



**McCROMETER, INC.'S STANDARD TERMS AND CONDITIONS OF SALE FOR  
PRODUCTS AND SERVICES  
REV. 1.4 04/17**

**SECTION 1: PRODUCT SALES AND FIELD SERVICES**

**ARTICLE 1: THE CONTRACT**

**ANY PREPRINTED TERMS AND/OR CONDITIONS ON BUYER'S PURCHASE ORDER OR INVOICE SHALL NOT APPLY AND MCCROMETER GIVES NOTICE OF REJECTION OF SUCH TERMS AND/OR CONDITIONS IN THEIR ENTIRETY.**

This document sets forth the Terms & Conditions of Sale for goods manufactured and/or supplied, and services provided, by McCrometer, Inc. of Hemet, California ("McCrometer") and sold to the original purchaser thereof ("Buyer"). Unless otherwise specifically stated herein, the term "McCrometer" includes only McCrometer, Inc. and none of its affiliates. The Contract shall be comprised of the following terms, together with such terms and conditions set forth in McCrometer's written proposal or quotation (the "Quotation"), including any documents, drawing or specifications incorporated by reference, and any additional or different terms proposed in Buyer's purchase order (the "Purchase Order") that are accepted by McCrometer in writing, which together shall constitute the entire agreement between the parties and supersede all previous communications, representations or agreements, either oral or written, with respect to the subject matter hereof. These terms and conditions are subject to change without notice.

**ARTICLE 2: APPLICABLE TERMS AND CONDITIONS:**

An offer by McCrometer in its Quotation that does not stipulate an acceptance date is not binding. These Terms & Conditions of Sale are contained directly and/or by reference in McCrometer's quote, order acknowledgment, and invoice documents. The first of the following acts constitutes an acceptance of McCrometer's offer and not a counteroffer, and creates a contract of sale ("Contract") in accordance with these Terms & Conditions: (i) Buyer's issuance of a purchase order document against McCrometer's offer or quote; (ii) acknowledgement of Buyer's order by McCrometer; or (iii) commencement of any performance by McCrometer pursuant to Buyer's order. Provisions contained in Buyer's purchase documents (including electronic commerce interfaces) that materially alter, add to or subtract from the provisions of these Terms & Conditions of Sale are expressly not a part of the Contract. The Contract shall be deemed to have been entered into upon written acknowledgement of the Purchase Order by an officer or authorized representative of the party to be bound. In the event of a conflict or inconsistency between the provisions of these standard terms and conditions, on the one hand, and specific provisions of Purchase Orders which are accepted by McCrometer in writing, on the other hand, the provisions of these terms and conditions shall govern the resolution of any such conflict or inconsistency, unless expressly agreed to otherwise in writing and signed by McCrometer. No representations or statements of any kind made by any representative of McCrometer, which are not stated herein, shall be binding on McCrometer. No course of dealing or usage of trade or course of performance shall be relevant to explain, supplement, or determine the meaning of any term or provision expressed in these terms and conditions or any Purchase Order.

\\\\  
\\\\  
\\\\



### **ARTICLE 3: PRICE**

Unless requested by Buyer, and included in the Quotation prices or stated in the Purchase Order accepted by McCrometer, prices do not include: packing for storage, freight charges, insurance, taxes (federal, local, or otherwise), customs duties and import/export fees, or any other item not specified in the Quotation, and shall be paid by Buyer. Buyer shall pay any sales, use or other taxes and duties imposed on the transaction or equipment. Prices are subject to change pursuant to Articles 4, 8 and 9 below. The terms of any Purchase Order and pricing information disclosed to Buyer shall remain confidential and shall not be disclosed to any third party without the prior written consent of authorized officer or representative of McCrometer (see Articles 14 & 18 for details).

