

INTRODUCTION

Thank you for signing up to take the “Contracting with the Customer” Workshop.

The purpose of the course is to allow participants to experience major contractual aspects of dealing with a theoretical customer at an EMS company, beginning with the receipt of a Non – Disclosure Agreement, after the execution of a manufacturing services agreement, to receiving a bid package or scope of work, through a dispute with the customer.

The course is intended to enhance the ability of participants to recognize issues and limit risk with respect to these issues. It is also designed to show how each discipline within the company might play a part in establishing and administering contracts with customers.

Please note that the book is divided into two sections. The first half contains the exercises that will be completed prior to class attendance, and the second half contains relevant resources, including example forms and guidelines. The second half of the book will be very helpful in answering the exercises in the first section of the book.

Each participant should read the entire text and complete the exercises prior to class attendance. This is necessary so that all participants can get the most out of the course. Attendees should expect a significant amount of discussion. Every exercise in the course is a real life situation.

Thank you for your interest and attendance. We hope the course will enhance both your ability to understand and administer contracts with customers and enhance your understanding of contract issues in a manufacturing services environment.

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Exercise 1

David Heckler, Senior Sales Executive, of EMS, Inc. (EMS), has recently called on a potential customer, the Benny Factor Corporation. He has given you, the likely Program Manager for this opportunity, a copy of a Confidential Disclosure Agreement with the Benny Factor Corporation and he asked that you forward to the Contracts/Legal Department for review prior to signature. ([Next Tab](#))

After you dutifully fax the document to the Contracts/Legal Department for review and approval, you read the document yourself to be certain that it has desirable features in it that EMS requires.

Please identify below any defects in the Agreement or issues that you think should be raised, and list them below:

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 20 lines visible. The paper has a slight shadow on its right side, suggesting it's resting on a surface.

BFC Benny Factor Corp.
359 Pleasant Valley Dr.
Sillycon Valley, CA 67818

CONFIDENTIAL DISCLOSURE AGREEMENT

Benny Factor Corporation, (“BFC”) would like to enter into discussions with _____ (“Vendor”) regarding _____. During such discussions and any subsequent contractual relations, it will be necessary for BFC to disclose information to VENDOR which BFC regards as confidential.

As a preliminary basis for such discussions the VENDOR agrees to the following terms and conditions:

1. Confidential information shall mean all information disclosed to VENDOR by BFC or obtained by VENDOR from BFC which relates to BFC’s past, present, or future research, development, manufacturing, or business activities. VENDOR shall not reproduce documents containing BFC Confidential Information. If additional copies are necessary, VENDOR shall request same from the BFC purchasing representative. BFC may disclose BFC Confidential Information to VENDOR either orally or in writing.
2. VENDOR shall not disclose to third parties any BFC Confidential Information provided to VENDOR without the written consent of BFC. VENDOR may not subcontract any work or request any action by third parties based upon BFC Confidential Information without prior written approval of BFC.
3. VENDOR agrees to hold in trust and confidence for BFC for a period of fifteen (15) years from date of disclosure all BFC Confidential Information. VENDOR agrees to use BFC Confidential Information only for the purpose of discussion, quoting, or to perform work for BFC as may be subsequently ordered. It is understood that disclosure by BFC of its Confidential Information to VENDOR shall not be operative in any way to create any license to VENDOR under patents of BFC, either express or implied.
4. The obligations of VENDOR under this Agreement regarding BFC Confidential Information shall not apply to information that was known to VENDOR prior to disclosure to VENDOR by BFC, which is or becomes publicly available, which is rightfully received by VENDOR from third parties without accompanying secrecy obligations, or which is approved by BFC in writing for release.
5. VENDOR agrees that it will have an appropriate Agreement with each of VENDOR’s employees sufficient to comply with all of the terms of this Agreement and that VENDOR will disclose BFC Confidential Information only to those employees who have a need to know.

6. Upon termination or expiration of this Agreement, or upon request from BFC, VENDOR shall return to BFC all items including, but not limited to, drawings, blueprints, descriptions, or other paper or documents, which contain BFC Confidential Information.
7. In connection with this Agreement, BFC does not wish to receive any information which may be considered confidential or proprietary by VENDOR. Accordingly, except with respect to the rights of VENDOR under valid patents and copyrights, no obligation of any kind is assumed by or is to be implied against BFC by virtue of BFC's discussions with VENDOR or with respect to any information received (in whatever form) from VENDOR and BFC will be free to reproduce, use, and disclose such information to others without limitation. Discussions and/or correspondence, or other activities under this Agreement shall not in any respect, impair the right of BFC to make, procure, or market products or services now or in the future which may be competitive with those offered by VENDOR.
8. This Agreement shall be construed and the legal relations between the parties hereto determined in accordance with the law of the State of Maryland.

Benny Factor Corporation

VENDOR

By: _____
Signature

By: _____
Signature

Name: _____
Typed

Name: _____
Typed

Title: _____

Title: _____

Date: _____

Date: _____

Exercise 2

After incorporating changes requested by the Contracts/Legal Department in the Confidential Disclosure Agreement provided by the Benny Factor Corporation, you have received a quote package and a Bid/No Bid meeting has been scheduled. Before the bid meeting, you want to be certain that the customer was potentially viable financially so that it would not be a waste of resources to bid the job. In addition, you need to know what, if any, financial assurances should be received as a condition of doing business.

The Contracts/Legal Department has provided to you a review of the Benny Factor Corporation as a result of the analysis of a Dun & Bradstreet report. ([see Tab 4](#))

1. What concerns regarding the potential business relationship with the Benny Factor Corporation arise as a result of the financial assessment?

2. Under what conditions would you do business with each of the divisions of the Benny Factor Corporation?

3. What type of financial assurances do you think would be most appropriate to receive from the Benny Factor Corporation to continue to process its bid and make it a viable candidate for business with EMS?

(Reference materials on Methods of Limiting Financial Risk, Tab 15)

FROM: Ben Counter / Credit Dept.

SUBJECT: Benny Factor Corporation - Financial Assessment

Benny Factor Corporation ("BFC") of Sillycon Valley, California was started and incorporated in California in 1987. This is a privately held company, a wholly owned subsidiary of Benny Factor Holding Corporation, started and incorporated in Delaware in 1997. Benny Factor Holding Corporation ("BFHC") in turn is owned by 5 individuals, 3 of whom have the last name Factor and 2 who evidently are members of the family by marriage. Specific stock ownership figures are not provided.

BFC operates as a manufacturer operating primarily in 3 different product groups each operated as a separate corporate division as follows:

1. The Avionics Products Division of BFC located in Anaheim, California, is a designer and manufacturer of electronics for the commercial and military aircraft industries. Products include airborne radar, GPS navigation systems, aircraft auto-pilot computer and control electronics, and entertainment packages for music and voice entertainment channeled for commercial passenger airlines.
2. The Medtronics Division of BFC located in Mountain View, California is engaged in the design, manufacture, and sale of a variety of medical electronic devices used in hospitals and clinics the world over, including such items as MRI systems, x-ray, fluoroscopic systems, blood gas monitoring systems for use by anesthesiologists, and a line of heart monitors and pace makers.
3. The Comtronics Division of BFC located in San Jose, California, operates as a designer and manufacturer of commercial electronics, primarily personal computers and peripherals, and network access devices, which the company sells under various brand names to OEM's and distributors.

Because BFC is a private company, the D&B report contains no financial information other than payment history which is good, averaging 4 days late on terms. D&B does not rate this company because of the lack of information.

Before we can proceed with a business arrangement with BFC, we will need either financial information consisting of a current balance sheet and income statement showing acceptable finances, or we will require financial assurances in the form of an Irrevocable Standby Letter of Credit, a third party guaranty from a financially strong third party, or another financial assurance acceptable to EMS. Also, as of the writing of this report, I am not sure which business sector will be our customer.

You have executed a Confidential Disclosure Agreement with BFC and received information against which to bid their PC and industrial assemblies. EMS has generated a bid proposal and sent it to BFC for review. (see [Tab 6](#)) BFC has decided to award the program to EMS and in order to meet its anticipated delivery dates for its customers it needs to accelerate the schedule and begin procurement of components for assembly immediately.

BFC sends to you a Letter of Intent signed by Manny Rupees. ([see 2 Tabs subsequent](#))

1. What do you tell him or her; what modifications or additions to the Letter of Intent received from BFC would you suggest and why?

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

*EMS, Inc. is
pleased to submit this
proposal to provide the
required technical
expertise and services for
the component
procurement,
manufacture, test, and
assembly to meet your
quality, cost, and
schedule commitments
for Benny Factor
Corporation products.*

Sally Smiley

Sally Smiley
Sr. Sales Executive

Lyk Yu

LykYu
Program Manager

June 1, 20XX

INTRODUCTION

This proposal is organized to provide Benny Factor Corporation with a background of EMS and our capabilities to produce your assemblies. Sections include:

- EMS Overview
- Pricing
- Terms and Conditions

Any questions regarding this proposal can be directed to David Heckler at 205-722-6607.

EMS OVERVIEW

A Benny Factor Corporation and EMS, Inc., relationship will allow value-added turnkey manufacturing by providing the following:

- Design Capabilities
- Competitive Pricing
- Complete Business and Technical Capabilities
- Manufacture of Quality Products For Benny Factor Corporation Customers
- Terms and Conditions Acceptable To Both Companies

EMS Technical expertise in printed circuit boards from design to delivery can be summed up in two words, “can do”!

Benny Factor Corporation as a premium supplier, requires supplier relationships with the technical expertise in the printed circuit board assembly manufacturing, test development, and mechanical assembly to reduce internal costs yet meet the customer schedule and quality needs.

Services at EM provide Benny Factor Corporation with the comfort level that your product is being manufactured to the highest quality levels available.

EMS, as a \$700 million plus contract manufacturer, meets these challenges by providing six basic services to ensure the best product at the quality and cost levels required by Benny Factor Corporation. The services are:

- Competitive Material and Labor Pricing
- Business Structure for Manufacturing
- Design, CAD, and Prototyping
- Test Development
- Advanced Manufacturing
- Component Reliability and Failure Analysis

EMS provides five basic services that set us apart during the manufacture of your product.

- Account Management
- Factory Within A Factory Support
- Material Procurement
- Worldwide Manufacturing Capabilities
- Advanced Manufacturing Technologies

EMS Factory within a Factory Philosophy.

The EMS Account Manager is the business and technical contact for the manufacture and assembly of your assemblies. They interface directly with the Benny Factor Corporation representative regarding schedules, pricing, delivery, engineering changes, quotations, and customer comments. The account manager at EMS, manages the program internally using the many assets assigned to your project to guarantee the quality and schedule commitments of Benny Factor Corporation.

The factory within the factory concept employs the fact that EMS produces products in a cellular manufacturing line. Each Cell has assigned to it a pool of engineers to cover all manufacturing, process, quality, and test requirements. Assigned to each cell are certified machine and assembly operators. These services provide daily support and report all issues to the account manager for resolution.

World Wide Purchasing

*EMS is a Customer
Oriented Supplier of
Quality Products and
Services. We are
Dedicated to Continual
Improvement and
Innovation.*

Benny Factor Corporation will be notified if any material, process, or test problems arise that may jeopardize any schedule commitments for the delivery period.

EMS has a worldwide network available for purchase of components necessary to manufacture, test, and assemble the Benny Factor Corporation boards. Volume pricing and commodity buyer approach allows EMS to obtain the best pricing in the industry.

EMS has six strategically located manufacturing sites in the world, three domestic and three international.

EMS standard AQL level of 0.65% is quoted for the Benny Factor Corporation assemblies as inspection requirements. EMS currently uses MIL STD 105E as the basis for all quality inspection criteria.

Each EMS person involved in the manufacture of your printed circuit boards and mechanical assembly has received extensive training and is certified to perform the task required to assure the highest quality.

Total People Involvement (TPI) allows EMS to use the people resources to the maximum to achieve the highest quality products in the contract manufacturing arena. From top management to the operators on our production line, we are committed to continuous improvement on all products we produce.

Benny Factor Corporation can be assured of the latest manufacturing technology because EMS is committed to the latest advanced manufacturing techniques.

Ramp to volume approach reduces the lead time required to manufacture printed circuit assemblies at EMS.

EMS's use of our advanced manufacturing laboratories allows for the development of the process prior to release to the volume production line. Our relationship will include developing advanced manufacturing techniques for the future.

Ramp to volume is an EMS developed method to reduce the manufacturing lead times and costs, typically 2 to 3 weeks depending on material and test development lead times.

Manufacturing start-up times vary depending on the longest component lead time and manufacturing test development. Utilizing the ramp to volume approach, EMS has developed a check-list of information required from Benny Factor Corporation that will assure a smooth and fast start-up of the manufacturing and assembly of your assemblies. Less material and test development, typical start-up times are 2 to 3 weeks after contract award date.

Commodity-Oriented purchasing and Quick-Response Systems assure the best possible schedule and material.

EMS has an experienced team using a quick response material system as a necessity to provide Benny Factor Corporation with the delivery times and costs it expects.

With our large commodity-oriented purchasing staff, supported by our International Purchasing Office located in the Republic of Singapore and Scotland, EMS can obtain materials at the best prices and lead-times available in the industry today. Material requirements are updated, at a minimum, on a weekly basis. In those instances where production delays may be imminent due to insufficient quantities, non-conforming supplies, etc., vendor sources are expedited to ensure program commitment. Vendor performance is measured by quality of their products and conformance to delivery schedules. Benny Factor Corporation is notified if an approved source slips in quality.

CONCLUSION

EMS appreciates the opportunity to provide this quotation to Benny Factor Corporation, We are confident that working as a team with Benny Factor Corporation together, we can be successful in producing the units domestically and at a cost that will allow both companies to prosper. EMS encourages Benny Factor Corporation to work with us in arriving at this goal.

On behalf of the entire proposal team, we would like to thank you once again for this opportunity.

