

# Standard Terms and Conditions Of Sale – Products & Control Systems

## 1. DEFINITIONS:

In these Terms and Conditions of Sale, "Seller" means Emerson Process Management AG, Baar; "Buyer" means the person, firm, company or corporation by whom the order is given; "Goods" means the goods (including any Software and Documentation, as defined in Clause 9) described in Seller's Acknowledgement of Order form; "Services" means the services described in Seller's Acknowledgement of Order Form; "Contract" means the written agreement (including these Terms and Conditions) made between Buyer and Seller for the supply of the Goods and/or provision of Services; "Contract Price" means the price payable to Seller by Buyer for the Goods and/or Services and "Seller Affiliate" means any company which is for the time being directly or indirectly controlled by the ultimate parent company of Seller. For the purposes of this definition, a company is directly controlled by or is a subsidiary of another company or companies which holds 50% or more of the shares carrying the right to vote at a general meeting of the first mentioned company and a particular company is indirectly controlled by another company or companies if a series of companies can be specified, beginning with that company or those companies and ending with the particular company, so related that each company in the series is directly controlled by one or more of the companies earlier in the series.

## 2. THE CONTRACT:

2.1 All orders must be in writing and are accepted subject to these Terms and Conditions of Sale. No terms or conditions put forward by Buyer and no representations, warranties, guarantees or other statements not contained in Seller's quotation or Acknowledgement of Order nor otherwise expressly agreed in writing by Seller shall be binding on Seller.

2.2 The Contract shall become effective only upon the date of acceptance of Buyer's order on Seller's Acknowledgement of Order form or upon the date of fulfilment of all conditions precedent stipulated in the Contract, whichever is the later (the "Effective Date"). If the details of the Goods or Services described in Seller's quotation differ from those set out in the Acknowledgement of Order Form the latter shall apply.

2.3 No alteration or variation to the Contract shall apply unless agreed in writing by both parties. However, Seller reserves the right to effect minor modifications and/or improvements to the Goods before delivery provided that the performance of the Goods is not adversely affected and that neither the Contract Price nor the delivery date is affected.

## 3. VALIDITY OF QUOTATION AND PRICES:

3.1 Unless previously withdrawn, Seller's quotation is open for acceptance within the period stated therein or, when no period is so stated, within thirty days after its date.

3.2 Prices are firm for delivery within the period stated in Seller's quotation and are exclusive of (a) Value Added Tax and (b) any similar and other taxes, duties, levies or other like charges arising outside Switzerland in connection with the performance of the Contract.

3.3 Prices (a) are for Goods delivered EXW (Ex works) Seller's shipping point, exclusive of freight, insurance and handling and (b) unless otherwise stated in the Seller's quotation, are exclusive of packing. If the Goods are to be packed, packing materials are non-returnable.

## 4. PAYMENT:

4.1 Payment shall be made: (a) in full without set-off, counterclaim or withholding of any kind (save where and to the extent that this cannot by law be excluded); and (b) in the currency of Seller's quotation within thirty days of date of invoice unless otherwise specified by Seller's Finance Department. Goods will be invoiced at any time after their readiness for despatch has been notified to Buyer. Services will be invoiced monthly in arrears or, if earlier, upon completion. Without prejudice to Seller's other rights, Seller reserves the right to: (i) charge interest on any overdue sums at 4% above the base lending rate of Zuger Kantonalbank, Zug (or such higher rate stipulated by applicable law) during the period of delay; (ii) suspend performance of the Contract (including withholding shipment) in the event that Buyer fails or in Seller's reasonable opinion it appears that Buyer is likely to fail to make payment when due under the Contract or any other contract; and (iii) at any time require such reasonable security for payment as Seller may deem reasonable.

## 5. DELIVERY PERIOD:

5.1 Unless otherwise stated in Seller's quotation, all periods stated for delivery or completion run from the Effective Date and are to be treated as estimates only not involving any contractual obligations.

5.2 If Seller is delayed in or prevented from performing any of its obligations under the Contract due to the acts or omissions of Buyer or its agents (including but not limited to failure to provide specifications and/or fully dimensioned working drawings and/or such other information as Seller reasonably requires to proceed expeditiously with its obligations under the Contract), the delivery/completion period and the Contract Price shall both be adjusted accordingly.

5.3 If delivery is delayed due to any act or omission of Buyer, or if having been notified that the Goods are ready for despatch, Buyer fails to take delivery or provide adequate shipping instructions, Seller shall be entitled to place the Goods into a suitable store at Buyer's expense. Upon placing the Goods into the store, delivery shall be deemed to be complete, risk in the Goods shall pass to Buyer and Buyer shall pay Seller accordingly.

