall be under no obligation to undertake such efforts) and receive full credit for the price of such Materials together with all reasonable costs, charges and expenses associated therewith. Any acceptance by Company is not a release or waiver of any of its rights under this Agreement.

**7. TITLE AND RISK OF LOSS**

- A. Title to all Materials subject to the Agreement shall remain with Seller until delivery and risk of loss shall pass to Company upon final acceptance of the Materials by Company. Any loss or damage to the Materials prior to acceptance shall be Seller's sole risk. After Company has accepted the Materials and the Materials are in its possession, Company shall be responsible for any loss or damage to the Materials, unless such loss or damage is caused by Seller's willful or negligent acts. Seller shall protect Company's property from and is responsible for any loss or damage arising out of the delivery of the Materials.
- B. Notwithstanding the stated F.O.B. point, Seller shall be responsible for any loss or damage occurring during transit when such loss or damage is attributable either to an act or omission of Seller or to a failure of Seller to adhere to the express shipping instructions of Company.

## 8. CONSIGNMENT

If the Agreement provides that the materials shall be purchased under a consignment, the following shall apply:

A. Seller shall deliver to and store, at no cost to Company, in the Company's designated warehouse(s), the inventory of Materials identified for that site. Company may, from time to time, utilize and make a withdrawal from the inventory on an as-needed basis. A Purchase Order and/or Contract shall be issued which references this Agreement and indicates the specific items, quantity, prices, ship to location, and delivery schedule for the Materials being ordered to replenish inventory consumed through a withdrawal. Company shall not be obligated to pay Seller for any Materials unless purchased by such Purchase Order and/or Contract. Under the Consignment program, Seller agrees that Company is not subject to any minimum order quantities or order amounts. Upon termination, Company may elect to make a withdrawal of any portion or all of the inventory and the remainder shall be promptly returned to Seller at no cost to Company.

B. Seller may take an inventory count of the Materials a maximum of two times per contract year by providing Company with notice of such intent thirty (30) days in advance. Seller shall provide the results of such count to Company within fifteen (15) days after completion. When a discrepancy in the inventory count occurs, Seller shall provide Company detailed documentation of shipments sent. If Company agrees that material is missing, Company shall be liable for the loss. If there is excess inventory, Seller shall pay or credit Company, at Company's option, the difference if the count reveals that Company previously paid for Materials included in the inventory.

## 9. LICENSE, PATENTS AND COPYRIGHTS

Seller represents and warrants that it has authority and grants Company a permanent, assignable, nonexclusive, royalty-free license to use any Third Party Work required while performing any services or obtaining Materials. Company shall have all the intellectual property rights in the work. As requested by Company, Seller shall do whatever is necessary, at Company's cost, to obtain patents or copyrights on any concepts, process, products or writings conceived, developed or produced by Seller while performing under this Agreement. Seller shall execute all documents as may be necessary to implement and carry out the provisions of this Section.

## 10. OWNERSHIP OF INFORMATION

A. All work prepared or developed by Seller in the performance of the Agreement shall become the sole and exclusive property of Company, whether delivered to Company or not, and shall, together with any materials furnished to Seller by Company, be delivered to Company upon request and, in any event, upon termination or completion of this Agreement. Except as specifically authorized in writing by Company, information and any other data developed or acquired by or furnished to Seller in the performance of this Agreement shall be used only in connection with materials provided to Company and shall be the exclusive property of Company.

B. Company and Seller agree that all work is a Work-Made-For-Hire under the copyright laws of the United States. In addition, if any work is not Work-Made-For-Hire, Seller agrees to assign and does hereby expressly assign to Company for all time, all right, title and interest to all work, including any and all copyrights, patents, trade dress, and any and all moral rights it may have in any whole or part of the materials. Seller agrees to obtain any assignments of rights from other parties, including its employees, it requires to comply with this Section.

C. During and after this Agreement, Seller agrees to assist Company in every reasonable way to secure, maintain and defend for Company's benefit all intellectual property rights it may have in any whole or part of the materials.