Pricing Summary

UNIT SELLING PRICES

**BFC Industrial
PC Assembly**

	<u>0-3,000</u>	<u>3,001 - 12,000</u>	<u>12,001 - 24,000</u>
Manufacturing Labor	\$ 77.48	\$ 69.73	\$ 62.74
Test Labor	\$ 25.82	\$ 23.24	\$ 20.92
Materials	\$ 413.20	\$ 371.88	\$ 334.64
Total Sales Price	\$ 516.50	\$ 464.85	\$ 418.30

Non Recurring Charges

Manufacturing Start-up	\$ 3,339
Stencils	\$ 2,200
ICT Development	\$13,808
Minimum Run Lot Size	500 units

**BFC Residential
PC Assembly**

	<u>0-12,000</u>	<u>12,001-24,000</u>	<u>24,001- 48,000</u>
Manufacturing Labor	\$ 6.04	\$ 5.43	\$ 4.89
Test Labor	\$ 2.01	\$ 1.81	\$ 1.63
Materials	\$ 32.20	\$29.98	\$ 26.08
Total Sales Price	\$ 40.25	\$ 36.22	\$ 32.60

Non Recurring Charges

Manufacturing Start-up	\$3,219
Stencils	\$1,100
ICT Development	\$5,893
Minimum Run Lot Size	1,000 Units

NOTES & ASSUMPTIONS

- Pricing for this proposal is **budgetary**.
- The period of production performance is bid from 8/20XX through 03/20XX.
- Product will be bulk packaged in multi-cell containers.
- From manufacturing assumptions all assemblies are 1-up panels.
- Benny Factor Corporation may reschedule all or part of a scheduled delivery one (1) time for a period not to exceed forth-five (45) days in accordance with the table below. At the end of this forty-five (45) day period, Benny Factor Corporation shall either accept delivery of rescheduled finished units and/or pay the material cost associated with rescheduled units not yet built

Days Before P.O. Delivery Date	Percentage Reschedule Allowance
0 – 30	0%
30 – 60	25%
60 – 90	50%
>90	100%

EMS shall use its best efforts to accommodate any upside schedule changes beyond the final order periods. EMS shall respond to any request for upside with current capabilities within three (3) days.

- Documentation Baseline: Bill of Materials dated 06/01/XX.
- Materials assumptions: PCB's and ASIC's are CFP per Benny Factor Corporation.

TERMS AND CONDITIONS

- EMS price adjustment is based on the anticipated long-term relationship with Benny Factor Corporation.
- We assume that Benny Factor Corporation will give EMS continued opportunities to expand and grow the business with additional part numbers and/or new assemblies in the upcoming year.
- All product shipments shall be Ex Works (Incoterms 2010) EMS facility. EMS selected carrier and method of shipment.
- Payment terms are net 30 days from the date of invoice, which shall not be earlier than date of shipment.
- This quotation is valid for forty-five (45) days.
- EMS's warranty period is for twelve (12) months from date of manufacture and such obligation shall be limited to correction of defects in EMS supplied materials or workmanship.
- EMS workmanship standards and processes apply.
- The terms of this quote are conditioned upon a manufacturing agreement between the parties which shall include:
 1. Reasonable cancellation charges payable to EMS for cancellation of material ordered and labor performed to comply with customer's binding forecast or purchase orders.
 2. Assurances of actual delivery of sufficient units to maintain the validity of pricing.
- Unless otherwise agreed in writing, EMS expressly rejects any of the customer's terms and conditions and limits acceptance of the terms of delivery under this quote to the terms contained herein.
- Assumptions, notes, and qualifications stated elsewhere in this proposal apply.

Pricing Summary
(continued)

- Due to current market conditions, price and delivery of integrated circuit logic and/or memory devices are subject to adjustment to the price and delivery prevailing at the time your firm order is placed.
- Prices, details thereof, and terms contained in this quotation are confidential to EMS and are provided for the sole use of the recipient company to which the quotation is addressed. Disclosure may not be made to third parties without EMS's written permission.

BFC Benny Factor Corp.
359 Pleasant Valley Dr.
Sillycon Valley, CA 67818

July 24, 20XX

LykYu
Program Manager

EMS, Inc.
4000 Maple Drive
Huntsville, Alabama 35805

Re: Letter of Intent

Dear Lyk:

It was great to talk with the EMS team in detail about the ramp up for the new PC Assembly Products. As you know, we need to place material on order immediately to ensure that we hit the market window for the product.

Please place on order, on behalf of Benny Factor Corporation, parts needed to support delivery of 3,000 of the Industrial PC Assembly and 12,000 of the Residential PC Assembly.

I will get back with you on the proposed contract as soon as our Legal Department responds with its comments.

Very truly yours,

Benny Factor Corporation

Manny Rupees

Buyer

Exercise 4

Before the parties were able to agree on a satisfactory document to allow long lead-time items to be ordered, the Purchasing Department at BFC issued a purchase order to EMS. ([see Tab 9](#)) It included those terms referenced on the reverse.

The purchase order was received by the CFO's office and forwarded to you for handling.

(Make sure to read the memorandum at [Tab 18](#), regarding acknowledgment of Customer Purchase Orders)

1. What should you do with the purchase order document? Why?

2. How would you respond to the purchase order document? Why?

BFC Benny Factor Corp.

EMS, Inc.

4000 Maple Drive
Huntsville, AL 35805

PURCHASE ORDER Page 0001	
Date: 10/01/XX	P.O. Number B30334
SHIP TO: BFC 395 Pleasant Valley Dr Sillycon Valley, CA 67814	TERMS: N45
SHIP VIA Best Method	Ex Works (Incoterms 2010) Manufacturer's Dock

ITEM NO.	QUANTITY	UNIT MEAS. (PER)	PART NUMBER/REVISION ITEM DESCRIPTION	DELIVERY	UNIT PRICE	P/S
1.	4, 800 annually 1,200 400 400 400		Industrial PC Assy Initial release as follows:	1/15/XX 2/15/XX 3/15/XX	\$338.38	
2.	72,000 annually		Residential PC Assy Initial release as follows:	1/15/XX 2/15/XX 3/15/XX	\$26.41	
Overshipment Will Not be Accepted Unless Previously Authorized by Purchasing					\$881,436.00	

Acknowledgment Required
(If Yes, Read and Sign Below)

NO ☐

YES ☐

THIS PURCHASE ORDER IS NOT BINDING UPON THE BUYER AND NO PAYMENTS WILL BE MADE HERE UNDER UNTIL THE ACKNOWLEDGMENT COPY IS DULY SIGNED BY SELLER AND RETURNED TO THE BUYER.

THE INSTRUCTIONS, TERMS, AND CONDITIONS ON THIS PURCHASE ORDER, AND ON ANY ATTACHMENTS HERETO, ARE MADE A PART HEREOF TO WHICH SELLER AGREES BY ACCEPTANCE OF THIS ORDER.

Signed – Seller

TERMS AND CONDITIONS

ACCEPTANCE/ENTIRE AGREEMENT -

Acceptance of this offer to purchase by acknowledgment, shipment or other performance shall be unqualified, unconditional and subject to and expressly limited to the terms and conditions of this agreement. All previous offers by Seller are hereby rejected. Any additional terms and conditions contained in Seller's response hereto shall be deemed objected to by Buyer (hereinafter 'BFC') and such conflicting or additional terms shall be of no effect nor binding upon BFC. Acceptance of materials, goods, Work or services, payment or any inaction by BFC shall not constitute BFC's consent to or acceptance of any such additional terms or conditions. Upon acceptance, the terms contained in this agreement or orders issued hereunder (Agreement) shall supersede all contemporaneous oral agreements and all prior oral or written communications between the parties and shall constitute the entire agreement between the parties with respect to the subject matter of this Agreement and shall not be modified or rescinded, except by a writing signed by the parties. All provisions on Seller's forms shall be deemed deleted. Estimates or forecasts furnished by BFC shall not constitute commitments.

ASSIGNMENT: No assignment of any rights, including rights to monies due or to become due hereunder, or delegation of any duties under this Agreement shall be binding upon BFC unless and until its written consent has been obtained. Seller shall be responsible to BFC for all Work performed by Seller's subcontractor(s) at any tier. All persons furnished by Seller shall be considered solely Seller's employees or agents, and Seller shall be responsible for payment of all unemployment, social security and other payroll taxes, including contributions when required by law.

CHANGES: BFC may at any time during the progress of the work performed hereunder (Work) require additions, deductions or deviations (all hereinafter Change or Changes) from the Work. No Change shall be considered as an addition, alteration or deduction from the Work nor shall Supplier be entitled to any compensation for Work done pursuant to or in contemplation of a Change, unless made pursuant to a written Change Order issued by BFC.

COMPLIANCE WITH LAW: Seller and Seller's agent(s), employee(s) and subcontractor(s) shall comply at their own expense with all applicable

Federal, state, and local laws, ordinances, regulations and codes, including the identification and procurement of required permits, certificates, licenses, insurance, approvals and inspections in performance under this Agreement. Seller hereby indemnifies and saves harmless BFC from or against any and all losses, penalties, and expenses (including court costs and reasonable attorney's fees) resulting from Seller's non-compliance therewith.

DISPUTES/CHOICE OF LAW/ FORUM: This Agreement and all transactions under or related to it shall be governed by the laws of the State of Alabama excluding its conflicts of law rules and excluding the Convention for the International Sale of Goods. Any dispute arising under or as a result of this Agreement must be settled by ARBITRATION according to the rules of the American Arbitration Association. Judgment on the award of the arbitrator(s) may be entered in any court of competent jurisdiction. THE PARTIES AGREE THAT ANY ARBITRATION OR LITIGATION PROCEEDING OF ANY KIND MUST BE BROUGHT ONLY IN MADISON COUNTY, ALABAMA AND THAT THEY WILL SUBMIT TO THE JURISDICTION OF THE COURTS THEREIN.

DELIVERY: TIME IS OF THE ESSENCE: If Seller fails to make delivery or perform the service at the time agreed upon, or performs the Work hereunder in such a fashion as to endanger its ability to make timely delivery or to render timely performance of services, BFC reserves the right to cancel, purchase elsewhere, and hold Seller accountable for any additional costs or damages incurred by BFC. If it appears Seller will not meet the agreed upon delivery schedule, Seller shall promptly notify BFC in writing and, if requested by BFC, ship via premium routing to avoid or minimize delay to the maximum extent possible, with the added cost to be borne by Seller. This is in addition to BFC's other remedies. Items received more than fifteen (15) days before schedule date may, at BFC's option, be returned at Seller's expense or be accepted and payment therefor withheld until the time when it would have been due had the items arrived at the proper time. SELLER SHALL NOT SHIP IN EXCESS OF THE VALUE OF \$100,000 ON ANY SINGLE BILL OF LADING FOR ANY SHIPMENT TO BFC.

FORCE MAJEURE: Neither party shall be liable for delays/failure due to accidents, acts of God, fire, strikes, embargo, acts of governmental or military authority, or similar causes beyond its control (Force

Majeure Event). If a Force Majeure Event occurs, the party delayed shall promptly give notice to the other. The party affected by such delay may elect to cancel all or any part of the unperformed portion of this Agreement.

IDENTIFICATION: Seller shall not engage in publicity or make public use BFC's or its affiliates name, marks, logos, insignia, symbol, logo or any other designation or drawing of BFC or its affiliate(s) in any circumstance related to this Agreement without BFC's prior written consent in each instance.

IMPLEADER: Seller shall not implead or bring any action against BFC based on any claim by any person for personal injury or death to an employee of BFC for which BFC has previously paid or is obligated to pay Worker's Compensation benefits to such employee or claimant and for which such employee or claimant could not otherwise bring legal action against BFC.

INDEMNIFICATION: Seller agrees to indemnify, defend and hold harmless BFC, its affiliates, customers, employees, successors and assigns (all referred to as BFC) from and against any losses, damages, claims, fines, penalties and expenses (including reasonable attorney's fees) that arise out of or result from: (1) injuries or death to persons or damage to property, including theft, in any way arising out of or caused or alleged to have been caused by the Work or services performed by, or material provided by Seller or Seller's agent(s), employee(s), or subcontractor(s); (2) assertions under Workers' Compensation or similar acts made by Seller's agent(s), employee(s), or subcontractor(s); or (3) any failure of Seller to perform its obligations under this Agreement. Seller shall maintain such public liability, property damage, and employees liability and compensation insurance as will protect BFC from any of said risks and from any claims under any applicable Workmen's Compensation and Occupational Disease Acts. Seller further agrees to indemnify BFC and hold it harmless from and against any and all losses and expenses, including court costs and reasonable attorney's fees (except losses arising solely out of BFC's negligence) which BFC may sustain by reason of claim, demand, legal action, or judgment based upon (a) alleged patent, trademark or copyright infringement arising out of the use or sale of such goods; (b) defects, either latent or patent, in the design, manufacture, preparation, or handling of such goods by Seller or those in privity with it; (c) the use by any persons of such goods; (d) Seller's delivery or service activity; or (e) Seller's breach of

any express or implied warranty. Seller shall have the right, at its expense, to defend said claims, provided that before yielding the defense of a claim, BFC may require that adequate security be furnished against any potential resulting judgments.

BFC'S: BFC shall at all times have title to all drawings, specifications, ideas, data, programs, and other technical and business information furnished by BFC to Seller and intended for use in connection with this Agreement, and the media on which such information is conveyed, however conveyed. Seller shall use such information only in connection with this Agreement and shall not disclose such information to any person, firm or corporation other than Seller's employees or subcontractors that are likewise obligated to keep such information confidential. The Seller shall, at BFC's request or upon completion of the order, promptly return all such information to BFC.

SELLER'S: Seller shall not provide under, or have provided in contemplation of, this Agreement any idea, data, program, technical, business or other intangible information, however conveyed, or any document, print, tape, disc, semiconductor memory or other information-conveying tangible article unless Seller has the right to do so, and Seller shall not view any of the foregoing as confidential or proprietary.

INSPECTION, ACCEPTANCE AND WARRANTY: All material, Work in progress and goods purchased hereunder are subject to BFC's inspection and testing at any place at any reasonable time during manufacture or progress prior to final acceptance. Notwithstanding any prior test or inspection at any place, all articles will be subject to final inspection and acceptance at BFC's plant. Except for latent defects, fraud, and gross mistakes that amount to fraud, final acceptance shall be deemed to have occurred within a reasonable time not to exceed forty-five (45) days after delivery. Seller expressly warrants that the goods, material, and Work covered hereunder will strictly comply and conform with any specifications, drawings, or other descriptions set forth or incorporated by reference in this Agreement and any samples furnished by BFC. The goods will be free of defects in design and workmanship and the material will be merchantable and fit for purposes expressed in any specifications, drawings, or other descriptions which are a part of this Agreement, and will conform to industry standards of performance and quality. Seller agrees to notify BFC in advance of changes to its or its supplier's manufacturing process that may impact the

performance of the material(s) in BFC's application. BFC's waiver, release or approval of design, material, data or drawings will not relieve Seller of any warranty hereunder or any requirements under this Agreement. Articles not in conformity herewith may, at BFC's option, be returned to Seller at Seller's expense for repair, replacement, credit, or refund as

BFC may direct, or BFC may retain same at a proper adjustment of price. The foregoing remedies are cumulative and do not limit or exclude any remedies provided by law or equity. Seller's warranties, service policies, or similar undertakings of Seller shall be enforceable by BFC's customers and the users of BFC's goods as well as by BFC. The foregoing warranty shall survive inspection, acceptance and payment.