## 6. FORCE MAJEURE:

6.1 The Contract (other than Buyer's obligation to pay all sums due to Seller in accordance with the Contract) shall be suspended, without liability, in the event and to the extent that its performance is prevented or delayed due to any circumstance beyond the reasonable control of the party affected, including but not limited to: Act of God, war, armed conflict or terrorist attack, riot, fire, explosion, accident, flood, sabotage; governmental decisions or actions (including but not limited to prohibition of exports or re-exports or the failure to grant or the revocation of applicable export licenses), or labour trouble, strike, lockout or injunction. Seller shall have no obligation to supply any hardware, software, services or technology unless and until it has received any necessary licences or authorisations or has qualified for general licences or licence exceptions under applicable import, export control and sanctions laws, regulations, orders and requirements, as they may be amended from time to time (including without limitation those of the United States, the European Union and the jurisdiction in which Seller is established or from which the items are supplied). If for any reason any such licenses, authorisations or approvals are denied or revoked, or if there is a change in any such applicable laws, regulations, orders or requirements that would prohibit Seller from

fulfilling the Contract, or would in the reasonable judgement of Seller otherwise expose Seller and/or Seller's Affiliate(s) to a risk of liability under applicable laws, regulations, orders or requirements, Seller shall be relieved without liability of all obligations under the Contract.

6.2 If either party is delayed or prevented from performance of its obligations by reason of this Clause for more than 180 consecutive calendar days, either party may terminate the then unperformed portion of the Contract by notice in writing given to the other party, without liability provided that Buyer shall be obliged to pay the reasonable cost and expense of any work in progress and to pay for all Goods delivered and Services performed as at the date of termination. Seller may deliver by instalments and if so each delivery shall constitute a separate contract and failure by Seller to deliver any one or more of the instalments in accordance with their terms shall not entitle Buyer to terminate the whole Contract or treat it as repudiated.

## 7. INSPECTION, TESTING, AND CALIBRATION:

7.1 Goods will be inspected by Seller or manufacturer and, where practicable, submitted to Seller's or manufacturer's standard tests before despatch. Any additional tests or inspection (including inspection by Buyer or its representative, or tests in the presence of Buyer or its representative and/or calibration) or the supply of test certificates and/or detailed test results shall be subject to Seller's prior written agreement and Seller reserves the right to charge therefore; if Buyer or its representative fails to attend such tests, inspection and/or calibration after seven days' notice that the Goods are ready therefore, the tests, inspection and/or calibration will proceed and shall be deemed to have been made in the presence of Buyer or its representative and the Seller's statement that the Goods have passed such testing and/or inspection and/or have been calibrated shall be conclusive.

7.2 Claims for shortfalls in quantity or for incorrect delivery shall be void if made more than 14 days after delivery.

## 8. DELIVERY, RISK & TITLE:

8.1 Unless otherwise expressly stated in the Contract, the Goods will be delivered Carriage Paid To (CPT) the destination named in the Contract; freight, packing and handling will be charged at Seller's standard rates. Risk of loss of or damage to the Goods shall pass to Buyer upon delivery as aforesaid and Buyer shall be responsible for insurance of the Goods after risk has so passed. Alternatively, if it is expressly stated in the Contract that Seller is responsible for the insurance of the Goods after their delivery to the carrier, such insurance will be charged at Seller's standard rates. "Ex-works", "FCA", "CPT" and any other delivery terms used in the Contract shall be defined in accordance with the latest version of Incoterms.

8.2 Subject to Clause 9, title to the Goods shall pass to Buyer upon delivery in accordance with Clause 8.1.

## 9. DOCUMENTATION AND SOFTWARE:

9.1 Title to and ownership of the copyrights in software and/or firmware incorporated into or provided for use with the Goods ("Software") and documentation supplied with the Goods ("Documentation") shall remain with the relevant Seller Affiliate (or such other party as may have supplied the Software and/or Documentation to Seller) and is not transferred hereby to Buyer.

9.2 Except as otherwise provided herein, Buyer is hereby granted a non-exclusive, royalty-free licence to use the Software and Documentation in conjunction with the Goods, provided that and for so long as the Software and Documentation are not copied (unless expressly authorised by applicable law) and Buyer holds the Software and Documentation in strict confidence and does not disclose them to others, or permit others to have access to them (other than Seller's standard operating and maintenance manuals). Buyer may transfer the foregoing licence to another party which purchases, rents or leases the Goods, provided the other party accepts and agrees in writing to be bound by the conditions of this Clause 9.

9.3 Notwithstanding Sub-clause 9.2, Buyer's use of certain Software, (as specified by Seller and including but not limited to control system and AMS Software) shall be governed exclusively by the applicable Seller Affiliate or third party licence agreement.

9.4 Seller and Seller Affiliates shall retain ownership of all inventions, designs and processes made or evolved by them and save as set out in this Clause 9 no rights in intellectual property are hereby granted.

## 10. DEFECTS AFTER DELIVERY:

10.1 Seller warrants (i) subject to the other provisions of the Contract, good title to and the unencumbered use of the Goods; (ii) that Goods manufactured by Seller and/or Seller's Affiliates shall conform with Seller's specifications therefore and be free of defects in materials and workmanship and (iii) that Services provided by Seller or Seller Affiliates will be performed with all reasonable skill, care and due diligence and in accordance with good engineering practice. Seller will make good, by repair or at Seller's option by the supply of a replacement part or parts, any defects which, under proper use, care and maintenance, appear in Goods of Seller's Affiliates' manufacture and which are reported to Seller within 12 calendar months from putting such Goods into operation or 18 calendar months after their delivery, whichever period expires the sooner, (90 days after delivery in the case of Consumables and spare parts) (the "Warranty Period") and which arise solely from faulty materials or workmanship: provided always that defective items are returned to Seller at Buyer's cost carriage and insurance prepaid within the Warranty Period. ("Consumables" shall include glass electrodes, membranes, liquid junctions, electrolyte and O-rings). Replaced items shall become the property of the Emerson Process Management group. Repaired or replacement items will be delivered by Seller at Seller's cost to Buyer's mainland site in Switzerland or, if Buyer is located outside Switzerland, FCA in Switzerland. Seller will correct defects in Services provided by Seller or Seller Affiliates and reported to Seller within ninety days after completion of such Services. Goods or Services repaired, replaced or corrected in accordance with this Clause 10.1 shall be subject to the foregoing warranty for the unexpired portion of the Warranty Period or for ninety days from the date of their return to Buyer (or completion of correction in the case of Services), whichever expires the later.