## 11. WARRANTY

A. Seller warrants that it has good and marketable title at the time the Materials are loaded for delivery to Company and that the Materials are not subject to any liens, charges, claims or encumbrances by any person or entity. Seller shall defend and hold harmless Company, its successors and assigns from and against any such liens, charges, claim or encumbrances. Seller warrants that, at the time of delivery to Company, the content of the Materials conforms to the specifications

stated in the Agreement.

B. Seller warrants that the Materials furnished hereunder shall be free from defects in design, material, workmanship and title, conform in all respects to the terms of Agreement, be new and, if no quality is specified, of the best quality. If at any time prior to eighteen (18) months from the date that the Materials are first used for the purposes intended by Company or four (4) years from the date of receipt by Company, whichever occurs first, it appears that the Materials or any part thereof do not conform to these warranties and Company so notifies Seller within a reasonable time after such discovery, Seller, at its sole expense and after obtaining Company's concurrence, shall promptly correct such nonconformity or replace the nonconforming Materials. The warranty period for such corrected or replaced Materials shall be of an equal duration as the original warranty period and shall commence upon acceptance of such corrected or replaced Materials. If Seller fails to fulfill its obligations under this Section, Company may reject or revoke acceptance and cover by purchasing substitute Materials or may proceed to make corrections or accomplish Seller's work by the most expeditious means available. Seller shall be liable for the cost of cover or correction performed by Company, including all damages proximately caused by the breach of the foregoing warranties and any damages such as removal and reinstallation costs, inspection costs and all shipping costs.

C. Seller shall promptly provide Buyer and the Contract Administrator (a) notice of any defects (latent or otherwise) in the Materials; (b) any warnings concerning defects (latent or otherwise) in the Materials; (c) any recall notices or safety bulletins related to the Materials; and (d) details including corrective action requirements. The provisions of this Section shall survive termination, cancellation or expiration of the Purchase Order and/or Contract.

## 12. WARRANTY AND INDEMNITY - PATENTS, TRADEMARKS, AND PROPRIETARY RIGHTS

A. Seller warrants that all materials, and processes used or supplied and any work performed are free from any infringement of any patent, trademark or other intellectual property right.

B. Seller shall indemnify and defend any action brought against Company based on a claim or allegation that any process or method used, material supplied or service performed pursuant to the Agreement constitutes an infringement or violation of any patent, trademark or other proprietary right. Company shall at Seller's expense give such information and assistance as it may deem appropriate for the defense of same, and Seller shall pay all of Company's actual costs and expenses of such action, including any damages awarded. If an infringement or violation is determined or held to exist and the use of such process, method, Materials or service is enjoined, Seller shall, at its own expense and at Company's option, either (1) procure for Company the right to continue using said process, Materials or service; (2) replace it with non-infringing process, Materials or service acceptable to Company; or (3) modify it in a manner acceptable to Company so that it becomes non-infringing.

## 13. PRICE AND PAYMENT

A. Company shall pay Seller the prices indicated in the Agreement for all Materials purchased under this Agreement. Unless otherwise agreed to by a Change Order issued by Buyer, Seller shall not increase the price stated in the Agreement. Invoices for Materials delivered shall be submitted on a timely basis, in the manner, frequency and form, and with such supporting documentation, as required by the Agreement. Seller shall promptly pay its subcontractors and/or suppliers upon receipt of each payment, the respective amounts allowed Seller to the extent of each such subcontractor and/or supplier's interest therein. Company shall pay approved invoices in accordance with the payment terms specified in the Agreement or shall notify Seller of its reasons for disapproval of such invoices. All payments are subject to adjustment for shortage or rejection.

B. Seller shall defend, indemnify and hold harmless Company from any and all claims, demands, causes of action and/or costs, including reasonable attorney fees, attributable to Seller's failure to make any payments required by this Section. Nothing in this Section or Agreement shall imply or infer an obligation of Company to make

payment to any party other than Seller.