INVOICING FOR SERVICES: Seller's invoices shall be rendered upon completion of the Work and shall be payable when the Work has been performed to the satisfaction of BFC. The Work shall be delivered free from all claims, liens, and charges whatsoever. BFC reserves the right to require, before making payment, proof that all parties furnishing labor and materials for the Work have been paid.

PLANT RULES: Seller shall become acquainted with conditions governing the delivery, receipt and storage of materials at the site of the Work so that Seller will not interfere with BFC's operations. Storage space will not necessarily be provided adjacent to the site of the Work. Therefore, Seller shall be expected to select, uncrate, remove and transport materials from the storage areas provided. BFC is not responsible for the safekeeping of Seller's property on BFC premises. Seller shall not stop, delay or interfere with BFC's work schedule without the prior approval of BFC. Seller shall provide and maintain sufficient covering and take any other precautions necessary to protect BFC's stock, equipment and other property from damage due to Seller's performance of the Work.

PRICES, TAXES AND PAYMENT: By acceptance of this Agreement, Seller certifies that the prices stated herein are not in excess of prices quoted or charged to any other purchaser in similar quantities for the same goods or services. Seller shall be paid, upon submission of proper invoices, the prices stipulated herein for goods delivered and accepted (dates to be shown). The price includes packing, crating, and transportation, F.O.B. point shown. Discounts will be taken on full amount of invoice(s). Payment of the price shall be made by BFC's check.

For the purpose of computing discounts and other terms of payment, time will be computed from the date of receipt by BFC of Seller's correct invoice(s) or the date of delivery of the goods, whichever is later. For the purpose of earning the discount, payment is deemed to be made on the date BFC's check is mailed. The price shall be subject to set-off for claims of BFC. Except for taxes, only charges shown on the face of this Agreement will be allowed without the prior written consent of BFC's agent. Taxes shall be billed as separate item on Supplier's invoice. A separate invoice shall be issued for each shipment. Invoices shall contain the following information: purchase order number, item number, description of goods and/or services, sizes, quantities, unit prices, and extended totals. Shipments sent C.O.D. will not be accepted and drafts will not be honored without the prior written consent of BFC, and all goods attendant therewith will be at Seller's risk. In no event shall payment be deemed to constitute acceptance.

BFC'S MATERIAL: All material furnished or specifically paid for by BFC shall be the property of BFC and shall be subject to removal at any time without additional cost, upon demand by BFC. Such material shall be used only in filling orders from BFC, shall be kept separate from other materials and shall be clearly identified as the property of BFC. Seller assumes all liability for loss or damage, with the exception of normal wear and tear, and agrees to supply a detailed statement of inventory, upon request by BFC.

SEVERABILITY/SURVIVAL/WAIVER: The invalidity in whole or in part of any provision hereof shall not affect validity of the remainder of such provision or any other provision. The obligations of the parties under this Agreement which by their nature would continue beyond the termination, cancellation, or expiration of this Agreement, shall survive termination, cancellation or expiration of this Agreement. No course of dealing or failure of either party to strictly enforce any provision of this Agreement shall be construed as a waiver of the future performance of that or any other provision hereof.

SOFTWARE LICENSE GRANT: Except as stated otherwise in this Agreement, BFC shall have a world-wide, royalty-free, non-exclusive, perpetual, transferable license to use, reproduce and sublicense all software furnished to BFC by Seller under this Agreement. BFC will not reverse compile or

disassemble the software, nor will BFC reproduce the software for the purpose of furnishing it to others.

TERMINATION: BFC may at any time terminate, for its convenience, this Agreement in whole or in part, by written or facsimile notice to Seller. In such case, BFC's liability shall be limited to payment of the amount due for Work performed up to and including the date of termination. Reimbursement upon termination shall not apply in the event BFC shall terminate because of the default of Seller and in no event shall reimbursement plus payments previously made exceed the total consideration hereof.

TOOLS AND EQUIPMENT: Unless otherwise specifically provided in this Agreement, Seller shall provide all labor, tools and equipment for performance of this Agreement. Should Seller actually use any tools owned or rented by BFC, Seller acknowledges that Seller accepts the tools as is, where is and that Seller shall have the risk of loss and damage to such tools. Seller agrees not to remove such tools from BFC's premises, to use tools only for the Work, and to return the tools to BFC upon completion of use, or at such time as BFC may request, in the same condition as when received by Seller, reasonable wear and tear excepted.

CONFLICT MINERALS: Seller represents and warrants that it is in full compliance with the Conflict Minerals Law. Upon BFC's written request, Seller shall provide BFC with a written copy of any audits, disclosures, or reports filed with or submitted to the Securities and Exchange Commission (SEC) by Seller as required by the Conflict Minerals Law including at a minimum, (a) the disclosure made by Seller to the Securities and Exchange Commission and (b) any independent private sector audit submitted through the SEC, each (a) and (b) in accordance with subsection (p) of Section 13 of the Securities and Exchange Act of 1934 and the Conflict Minerals Law. Without any further consideration, Seller shall provide such further cooperation as BFC may reasonably require in order to meet any obligations it may have under the Conflict Minerals Law.

U.S. GOVERNMENT PROCUREMENT LAW: If a government contract number or if an indication that this procurement is for end-use under a government contract or subcontract appears on the face of this Agreement, all applicable Federal Acquisition Regulation (FAR) or the related regulations of other cognizant government agencies such as, e.g. the General Services Administration, for which goods are acquired hereunder shall be complied with.

BFC has agreed to accept the changes proposed in EMS's purchase order acknowledgment letter until the parties can reach agreement on a final negotiated agreement. EMS has proposed its boilerplate agreement and BFC objects because there are some clauses that it thinks must be included in its final agreement with EMS. These clauses can be found under [Tab 11](#).

Remember that BFC is a very important customer. We are already engaged with them and ordering material, and they are necessary to keeping one of EMS's facilities up and running.

[illegible]

2.0 PURCHASE ORDERS AND LEADTIME

- 2.1 Purchase Orders. BFC shall order Product by submitting written purchase orders (referred to hereinafter as “Purchase Orders”) to Supplier pursuant to and referencing this Agreement. Supplier will automatically accept all Purchase Orders that are in conformance with this Agreement.
- 2.2 Purchase Order Lead-time. Lead-time for delivery of Product shall be ____ days after Supplier’s receipt of Purchase Order. Both parties agree to work in good faith to reduce such lead-time by at least one (1) week during every six (6) month period of the term hereof (Any reference to “days” shall mean “working” days).
- 2.3 Establishment of JIT Delivery Process. Supplier agrees to work in good faith with BFC to establish a JIT process. Supplier will establish such JIT process within ninety (90) days after receipt of BFC’s initial purchase order(s) for Product. BFC will indicate in each of its Purchase Orders whether such Purchase Order is subject to the JIT process. Actual requirements will be based on BFC manufacturing demand requirements (Pull) signals, which BFC will give directly to Supplier through facsimile, empty Kanban, or other method (e.g., Trigger) as directed by an authorized BFC manufacturing representative. Title for Product ordered by BFC under the JIT process shall not pass to BFC until BFC initiates a Pull. Supplier will manage all JIT Purchase Orders on a “first in, first out” (FIFO) basis.
- 2.4 JIT Purchase Orders: Scheduling. BFC will provide Supplier with a ninety (90) day blanket Purchase Order that estimates BFC’s quarterly demand requirements by month. BFC will review and update its requirements at least monthly, based upon BFC’s forecast, backlog, and shipping data. BFC may reschedule or cancel its daily delivery requirements at any time to accommodate BFC’s JIT/Pull process requirements. Supplier acknowledges that BFC’s customer shipping model during each calendar quarter is: BFC ships approximately 20% of its quarterly forecasted requirements during the first month, 30% during the second month, and 50% during the third month. BFC may reschedule or cancel its aggregate monthly requirements as follows:

Amount of Notice	% of Monthly Quantity that may be canceled	% of Monthly Quantity that may be rescheduled
0- 30 days	10%	+/- 25%
31- 60 days	50%	+/- 50%
more than 60 days	100%	+/- 100%

In the event BFC cancels or reschedules a Purchase Order or portion thereof, Supplier shall reasonably assess all open orders, raw materials, work in progress, and subassemblies in inventory to determine whether or not Supplier can use such items for the manufacture of other products or be diverted for any other purpose, in order to minimize both parties financial Product exposure.

- 2.5 Most Favored Customer Status. In the event Supplier cannot deliver Product to BFC due to component shortages, allocations, or process constraints beyond Supplier's reasonable control, Supplier agrees that Supplier will deliver the Product to BFC no later than and in proportions comparable to, orders that Supplier delivers to any of Supplier's most favored customers that use the same allocated components, materials, or processes.

5.0 COST REDUCTIONS.

The parties agree to aggressively pursue any and all cost and lead-time reduction opportunities related to the Product and processes covered under this Agreement. Supplier agrees to provide to BFC a written list of proposed cost and lead-time reduction opportunities within five (5) days after the beginning of each calendar quarter during the term hereof BFC agrees to share with Supplier any cost reductions that are first proposed by Supplier, and are approved by BFC, after the first full calendar quarter of full production. Such cost savings shall be apportioned as follows:

Period of Agreement Term	Apportionment of Cost Savings	
	BFC	Supplier
1st Qtr.	0%	100%
2nd Qtr.	50%	50%
3rd Qtr. and thereafter	100%	0%

Supplier acknowledges that BFC's cost reduction targets are 5% or greater per quarter.

6.0 PRODUCT REQUIREMENTS FORECAST; PURCHASE OF LONG LEADTIME ITEMS.

- 6.1. Forecast. BFC will provide Supplier with a nine (9) month rolling forecast of requirements, to be updated on a monthly basis. Supplier shall not regard such forecast as a firm commitment to purchase.
- 6.2. Long Leadtime Items. Upon the prior written approval of BFC, Supplier will place orders for identified long leadtime parts required to manufacture the Product. In the event Supplier incurs any cancellation, restocking, or obsolescence

charges relating to such long leadtime material or parts purchased by Supplier to meet BFC's requirements, and if Supplier is unable to utilize such material for any other use, BFC agrees to reimburse for such cost if the amount of any such cost is reasonable.

- 6.3. Material Liability. With the exception the BFC approved long lead time items identified in section 6.2 above, BFC's sole material liability shall be for all final assemblies and cost of materials on order and not subject to cancellation in accordance with section 2.4 above.
- 6.4. Conflict Minerals. Supplier represents and warrants that it is in full compliance with the Conflict Minerals Law. Upon BFC's written request, Supplier shall provide BFC with a written copy of any audits, disclosures, or reports filed with or submitted to the Securities Exchange Commission (SEC) by Supplier as required by the Conflict Minerals Law including, at a minimum, (a) the disclosures made by Supplier to the Securities and Exchange Commission and (b) any independent private sector audit submitted through the SEC, each (a) and (b) in accordance with subsection (p) of Section 13 of the Securities Exchange Act of 1934 and the Conflict Minerals Law. Without any further consideration, Seller shall provide further cooperation as BFC may reasonably require in order to meet any obligations it may have under the Conflict Mineral Law.

9.0 WARRANTY; RETURN AND REPAIR OF DEFECTIVE PRODUCT.

- 9.1. Duration. Supplier warrants each Product delivered hereunder will, for a period of two (2) years after the date BFC accepts such Product, be free from defects in design, workmanship, and material. Products shall also comply with any applicable laws. Supplier agrees that it shall clearly mark all items of Product with shop order/serial number, for date-of-manufacture traceability.
- 9.2. Return and/or Replacement of Defective Product. In addition to any other rights BFC may have, if BFC finds items delivered pursuant to this Agreement to be not as warranted, BFC may return such items to Supplier, at Supplier's expense, for correction, replacement, or credit, as BFC may direct. Any items corrected or furnished in replacement shall also be subject to all the provisions of this article, to the same extent as items initially furnished. BFC may require Supplier to replace or rework non-performing Product within a reasonable time after written notification by BFC. All such rework, inspection, repackaging, and transportation shall be at Supplier's expense.
- 9.3. Survival of Warranty. This warranty provision shall survive any inspection, delivery, acceptance, payment, expiration, or earlier termination of this Agreement, and such warranties shall run to BFC, its successors, and assigns. However, nothing herein shall limit BFC's rights in law for damages resulting from delivery of defective Product.

- 9.4. Return Material Authorization. Supplier shall provide an RMA number to BFC within one (1) business day after BFC's request.
- 9.5 Epidemic Failures. Supplier agrees to repair or replace, at BFC's option and at Supplier's expense, all affected Product when a failure is epidemic in nature. A failure mode shall be considered "epidemic" for purposes of this Agreement if similar failures occur at a rate higher than the rate or level specified in the latest revision of Exhibit C - Product Quality Requirements. Supplier agrees to pay any costs associated with any retrofit of the affected Product due to epidemic failures, including, but not limited to, diagnostics, repair, and replacement and any labor or overhead charges of BFC or its service providers.

Exercise 6

On January 1st, EMS shipped BFC 1,000 units of its residential PC assembly. These units arrived at BFC on January 6th and were placed into a holding area for receiving inspection at BFC. On January 20th, the units were inspected at BFC. Some of the units failed test at BFC. BFC did a failure analysis which indicated that an integrated circuit on the motherboard of the device appeared to be malfunctioning. After review by the component engineering function at BFC, the conclusion was reached that the IC was malfunctioning due to some very small cracks in the IC. These cracks appeared to be either a result of the manufacturer's process or mechanical placement at EMS.

BFC became very concerned because the cracks apparently make the IC sensitive to moisture and if enough moisture seeps into the crack in the IC, the unit will experience intermittent failures.

BFC has been consigning this IC to EMS for the life of the program. BFC is concerned that there may be additional units in the field that will fail upon exposure to moisture or high humidity.