10.2 Goods or Services sourced by Seller from a third party (not being a Seller Affiliate) for resale to Buyer shall carry only the warranty extended by the original manufacturer.

10.3 Notwithstanding Clauses 10.1 and 10.2, Seller shall not be liable for any defects caused by: fair wear and tear; materials or workmanship made, furnished or specified by Buyer; non-compliance with Seller's storage, installation, operation or environmental requirements; lack of proper maintenance; any modification or repair not previously authorised by Seller in writing; nor the use of non-authorised software or spare or replacement parts. Seller's costs incurred in investigating and rectifying such defects

shall be paid by Buyer upon demand. Buyer shall at all times remain solely responsible for the adequacy and accuracy of all information supplied by it.

**10.4** Subject to Clause 12.1, the foregoing constitutes Seller's sole warranty and Buyer's exclusive remedy for breach thereof. No representations, warranties or conditions of any kind, express or implied, shall apply as to satisfactory quality, merchantability, fitness for any particular purpose or any other matter with respect to any of the Goods or Services.

#### **11. PATENT, ETC. INFRINGEMENT:**

**11.1** Subject to the limitations set forth in Clause 12, Seller shall indemnify Buyer in the event of any claim for infringement of Letters Patent, Registered Design, Design Right, Trade Mark or Copyright ("Intellectual Property Rights") existing at the date of formation of the Contract arising from the use or sale of the Goods, against all reasonable costs and damages awarded against Buyer in any action for such infringement, or for which Buyer may become liable in any such action, provided always that Seller shall not be liable to so indemnify Buyer in the event that:

(i) such infringement arises as a result of Seller having followed a design or instruction furnished or given by Buyer, or the Goods having been used in a manner or for a purpose or in a country not specified by or disclosed to Seller prior to the date of the Contract or in association or combination with any other equipment or software, or

(ii) Seller has at its expense procured for Buyer the right to continue to use the Goods or has modified or replaced the Goods so that the Goods no longer infringe.

(iii) Buyer has failed to give Seller the earliest possible notice in writing of any claim made or to be made or of any action threatened or brought against Buyer and/or Buyer has failed to permit Seller, at Seller's expense, to conduct and control any litigation that may ensue and all negotiations for a settlement of the claim, or

(iv) Buyer has made without Seller's prior written consent any admission which is or may be prejudicial to Seller in respect of any such claim or action, or

(v) the Goods have been modified without Seller's prior written authorisation.

**11.2** Buyer warrants that any design or instructions furnished or given by it shall not cause Seller to infringe any Intellectual Property Rights in the performance of Seller's obligations under the Contract and shall indemnify Seller against all reasonable costs and damages which Seller may incur as a result of any breach of such warranty.

#### **12. LIMITATION OF LIABILITY:**

**12.1** Except for Seller's unlawful intent or gross negligence, and death or injury caused by Seller's negligence: (i) Seller's and Seller Affiliates' total liability for any and all damages, claims or causes of action howsoever arising (including, without limitation, damage, claims or causes of action by virtue of tort, by breach of contract or statutory duty, negligence, strict liability or infringement of Intellectual Property Rights) shall not exceed the Contract Price; and (ii) Seller and Seller Affiliates shall not be liable to the Buyer in any circumstances for any loss of profits, loss of contracts, loss of use, loss of data or consequential or indirect loss nor, save as set out in Clause 11 and in the preceding provisions of this Clause, for any loss or damage of any kind whatsoever, howsoever arising, claimed against or suffered by Buyer.

#### **13. STATUTORY AND OTHER REGULATIONS:**

**13.1** If Seller's obligations under the Contract shall be increased or reduced by reason of the making or amendment after the date of Seller's quotation of any law or any order, regulation or bye-law having the force of law that shall affect the performance of Seller's obligations under the Contract, the Contract Price and delivery period shall be adjusted accordingly and/or performance of the Contract suspended or terminated, as appropriate.

**13.2** Except to the extent otherwise required by applicable law, Seller shall have no responsibility for the collection, treatment, recovery or disposal of (i) the Goods or any part thereof when they are deemed by law to be 'waste' or (ii) any items for which the Goods or any part thereof are replacements. If Seller is required by applicable law, including waste electrical and electronic equipment legislation, European Directive 2002/96/EC (WEEE) and related legislation in EU Member States, to dispose of 'waste' Goods or any part thereof, Buyer shall, unless prohibited by applicable law, pay Seller, in addition to the Contract Price, either (i) Seller's standard charge for disposing of such Goods or (ii) if Seller does not have such a standard charge, Seller's costs (including all handling, transportation and disposal costs and a reasonable mark-up for overhead) incurred in disposing of such Goods.