### **ARTICLE 4: PAYMENT TERMS**

Terms of payment will be determined after a review of Buyer's credit history, unless Buyer already has an account with McCrometer. Payment shall be due within 30 days of the date of McCrometer's invoice in U.S. funds. The parties agree that in the event of any breach of this ARTICLE, McCrometer's damages suffered would be difficult to calculate. Therefore, at the sole option of McCrometer, Buyer shall be charged a late fee payable upon McCrometer's demand on amounts not paid by Buyer when due, including, without limitation, any and all amounts as to which due dates for payment thereof have been accelerated by McCrometer upon Buyer's default, or for any other reason, which shall be equivalent to the interest rate on any and all such amounts at the lower of: (1) one and one-half percent (1.5%) per month, or (2) the highest rate of interest then permitted by applicable law as liquidated damages and not as a penalty, which is the parties' reasonable estimate of fair compensation for the foreseeable losses that might result from the breach. If payment from Buyer is not received in a reasonable time, other Purchase Orders placed by Buyer shall be subject to hold, and will release McCrometer of any further obligation of performance or timely delivery. Orders that exceed \$50,000 U.S. Dollars are subject to 30% down payment; the remaining balance is contingent on credit review. Buyer hereby grants McCrometer a security interest in and to all products, parts, accessories, tools, equipment and materials which may be sold and/or furnished by McCrometer to Buyer, and in all proceeds and products of the foregoing. Buyer authorizes McCrometer to file any financing or continuation statements to perfect such security interest without the signature of Buyer to the extent permitted by applicable law. Such security interest is in addition to any rights McCrometer might have pursuant to applicable Materialmen's Lien, Mechanic's Lien, Construction Lien or comparable statutes.

### **ARTICLE 5: TITLE, DELIVERY AND INSURANCE**

All products sold or licensed, including all equipment, parts, manuals, and related materials required for installation and/or use thereof, shall be FCA Seller's Premises, Hemet, California USA (Incoterms 2010) and all repair or replacement parts may, at McCrometer's option, be FCA McCrometer's designated repair/manufacturing facilities (Incoterms 2010). International deliveries shall be ExWorks Seller's Premises (Incoterms 2010), unless specified otherwise at the time of Quotation and is included in the Quotation/Purchase Order amount. Full risk of loss (including transportation delays and losses) shall pass to Buyer, regardless of whether title has been passed to Buyer, transport is arranged or supervised by McCrometer, or start-up is carried out under the direction or supervision of McCrometer. Loss or destruction of the equipment or injury or damage to the equipment that occurs while risk of such loss or damage is born by Buyer does not relieve Buyer of its obligation to pay McCrometer for the equipment.

MCCROMETER SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGES OR EXPENSE, INCLUDING, WITHOUT LIMITATION, CONSEQUENTIAL OR INCIDENTAL DAMAGES, LOSS OF PROFITS OR REVENUES LOSS OF



USE, OR OTHERWISE, WHATSOEVER INCURRED OR SUFFERED BY BUYER OR BUYER'S CUSTOMERS IF MCCROMETER FAILS TO MEET ANY SPECIFIED DELIVERY SCHEDULE.

Without limiting the generality of the foregoing, McCrometer shall not be responsible for any such delay, damages, expenses, or losses caused by circumstances outside McCrometer's control. To the extent that any cause beyond the reasonable control of McCrometer results in an actual delay in deliveries or the performance of services on the part of McCrometer as herein provided, the time for performance by McCrometer shall be extended for a period of time at least equal to the period of delay plus a reasonable period of time thereafter in order to permit McCrometer to take steps which McCrometer deems to be necessary or appropriate to complete performance.

#### **ARTICLE 6: LATE RELEASE FOR DELIVERY; PRICE ADJUSTMENT**

All quotations and resulting Purchase Order/Agreements are based upon the Buyer's release for delivery of Goods on the Delivery Date as stated on the quotation and/or Purchase Order. If the Buyer delays the release for delivery beyond the agreed Delivery Date through no fault of McCrometer, such delay shall be deemed a change order to the quotation and/or Purchase Order by Buyer and will result in a price adjustment to the Purchase Order. Such price adjustment shall be in an amount to compensate McCrometer for the storage, safety and insurance of the Goods for the duration of the delayed delivery acceptance by Buyer. Such price adjustment shall be agreed to by both Parties prior to shipment.