BFC has demanded that EMS accept a debit for the units which failed test at BFC as well as pay to have the most recent 2,000 units shipped into the field either tested in the field or recalled by EMS and replaced. BFC has refused delivery of additional product from EMS which has already been built and is covered by non-cancellable purchase orders in accordance with the delivery scheme and schedule agreed to between the companies. BFC has also put all payments for EMS receivables on hold.

Up to this point in the relationship with BFC, you have been dealing with BFC's program manager, Mike Hindagui. Mike is very pro-EMS and has been reasonable to deal with in the past on such issues. However, the contract manager at BFC, Willie Jesse, has indicated that he must hear from EMS within 24 hours that it will pay for recalling all of the product or he will cancel all orders with EMS for this product as well as the industrial PC Assembly.

1. What is EMS's contractual exposure under these circumstances for the units shipped in January? Units in the field? Under what conditions? Assume that BFC has signed EMS's Standard Manufacturing Services Agreement found in [Tab 13](#). Please cite contractual references to support your answer.

- [illegible]

EMS, Inc.

4000 Maple Drive
Huntsville, Alabama 35805

MANUFACTURING SERVICES AGREEMENT

THIS AGREEMENT ("Agreement") is effective _____ by and between, _____ a _____ corporation (hereinafter referred to as "Customer") and EMS, Inc., _____ (hereinafter referred to as "EMS") a corporation, a wholly owned subsidiary of located at , for the purchase and sale of various products as detailed in the Product Specific Attachments ("PSA") hereto and under the following terms and conditions.

1. TERM

The term of this Agreement shall be for a period of not less than twelve (12) months from the effective date hereof, but shall automatically extend to include the term of any PSA herein.

2. PRICES AND DELIVERY

Prices are as defined in EXHIBIT A to the respective PSA and are based on the configuration specified in EXHIBIT C Specifications. Pricing is valid for all deliveries occurring during the term of the respective PSA, unless otherwise specified. Product ordering and delivery shall be in accordance with the schedule or method of releases by purchase orders set forth in EXHIBIT B of the respective PSA. A minimum purchase quantity or pricing matrix at volume breaks will be included in EXHIBIT B to maintain price validity. Unless otherwise specified in the PSA, prices include EMS designed packaging according to good commercial standards. All products shipments shall be Ex Works (Incoterms 2010) EMS facility. EMS's facility and freight collect. Shipments by EMS shall be to destinations in the country of manufacture; price does not include export licensing of product or payment of duties, tariffs or broker's fees.

3. PAYMENT TERMS

Payment terms are net thirty (30) days after date of invoice. On any invoice not paid by maturity date, CUSTOMER shall pay interest from maturity to date of payment at the rate of 1% per month. Payment shall be made, and orders received in U.S. Dollars.

4. CHANGES

4.1 CUSTOMER may upon proper notice make changes within the general scope of this Agreement. Such changes may include, but are not limited to (1) drawings, plans, designs, procedures, specifications, test specifications, or bills of material, (2) methods of packaging and shipment, (3) quantities of units or other equipment to be furnished, (4) delivery schedule, or (5) CUSTOMER provided equipment. If any such change causes either an increase or decrease in

EMS's cost, or the time required for performance of any part of the work under this Agreement, whether changed or not changed by any such change order, an equitable adjustment shall be made in prices or delivery schedules, or both, and the respective PSA of this Agreement shall be modified in writing accordingly.

4.2 EMS shall be compensated for reasonable costs associated with any obsolete material as a result of any engineering or other changes by CUSTOMER within forty-five (45) days. EMS will provide one Engineering Change Order, (ECO), per month without non-recurring administrative cost. Additional ECO's will cost \$250 plus any change related impacts.

4.3 EMS shall, as appropriate during manufacture of product, make suggestions for cost saving design changes. The parties shall share equally in any EMS proposed design changes accepted by CUSTOMER which result in cost savings.

5. RESPONSIBILITY FOR PRODUCT PERFORMANCE

Unless otherwise stated, CUSTOMER bears design responsibility for the subject product. EMS bears responsibility for good workmanship and operational performance as it is affected by proper manufacture, procurement of materials, and test compliant with EXHIBIT C Specifications of the respective PSA.

6. ACCEPTANCE

Acceptance shall occur at EMS's facility based upon satisfactory completion of a mutually agreeable Acceptance Test Procedure or Inspection designed to demonstrate specification compliance or at CUSTOMER's facility no later than fifteen (15) days after receipt. Product shall be deemed accepted if not rejected within this period. Risk of loss shall pass to CUSTOMER upon delivery by EMS to the carrier.

7. CUSTOMER FURNISHED EQUIPMENT, MATERIAL AND DOCUMENTATION/SUBCONTRACTORS

7.1 Equipment, materials, or documentation as outlined in EXHIBIT D of the respective PSA shall be provided by CUSTOMER to EMS for use in the performance of this contract. Any CUSTOMER furnished equipment, material, or documentation shall be fit for its intended purpose and delivered to EMS in a timely manner. CUSTOMER shall be responsible for schedule delay, reasonable inventory carrying charges, and allocated equipment downtime charges associated with late or non-delivery of CUSTOMER furnished items. Documentation, including bills of material, drawings, and artwork shall be current and complete. EMS shall be responsible for reasonable diligence and care in the use and protection of any CUSTOMER furnished equipment, but shall not be liable for repair or replacement due to nominal failure or wear and tear or maintenance costs unless agreed to in writing by EMS.

7.2 EMS reserves the right to qualify all CUSTOMER directed subcontractors to insure compliance with EMS minimum quality and creditworthiness standards.

7.3 CUSTOMER represents and warrants to EMS that any materials required to support the requirements as outlined in EXHIBIT D comply with the Conflict Minerals Law, Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, any similar applicable laws, and any implementing regulations (collectively, "Conflict Minerals Law"). CUSTOMER further agrees to promptly prepare and provide to EMS, upon request, any audits, disclosures, reports, or other sourcing or supply chain information that CUSTOMER or EMS may be required by the Conflict Minerals Law to maintain, or to file, submit, or disclose to the Securities and Exchange Commission or any other governmental entity relating to such materials. Without in any way limiting the foregoing, CUSTOMER shall provide such further cooperation as EMS may require in order to meet any obligations Supplier may have under the Conflict Minerals Law.

8. ORDER OF PRECEDENCE

When interpreting this Agreement precedence shall be given to the respective parts in the following descending order:

- (1) This Agreement
- (2) Product Specific Attachments and EXHIBITS to this Agreement
- (3) If purchase orders are used to release product, those portions of the purchase order that are not pre-printed.

9. CONFIDENTIAL DATA

All written information and data exchanged between the parties for the purpose of enabling EMS to manufacture and deliver product under this Agreement that is marked "Confidential" or the like, shall be deemed Confidential Information.

The party which receives such Confidential Information agrees not to disclose it directly or indirectly to any third party without the prior written consent of the disclosing party. Confidential Information disclosed pursuant to this Agreement shall be maintained confidential for a period of two (2) years after the disclosure thereof. No right or license either expressed or implied is granted to either party under any patent, patent application, or any other intellectual property right as a result of such disclosure.

10. INDEMNITY

CUSTOMER agrees, at its expense, to defend and indemnify EMS in any suit, claim, or proceeding brought against EMS alleging that any product or part thereof manufactured pursuant to this Agreement directly or indirectly infringes any patent, copyright, trademark or mask work provided CUSTOMER is promptly notified, given assistance required, and permitted to direct the defense. The foregoing indemnity shall not apply to alleged infringement by EMS's manufacturing processes or designs.

11. ASSIGNMENT

Neither this Agreement nor any rights or obligations hereunder shall be transferred or assigned by either party without the written consent of the other party, which consent shall not be unreasonably withheld. This Agreement may be assigned by either party to any corporation controlling, controlled by, or under common control with its parent corporation, or to any successor to substantially all the business of the party.

12. NOTICE

Notice under any provision of this Agreement shall be deemed good and sufficient if sent by any method providing for a return receipt to:

CUSTOMER:

Program Manager: _____

EMS

13. TAXES AND DUTIES

13.1 All taxes or charges other than those based on net income imposed by any taxing authority upon the manufacture, sale, shipment, or use of the product which EMS is obligated to pay or collect, shall be added to the purchase price paid by CUSTOMER.

13.2 Any cost increase of components due to the increase or addition of a duty, tariff, or Fair Market Value by any governmental entity after the effective date of the respective PSA to this Agreement shall be added to the purchase price paid by the CUSTOMER.

14. WARRANTY AND LIABILITY DISCLAIMER

14.1 Unless otherwise specified in the respective PSA, EMS's warranty period is for ninety (90) days from date of manufacture and such obligation shall be limited to correction of defects in EMS' workmanship. To the extent transferrable or assignable, EMS shall transfer any component manufacturer's warranties to CUSTOMER. EMS shall, at its option, repair, replace, or issue a credit for product found defective during the warranty period.

14.2 EMS shall concur in advance on all product to be returned for repair or rework. An Authorized Returned Material (ARM) number must be obtained by CUSTOMER from EMS prior to return shipment. All returns will be processed in accordance with EMS's Authorized Returned Material Procedure. Return cost for valid returns shall be paid by EMS. A shipping and handling charge shall be assessed for invalid or no defect found returns.

14.3 This warranty does not include Products that have defects or failures resulting from (A) CUSTOMER's design of Products including, but not limited to, design functionality failures, specification inadequacies, failures relating to the functioning of Products in the manner for the intended purpose or in the specific CUSTOMER's environment; (B) accident, disaster, neglect, abuse, misuse, improper handling, testing, storage, or installation including improper handling in accordance with static sensitive electronic device handling requirements; or (C) alterations, modifications, or repairs by CUSTOMER or third parties.

14.4 THE SOLE REMEDY UNDER THIS WARRANTY SHALL BE THE REPAIR, REPLACEMENT OR CREDIT FOR DEFECTIVE PARTS AS STATED ABOVE. THIS WARRANTY IS IN LIEU OF ANY OTHER WARRANTIES EITHER EXPRESSED OR IMPLIED, INCLUDING MERCHANT ABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

14.5 Neither party shall be liable for consequential, special, indirect, or incidental damages including loss of profits as a result of the breach of this Agreement.

15. FORCE MAJEURE

15.1 Neither party shall be responsible for any failure to perform due to unforeseen circumstances or causes beyond its control and without its fault or negligence. Example of such causes are acts of nature or of the public enemy, war, riot, embargoes, act of civil or military authorities, fire, floods, unusually severe weather, accidents, strikes, and shortages of transportation facilities, fuel, labor, or materials.

15.2 If, however, EMS fails to perform any of its obligations for reasons defined above, for a cumulative period of ninety (90) days or more from the date of EMS's notification to CUSTOMER, then CUSTOMER, at its option may extend the corresponding delivery period for the length of the delay, or terminate this Agreement for convenience in accordance with this Section.

16. TERMINATION

CUSTOMER may terminate this Agreement, any supplement thereto or purchase order, at any time, for any reason at its own convenience. In such case, CUSTOMER will be responsible for all reasonable termination charges. Termination charges shall include full price for completed product required to fill open CUSTOMER orders, charges related to material ordered to meet forecasts within component lead times, labor and materials relating to work-in-process, vendor cancellation, and restocking charges (if any), and a reasonable profit. Termination charges shall be paid within forty-five (45) days of submission by EMS to the CUSTOMER. Excess material will be shipped to CUSTOMER upon receipt of payment. EMS shall make available to CUSTOMER for its inspection, inventory, work-in-process, documents, and other evidence bearing on the payment of the termination charges. EMS may terminate this Agreement for any reason at its convenience at no cost with ninety (90) days notice. Any firm commitments or accepted orders for product shall be unaffected by such cancellation and shall be completed in accordance with this Agreement.

17. CANCELLATION

Either party may cancel this Agreement for default if the other party materially breaches this Agreement. However, no right of default shall accrue until thirty (30) days after the defaulting party is notified in writing of the material breach and has failed to cure or give adequate assurances of performance within the thirty (30) day period after notice of material breach.

18. RESCHEDULE OF DELIVERIES

CUSTOMER may reschedule all or part of a scheduled delivery one (1) time for a period not to exceed forty-five (45) days in accordance with the table below. At the end of this forty-five (45) day period, CUSTOMER shall either accept delivery of rescheduled finished units and/or pay the material cost associated with rescheduled units not yet built.

Days Before P.O. Delivery Date	Percentage Reschedule Allowance
0 - 30	0%
31 - 60	25%
61 - 90	50%

Days Before P.O. Delivery Date	Percentage Reschedule Allowance
>90	100%

EMS shall use its best efforts to accommodate any upside schedule changes beyond the firm order periods.

19. ELECTRONIC DATA INTERCHANGE

The parties agree to work diligently to negotiate in good faith within thirty (30) days after the effective date of this Agreement to sign an Electronic Data Interchange (EDI) Agreement to electronically transmit and receive data in agreed formats in substitution for conventional paper based documents. The transaction sets accepted under such EDI Agreement shall be selected to provide a mutual benefit to the parties for both ordering of product and payment for services.

20. ENTIRE AGREEMENT

As stated above, this Agreement and any other Agreement incorporated by reference, including the respective PSA and EXHIBITS to this Agreement, constitute the entire agreement of the parties; superseding all previous Agreements covering the subject matter. It shall not be changed or modified except by written Agreement, specifically amending, modifying, and changing this Agreement, signed by EMS and an authorized representative of the CUSTOMER. If CUSTOMER's purchase order is used to release product under this Agreement, any terms relating to CUSTOMER's purchase order shall not apply unless otherwise agreed to by EMS.

21. DISPUTES AND CHOICE OF LAW

The parties shall attempt to resolve any disputes between them arising out of this Agreement through good faith negotiations. This Agreement shall be construed in accordance with and governed by the laws of the jurisdiction in which the product is manufactured, unless otherwise agreed to by the parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed effective as of the date on page one, by their officers, duly authorized.

EMS, Inc.

(CUSTOMER) _____

By: _____

By: _____

Signature

Signature

Typed Name

Typed Name

Title

Title

Date

Date

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EXHIBITS TO PRODUCT SPECIFIC ATTACHMENTS

(INCORPORATED BY REFERENCE AND MADE PART OF THIS AGREEMENT WHEN
SIGNED BY BOTH PARTIES)

- A. PRICES
- B. DELIVERY SCHEDULE/RELEASES
- C. SPECIFICATIONS
- D. CUSTOMER FURNISHED EQUIPMENT, MATERIAL AND DOCUMENTATION

EMS, Inc.