**13.3** Buyer's personnel shall, whilst on Seller's premises, comply with Seller's applicable site regulations and Seller's reasonable instructions, including but not limited to those relating to safety, security and electrostatic discharge.

#### **14. COMPLIANCE WITH LAWS**

Buyer agrees that all applicable import, export control and sanctions laws, regulations, orders and requirements, as they may be amended from time to time, including without limitation those of the United States, the European Union and the jurisdictions in which Seller and Buyer are established or from which items may be supplied, and the requirements of any licenses, authorisations, general licences or licence exceptions relating thereto will apply to its receipt and use of hardware, software, services and technology. In no event shall Buyer use, transfer, release,

export or re-export any such hardware, software or technology in violation of such applicable laws, regulations, orders or requirements or the requirements of any licences, authorisations or licence exceptions relating thereto. Buyer agrees furthermore that it shall not engage in any activity that would expose the Seller or any of its affiliates to a risk of penalties under laws and regulations of any relevant jurisdiction prohibiting improper payments, including but not limited to bribes, to officials of any government or of any agency, instrumentality or political subdivision thereof, to political parties or political party officials or candidates for public office, or to any employee of any customer or supplier. Buyer agrees to comply with all appropriate legal, ethical and compliance requirements.

#### **15. DEFAULT, INSOLVENCY AND CANCELLATION:**

Seller shall be entitled, without prejudice to any other rights it may have, to cancel the Contract forthwith, wholly or partly, by notice in writing to Buyer, if (a) Buyer is in default of any of its obligations under the Contract and fails, within 30 (thirty) days of the date of Seller's notification in writing of the existence of the default, either to rectify such default if it is reasonably capable of being rectified within such period or, if the default is not reasonably capable of being rectified within such period, to take action to remedy the default or (b) on the occurrence of an Insolvency Event in relation to Buyer. "Insolvency Event" in relation to Buyer means any of the following: (i) a meeting of creditors of Buyer being held or an arrangement or composition with or for the benefit of its creditors being proposed by or in relation to Buyer; (ii) a chargeholder, receiver, administrative receiver or similar person taking possession of or being appointed over or any distress, execution or other process being levied or enforced (and not being discharged within seven days) on the whole or a material part of the assets of Buyer; (iii) Buyer ceasing to carry on business or being unable to pay its debts; (iv) Buyer or its directors or the holder of a qualifying floating charge giving notice of their intention to appoint, or making an application to the court for the appointment of, an administrator; (v) a petition being presented (and not being discharged within 28 days) or a resolution being passed or an order being made for the administration or the winding-up, bankruptcy or dissolution of Buyer; or (vi) the happening in relation to Buyer of an event analogous to any of the above in any jurisdiction in which it is incorporated or resident or in which it carries on business or has assets. Seller shall be entitled to recover from Buyer or Buyer's representative all costs and damages incurred by Seller as a result of such cancellation, including a reasonable allowance for overheads and profit (including but not limited to loss of prospective profits and overheads).

#### **16. SUPPLEMENTARY TERMS AND CONDITIONS:**

If the Goods comprise or include a control system, Seller's Supplementary Terms and Conditions Applicable to the Supply of Control Systems and Related Services (set out below) shall apply to the control system and related services only. Such Supplementary Terms and Conditions shall take precedence over these Standard Terms and Conditions of Sale; copies are available from Seller upon request.

#### **17. MISCELLANEOUS:**

**17.1** No waiver by either party with respect to any breach or default or of any right or remedy and no course of dealing, shall be deemed to constitute a continuing waiver of any other breach or default or of any other right or remedy, unless such waiver be expressed in writing and signed by the party to be bound.

**17.2** If any clause, sub-clause or other provision of the Contract is invalid under any statute or rule of law, such provision, to that extent only, shall be deemed to be omitted without affecting the validity of the remainder of the Contract.

**17.3** Buyer shall not be entitled to assign its rights or obligations hereunder without the prior written consent of Seller.

**17.4** Seller enters into the Contract as principal. Buyer agrees to look only to Seller for due performance of the Contract.

**17.5** GOODS AND SERVICES PROVIDED HEREUNDER ARE NOT SOLD OR INTENDED FOR USE IN ANY NUCLEAR OR NUCLEAR RELATED APPLICATIONS. Buyer (i) accepts Goods and Services in accordance with the foregoing restriction, (ii) agrees to communicate such restriction in writing to any and all subsequent purchasers or users and (iii) agrees to defend, indemnify and hold harmless Seller and Seller's Affiliates from any and all claims, losses, liabilities, suits, judgements and damages, including incidental and consequential damages, arising from use of Goods and Services in any nuclear or nuclear related applications, whether the cause of action be based in tort, contract or otherwise, including allegations that the Seller's liability is based on negligence or strict liability.

**17.6** The Contract shall in all respects be construed in accordance with the laws of Switzerland excluding, however, any effect on such laws of the 1980 Vienna Convention on Contracts for the International Sale of Goods, and to the fullest extent permitted by law, shall be without regard to any conflict of laws or rules which might apply the laws of any other jurisdiction. All disputes arising out of the Contract shall be subject to the exclusive jurisdiction of the courts in the Canton of Zug, Switzerland.