#### **ARTICLE 7: PATENT OR TRADEMARK INFORMATION**

If the equipment sold hereunder is to be prepared or manufactured according to Buyer's specifications, Buyer shall indemnify and hold McCrometer harmless from any claims or liability for patent or trademark infringement on account of the sale of such goods.

Subject to all limitations of liability provided herein, McCrometer will, with respect to any Products of McCrometer's design or manufacture, indemnify Buyer from any and all damages and costs as finally determined by a court of competent jurisdiction in any suit for infringement of any U.S. patent (or European patent for Products that McCrometer sells to Buyer for end use in a member state of the E.U.) that has issued as of the delivery date, solely by reason of the sale or normal use of any Products sold to Buyer hereunder and from reasonable expenses incurred by Buyer in defense of such suit if McCrometer does not undertake the defense thereof, provided that Buyer promptly notifies McCrometer of such suit and offers McCrometer either (i) full and exclusive control of the defense of such suit when Products of McCrometer only are involved, or (ii) the right to participate in the defense of such suit when products other than those of McCrometer are also involved. McCrometer's warranty as to use patents only applies to infringement arising solely out of the inherent operation of the Products according to their applications as envisioned by McCrometer's specifications. In case the Products are in such suit held to constitute infringement and the use of the Products is enjoined, McCrometer will, at its own expense and at its option, either procure for Buyer the right to continue using such Products or replace them with non-infringing products, or modify them so they become non-infringing, or remove the Products and refund the purchase price (prorated for depreciation) and the transportation costs thereof. The foregoing states the entire liability of McCrometer for patent infringement by the Products. Further, to the same extent as set forth in McCrometer's above obligation to Buyer, Buyer agrees to defend, indemnify and hold harmless McCrometer for patent infringement related to (1) any goods manufactured to the Buyer's design, (2) services provided in accordance with the Buyer's instructions, or (3) McCrometer's Products when used in combination with any other devices, parts or software not provided by McCrometer hereunder.



Buyer agrees not to remove or alter any indicia of manufacturing origin or patent numbers contained on or within the Products, including without limitation the serial numbers or trademarks on nameplates or cast, molded or machined components.

#### **ARTICLE 8: CHANGES**

Buyer may request, in writing, changes in the design, drawings, specifications, shipping instructions and schedules of the equipment. Charges for change requests will be quoted to and paid by Buyer on an item-by-item basis, with a minimum charge of \$550.00 (five hundred fifty dollars) for any change request. Such changes will be implemented only upon receipt of a new or amended Purchase Order, acceptance of which by McCrometer will constitute Buyer's agreement to pay all such additional charges and Buyer shall be solely responsible and liable for all consequences which may result from such changes, including, without limitation, delays in completing delivery.

#### **ARTICLE 9: CANCELLATION OR TERMINATION**

Buyer has the right to cancel the Contract upon fifteen (15) days written notice to McCrometer; and such cancellation is effective only upon the written acknowledgement and authorization of McCrometer. Cancellation of a Purchase Order shall not relieve Buyer of payment under the Contract. McCrometer's receipt of the cancellation notice shall be given to Buyer in writing, and Buyer shall pay McCrometer upon the following schedule: 20% of total Purchase Price if the order has entered Engineering; 75% of the total Purchase Price if McCrometer has ordered/received materials to produce Buyers equipment; 100% of the total Purchase Price if cancellation occurs after completion of the order.