4000 Maple Drive
Huntsville, Alabama 35805

MANUFACTURING SERVICES AGREEMENT # _____

PRODUCT SPECIFIC ATTACHMENT #1

PRODUCT COVERED BY THIS ATTACHMENT _____

EFFECTIVE DATE OF THIS ATTACHMENT _____

TERM OF PERFORMANCE OF ATTACHMENT _____

EMS, Inc.

(CUSTOMER) _____

By: _____

By: _____

Typed Name

Typed Name

Title

Title

Date

Date

ATTACHMENT #

PRODUCT: _____

**EXHIBIT A
(as applicable)**

Product

Quantity

Price

EMS will prepare a list of components that require longer lead times than the 90 days of firm purchase orders referenced in Exhibit B. EMS will order the long lead components using the Customer furnished forecast. Customer will be responsible for all long lead time material ordered to the forecast.

Variable Pricing of Strategic Components:

Necessary Order Lead Time:

Long Lead-Time Items:

Minimum Order Quantity/Month or Run Rate:

Non-Recurring Charges:

Billback Provisions:

ATTACHMENT #

PRODUCT:_____

EXHIBIT B

Schedule or Method of Purchase Order Releases

CUSTOMER shall provide EMS with an initial ninety (90) day firm purchase order commitment and a non-binding forecast for product requirements for an additional six (6) months. The next month, the first non-binding forecast month shall automatically become part of the current ninety (90) day purchase order commitment, a new non-binding forecast month shall be added, and a new firm purchase order issued, so that a rolling firm purchase order commitment of ninety (90) days is maintained.

ATTACHMENT #

PRODUCT: _____

EXHIBIT C

SPECIFICATIONS
(as applicable)

Baseline Bill of Material

Any Specific Quality Standards

Statement of Work

Acceptance/Inspection Criteria

Packaging Specification

Workmanship Standards

Description of In Circuit or Functional Test

Drawings / Artwork

Environmental Stress Screening Requirements

Parts/Component Specifications

Approved or Qualified Vendor List

Drill Tapes

Electrostatic Discharge Requirements

Other

ATTACHMENT #

PRODUCT: _____

EXHIBIT D

CUSTOMER FURNISHED EQUIPMENT/CONSIGNED MATERIAL

Uniform Commercial Code Article 1 and 2 Excerpts

The following are excerpts from Article 1 and 2 of the Uniform Commercial Code. Those articles of the Uniform Commercial Code are enacted in all states in the United States in some form (except Louisiana) and govern the sale of goods between merchants as well as between a merchant and a consumer buyer.

To a large extent, although not always, the theories demonstrated by these experts apply in any context relating to the sale of goods even in international jurisdictions that do not apply to this particular law.

From time to time EMS employees may encounter references to the United Nations Convention on Contracts for the International Sale of Goods (“UNCISG”). The convention will apply to a sales contract between a Buyer and Seller each of whom has its place of business in different countries that are signatories to the convention, unless the Buyer or the Seller specifically provides otherwise. Signatories include:

Albania, Armenia, Argentina, Australia, Austria, Belarus, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Romania, Russian Federation, San Marino, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, Turkey, the former Yugoslav Republic of Macedonia, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Zambia.

Notable countries absent from the list include the United Kingdom, Malaysia, Brazil, and India.

It is always preferable to select what law will apply to any particular contract. When there is any question as to what law applies or the interpretation of law applicable to a particular transaction, legal assistance should be sought to be certain that the agreement has the intended effect.

UNIFORM COMMERCIAL CODE OVERVIEW/SALES

I. ARTICLE 2 SALE OF GOODS

1) What is the Uniform Commercial Code?

- Article 1.....General Provisions
- Article 2.....Sales
- Article 2A.....Leases
- Article 3.....Negotiable Instruments
- Article 4.....Bank Deposits and Collections
- Article 4A.....Funds Transfer
- Article 5.....Letters of Credit
- Article 6.....Bulk Sales
- Article 7.....Documents of Title
- Article 8.....Investment Securities
- Article 9.....Secured Transactions

The UCC was written by The American Law Institute and the National Conference of Commissioners on Uniform State Laws. Article 2 has been adopted by 49 states (not Louisiana) with minor differences among those adopting that article.

2) UCC Article 2

Currently adopted version of Article 2 was initially written in 2001 and 2002. A new version, with modifications, exists but it has not been adopted by any state as yet. ALWAYS use information and texts that reflect the law and commercial code applicable to the state law of the contract

Example:

- “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing (California).
- “Good faith” means honesty in fact in the conduct or transaction concerned (Alabama).

II. ARTICLE 1 PART 1, GENERAL PROVISIONS

General definitions in this section apply to the entire UCC, not just Article 2.

Principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion,

mistake, bankruptcy, and other validating or invalidating cause supplement its provisions. [§ 1–103]

- 1) “Agreement,” as distinguished from “contract,” means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in § 1 – 303. [§ 1–201(b)(13)]
- 2) “Contract,” as distinguished from “agreement,” means the total legal obligation that results from the parties’ agreement as determined by the UCC and as supplemented by any other applicable laws. [§ 1–201(b)(12)]
- 3) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing. [§ 1–201(b)(20)]
- 4) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity. [§ 1– 201(b)(27)]
- 5) “Signed” includes using any symbol executed or adopted with present intention to adopt or accept a writing. [§ 1–201(b)(37)]
- 6) “Writing” includes printing, typewriting, or any other intentional reduction to tangible form.
- 7) “Written” has a corresponding meaning. [§ 1–201(b)(43)]
- 8) A person has “notice” of a fact if the person:
 - Has actual knowledge of it,
 - Has received a notice or notification of it, or
 - From all the facts and circumstances known to that person at the time in question, has reason to know that it exists. [§1–202(a)]
- 9) “Knowledge” means actual knowledge. [§ 1–202(b)]

10) Choice of Law

Although the UCC allows the parties to select whatever law they want to apply, whether or not it has any relation to the transaction in question, most states have adopted a rule that indicates that the law chosen must have some reasonable relation to the contract.

11) Freedom of Contract

Parties may agree to vary the effect of the provisions of the UCC on their contract EXCEPT:

- obligation of good faith,
- diligence,
- reasonableness,
- care, and as otherwise stated in UCC. [§ 1–302(b)]

12) Course of Performance

A “course of performance” is the sequence of conduct between the parties to a particular transaction that exists if:

- The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
- The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection. [§ 1–303(a)]

13) Course of Dealing

A “course of dealing” is a sequence of conduct concerning a previous transaction between the parties to a particular transaction that is fairly regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. [§ 1–303(b)]

14) Usage of Trade

“Usage of trade” is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. [§ 1–303(c)]

15) Interpretation

The previous terms should be interpreted as in harmony, but if that construction is unreasonable:

- Express terms prevail over all
- Course of performance prevails over course of dealing and usage of trade
- Course of dealing prevails over usage of trade [§ 1–303(e)]

16) Obligation and Good Faith

Every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement. [§ 1–304]

17) Settlement of Breach

A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record. [§ 1–306]

III. ARTICLE 2 SALES PART 1, GENERAL CONSTRUCTION AND SUBJECT MATTER

1) Transactions in Goods

Article 2 applies to transactions in goods; does not apply to security interests and is not intended to impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers. [§ 2–102]

2) Merchant

“Merchant” means a person who deals in goods of a kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment as an agent or broker or other intermediary who, by his occupation, holds himself out as having such knowledge or skill. [§ 2 – 104(1)]

3) Goods

“Goods” means all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in actions. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty. [§ 2 – 105]

4) “Hybrid” Transactions; Goods and Services

Majority rule: If the “predominant purpose” of the whole transaction was the sale of goods, Article 2 will be applied to the whole (if goods are involved, most courts apply Article 2)

Minority rule: Article 2 applies to the sale of goods aspect of the transaction only (problems arise in applying two different measures of damages)

IV. ARTICLE 2 SALES PART 2, FORM, FORMATION, AND RE-ADJUSTMENT OF CONTRACT

1) Formal Requirements: Statute of Frauds

Contract for sale of goods of \$500 or more is not enforceable unless there is a writing sufficient to indicate that a contract has been made between the parties and signed by the party against whom enforcement is sought. [§ 2-201(1)]

2) Between Merchants

If within a reasonable time a writing in confirmation of the contract sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of a writing against such party unless written notice of objection to its contents is given within 10 days after it is received. [§ 2-201(2)]

YOU SNOOZE, YOU LOSE

3) Formation in General

- a) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. [§ 1-204(1)]
- b) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. [§ 1-204(2)]
- c) Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. [§ 1-204(3)]

4) Firm Offers

An offer by a merchant to buy or sell goods in a signed writing, which by its terms gives assurance that it will be held open, is not revocable, for lack of consideration, during the time stated or if no time is stated for reasonable time, but in no event more than three months. [§ 2-205]

5) Offer and Acceptance

Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a contract shall be construed as inviting acceptance in any manner and any medium reasonable.

An order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by prompt promise to ship or by the prompt current shipment of goods. [§ 2–206]

6) Battle of the Forms

A written confirmation sent within reasonable time is an acceptance even though it states terms additional to, or different from, those offered or agreed upon unless acceptance is expressly made conditional upon assent to the additional or different terms. [§ 2–207(1)]
So, we have acceptance? What are the terms of the agreement?

a) Between merchants such terms become part of the contract, unless:

- the offer expressly limits acceptance to the terms of the offer;
- they materially alter it; or
- notification of the objection to them has already been given or is given within a reasonable time after notice of them is received. [§ 2–207(2)]

b) Typical clauses that would normally “materially alter” the contract:

- Warranty limitations, including merchantability and fitness
- Terms deviating from usage of trade
- Reservation of Seller to cancel if any invoice is not paid when due
- Arbitration clause
- Clause requiring complaints be made in a time materially shorter than customary or reasonable

c) Typical clauses which would NOT normally “materially alter” the contract:

- Slightly enlarging force majeure clause
- Clause fixing reasonable time for complaints within customary limits
- In case of a purchase for sale to another, providing for inspection by the third party
- Interest on overdue invoices
- A clause altering remedies within customary trade usage

The idea is to avoid clause that would result in hardship or surprise to other party if incorporated without knowledge of that party.

d) **Battle of the Forms**

Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writing of the parties do not otherwise establish a contract. In such cases the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any provisions of the UCC. [§ 2-207(3)]

- e) Under the present state of the law, we believe that there is no language that a lawyer can put in a form that will always assure the client of forming a contract on the client's own terms. These efforts will be frustrated by a responsive document that is expressly conditional on assent to that document's terms, by prior oral agreement, or by the document's use as an acceptance, not an offer. If one must have a term, that party should bargain with the other party for the term; a client should not get it by a lawyer's slight of hand. If a seller must have the term to reduce its liability but cannot strike a bargain for it, the only answer may be to raise the price, buy insurance, or – as a last resort – have an extra martini every evening and do not capitalize the corporation too heavily. Uniform Commercial Code, White and Summers 5th Edition (2000)

7) Modification

An agreement modifying the contract under the UCC needs no consideration to be binding. Overrules common law “pre-existing duty” rule. [§ 2-209(1)]

V. ARTICLE 2 SALES PART 3, DELIVERY TERMS, WARRANTIES AND PERFORMANCE

1) General Obligations of Parties

The obligation of the Seller is to transfer and deliver and that of the Buyer is to accept and pay in accordance with contract. [§ 2-301]

2) Unconscionability

If the court, as a matter of law, finds the contract or any clause of the contract would have been unconscionable at the time it was made, it may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it

may so limit the application of any unconscionable clause as to avoid any unconscionable result. [§ 2–302]

The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

EXAMPLE: Clause limiting time for complaints held inapplicable to latent defects in the shipment of catsup which could only be discovered by microscopic analysis.

3) Open Price Term

The parties, if they so intend, can conclude a contract for sale even though the price is not settled. In such a case, the price is a reasonable price at the time of delivery, if:

- Nothing is said as to the price; or
- The price is left to be agreed and there is no agreement; or
- The price is to be fixed in terms of some market or other standard by a third-person and is not so set. [§ 2–305]

When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through the fault of one party, the other may, at his option, treat the contract as cancelled or himself fix a reasonable price. [§ 2–305(3)]

HOWEVER, if the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed, there is NO contract. [§ 2–305(4)]

4) No Specified Place for Delivery

Unless otherwise agreed:

- Seller's place of business.
- If goods are identified to the knowledge of both parties in some other place, delivery at that place. [§ 2–308]

5) Absence of Specific Time Provisions

Time for shipment or delivery or any other action under contract, if not provided, shall be "a reasonable time." [§ 2–309(1)]

Where the contract provides for successive performances, but is indefinite in duration it is valid for reasonable time, but unless otherwise agreed may be terminated at any time by either party. [§ 2–309(2), many distributorship agreements fall in this category]

6) Termination

Termination of the contract by one party, except on the happening of an agreed-upon event, requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable. [§ 2-309(3)]

Justifiable cancellation for breach is a remedy for breach and not the kind of termination covered by § 2-309.

7) Payment

Unless otherwise agreed, payment is due at the time and place at which the Buyer is to receive the goods even though the place of shipment is the place of delivery. [§ 2-310(a)]

Buyer's payment and Seller's relinquishment of full possession and control of the goods are "concurrent conditions" absent contrary agreement.

Tender of a check is only a conditionally valid tender. As between Seller and Buyer, the Seller is entitled to reassert dominion over the goods if the Buyer has acquired them by giving a check that bounces. [§ 2-511(2)]

8) Options and Cooperation Respecting Performance

An agreement for sale, which is otherwise sufficiently definite to be a contract, is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness. [§ 2-311(1)]

Such particulars are often found in the course of dealing, usage of trade, or implication from circumstances in explicit language used by the parties.