**17.7** The headings to the Clauses and paragraphs of the Contract are for guidance only and shall not affect the interpretation thereof.

**17.8** All notices and claims in connection with the Contract must be in writing.

# **SUPPLEMENTARY TERMS AND CONDITIONS** **APPLICABLE TO THE SUPPLY OF CONTROL SYSTEMS** **AND RELATED SERVICES**

These Supplementary Terms and Conditions shall apply to the supply of control systems and related services and they are supplementary to Seller's Standard Terms and Conditions of Sale - Product & Control Systems set out above ("Standard Conditions of Sale"); in the event of any conflict between these Supplementary Terms and Conditions and the Standard Conditions of Sale, the former shall prevail.

## **Part 1 - Applicable in all cases:-**

### **S1. DEFINITIONS:**

**S1.1** In these Supplementary Terms and Conditions the following words shall have the following meanings:

**Buyer Affiliate** – means any company which is for the time being directly or indirectly controlled by the ultimate parent company of Buyer. For the purposes of this definition, a company is directly controlled by or is a subsidiary of another company or companies which holds 50% or more of the shares carrying the right to vote at a general meeting of the first mentioned company and a particular company is indirectly controlled by another company or companies if a series of companies can be specified, beginning with that company or those companies and ending with the particular company, so related that each company in the series is directly controlled by one or more of the companies earlier in the series.

**Commissioning**- the checking, adjusting, testing and proving of the System following Installation and/or the setting to work of the System in conjunction with the Plant, all as specified in the Contract.

**Configuration** - the application of the Equipment and/or Software to the specific requirements of the Contract, as detailed in the Base and/or Detailed Design Specifications (as applicable).

**Contract Price** - the total price payable for the System and, where appropriate, licence fees for Software and lump sum payments for Site Work (if applicable), as identified in the Contract.

**Data** - information, instructions, specifications, drawings, designs, technical details, literature, Software, marketing and advertising literature, catalogues, computer printouts and any other type of documentation.

**Detailed Design Specification** – if expressly required by the contract, the specification which details the Configuration, including the functionality of the System, particularly with respect to interfaces between the System and the Plant, the features of the System and the interaction between such interfaces and features.

**Equipment** - all machinery, apparatus, articles, materials and things (not including Software) provided by Seller.

**Factory Acceptance Tests** - the inspection and tests performed on the System at Seller's or manufacturer's works after Staging/Assembly and before delivery, in accordance with the Factory Acceptance Test Specification.

**Factory Acceptance Test Specification** - the specification which details the Factory Acceptance Tests.

**Functional Design Specification** – the specification which details the extent of supply of Equipment and Software and includes, where applicable, an outline description of Buyer's process to be controlled by the System and the control functions to be incorporated into the System.

**Installation** - the fixing into position of the various items of the System, their connection to the Plant and to the electrical power and/or air supplies (as applicable).

**Plant** - all facilities, machinery, apparatus, articles, materials and things to be provided by Buyer on the Site to be used in conjunction with or in association with the System and/or the Installation and/or Commissioning of the System.

**Seller's Personnel** - employees of Seller, Seller Affiliates and/or Seller's subcontractors.

**Site** - the place(s) identified in the Contract where the System is to be installed.

**Site Acceptance Tests** - the tests (if any) to be carried out on Site to demonstrate that the System is capable of achieving the functions set out in the Specification.

**Site Acceptance Test Specification** - the specification which details the Site Acceptance Tests.

**Site Work** - Services (if any) to be provided by Seller on Site in accordance with the Contract.

**Specification** - the specification of the System incorporated into the Contract, as supplemented, amended and/or qualified by the Functional Design Specification and (if applicable) the Detailed Design Specification.

**Software Licence** - the software licence agreement(s) applicable to the Software.

**Staging/Assembly** - the assembly of the System in Seller's or Seller Affiliate's works, including the interconnection of the separate items of Equipment and where applicable the integration of Equipment and Software required under the Contract, any items of Plant free issued to Seller in accordance with Clause S5 - Free Issue Materials) into the System.

**System** - the combination of Equipment, Software and Configuration as detailed in the Specification.

**S1.2** Subject to Clause 9 thereof, throughout the Standard Conditions of Sale "Goods" shall have the same meaning as "System".

### **S2. PAYMENT:**

**S2.1** Seller shall render invoices as follows:

15% of the Contract Price - on receipt of Buyer's written order or written instruction to put work in hand, whichever is the sooner.

20% of the Contract Price - on delivery by Seller of the Functional Design Specification for Buyer's approval.

35% of the Contract Price - on receipt by Seller of materials for Staging/Assembly of the System.

15% of the Contract Price – at start of Factory Acceptance Tests.

15% of the Contract Price - on Seller's notification of readiness to deliver the System.

(Where the implementation programme is phased, Seller may submit invoices as above for the portion of the Contract Price applicable to each such phase).

Any sums other than the Contract Price - monthly in arrears.

**S2.2** Payment shall not be withheld on account of minor defects or omissions which do not materially affect the functionality of the System.

**S2.3** Buyer shall be deemed to have waived the right to dispute any of Seller's invoices unless Buyer shall have notified Seller of any dispute (stating in full the reason for the dispute) in writing within thirty (30) days of the date of submission of the invoice to Buyer.