#### **ARTICLE 10: PED DOCUMENT TRANSLATION**

For orders requiring PED certification, the importer is responsible for providing the translation of documentation into the local language of the final destination per PED 2014\68\EU. McCrometer is not responsible for the translation of documentation into languages other than English unless specifically included as a line item on the purchase order, and the purchaser agrees to make such translations available whenever required/requested.

#### **ARTICLE 11: PRICES**

All prices are in U.S. dollars and are based on Delivery as stated above. Prices do not include any charges for services such as insurance; brokerage fees; sales, use, inventory or excise taxes; import or export duties; special financing fees; VAT, income or royalty taxes imposed outside the U.S.; consular fees; special permits or licenses; or other charges imposed upon the production, sale, distribution, or delivery of Products. Buyer will either pay any and all such charges or provide McCrometer with acceptable exemption certificates, which obligation survives performance under this Contract. Buyer is prohibited from setting off any and all monies owed under this from any other sums, whether liquidated or not, that are or may be due Buyer, which arise out of a different transaction with McCrometer or any of its affiliates

#### **ARTICLE 12: FORCE MAJEURE**

McCrometer is excused from performance of obligations under this Contract to the extent caused by acts or omissions that are beyond its control, including but not limited to Government embargoes,



blockages, seizures or freeze of assets, delays or refusals to grant an export or import license or the suspension or revocation thereof, or any other acts of any Government; fires, floods, severe weather conditions, or any other acts of God; quarantines; labor strikes or lockouts; riots; strife; insurrections; civil disobedience or acts of criminals or terrorists; war; material shortages or delays in deliveries to McCrometer by third parties. In the event of the existence of any force majeure circumstances, the period of time for delivery, payment terms and payments under any letters of credit will be extended for a period of time equal to the period of delay. If the force majeure circumstances extend for six months, McCrometer may, at its option, terminate this Contract without penalty and without being deemed in default or in breach thereof.

#### **ARTICLE 13: STANDARD WARRANTY; WARRANTY PERIOD**

Unless a particular product has a different Warranty Period in its documentation, McCrometer warrants that the equipment or services supplied will be free from defects in material, and workmanship for a period 12 months from the date the equipment was first installed, but in no event longer than 18 months from the date the equipment was first shipped by McCrometer. Repairs shall be warranted for 12 months or, if the repair is performed under this warranty, for the remainder of the original warranty period, whichever is less. Buyer shall report any claimed defect in writing to McCrometer immediately upon discovery and in any event, within the warranty period. McCrometer shall, at its sole option, repair the equipment or furnish replacement equipment or parts thereof, at the original delivery point. McCrometer shall not be liable for costs of removal, reinstallation, or gaining access. If Buyer or others repair, replace, or adjust equipment or parts without McCrometer prior written approval, McCrometer is relieved of any further obligation to Buyer under this Article with respect to such equipment.

No equipment furnished by McCrometer shall be deemed to be defective by reason of normal wear and tear, failure to resist erosive or corrosive action of any fluid or gas (unless otherwise specified in Quotations/ Purchase Order Specifications), Buyer's direct or indirect failure (or the failure of its agents or contractors) to properly store, install, operate, or maintain the equipment in accordance with good industry practices or specific recommendations of McCrometer, or Buyer's failure to provide complete and accurate information to McCrometer concerning the operational application of the equipment.

**THE FOREGOING LIMITED WARRANTIES WITH RESPECT TO EQUIPMENT AND PRODUCTS ARE EXCLUSIVE AND IN LIEU OF ANY AND ALL OTHER WARRANTIES OF QUALITY OR PERFORMANCE, EXPRESS, IMPLIED OR STATUTORY, INCLUDING, WITHOUT LIMITATION, ANY AND ALL WARRANTIES OF MERCHANTABILITY OR FITNESS OF SAID EQUIPMENT AND PRODUCTS FOR ANY PARTICULAR PURPOSE. MCCROMETER DISCLAIMS ANY WARRANTY, WHETHER EXPRESS OR IMPLIED, REGARDING THE SUITABILITY OF PRODUCTS AND EQUIPMENT SUPPLIED PURSUANT TO ANY PURCHASE ORDER FOR INSTALLATION IN ANY PARTICULAR SYSTEM OF SYSTEMS. MCCROMETER MAKES NO WARRANTY OF ANY KIND WITH RESPECT TO ANY SERVICES PERFORMED BY MCCROMETER OR ITS AGENTS PURSUANT TO ANY QUOTATION.**