9) Warranty of Title

There is implied warranty by the Seller in sales contracts that:

- The title conveyed shall be good, and its transfer rightful, and
- The goods shall be delivered free of any security interest or other lien or encumbrance of which the Buyer at the time of contracting has no knowledge. [§ 2-312(1)]

Warranty of title may be excluded or modified by specific language or by circumstances which give the Buyer reason to know that the person selling the goods does not claim title

in himself and is only selling whatever right he has in the goods (like a “quitclaim”). [§ 2– 312(2)]

10) Warranty Against Infringement

Unless otherwise agreed, a Seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like, but a Buyer who furnishes specifications to the Seller must hold the Seller harmless against any such claim which arises out of compliance with specifications. [§ 2 – 312(3)]

11) Express Warranties by Seller

By affirmation of fact or promise relating to the goods which becomes part of the “basis of the bargain” that the goods will so conform. Any description of the goods which is a part of the “basis of the bargain.” Any sample or model which is made part of the “basis of the bargain.” Not necessary to use formal words, such as “warrant” or “guarantee.” [§ 2 – 313]

Statement merely giving Seller’s opinion, affirming value of the goods, or commendation of the goods does not create a warranty. Puffing – “This is the best you will ever see”; “There is no better product on the market”; “Do not worry, Chrysler will stand behind its products 100% if you have a warranty issue.”

12) Implied Warranty of Merchantability

Unless excluded or modified in accordance with § 2–316, if the Seller is a merchant with respect to goods of that kind, warranty applied. Also applies to the serving for value of food and drink to be consumed on the premises or elsewhere.

To be merchantable, goods must:

- Pass without objection in the trade under contract description; and
- In the case of fungible goods, be of fair average quality within the description; and
- Be fit for the ordinary purpose for which such goods are used; and
- Run within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
- Be adequately contained, packaged, and labeled as the agreement may require; and
- Conform to the promise or affirmations of fact made on the container or label, if any.

In cases of doubt as to what quality is intended, the price at which a merchant closes the contract is an excellent index of the nature and scope of his obligation under § 2–314 [Comment 7].

13) Implied Warranties of Fitness for Particular Purpose

Where the Seller, at the time of contracting, has reason to know any particular purpose for which the goods are required and that Buyer is relying on the Seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified, an implied warranty that the goods shall be fit for such purpose. [§ 2–315]

14) Exclusion or Modification of Warranties

Merchantability exclusion – Must mention merchantability and, in case of a writing, must be conspicuous.

Implied warranty of fitness – Exclusion must be in writing and conspicuous; all implied warranties of fitness are excluded by statement that “there are no warranties which extend beyond description on the face hereof.” [§ 2–316(2)]. Unless circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” “with all faults,” or other language which in common understanding calls the Buyer's attention to the exclusion of warranties and makes plain there is no implied warranty [§ 2–316(3)(a)]. Warranties, whether express or implied, are construed as consistent and cumulative unless the construction is unreasonable, then the parties' intent must be ascertained. [§ 2–317]

In determining intention:

- Exact or technical specifications displace an inconsistent sample or model or general language of description;
- A sample from an existing bulk displaces inconsistent general language of description;
- Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

15) Third-Party Beneficiaries and “Privity” § 2 – 318

Generally extends warranty liability of Seller to either Buyer's family and guests, or others likely to consume or be affected by the goods if they are injured, depending on which alternative is adopted.

California omits this section in its entirety. Majority of states extend coverage to any natural person reasonably expected to use, consume, or be affected by the goods who was injured. Liability flowing from this section cannot be modified or limited.

16) F.O.B. Term

Unless otherwise agreed:

- FOB Katmandu, Michigan – If place of shipment, Seller must at that place arrange for shipment of the goods in accordance with § 2–504 and bear the expense and risk of putting them in possession of the carrier, or when at the place of destination, the Seller must at his own expense and risk transport the goods to that place and tender delivery as provided in § 2–503.

17) C.I.F. Term

Unless otherwise agreed:

- CIF Katmandu, Michigan – The price includes in a lump sum the cost of the goods and the insurance and freight to the named destination, and the Seller is required to arrange for shipment and obtain a policy of insurance. Use of INCOTERMS 2000 recommended by the presenters rather than UCC delivery terms, which will become obsolete and are confusing if used in the international context.

18) Passing of Title

Unless otherwise agreed or specifically addressed elsewhere in the Code:

- Title passes to Buyer at the time and place at which the Seller completes his performance of delivery despite any document of title to be delivered or any reservation of a security interest;
- If delivery is made without movement of the goods, title passes when the document of title is delivered, or if no documents are delivered, title passes at a time and place of contracting. [§ 2 – 401]

19) Seller's Tender of Delivery

Tender of delivery requires that the Seller put and hold conforming goods at the Buyer's disposition and give the Buyer any notification reasonably necessary to enable him to take delivery. [§ 2–503].

Where the contract does not specify delivery at a particular destination, unless otherwise agreed, the Seller must put the goods in the possession of a carrier and make a contract for their transportation and promptly notify the Buyer of shipment. [§ 2–504]

Tender of delivery is a condition to the Buyer's duty to accept the goods and, unless otherwise agreed, to pay for them. [§ 2–507(1)]

Seller can cure a nonconforming tender prior to expiration of time for performance and within a reasonable time where Seller had reasonable grounds to believe the tender would be acceptable if he seasonably notifies Buyer of intent to substitute conforming tender. [§ 2–508] (See also “perfect tender” rule [§ 2 – 601])

20) Risk of Loss in Absence of Breach

Where the contract requires or authorizes Seller to ship by carrier:

- If contract does not require Seller to deliver to a certain destination, risk of loss passes to Buyer when goods are delivered to carrier.
- If contract requires Seller to deliver at a particular destination and goods are duly tendered, risk of loss passes to Buyer when they are duly tendered. [§ 2–509(1)]
- If goods are held by a bailee and delivered without being moved, risk of loss passes to Buyer upon receipt of negotiable document of title or upon acknowledgment by the bailee of the Buyer's right to possess the goods. [§ 2–509(2)]
- In any other case, the risk of loss passes to the Buyer on his receipt of the goods if the Seller is a merchant; otherwise the risk passes to the Buyer on tender of delivery. [§ 2–509(3)]
- Where tender or delivery of goods so fails to conform to the contract as to give Buyer right of rejection, risk of loss remains on Seller until cure or acceptance.
- If acceptance is rightfully revoked, Buyer may, to the extent of any deficiency in his insurance coverage, treat the risk of loss as having rested on the Seller from the beginning. [§ 2–510]
- Unless otherwise agreed, tender of payment is a condition to the Seller's duty to tender goods and complete any delivery. If by check, payment is conditional and is defeated if check is dishonored. [§ 2–511]

21) Buyer Right to Inspection of Goods

Unless otherwise agreed, where goods are tendered or delivered or identified by the contract for sale, the Buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner.

If goods do not conform, inspection cost may be recovered from Seller. [§ 2–513]

Exceptions are COD deliveries and payment against documents of title with no reservation of inspection rights in the agreement. [§ 2–513(3)]

ARTICLE 2, PART 6, BREACH, REPUDIATION, AND EXCUSE

1) Perfect Tender Rule – Buyer’s Rights on Improper Delivery

Unless otherwise agreed, if the goods or tender of delivery fail in any respect to conform to the contract, the Buyer may:

- Reject the whole,
- Accept the whole, or
- Accept any commercial unit or units and reject the rest. [§ 2–601]

Be careful, most cases decided to date suggest that the Perfect Tender Rule is so eroded that the law would be little changed if § 2–601 gave the right to reject only upon “substantial” non–conformity.

2) Manner and Effect of Rightful Rejection

Rejection of goods must be within reasonable time after their delivery or tender. It is ineffective unless the Buyer seasonably notifies the Seller. [§ 2–601]

3) After Rightful Rejection

After rejection, any exercise of ownership by the Buyer over goods is wrongful. Buyer has no further obligation with regard to goods rightfully rejected except to hold them with reasonable care for Seller if taking possession before rejection [§ 2–601, but subject to duties and options relating to rightfully–rejected goods in §§ 2–603 and 604].

4) Merchant Buyer’s Duties as to Rightfully–Rejected Goods

Must follow reasonable instructions received from Seller. If no instructions, make reasonable efforts to sell for Seller’s account if they are perishable or might decline in value quickly.

Seller’s instructions are not reasonable if, on demand, indemnity for expenses is not forthcoming; Buyer is entitled to out–of–pocket expenses and usual commission. [§ 2–603]

5) Merchant Buyer's Duties as to Rightfully-Rejected Goods – Salvage

If goods are not perishable or declining in value quickly, and no instructions are received within reasonable time, Buyer may store rejected goods for Seller's account, reship them to him, or resell them. [§ 2-604] Buyer may recoup costs as in § 2-603.

6) Waiver of Buyer's Obligations by Failure to Particularize

Buyer's failure to state particular reason for rejection ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or establish a breach if Seller could have cured it if stated seasonably, or between merchants when the Seller has after rejection made a request in writing for full and final statement of defects on which the Buyer proposes to rely. [§ 2-605]

7) What Constitutes Acceptance of Goods

- Buyer inspects and accepts or agrees to retain goods in spite of nonconformity, or
- Buyer fails to make an effective rejection (after reasonable opportunity to inspect), or
- Does any act inconsistent with the Seller's ownership and if such act is wrongful is ratified by Seller. [§ 2-606(1)]

Acceptance of the part of any commercial unit is acceptance of the entire unit. [§ 2-606(2)]

8) Effect of Acceptance

The Buyer must pay at the contract rate for the goods accepted. Acceptance precludes rejection unless acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. [§ 2-607]

Buyer must, within reasonable time after he discovers or should have discovered any breach, notify the Seller of the breach or be barred from any remedy, and if the claim is one for infringement or the like and the Buyer is sued as a result of such breach, he must so notify the Seller within reasonable time after notice or be barred from any remedy over the liability established by the litigation. [§ 2-607(3)]

The burden is on the Buyer to establish any breach with respect to the goods accepted. [§ 2-607(4)]

9) Revocation of Acceptance in Whole or in Part

The Buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:

- On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured, or
- Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or the Seller's assurances. [§ 2-608(1)]

Revocation of acceptance must occur within a reasonable time after the Buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which are not caused by their own defects. [§ 2-608(2)] A Buyer who revokes has the same rights and duties with regard to the goods as if he had rejected them. [§ 2-608(3)]

10) Right to Adequate Assurances of Performance

Either party may demand adequate assurances of the performance in writing and may suspend performance for which he has not already received the agreed return.

Between merchants, the reasonableness of grounds for insecurity and adequacy of assurances offered is determined according to commercial standards. [§ 2-609]

After receipt of justified demand, failure to provide within a reasonable time not to exceed 30 days such assurances of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract. [§ 2-609(4)]

Repeated delinquencies must be viewed as cumulative. Commercial sense requires that if repeated claims for assurance are made under this section, the basis for these claims must be increasingly obvious.

11) Anticipatory Repudiation

Where either party repudiates the contract with respect to a performance not yet due and the loss of such performance substantially impairs the value of the contract to the other. [§ 2-610]

The aggrieved party may:

- For commercially reasonable time await performance by the repudiating party, or

- Resort to any remedy for breach, or
- In either case suspend his own performance. [§ 2–610]

Until the repudiating party's next performance is due, he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final. Such retraction must include required assurances. [§ 2–611]

12) Installment Contracts

An “installment contract” is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause, “each delivery is a separate contract,” or its equivalent. [§ 2–612(1)]

The Buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents. [§ 2–612(2)]

HOWEVER, if the nonconformity does not substantially impair the value of the whole contract, and the Seller gives adequate assurances of performance, the Buyer must accept that installment.

Perfect Tender Rule is rejected in this context.

BEWARE

In situations where the value of the whole is substantially impaired, the aggrieved party reinstates the contract if he:

- Accepts a nonconforming installment without seasonably notifying of cancellation, or
- If he brings an action with respect to only the past installments, or
- Demands performance as to future installments. [§ 2–612(3)]

13) Casualty to Identified Goods

Where goods identified to a contract suffer casualty without fault of either party before the risk of loss passes to the Buyer, if the loss is total, the contract is avoided, and if the loss is partial, the Buyer can treat the contract as avoided or accept the goods with due allowances for deterioration or deficiency, but without future right against the Seller. [§ 2–613]

14) Commercial Impracticability/ Failure of Presupposed Conditions

A Seller is not in breach if delay in delivery or non-delivery had been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with governmental regulation or order. [§ 2-615(a)]

However, Seller must, to the extent only a portion of his capacity is affected, allocate production and deliveries among customers in a fair and reasonable manner and must notify the Buyer seasonably that there will be a delay or non-delivery. [§ 2-615(b)(c)]

This excuse usually does not apply to increased cost alone or price collapse.

This excuse would usually apply to severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, or unforeseen shutdown of major sources of supply.

VI. ARTICLE 2 SALES PART 7, REMEDIES

1) Seller's Remedy on Discovery of Buyer's Insolvency

- Cash basis,
- Stop delivery,
- Reclaims goods within 10 days after receipt. [§ 2-702]

2) Seller's Remedies in General

Where the Buyer wrongfully rejects or revokes acceptance of goods, fails to make payment, repudiates with respect to part of the whole, Seller may:

- Withhold delivery of goods,
- Stop delivery by any bailee,
- Resell and recover damages,
- Recover damages for non-acceptance or the price, or
- Cancel. [§ 2-703]

3) Seller's Right to Identify Goods to the Contract Notwithstanding Breach or to Salvage Unfinished Goods

Aggrieved Seller may resell goods identified to the contract if within his possession or control. If goods are unfinished, Seller may exercise reasonable commercial judgment for

avoiding loss and wholly identify the goods to the contract or cease manufacture, and resell for scrap or salvage value, or proceed in any other reasonable manner. [§ 2-704]

4) Seller's Stoppage of Delivery in Transit or Otherwise

Seller may stop delivery of goods in possession of carrier or other bailee upon discovery of Buyer's insolvency and may stop delivery when Buyer repudiates or fails to make a payment due before delivery or if for any other reason the Seller has a right to withhold or reclaim the goods. [§ 2-705]

5) Seller's Resale Including Contract for Resale

Seller may resell in good faith and recover difference between the resale price and the contract price along with incidental damages (per § 2-710), but less expenses saved as a consequence of the Buyer's breach. [§ 2-706(1)]

6) Seller's Damages for Non-Acceptance or Repudiation

Measure of damages for non-acceptance or repudiation by the Buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages but less expenses saved in consequence of the Buyer's breach. [§ 2-708(1)]

BUT ... if measure of damages in (1) above is adequate to put the Seller in as good a position as performance would have done, then the measure of damages is profit (including reasonable overhead) plus incidental damages, due allowance for costs reasonably incurred and due credit for payments or proceeds of resale. [§ 2-708(2)]

"Lost Volume" Seller, component manufacturer, no resale market examples.