All undisputed invoices shall become due and payable in accordance with Clause 4 or S16.2, as the case may be.

### **S3. BUYER'S DATA:**

**S3.1** Should Seller become aware of any errors, inaccuracies, inconsistencies or ambiguities in the Data provided by Buyer, it shall advise Buyer of same; it being recognised by Buyer that Seller shall have no obligation to verify or otherwise assess the correctness of Data provided to it. Buyer shall promptly advise Seller if Buyer becomes aware of any inaccuracy or error in Seller's interpretation of Buyer's Data.

**S3.2** If the System is or incorporates an emergency shutdown, fire and gas detection or other safety system (hereinafter referred to as a "Safety System"), Buyer shall be solely responsible for the definition of the parameters of the shutdown, detection or other safety process in question and of the methodology to be employed (hereinafter referred to as the "Logic") to effect the safe shutdown or other operation of the Safety System.

**S3.3** Buyer shall indemnify and hold Seller fully harmless against all claims, liabilities, costs, losses and/or expenses of any kind whatsoever arising directly or indirectly as the result of Seller having acted upon, or carried out the Configuration of the System in accordance with Buyer's or its representative's, agent's or servant's instructions, Data, or (in the case of Safety Systems) Logic.

### **S4. SUPPLY OF DATA BY SELLER:**

**S4.1** If, under the Contract, Seller is required to submit to Buyer for Buyer's approval copies of specifications and/or drawings, unless otherwise stated in the Contract two copies only shall be submitted. Such specifications and drawings submitted shall be approved within the periods agreed, or when no periods are agreed, within fourteen (14) days from the date of submission. They shall be deemed to have been approved upon expiry of such period if Buyer shall not have given his approval or otherwise in writing before expiry thereof.

**S4.2** Seller will, as provided in the Contract, provide Buyer with the following:-

a) Drawings - Three copies of dimensional drawings of items manufactured by Seller or its affiliate(s), and one copy of dimensional drawings of all other items, for installation purposes.

b) Instruction books - Two sets of applicable instructions (one set only in respect of Equipment and/or Software not manufactured or produced by Seller or its affiliate(s)) for the routine operation and maintenance of the System.

c) Test certificates - One certificate for each item of Equipment.

d) Software - One set of Software on the appropriate medium as defined by Seller.

Additional copies of these items may be requested at prices to be agreed, subject to availability in the case of items not manufactured by Seller or its affiliate(s). In no event shall Seller be obliged to supply manufacturing drawings of Equipment or source code or object code for Software.

**S4.3** Buyer shall promptly advise Seller if Buyer becomes aware of any inadequacy or error in Seller's Data.

### **S5. FREE-ISSUE MATERIAL:**

Whilst it is in Seller's custody, Seller shall be responsible to Buyer for the care and control of all material free-issued by Buyer under the Contract. Seller shall replace at its cost all such material which is lost, or destroyed or damaged by reason only of Seller's negligence. In all other circumstances Buyer shall bear the risk of all loss and/or damage to such materials at all times and shall indemnify Seller against any and all claims, losses, damages, actions, costs and expenses arising as a result of damage, death or injury to Seller or to any third party caused directly or indirectly to or by any such materials. Seller shall promptly notify Buyer of any defects in such materials as and when Seller becomes aware of any such defect and Buyer shall be responsible for arranging for the rectification or removal of such defects. Seller undertakes, where appropriate, to use such materials in accordance with the manufacturer's instructions (to the extent they have been made known to Seller by Buyer).

### **S6. INSPECTION AND WORKS TEST:**

**S6.1** The System shall be submitted to the Factory Acceptance Tests before despatch. If Buyer wishes to inspect the Equipment or to witness any tests, such viewing shall be mutually agreed and Seller will give Buyer 7 (seven) days' notice in writing of when the System will be available for the performance of Factory Acceptance Tests.

**S6.2** In the event that Buyer or his representative fail to attend for the Factory Acceptance Tests on the due date, Seller shall be entitled to proceed in their absence and the results of such tests shall be deemed to be in accordance with the Factory Acceptance Test certificate issued by Seller. Such certificate may record that the Factory Acceptance Tests had been carried out in the absence of Buyer or its representative and/or that the System had passed the Factory Acceptance Tests subject to reservations relating to minor defects, which are to be remedied by Seller at a time to be agreed.

**S6.3** If during the Factory Acceptance Tests any of the System is found not to be in accordance with the Specification, Seller shall promptly remedy the defect. Thereafter (save in the case of minor defects not affecting the functionality of the System) the Factory Acceptance Tests shall be repeated in accordance with this Clause S6, insofar as it is necessary to demonstrate that the System fully conforms with the Specification.

**S6.4** If the Factory Acceptance Tests show that the System meets the Specification and if Buyer or his representative has attended the Factory Acceptance Test, then Buyer or his representative shall sign an Acceptance Certificate accordingly. The Acceptance Certificate may record that the System has passed the Factory Acceptance Tests but subject to reservations relating to minor defects which will be remedied by Seller at a time to be agreed.

**S6.5** Buyer shall be deemed to have accepted the System upon issue of the test certificate referred to in Sub-Clause S6.2 or, as the case may be, upon signature of the Acceptance Certificate referred to in Sub-Clause S6.4.