McCrometer does not authorize any person or entity (including, without limitation, McCrometer agents and employees) to make any representations (verbal or written) contrary to the terms of this limited warranty or its exclusions. Such terms of this limited warranty and its exclusions can only be effectively modified in writing and only by the President of McCrometer.

#### **ARTICLE 14: TECHNICAL DOCUMENTS; RESPONSIBILITIES OF PARTIES**

Technical documents furnished to Buyer, such as drawings, descriptions, designs and the like, shall



be deemed provided on a confidential basis, shall remain McCrometer's exclusive property, shall not be provided in any way to third parties, and shall only be used by Buyer for purposes of installation, operation and maintenance of the products sold by McCrometer. Technical documents submitted in connection with a Quotation that does not result in Purchase Order shall be returned to McCrometer if requested.

**Documentation Approvals:** As documentation approvals (drawings, procedures, etc.) are critical in McCrometer's ability to meet the Delivery Date, each party agrees to the dates below. Delays by Buyer in the return of documentation approvals will result in an equitable extension of the Delivery Date.

**McCrometer to Provide to Buyer:** McCrometer shall provide to Buyer Key Engineering Documents that affect the design and manufacturing of the Goods, such as: general arrangement drawings; flow sizings/calculations; inspection test plans; welding procedures, etc. Seller is to provide Key Engineering Documents to Buyer within two (2) calendar weeks from the acceptance of a valid Purchase Order.

**Buyer to provide to McCrometer:** Buyer is to comment and/or approve the Key Engineering Documents within two (2) calendar weeks of submission to Buyer by McCrometer. If the Key Engineering Documents are commented on by Buyer, McCrometer is to provide revised (incorporating Buyers comments) Key Engineering Documents to Buyer within five (5) business days. All further comment/approvals and resubmissions are to be completed within five (5) business days of submission by the other Party.

**Witnessed Tests:** If witnessed testing is required, the Buyer shall provide such witnesses in a timely manner so as not to cause a delay in the Delivery Date. Buyer shall provide their witness within ten (10) business days of Seller's notice of inspection.

## ARTICLE 15: INDEMNIFICATION

Indemnification applies to a party and to such party's successors-in-interest, assignees, affiliates, directors, officers, and employees ("Indemnified Parties"). McCrometer is responsible for and will defend, indemnify and hold harmless the Buyer Indemnified Parties against all losses, claims, expenses or damages which may result from accident, injury, damage, or death due to McCrometer's breach of the Warranty herein, or its negligence or willful misconduct. This indemnification is provided on the condition that the Buyer is likewise responsible for and will defend, indemnify and hold harmless the McCrometer Indemnified Parties against all losses, claims, expenses or damages which may result from accident, injury, damage, or death due to the negligence, omissions, or willful misconduct of the Buyer, or the misuse or misapplication of any goods or services sold by McCrometer to by the Buyer or any third party affiliated or in privity with Buyer.