7) Action for Price

If Buyer fails to pay the price as it becomes due, Seller may recover, along with incidental damages, the price:

- Of goods accepted, damaged, or lost after risk of loss passed to Buyer, and
- Of goods identified to the contract, if the Seller is unable to sell them after a reasonable effort at a reasonable price. [§ 2-709]

8) Seller's Incidental Damages

... any commercially reasonable charges, expenses, or commissions incurred in stopping delivery and the transportation, care, and custody of goods after the Buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach. [§ 2-710]

9) Buyer's Remedies in General

Where the Seller fails to make delivery or repudiates, or the Buyer rightfully rejects or revokes acceptance, Buyer may cancel and:

- "Cover",
- Recover damages for non-delivery,
- If goods have been identified to the contract, recover them under § 2-502,
- Obtain specific performance under § 2-716.

10) "Cover"

Buyer may purchase substitute goods if done in good faith and without unreasonable delay and recover the difference between the cost of cover and the contract price plus incidental or consequential damages but less expenses saved in consequence of the Seller's breach.

Buyer's option to cover; other remedies are available. [§ 2-712]

11) Buyer's Damages for Non-Delivery or Repudiation

Buyer's damage for non-delivery or repudiation by the Seller is the difference between the market price at the time when the Buyer learned of the breach and the contract price together with incidental and consequential damages less expenses saved. [§ 2-713]

12) Buyer's Damages for Breach in Regard to Accepted Goods

Buyer may recover damages for nonconformity of tender the loss resulting from the ordinary course of events from the Seller's breach in any manner which is reasonable.

Breach of warranty damages are the difference between the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted.

Consequential and incidental damages allowed. [§ 2-714]

13) Buyer's Incidental Damages

... include reasonably incurred expenses for inspection, receipt, transportation and care, and custody of goods rightfully rejected, any commercially reasonable charges, expenses, and commissions in connection with effecting cover and any other reasonable expense incident to the delay or the breach. [§ 2-715(1)]

14) Buyer's Consequential Damages

... include any loss resulting from general or particular requirements and needs of which the Seller, at the time of contracting, had reason to know and which could not reasonably be prevented by cover or otherwise, and injury to person or property proximately resulting from any breach of warranty. [§ 2-715(2)]

15) Specific Performance

Buyer's right to specific performance allowable where goods are unique or in other proper circumstances; may include any relief the court may deem just. [§ 2-716]

16) Deduction of Damages from the Price

The Buyer, on notifying the Seller of his intention to do so, may deduct all or part of the damages resulting from any breach of the contract from any part of the price still due under the same contract. [§ 2-717]

17) Liquidated Damages

Damages for breach by either party may be liquidated in the agreement, but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasability of otherwise obtaining an adequate remedy. Large liquidated damages may be void as a penalty. [§ 2-718]

18) Modification or Limitation of Remedies

Remedies may be limited; limiting Buyer's remedies to return of goods and repayment of the price or to repair and replacement of nonconforming goods or parts is specifically allowed. Remedies are optional unless stated to be sole and exclusive. [§ 2-719]

19) Limitation of Remedies

If exclusive remedy fails of its essential purpose other remedies are available. Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable.

Limitation of consequential damages for injury to a person in case of consumer goods is unconscionable, but limitation of damages where the losses are commercial is not. [§ 2–719]

20) Statutes of Limitation for Contracts for Sale

An action for breach of a contract for sale must be commenced within four years after the cause of action has accrued. Parties may agree to reduce this to not less than one year but may not extend it. [§ 2–725]

21) Accrual of Actions

A cause of action accrues when the breach occurs, regardless of when the aggrieved party discovers it. Breach of warranty occurs when tender of delivery is made, except where warranty explicitly extends to future performance of the goods, then the action accrues when the breach is, or should have been, discovered. [§ 2–725]

METHODS OF LIMITING FINANCIAL RISK

From time to time EMS will have occasion to do business with Customers who have great sales and growth potential but are not currently financially sound. In these circumstances, Program Management must be extremely vigilant to prevent unnecessary financial risk to the Corporation. As the main interface with the Customer, it is incumbent upon the Program Manager to investigate with the help of Marketing, Finance, and Contracts the financial health and stability of the prospective Customer. Failure by Program Management to raise the awareness of higher management regarding unfavorable day to day developments with a particular Customer who is not financially sound may lead to a situation where EMS assumes too much risk for the return on the program.

In addition to the use of the above procedure, financial assurances from the Customer can be required by EMS in many forms according to each Customer's situation.

1. PARENT GUARANTY

Even though a particular Customer may not be very credit worthy, it may have a more financially sound parent to guaranty termination liability and payments by its subsidiary. Like all other forms of guaranty mentioned below, the Program Manager must be careful to continually renew the Agreement so that it does not expire during the course of the relationship and to ensure that the amount of the guaranty is sufficient to cover EMS's exposure as the relationship develops.

2. LETTER OF CREDIT

A confirmed irrevocable Letter of Credit issued by a bank in the United States provides excellent security. The Program Manager must be careful to fully understand the terms and conditions of the Letter of Credit and make certain that the creditor is able to fulfill all conditions. EMS would be able to draw upon the Letter of Credit if invoices are past due or in the event of termination or insolvency by the Customer. ([See Tab 16](#))

3. ASSIGNMENT OF PURCHASE ORDERS

In the event that EMS is providing to the Customer a product that will be passed on by the Customer with little or no value added, EMS could request that purchase orders to its Customer be assigned EMS so that if our Customer is unable to complete performance, EMS may complete delivery. This method essentially gives EMS the right to bypass its Customer and sell directly to its Customer's Customer to divest itself of finished product and inventory.

4. PURCHASE ORDER FROM CUSTOMER'S MORE STABLE CUSTOMER

EMS can request that its Customer's Customer issue a purchase order directly to EMS and financially guarantee the transaction so that the party issuing the Purchase Order will take responsibility for the failure of EMS's immediate Customer to perform. This can

be used in situations where the Customer sells a portion of a system to its Customer for incorporation into an ultimate product. Even if EMS's Customer should be unable to perform, EMS has the financial backing of a sound party and could still sell the product to the ultimate user and minimize its risk.

5. UP-FRONT PAYMENT FOR MATERIAL

Since inventory in the event of cancellation or failure of the Customer to purchase all units scheduled is the most significant exposure to EMS, this potential risk can be eliminated by requiring the Customer to pay for material when purchased so that EMS would hold purchased material for the Customer's account prior to manufacturing. In this method, EMS would have no more exposure than it would have if it dealt with the Customer on a consigned material basis.

While these are the primary methods of reducing financial risk to EMS when dealing with financially weak Customers, the list is not exhaustive.

EMS SHOULD NEVER UNCONSCIOUSLY ACCEPT BUSINESS WHICH HAS AN INORDINATE AMOUNT OF RISK COMPARED TO THE RATE OF RETURN TO THE CORPORATION. EMS IS IN BUSINESS TO PROVIDE QUALITY MANUFACTURING AND DESIGN SERVICES NOT TO ACT AS A FINANCIAL GUARANTOR OF THE SUCCESS OF A CUSTOMER'S PRODUCT.

SAMPLE STAND – BY LETTER OF CREDIT

ISSUE DATE July 4, 20XX

IRREVOCABLE CONFIRMED LETTER OF CREDIT

NUMBER #123456

BENEFICIARY:

EMS, Inc.
4000 Maple Drive
Huntsville, Alabama 35805

ATTN: D. Warbucks
Vice President & Chief Financial Officer

Dear Sirs:

We hereby authorize you to draw on us for account of Customer, Inc., up to an aggregate amount of \$X,000,000 U.S. Dollars, available by your draft, at sight on First National Bank accompanied by a written statement purportedly signed by one who states therein that he/she is an authorized representative of the beneficiary as follows:

“I hereby certify that I am an authorized representative of the beneficiary and certify that this drawing represents amounts past due and owing by Customer, Inc.”

Copies of the invoices representing the amount past due and owing must accompany this statement.

This Letter of Credit may be transferred upon written request. The original of this credit must accompany the request, in order that the transfer when affected may be endorsed thereon.

This Letter of Credit sets forth in full the terms of our undertaking and such undertaking shall not in any way be modified, amended, or amplified by reference to any document, instrument, or agreement referred to herein or in which this Letter of Credit is referred to or to which this Letter of Credit relates, and any such reference shall not be deemed to incorporate herein by reference any document, instrument, or agreement.

All drafts so drawn must be marked:

“Drawn under First National Bank Credit Number #123456.”

We engage with you that all drafts drawn under and in compliance with the terms of this credit will be duly honored by us on delivery of documents as specified if presented at this office on or before December 31, 20XX.

Unless otherwise expressly stated herein, this credit is subject to the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 600, latest revision.

Very truly yours,

Authorized Signature
Issuing Bank

FORM AGREEMENTS AND THE BATTLE OF THE FORMS . . .

Two of the foremost authorities in interpretation of the Uniform Commercial Code in the United States are James J. White and Robert S. Summers. They are professors at the University of Michigan School of Law and the Cornell University School of Law, respectively. They have published several editions of a treatise entitled UNIFORM COMMERCIAL CODE. Their interpretation and analysis of the Uniform Commercial Code including Article 2 of that Code which relates to the sale of goods is well respected and often cited by lawyers and judges alike. Their conclusion on the use of form contracts such as purchase orders, acknowledgements, etc., follows:

Under the present state of the law we believe that there is no language that a lawyer can put on a form that will always assure his client of forming a contract on his client's own terms. For example, such efforts may be frustrated if the responsive document is expressly conditional on assent to that documents terms ... and there the client will not get his own term unless some other section of the Code gives them to him. In our view, if the client must have a term, he should bargain with the other party for that term; he should not get it by his lawyer's sleight of hand. If he must have the term but cannot strike a bargain for it, his only answer may be to raise his price, buy insurance, or as a last resort, have a couple extra martinis every evening and capitalize his corporation more thinly than he otherwise would.

Reliance on a form to make a given term a portion of a contract with knowledge that the other party will probably object, is foolish. If the term is important enough to be required, there should be no deviation from the term and if it is not important, argument over its acceptance is a waste of resources.

EMS, INC.

Interoffice Memorandum

Date: January 15, 20XX

To: Program Managers, Program Administrators, Financial Analysts, and Contract Administrators

From: Dewey Cheatum, Legal/Contracts Department

Copy To: CFO, COO

Subject: Acknowledgment of Customer Purchase Orders

In order to preserve our rights and receive equitable treatment from our customers in circumstances where we do not have a written agreement other than a purchase order, we must acknowledge our customer's purchase orders by sending an acknowledgment letter. We should never return the customer's acknowledgment copy of the purchase order. The acknowledgment letter we send should do or include the following items:

1. Specifically reject the terms and conditions associated with or on the back of the purchase order with which we do not agree. Most of our customers have very inequitable language on the back of their purchase orders relating to warranty, cancellation, rescheduling, etc. If we do not take exception and reject these terms and conditions, we accept them.
2. We should state that our acceptance of the order is conditioned upon the terms and conditions of a referenced quote or bid letter that gives any terms, conditions, or assumptions associated with our pricing. Key items are payment, cancellation, warranty, and schedule flexibility terms. We should include a sentence that indicates that we expressly reject any terms or conditions that are conflicting with our quote or pricing assumptions.

Please see the attached draft acknowledgment that you may want to consider using. I am sure that there are differing circumstances for different customers that require modification or different handling of this issue, and we should address these on a case-by-case basis. However, in the absence of a written agreement other than the customer's purchase order, we must be very careful not to accept the terms of the purchase order if those terms are not acceptable to us. Remember that accepting the customer's purchase order terms and conditions limits any price changes or cancellation recovery to that listed on the back of the order.

If Program Managers have not read the order and do not know the ramifications, they should do so, and address those that are a problem.

If you have any questions or need any additional assistance, please contact me at your convenience.

SAMPLE ACKNOWLEDGMENT LETTER

Customer Inc.
1234 Brown Street
Hi-Tech, CA 09413

ATTENTION: Mr. Buyer

Re: Customer Purchase Orders P1001, P1002 and P1003

Dear Mr. Buyer:

EMS is pleased to accept and acknowledge the referenced purchase orders conditioned upon the following:

1. Payment terms are Net 30 days as opposed to Net 45 as indicated (or any needed correction);
2. All the terms of EMS's quote letter dated September 5, 20XX including those provisions relating to cancellation, warranty, schedule flexibility, and F.O.B. point shall apply; and
3. Any terms conflicting with our September 5, 20XX letter or in addition to those terms are rejected and will not form a basis for our agreement.

If you have any questions or need any additional assistance, please feel free to contact me at your convenience.

Very truly yours,

Sally Smith
Program Manager

cc: Financial Analyst
Contracts

EMS SUGGESTED CONTRACT GUIDELINES

ITEM	STANDARD OR PREFERRED	ACCEPTABLE VARIATIONS	COMMENTS
Term	1 year w/Mutual Renewal Options	Multiyear w/Periodic Price negotiation Option	Provision for Termination for Convenience by either party
Price	Baseline for fixed quantity within a fixed limited period (1 year)	Step pricing or bill back provisions. Other variations as mutually agreed	Variations in accordance with published contribution guidelines
Changes	At customer's written direction provided customer agrees to impact	Proceed on verbal if EMS written confirmation is not objected to	Rapid ECO impact assessment mandatory to maintain program momentum and profitability
Acceptance	To mutually agreed test procedure and inspection criteria at EMS or customer's facility	Within 30 days	EMS and Customer inspection to identical criteria is mandatory
Limitation of Liability	Mutual, no consequential or liquidated damages	None	Mandatory
Cancellation/Termination			
For Convenience	Upon written direction. Customer bears all reasonable cancellation cost, including G&A and Profit	Cost by pre-established cancellation schedule in contract including G&A. Profit negotiable	This is critical to avoid financial risk to EMS
For Default	Upon breach after 30 day cure period without cure		

EMS SUGGESTED CONTRACT GUIDELINES

ITEM	STANDARD OR PREFERRED	ACCEPTABLE VARIATIONS	COMMENTS
Indemnity	EMS to customer on mfg. processes Customer to EMS on design, specifications	EMS to customer on EMS design	Medical, avionics, and other high risk items require detailed analysis and possible higher cost for insurance coverage
Law & Forum	Law and forum of EMS manufacturing location	Customer's law with no specified forum	Do not waive jury trial
Warranty	90 days standard on EMS provided workmanship, flow through of material warranties	Various warranty periods available up to 24 months at additional cost	No warranty of materials, customer's design or functionality. No warranty for fitness for intended function unless designed by EMS
Payment Terms	30 days from date of invoice	45 days at ½% increase in selling price	No discounts. No terms longer than 45 days unless approved by CFO
Delivery	Ex Works origin. Title and risk of loss passes at Ex Works point	F.O.B. term acceptable in U.S.	No duties, broker fees, etc.
P. O. Coverage	90 days and long lead material to forecast Forecast 90 – 180 days	Anything that does not transfer risk of cancellation of, or change to, material to EMS	
Schedule	Frozen 30 days prior to delivery	21 days prior	Critical to financial return

EMS SUGGETED CONTRACT GUIDELINES

ITEM	STANDARD OR PREFERRED	ACCEPTABLE VARIATIONS	COMMENTS
Reschedule flexibility	+/- 25% 30 – 60 days +/- 50% 60 – 90 days +/- 100% >90 days Total quantity maintained, 1 reschedule only	30 – 45 days? 45 – 60 days?	Critical to financial return
CFM or Purchase from Customer	Not preferred	Acceptable with adequate safeguards on schedule delay including carrying cost, down time cost	Critical to financial return

EMS, Inc.