#### 14. CHANGES

A. Company may make changes to the Agreement, including without limitation, changes to any one or more of the following: (a) the specifications of the Materials, (b) the addition or deletion of Materials; (c) the method of shipment of the Materials and (d) the place or time of inspection, delivery or acceptance of the Materials. If such change causes an increase or decrease in the cost of, or time required for performance of, the Agreement, an equitable adjustment may be made by Change Order issued by Buyer. Nothing in this Section shall excuse Seller from proceeding with performance of the Agreement as changed. No price increases, costs, charges or other amounts, extensions of time for delivery or other changes shall be binding on Company unless evidenced by a Change Order issued by Buyer. Payments made under this Section shall not exceed the aggregate price specified in the Agreement, less payments otherwise made or to be made. The provisions of this Section shall not apply if Company cancels all or any portion of the Agreement due to the Default of Seller.

B. No claim by Seller for adjustment hereunder shall be considered unless made in writing within ten (10) days from the date notice of any such change is received by Seller. Where the cost of Materials related to a change is included in Seller's claim for adjustment, Company shall have the right to take title thereto and prescribe the manner of disposition thereof.

#### 15. FORCE MAJEURE

A. Except as otherwise provided herein, Seller shall not be liable for a reasonable delay or default in furnishing Materials hereunder and Company shall not be liable for failure to perform any of its obligations hereunder, to the extent due to fire, flood, storm, other natural disaster, national emergency or war, and not due to labor problems, inability to obtain financing, negligence or other similar condition of such party, provided that either party has given the other prompt notice of such occurrence.

B. Within seven (7) days of the commencement of any excusable delay, Seller must notify Buyer in writing of the nature, cause, date of commencement and expected impact of the event. Seller must exercise due diligence in proceeding to meet its performance obligations hereunder, notwithstanding the delay. Upon Seller satisfying these conditions, Company may extend the schedule for the period of time equal to the time actually lost by reason of the delay.

#### 16. TERMINATION FOR CONVENIENCE

Company may, at its option, by written Change Order issued by Buyer, terminate the Agreement or any part thereof upon ten (10) days notice without cause. Upon such termination, Seller agrees to waive all claims for damages, including claims for loss of profits and to accept as its sole remedy for termination the cost of all Materials delivered prior to the date of termination, including reasonable overhead and profit thereon and reasonable cost incurred by Seller in terminating the Agreement. Company shall have no liability whatsoever for goods which are Seller's standard stock. Termination shall not relieve Seller of any of its obligations for Materials delivered hereunder.

#### 17. CANCELLATION FOR DEFAULT

Seller shall be in default hereunder if: (a) Seller refuses, neglects or fails in any respect to prosecute the Agreement hereunder or any portion thereof with promptness, diligence or in accordance with any of the provisions set forth herein; (b) Seller refuses, neglects, or fails to perform any other obligations under this Agreement or provide adequate assurance of performance; (c) Seller makes an assignment for the benefit of creditors or bankruptcy or insolvency proceedings are instituted by or against Seller; or (d) at any time in Company's sole judgment, Seller's financial or other condition or progress on the Agreement shall be such as to endanger timely performance. If Seller fails to remedy such default within five (5) days after receipt by it of such written notice, in addition to all other remedies hereunder, under applicable law or in equity, Company may exercise any one or more of the following remedies: (a) cancel all or any portion of the Agreement without liability, except the obligation to pay the purchase price for conforming Materials received by Company prior to cancellation, accepted in accordance with the Agreement and not previously paid

for, (b) require Seller to repair or replace any or all Materials, at Company's option and at Seller's sole expense at the location designated by Company, (c) require Seller to pay all transportation and other charges arising from delivery, storage and return of Materials, (d) purchase replacement Materials from a third party and charge the same to Seller, (e) recover from Seller any and all increased costs and other damages relating to such default and (f) recover attorneys' fees and costs of suit, plus interest. No delay by Company in the enforcement of any provision of the Agreement shall constitute a waiver thereof, and no waiver thereof shall constitute a waiver of any other provision. Upon cancellation, Seller shall deliver all Materials in progress under the Agreement and provide Company with all intellectual rights in any Materials.