### **S7. PACKING AND TRANSPORT:**

The System will be packed in accordance with Seller's or manufacturer's standard packing specification for delivery by "Air Ride" road vehicle. Such packing is included in the Contract Price; however, packing materials are non-returnable.

### **S8. WARRANTY:**

**S8.1** Seller's warranty given in Clause 10.1 (ii) of the Standard Terms and Conditions of Sale shall be amended to read "that Goods manufactured by Seller's affiliates shall conform to the requirements of the Specification and shall be free of defects". Clause 10

shall not apply to Software; the warranty for Software is set out in the appropriate Software Licence.

**S8.2** Seller shall not be liable for failure to attain any specific availability levels quoted unless it has guaranteed them subject to a limitation of its liability in respect thereof, subject to agreed tolerances, and, where appropriate, subject to a bonus for improvement in performance levels quoted.

**S8.3** The provisions of Clause 10 of the Standard Terms and Conditions of Sale, together with the foregoing, constitutes Seller's sole warranty and Buyer's exclusive remedy for breach thereof. No representations, warranties or conditions of any kind, express or implied, shall apply as to merchantability, fitness for any particular purpose or any other matter with respect to any part of the System or Services.

#### **S9. CONFIDENTIALITY:**

**S9.1** Seller undertakes for a period of ten (10) years from the date of formation of the Contract to keep confidential and not to disclose to any third party without Buyer's written consent any Data supplied by Buyer relating to the Plant or Buyer's processes which have been designated in writing by Buyer as confidential, except as may be necessary for the proper performance of the Contract or where required by law to do so.

**S9.2** Buyer shall for a period of ten (10) years from the date of the Contract keep confidential and not disclose to others without Seller's prior permission in writing any Data whether of a commercial or technical nature, acquired from Seller and shall use the same only for the purpose of (a) carrying out the Contract, and (b) the installation, operation and maintenance of the System.

**S9.3** Both parties agree to keep Data received from the other party and which is the subject of Sub-Clauses S9.1 and/or S9.2 in the manner in which they keep like information of their own.

**S9.4** Nothing contained in Sub-Clauses S9.1, S9.2 and S9.3 shall apply to prevent either party from disclosing Data:-

- a) in its possession (with no restriction on disclosure) prior to receiving it from the other, or
- b) which is or later becomes public knowledge other than by breach of this clause, or
- c) which it may independently receive from a third party with no restriction on disclosure, or
- d) which is independently developed by an employee who has not benefited from the Data referred to in Sub-Clause S9.1 or, as the case may be, S9.2.

#### **S10. NON-SOLICITATION:**

Buyer acknowledges and agrees that Seller and Seller's Affiliates have expended considerable resources in selecting and training employees and independent contractors to perform the specialized work contemplated by this Contract. Accordingly, Buyer agrees that it shall not, and shall procure that each Buyer Affiliate shall not, at any time during the term of this Contract and for a period of one (1) year following completion of the Services, either on its own behalf or in association with any other person, directly or indirectly, approach, canvass, solicit, hire, engage or employ any employees or independent contractors of Seller or any Seller Affiliate or Seller's representatives or contractors engaged in the performance of the Services. Should Buyer violate the foregoing provision, Buyer agrees to pay Seller an amount equal to Seller's standard hourly fee for the employee in question multiplied by 2,000 hours. Buyer acknowledges that nothing in this Clause shall restrict Seller from seeking any remedy available to it pursuant to applicable laws to compensate it for breach of this provision, including but not limited to injunctive relief. To the extent that Buyer is unable to ensure compliance by any Buyer affiliate with the terms of this Clause S10 then Buyer shall indemnify Seller in respect of any loss, costs, claims or expenses incurred as a result of such non-compliance.

### **Part 2 - Additional terms and conditions applicable only when Seller is responsible for Site Work:-**

When under the Contract Seller is responsible for the provision of Site Work, the following additional terms and conditions shall apply:

#### **S11. SCOPE OF SITE WORK:**

The Site Work to be provided by Seller shall be as detailed in the Contract.

#### **S12. SITE FACILITIES:**

**S12.1** To enable Seller's obligations under the Contract in respect of Site Work to be expeditiously and properly carried out Buyer will provide the facilities set out in the Contract at no cost to Seller, as and when required; if no such facilities are stated in the Contract, Buyer shall at no cost to Seller provide all facilities and assistance required by Seller which may include but shall not be limited to the following:

- a) suitable access to the Site, satisfactory foundations and environmental conditions for the Equipment, adequate lifting facilities and scaffolding, all unskilled labour, any masons', joiners' or builders' work necessary, suitable security and protection for the Site and for the System from time of delivery, any electrical power, lighting and heating needed, suitable sanitation facilities and drinking water (reasonably close to the point(s) of installation of the System) and all other necessary facilities and assistance.
- b) permanent and suitable electrical and/or air supplies for the Equipment, terminated in accordance with Seller's requirements.
- c) convenient continuous and unrestricted access to the Plant and to the System.
- d) qualified operators and attendants for the Plant.
- e) a safe working environment for Seller's Personnel (including where appropriate, safety induction procedures and special protective clothing).
- f) adequate first-aid and medical facilities at or adequately close to the Site.

**S12.2** Buyer will be responsible for ensuring that the Plant is correctly installed and fit for its purpose and that any necessary minor adjustments to be made to the Plant are carried out expeditiously.