4000 Maple Drive
Huntsville, Alabama 35805

LETTER OF AGREEMENT

This Letter of Agreement (“LOA”), made this the ____ day of _____, 20__ (“Effective Date”), is between _____ (“Customer”) having offices at _____, and _____ (“Manufacturer”), having offices at _____.

Customer and Manufacturer are establishing a business relationship under which Customer may, among other things, have Manufacturer procure components, and manufacture, assemble, test, and perform other services related to the products listed within Attachment A (“Products”). Assuming mutual resolution of technical and business issues, the parties intend to sign a Manufacturing Services Agreement (“Agreement”) on or about _____, 20__.

This LOA is for the purpose of authorizing Manufacturer to begin work immediately, pending a fully negotiated Agreement. This LOA implies no commitment to enter into the Agreement. Both parties acknowledge the execution of an Agreement is contingent upon the mutual consent of the parties, and that should the Agreement not be executed, the express terms of this LOA shall be the sole governing document. This LOA shall continue in full force until it is terminated, pursuant to this LOA, or upon execution of the Agreement.

Customer authorizes Manufacturer to procure the quantity and type of materials, and provide related services, in support of the requirements in Attachment A. Customer represents and warrants to Manufacturer that any materials required to support the requirements of Attachment A comply with the Conflict Minerals Law, Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, any similar applicable laws, and any implementing regulations (collectively, “Conflict Minerals Law”). Customer further agrees to promptly prepare and provide to Manufacturer, upon request, any audits, disclosures, reports, or other sourcing or supply chain information that Customer or Manufacturer may be required by the Conflict Minerals Law to maintain, or to file, submit, or disclose to the Securities and Exchange Commission or any other governmental entity relating to such materials. Without in any way limiting the foregoing, Customer shall provide such further cooperation as Manufacturer may require in order to meet any obligations Supplier may have under the Conflict Minerals Law.

Customer shall issue Purchase Orders for the purpose of Manufacturer manufacturing and shipping Products pursuant to this LOA.

The prices in Attachment A shall be utilized for invoicing. Manufacturer invoices shall be paid in U.S. Dollars net thirty (30) days from the date of invoice, which for shipped units, shall not be issued prior to the date the Products are shipped F.O.B. Manufacturer's dock.

Because Customer may desire to achieve compliance with laws governing environmental compliance, including but not limited to European Union Directive 2002/95/EC on the Restriction of the use of certain Hazardous Substances in Electrical and Electronics Equipment and Directive 2002/96/EC on Waste Electrical and Electronic Equipment ("WEEE") (collectively, "Directives"), all of which limit the importation of certain dangerous substances, Customer shall ensure that all Product designs, bills of materials, and approved vendor lists specify that all components and materials incorporated into Products that need be, or that Customer desires to be, compliant with any environmental laws(s), including the Directives ("Environmentally Compliant"), and the packaging and labeling of such Environmentally Compliant Products, meet the requirements of the applicable environmental laws(s). At Customer's written request, Manufacturer will certify in writing that its manufacturing processes comply with any such applicable environmental laws to the extent such compliance is required under this LOA. For any goods subject to the WEEE Directive, as amended, and including any applicable implementing legislation, Customer agrees to create, obtain, and/or utilize such recycling mechanisms as required by WEEE which provide for the collection of waste electrical and electronic equipment. No adjustments in pricing shall be allowed for Customer's agreement to undertake this responsibility in compliance with WEEE.

Manufacturer's warranty period is for one year from the date of manufacture, and is limited to correction of defects in Manufacturer workmanship only. Manufacturer will pass on to Customer all manufacturers' component warranties to the extent that they are transferable, but will not independently warrant components. This warranty does not include Products that have defects or failures resulting from Environmentally Compliant components or Environmentally Compliant manufacturing processes, including, but not limited to, solder joint failures and other malfunctions caused by lead-free or hybrid soldering processes, new board finishes, new solder alloys or chemistries for which the industry has limited experience, or equipment malfunction resulting from whiskers or other similar phenomena. Customer bears all design and Environmental Compliance responsibility for the Product. MANUFACTURER DISCLAIMS OTHER EXPRESS OR IMPLIED WARRANTIES INCLUDING: ALL WARRANTIES OF MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE, DESIGN, AND INFRINGEMENT.

Customer may terminate this LOA upon written notice to Manufacturer. Upon termination for any reason (including breach by Manufacturer), Customer shall be responsible

for all termination costs. However, Customer's maximum liability shall not exceed: (1) for materials, the quantity and type of materials acquired by Manufacturer in support of this LOA, or other written authorization, plus a reasonable cost of capital and material handling charge; (2) for labor, Customer's authorization to complete and ship Products at the purchase price in effect at the date of termination, a pro rata percentage of the finished Product purchase price for WIP, and the full purchase price for any finished Product; (3) Manufacturer's documented cost to perform Customer authorized non-recurring engineering or associated program duties; and (4) Manufacturer's reasonable and actual expenses incurred either prior to termination or as an unavoidable consequence of termination.

In the event of termination for any reason, Manufacturer shall use reasonable commercial efforts to minimize Customer's liability by canceling all agreements it has entered into and managing material, labor, and overhead cost to a minimum. Manufacturer will deliver to Customer all product components, documentation, and other property owned by Customer, or which Customer has paid for under this LOA.

IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY INDIRECT, CONSEQUENTIAL, OR SPECIAL DAMAGES RESULTING FROM THE CONTINUATION OR ABANDONMENT OF NEGOTIATIONS, OR ANY BREACH OF THIS LOA. IN NO EVENT SHALL MANUFACTURER'S LIABILITY UNDER THIS AGREEMENT (WHETHER ASSERTED AS A TORT CLAIM OR CONTRACT CLAIM) EXCEED THE AMOUNTS PAID TO MANUFACTURER HEREUNDER.

Customer is responsible for the design of the Products. Customer will promptly defend, indemnify and hold Manufacturer harmless from and against every kind of cost, expense, or loss (including attorneys' fees and legal costs) directly relating to any claim or threatened claim: (1) that any Product or portion of a Product violates the intellectual property rights of a third party; (2) that the Product has a design defect; or (3) arising from or related to the distribution, sale, or use of any Product or portion of a Product.

This LOA and its attachments make up the entire agreement between the parties, and supersede prior discussions, except for any related written agreements concerning confidentiality. Both parties expressly reject any pre-printed terms and conditions of any Purchase Order, Acknowledgment, or any other form or document of either party. Only a writing executed by authorized representatives of both parties hereof may amend the terms. This LOA will not be assigned by either party without the other party's prior written consent.

Signature Page Follows

ACCEPTED AND AGREED TO:

MANUFACTURER

By: _____

Name: _____

Title: _____

ACCEPTED AND AGREED TO:

CUSTOMER

By: _____

Name: _____

Title: _____

WARRANTY

XYZ's warranty period is for ninety (90) days from date of manufacture and is limited to correction of defects in XYZ workmanship. "Workmanship" shall mean manufacture in accordance with IPC-A-610, Class 2 or Customer's workmanship standards set forth in the Specifications. XYZ shall, at its option and at its expense, repair, replace or issue a credit for Product found defective during the warranty period. In addition, XYZ will pass on to Customer all manufacturer's Component warranties to the extent that they are transferable, but will not independently warrant any Components.

XYZ shall concur in advance on all Product to be returned for repair or rework. An Authorized Returned Material (ARM) number must be obtained by Customer from XYZ prior to return shipment, and all returns shall state the specific reason for such return. For valid returns, XYZ shall pay all transportation costs for Customer's return of the Product and to ship the repaired or replacement Product to Customer; Customer shall pay these charges, plus a handling charge, for invalid or "no defect found" returns.

This warranty does not include Products that have defects or failures resulting from (a) Customer's design of the Product; (b) accident, disaster (including lightning or excessive voltage), neglect, abuse, misuse, improper handling (including improper handling in accordance with static sensitive electronic device handling requirements), testing, storage, installation, or maintenance; (c) alterations, modifications or repairs by Customer or third parties; or (d) Environmentally Compliant Components or Environmentally Compliant manufacturing processes, including, but not limited to, solder joint failures and other malfunctions caused by lead-free or hybrid soldering processes, new board finishes, new solder alloys or chemistries for which the industry has limited experience, or equipment malfunction resulting from whiskers or other similar phenomena. Customer bears all design and environmental compliance responsibility for the Product. Customer acknowledges that new Environmentally Compliant manufacturing processes may result in unforeseen quality or other issues. Without in any manner limiting the scope of this Section, XYZ shall utilize best practices and industry standards in providing workmanship, and shall cooperate with Customer and suppliers to resolve or minimize such issues. However, XYZ shall not be liable for any increased costs or other liabilities resulting from the same.

THE SOLE REMEDY UNDER THIS WARRANTY SHALL BE THE REPAIR, REPLACEMENT OR CREDIT FOR DEFECTIVE PARTS AS STATED ABOVE. THIS WARRANTY IS IN LIEU OF ANY OTHER WARRANTIES EITHER EXPRESS OR IMPLIED, INCLUDING MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Ways to Shed or Limit Product Liability:

1. Indemnity and Hold Harmless Agreement or contract clause
2. Purchase of Insurance
3. Customer Insurance, EMS named as an additional insured, changes to policy with notice to EMS in advance
4. Review of Design, Inspection, Use, Warnings, and Customer's Warranty
5. Limited Warranty
6. Financially-sound Customer
7. Avoid products that may cause personal injury or catastrophic property damage, i.e., aviation, intrusive medical, nuclear, and explosive devices

Questions to Ask the Customer:

1. What product liability strategy does the Customer have?
2. What has been the Customer's experience in litigation relating to the product? How many claims have been filed?
3. Does the Customer expect us to accept any product liability risk beyond EMS supplied workmanship?
4. What type and how much insurance does the Customer have to cover product liability on the product? What is deductible?
5. Does the Customer generally agree with suppliers to limit consequential damages such as damage indirectly related to product liability or late delivery including down-time charges and its customer's damages?
6. What warranty does the Customer give to its customer?
7. What indemnities or limitations of liability does the Customer get from its customer?
8. What safety or other certifications or standards does the product design or manufacture meet?
9. What are the uses for this product and the product into which it may be incorporated? Military? Aircraft? Nuclear? etc.
10. Is EMS building the entire product or a component part? If a component part, who completes manufacture?

Additional Issues with International Contracts

1. **Currency**: What is the currency for invoice and payment? Is a foreign exchange (FX) clause required due to currency fluctuations?
2. **Choice of Law**: Is the law that is applicable to the contract in harmony with the substantive law assumptions in the contract with respect to warranties, limitations of liability, damages for breach, and other significant contract terms? Have lawyers in the applicable jurisdiction been consulted, and reviewed the contract? Are the parties to the contract signatories to the United Nations Convention on the International Sale of Goods (UNCISG), and has the UNCISG been disclaimed, or accepted in the contract terms?
3. **Dispute Resolution**: What forum has been agreed upon, if any, for resolution of disputes? In what country? Mediation, litigation, or arbitration? If arbitration, what rules will apply? How many arbitrators will there be? What will the language of the arbitration be? What will the nationality of the arbitrator (s) be? Does it matter?
4. **Proper Authority**: Are you sure about the exact name of the legal entity with whom you are contracting? Do the people who are representing your contracting partner have authority to bind the company? Do they have a power of attorney that supports their authorization to bind their company (Mexico, for example)?
5. **Delivery Terms**: Are the parties using INCOTERMS® 2010 in the contract as delivery terms? When doing business internationally, these terms are generally used, and address import/export, carriage, insurance, duties, risk of loss, and who pays for what. However, they do not address transfer of title, which should be addressed separately.
6. **Language of Contract**: Have the parties specified the controlling language in the contract, and of dispute resolution?
7. **Insurance**: Are there any particular insurance concerns regarding international shipment, or shipment by ocean that need to be addressed? Do policies cover risk of loss, and what is the retainage or deductible?
8. **Taxes**: Have all taxes been accounted for and allocated between the parties? If there are value-added taxes in the transaction, is the contracting party that pays such taxes eligible to receive a refund of such taxes, or should another entity, or subsidiary be the contracting party? Will this transaction cause my company to be taxed in another jurisdiction and create a "permanent establishment", or otherwise subject my company to any foreign taxes that can be avoided?
9. **Import/Export**: Is the product being shipped properly classified with respect to its Harmonized Tariff Schedule number, and properly classified for purposes of payment of

duty? Are any special licenses required? Do all parties in the supply chain moving the product have authorization, or a power of attorney, to act as freight forwarder, broker, etc., if required?

10. Inspection/Acceptance: Is there a clear inspection and acceptance criteria with a related limited timeframe for rejection of any product? Does a surveyor need to be engaged to inspect goods as an agent for the buyer?

11. Compliance with Laws: Does the contract require that each party comply with any applicable laws, including those that might be unique or specific to the jurisdictions where the parties reside, where the contract will be performed, or where any product will be used? This may include issues related to packaging, end-of-life management, energy conservation, product longevity, design for end-of-life, material selection, and reduction or elimination of environmentally sensitive materials. It may also include issues related to importing and exporting, chain of custody security (C-TPAT), and prohibitions against corrupt practices like the Foreign Corrupt Practices Act (FCPA) in the United States.