#### 18. TECHNICAL DATA

All materials and documents prepared or developed by Seller in connection with the performance of this Agreement, including all manuals, data, designs, drawings, plans, specifications, reports, calculations and summaries, shall become the property of Company when prepared, whether delivered to Company or not, and shall, together with any materials and documents furnished to Seller by Company, be delivered to Company upon request or termination of this Agreement.

#### 19. SET OFF

Company shall be entitled at any time to set off any sums owing by Seller or any of Seller's affiliated companies, to Company or any of Company's affiliated companies, against sums payable by Companies.

#### 20. LIMITATION ON LIABILITY

Except as may be expressly stated elsewhere in this Agreement, neither party shall be liable to the other party for incidental, indirect, or consequential damages, including, but not limited to, loss of profits or revenue.

#### 21. INDEMNIFICATION

A. Seller covenants and agrees that it shall defend, indemnify and hold Company, and all of its officers, agents and employees harmless for any claim, loss, damage, cost, charge, expense, lien, settlement or judgment, including interest thereon, whether to any person, including employees of Seller, its Subcontractors and Suppliers, or property or both, arising directly or indirectly out of or in connection with Seller's or any of its Subcontractor's or Supplier's performance of the Agreement or in connection with the performance of the Work, to which Company or any of its officers, agents or employees may be subject or put by reason of any act, action, neglect or omission on the part of Seller, any of its Subcontractors or Suppliers or Company, or any of their respective officers, agents and employees. Without limiting the foregoing, said obligation includes claims involving Seller's, Supplier's or Subcontractor's employees injured while going to and from the Project.

B. In the event any suit or other proceedings for any claim, loss, damage, cost, charge or expense covered by Seller's foregoing indemnity should be brought against Company or any of its officers, agents or employees, Seller hereby covenants and agrees to assume the defense thereof and defend the same at Seller's own expense and to pay any and all costs, charges, attorney's fees, and other expenses, and any and all judgments that may be incurred by or obtained against Company or any of its officers, agents, or employees in such suits or other proceedings. In the event of any judgment or other lien being placed upon the property of Company in such suits or other proceedings, Seller shall at once cause the same to be dissolved and discharged by giving bond or otherwise.

#### 22. INGREDIENTS AND HAZARDOUS MATERIALS

A. Prior to delivery, Seller shall promptly furnish to Company a Material Safety Data Sheet ("MSDS") for any chemicals or hazardous materials or products to be delivered to Company, which includes at a minimum: (a) a list of all ingredients in the products and materials to be brought by Seller or its subcontractor or supplier to Company's property, (b) the quantity of all such ingredients and (c) information concerning any changes in or additions to such ingredients. Company shall require the immediate removal of any substance from its property

if Seller fails to provide a MSDS. Any damage or delays caused by the removal of such substance shall be at Seller's expense.

B. Prior to and during the shipment of any products or materials, Seller shall furnish Company and any carriers with sufficient written warnings and notices (including appropriate labels on the products, materials, containers and packaging) of any hazardous material that is an ingredient or a part of any of the products or materials, together with all special handling instructions, safety measures and precautions necessary to comply with all applicable laws, to inform Company and any carriers of any applicable legal requirements and prevent bodily injury or property damage in the handling, transportation, processing, use or disposal of the products, materials, containers and packaging.

### 23. CONFIDENTIALITY

A. Seller acknowledges and agrees that all information Company discloses to Seller or to which Seller may have access during Seller's performance of the Agreement is considered proprietary and confidential by Company, unless designated otherwise. This information is and shall, at all times, remain the property of Company. Seller shall limit the disclosure of the information or any portion thereof to those of its employees and Subcontractors and Suppliers who are required to perform the Agreement and who have a strict need to know such information. Seller shall advise such persons of the existence of this Agreement, of the confidential nature of the information and of Seller's obligations regarding same under this Agreement. Seller, its employees, subcontractors and suppliers and their employees shall not, without permission of Company, disclose such proprietary or confidential information to any third party for any reason or purpose whatsoever. In the event of a breach or threatened breach of this Section by Seller or those under its control, Company shall be entitled to an injunction restraining such conduct. Nothing herein shall be construed as prohibiting Company from pursuing any other remedies available to Company for such breach or threatened breach.