**S12.3** Unless otherwise agreed Seller will not be responsible for unloading the System and moving it to the place of Installation. If, in Seller's sole opinion, the Site environmental conditions are not suitable for the Installation of the System, a safe working environment does not exist on Site or if Buyer fails to have provided any facility or assistance to be provided by it under the Contract, Seller's obligations to provide Site Work shall be suspended (without liability to Seller) until the conditions have been rectified to Seller's satisfaction and any time limits for completion of the Site Work shall be appropriately extended. If the System has suffered loss, damage or deterioration after delivery and before Site Work commences, the System shall be put in a satisfactory condition at Buyer's cost before Seller shall be obliged to proceed.

**S12.4** Where the Contract calls for the carrying out of Site Work outside Switzerland, Buyer shall also provide at no cost to Seller:-

- a) suitable accommodation and messing facilities to a suitable international standard at or near the Site.
- b) assistance with obtaining (in sufficient time not to cause delay) visas, residence permits, work permits and any other necessary authorities for any of Seller's Personnel (and their dependants if appropriate) required to attend at the Site for the purposes of the Contract.
- c) assistance with obtaining any licences, authorities or permits necessary for the importation into the foreign country, and subsequent re-export, of any test equipment and tools necessary for the performance of the Contract, if these are to be provided by Seller.

#### **S13. SUPERVISION OF INSTALLATION:**

**S13.1** Where Seller is responsible for supervision of Installation or part thereof, Seller shall provide the services of one or more competent personnel to give instruction to the skilled and unskilled labour provided by Buyer to secure:-

- a) the reception and unpacking of the Equipment
- b) the moving to the place or places of Installation of the various items of Equipment and their installation.

If called for by the Contract, Seller shall load the Software and (if provided by Seller) the Configuration software onto the Equipment. If the Configuration has been performed by Buyer or others, Buyer shall be responsible for the loading of the Configuration software.

**S13.2** The skilled and unskilled labour provided by Buyer shall remain the servants of and under the control of Buyer. Seller shall not be liable for any act or omission of such labour, but if in giving or omitting to give orders or instructions to such labour, Seller's supervisory personnel fail to use proper skill and care, Seller shall be liable for the consequences of such failure in accordance with the Contract.

#### **S14. SITE ACCEPTANCE TESTS:**

Where Seller is responsible under the Contract for the performance of the Site Acceptance Tests:-

**S14.1** When Installation is complete to Seller's satisfaction, Seller will give 7 (seven) days' notice to Buyer of the commencement of the Site Acceptance Tests. Unless otherwise agreed in the Contract, the Site Acceptance Tests will be conducted in accordance with Seller's standard test procedures.

**S14.2** If Seller is unable to proceed with Site Acceptance Tests on the due date for commencement thereof due to reasons within the control of Buyer, or if the System fails to pass the Site Acceptance Tests due to reasons outside Seller's control, the System shall be deemed to have been taken over and the Site Acceptance Certificate referred to in Sub-Clause S14.4 shall be deemed to have been signed by Buyer. In either event the Site Acceptance Tests, or repeats thereof, shall be conducted at a time to be agreed and any additional costs incurred by Seller shall be to the account of Buyer.

**S14.3** If during the Site Acceptance Tests any of the System is found not to be in accordance with the Specification, Seller shall promptly make good the defect. Thereafter the Site Acceptance Tests shall be repeated in accordance with this Clause S14, insofar as is necessary to demonstrate that the System conforms with the Specification.

**S14.4** When the System has passed Site Acceptance Tests, Buyer shall sign a Site Acceptance Certificate. The Site Acceptance Certificate may record that the System has passed the Site Acceptance Tests but subject to reservations related to minor defects, which defects will be rectified by Seller at a time to be agreed.

**S14.5** The signature of the Site Acceptance Certificate by Buyer shall, save in the case of fraud or dishonesty relating to or affecting any matter dealt with therein, and save for any continuing liabilities of Seller as detailed in Clause 10 of the Standard Conditions of Sale, or the remedying of minor defects referred to in Sub-Clause S14.4, be conclusive evidence of the sufficiency of the System and any Site Work provided by Seller in connection with the Contract.

**S15. COMMISSIONING:** If specified in the Contract, Seller shall assist Buyer with Commissioning. Buyer shall be responsible for the operation of the System and of the Plant during Commissioning and shall provide suitably qualified personnel to perform such work.

#### **S16. PAYMENT FOR SITE WORK:**

**S16.1** Unless otherwise agreed, any sums payable in respect of Site Work shall be paid within 30 (thirty) days of Seller's invoices rendered monthly in arrears and in any event the balance of any monies due to Seller shall be payable not later than 30 (thirty) days from the completion of Site Work.

**S16.2** If under the Contract, Buyer or Buyer's agent or representative is required to countersign Seller's timesheets or other related documentation, such countersignature shall be conclusive proof that the Site Work concerned has been performed and that Seller is entitled to claim payment therefore.

**S17. STATUS OF SELLER'S PERSONNEL:** Nothing in the Contract shall establish the relationship of master and servant as between Buyer and Seller's Personnel, and Seller's Personnel shall not be required to perform any tasks not falling within Seller's responsibility under the Contract.

**Emerson Process Management AG**

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