B. Seller and its employees shall not be required to protect or hold in confidence any such information which (1) becomes known to the public through no act or omission of Seller or its employees; (2) is ordered to be disclosed by a court or administrative agency; or (3) is thereafter developed independently by Seller. In the event that Seller is requested or required under compulsion of legal process to disclose such information, Seller shall not, unless required by law, disclose the information until Company has first (i) received prompt written notice of such request or requirements to disclose and (ii) had an adequate opportunity to obtain a protective order or other reliable assurance that confidential treatment shall be accorded to the Information. Seller shall not oppose actions by Company to assure such confidential treatment.

C. No publications or advisements concerning the subject matter of the Agreement, Company's name and/or logo, or photographs of Company property and materials or portions thereof shall at any time be made by or on behalf of Seller, its subcontractors, or suppliers, unless prior written authorization therefore is obtained from Buyer.

### 24. LAWS, REGULATIONS AND PERMITS

Seller shall keep itself fully informed of and shall observe and comply with all federal, state and local laws, ordinances, codes and regulations including, but not limited to, environmental and pollution control laws; orders and decrees of bodies or tribunals having any jurisdiction or authority over the Materials; and any rules or regulations of Company relating to health, safety or performance of the Agreement which in any manner affect those engaged or employed on any work, the Materials used in any work, or the performance of the Agreement. If any discrepancy or inconsistency should be discovered between the Agreement and any such law, ordinance, code, regulation, order or decree, Seller shall immediately report the same in writing to Buyer. Seller shall be responsible for the compliance by its subcontractors and suppliers of all tiers with the above provisions and shall be liable for all fines levied in violation of any laws, ordinances, codes and/or regulations.

### 25. FEDERAL CONTRACTING REQUIREMENTS

A. The following Federal Acquisition Regulation ("FAR") clauses, as amended, are incorporated by reference in these terms and conditions

unless Seller is exempt thereunder: Equal Opportunity, FAR 52.222-26 (applies to all orders); Prohibition on Segregated Facilities, FAR 52.222-21 (applies to all orders); Affirmative Action for Workers with Disabilities-FAR 52.222-36 (applies to orders of \$10,000 or more); Anti-Kickback Procedures, FAR 52.203-7 (applies to all orders over \$100,000); Affirmative Action for Special Disabled and Vietnam Era Veterans-FAR 52.222-35 (applies to orders of \$25,000 or more); and Employment Reports on Disabled Veterans and Veterans of the Vietnam Era-FAR 52.222-37 (applies to orders of \$25,000 or more). The terms "Contractor," "Government," and "Contracting Officer" as used in the FAR clauses shall be deemed to refer to "Seller," "Company" and "Contract Administrator."

B. Except to the extent that this Agreement is exempt from any of the requirements set out below, Seller agrees to be bound by and comply with the clauses set forth at 48 CFR 52.219-8 (Utilization of Small Business Concerns) (only if this Agreement exceeds \$100,000) and 48 CFR 52.219-9 (Small Business Subcontracting Plan) (only if this Agreement exceeds \$500,000 and if Company requests submission of a Small Business Subcontracting Plan).

### 26. NETWORK SECURITY/VIRUS PROTECTION

A. If Company's access to Seller's system or Seller's access to Company's system requires a network connection between Company's wide area network (WAN) and Seller's WAN, Seller and Company shall take reasonable and customary precautions to prevent unauthorized access to or use of the Network Connection through their respective networks. The parties agree, however, that each party is responsible for the security of its own network. Neither party shall be liable to the other for unauthorized access to the network connection, so long as such party shall have taken reasonable and customary precautions to prevent such unauthorized access.

B. Neither Company or Seller shall knowingly engage in creating or transmitting computer virus software or other programs which could contaminate or otherwise cause the malfunction of any system (i.e., viruses, trojan horses, trap doors, worms, etc.). When providing electronic materials (any electronic media method, including but not limited to diskette or CD-ROMs) to Company or Seller under this Agreement, both parties agree to exercise the same standard of care that it uses to safeguard against the transfer of known computer viruses or other system errors which could contaminate or otherwise cause the malfunction of its own computer system.

### 27. ELECTRONIC MEDIA TOOL VIRUS PROTECTION

A. Any electronic media tool, including, but not limited to, diskettes, CD-Roms, laptops, or any other form of software or hardware provided or used by Seller, shall be free from any virus, or any other system error that may contaminate or otherwise cause harm to Company's computer environment. Seller warrants that any software, and related documentation in electronic form, shall not contain, or result in the creation or insertion of, any disabling device (i.e., any virus, timer, clock, counter, time lock, time bomb, or other limiting design, instruction, or routine) that would erase data or programming, cause any resource to become inoperable or otherwise incapable of being used in the full manner for which such resource was intended to be used, or cause any software or documentation, any portion thereof, or any other programs, hardware, equipment, or data to become inoperable or otherwise become incapable of being used in the full manner for which it was designed, intended, and created.

B. Seller further warrants that any software and related documentation in electronic form, shall not contain any computer code that would: (i) disable the software or impair its use or operation in any way based on the elapsing of a period of time, the exceeding of an authorized number of copies, users, or other relevant metric, or the advancement to a particular date or other numeral (referred to as "time bombs", "time locks", or "drop dead" devices); (ii) permit Seller or any third party to remotely, and without Company's knowledge or approval, access the software through a device such as those referred to as a "trap," "access code," or "trap door"; or (iii) permit Seller or any third party to track, monitor, or otherwise report on the use or operation of such software.

C. If such virus or other contaminant is brought into Company's computer environment, by or through Seller, Seller shall reimburse Company for all labor and materials costs incurred by Company to

identify, contain and correct the effects of such virus. The hourly rate paid by Seller for the identification, containment and correction of the effects of such virus shall be at the prevailing hourly rate incurred by Company.

#### **28. RECORDS AND AUDITS**

Company or its authorized representative shall have access to Seller's records at Company's premises or at Seller's regular place of business during normal business hours to review, audit, and verify any information connected with this Agreement for a period of three (3) years after completion of the Agreement. Copies of any material shall be made for Company at its request and any reasonable cost of reproduction shall be borne by Company.

#### **29. NONWAIVER**

None of the provisions of the Agreement shall be considered waived by either party unless such waiver is given in writing by the other party. No such waiver shall be a waiver of any past or future default, breach or modification of any of the terms, provisions, conditions or covenants of the Agreement unless expressly set forth in such waiver.

#### **30. NOTICES**

Notices and other written communications are to be made in writing to the address stated in the Agreement. Such notices and other written communications must reference the Purchase Order and/or Contract Number appearing in the Agreement.

#### **31. SAVING CLAUSE- INDEPENDENT TERMS**

Each term and condition of this Agreement is deemed to have an independent effect and the invalidity of any partial or whole paragraph or section shall not invalidate the remaining paragraphs or sections. The obligation to perform all of the terms and conditions shall remain in effect regardless of the performance of any invalid term by the other party.

#### **32. ASSIGNMENT**

No assignment of this Agreement or any of its rights or obligations hereunder shall be made by Seller without first obtaining the written consent of Company. This Agreement shall be binding upon and inure to the benefit of the respective successors and permitted assigns of the parties hereto.

#### **33. GOVERNING LAW AND JURISDICTION**

The Agreement, and the rights, obligations and liabilities of the parties hereto shall be construed in accordance with the law of the State of Michigan, without regard to its conflict of law principals. The parties agree that any action with respect to this Agreement shall be brought in a court of competent subject matter jurisdiction located in the State of Michigan and the parties hereby submit themselves to the exclusive jurisdiction and venue of such court for the purpose of such action.

#### **34. SURVIVAL**

All of the terms of this Agreement which by their nature extend beyond (a) the termination or cancellation of this Agreement or (b) the completion of the delivery of Materials shall survive and remain in full force and effect and apply to respective successors and assigns.

#### **35. CONSTRUCTION OF TERMS**

The terms of this Agreement have been arrived at after mutual negotiation and the parties agree that its terms shall not be construed against any party by reason of the fact that this Agreement was prepared by one of the parties.