## ARTICLE 16: LIMITATION OF LIABILITY

McCrometer's only liability under any purchase order shall be to repair or replace equipment and parts which are found to be defective within the applicable warranty period, or, at McCrometer's option, refund the purchase price of such equipment or parts. Mccrometer's maximum liability shall not exceed the purchase order amount of such defective equipment or part, and any liability of McCrometer shall terminate upon the expiration of the warranty period, if not sooner terminated. In no event shall McCrometer be liable to buyer for any incidental, consequential, indirect, special or punitive damages, whether pursuant to contract, in tort, or based upon negligence or strict liability, including but not limited to, damages for loss of profits or revenue, loss of use of the equipment or any associated equipment



used by buyer in connection therewith, lost goodwill, costs of substitution or replacement, costs of any delay or inability to operate the equipment, work stoppage, environmental damage, nuclear incident, loss by reason of shutdown or non-operation, increased expenses of operation, cost of purchase of replacement power or claims of buyer or BUYER's customers for service interruption or other damages suffered by buyer or its customers. In no event shall McCrometer be liable to buyer for any damages whatsoever resulting from the failure of any system or systems in which McCrometer's products are installed.

Buyer shall defend, indemnify, release and hold harmless McCrometer, its directors, officers, employees, agents, representatives, successors and assigns, whether acting in the course of their employment or otherwise, against any and all suits, actions, or proceedings, at law or in equity, and from any and all claims, demands, losses, judgments, fines, penalties, damages, costs, expenses, or liabilities (including, without limitation, claims for personal injury or property or environmental damage) arising from any act or omission of McCrometer, its agents, employees, or subcontractors, or from McCrometer's participation in any legal proceeding alleging the failure or in-operation of a system in which McCrometer's products were installed, in either case except to the extent attributable to the sole negligence of McCrometer. Buyer further agrees to indemnify McCrometer for any reasonable attorneys' fees or other costs that McCrometer incurs in the event that McCrometer has to take legal action to enforce any indemnity provision hereunder.

#### **ARTICLE 17: SITE ACCESS; PREPARATION; WORKER SAFETY; ENVIRONMENTAL COMPLIANCE**

In connection with services provided by McCrometer, Buyer agrees to permit prompt access to equipment. Buyer assumes full responsibility to back-up or otherwise protect its data against loss, damage or destruction before services are performed. Buyer is the operator and in full control of its premises, including those areas where McCrometer employees or contractors are performing service, repair and maintenance activities. Buyer will ensure that all necessary measures are taken for safety and security of working conditions, sites and installations during the performance of services. Buyer is the generator of any resulting wastes, including without limitation hazardous wastes. Buyer is solely responsible to arrange for the disposal of any wastes at its own expense. Buyer will, at its own expense, provide McCrometer employees and contractors working on Buyer's premises with all Personal Protective Equipment (PPE) and information and training required under applicable safety compliance regulations and Buyer's policies. In the event that a Buyer requires McCrometer employees or contractors to attend safety or compliance training programs provided by Buyer, Buyer will pay McCrometer the standard hourly rate and expense reimbursement for such training attended. The attendance at or completion of such training does not create or expand any warranty or obligation of McCrometer and does not serve to alter, amend, limit or supersede any part of this Contract.

If the instrument to be serviced is in a Confined Space, as that term is defined under OSHA regulations, Buyer is solely responsible to insure that the all safety and emergency services are available and in place prior to a McCrometer technician entering the confined space. Safety requirement for confined spaces shall include testing for gas and toxins in the confined space, as well as proper ventilation.

#### **ARTICLE 18: PROPRIETARY INFORMATION**

"Proprietary Information" means any information, technical data or know-how in whatever form, whether documented, contained in machine readable or physical components, mask works or artwork, or otherwise, which McCrometer considers proprietary, including but not limited to service and maintenance manuals. Buyer and its customers, employees and agents will keep confidential all such



Proprietary Information obtained directly or indirectly from McCrometer and will not transfer or disclose it without McCrometer's prior written consent, or use it for the manufacture, procurement, servicing or calibration of Products or any similar products, or cause such products to be manufactured, serviced or calibrated by or procured from any other source, or reproduce or otherwise appropriate it. All such Proprietary Information remains McCrometer's property. No right or license is granted to Buyer or its customers, employees or agents, expressly or by implication, with respect to the Proprietary Information or any patent right or other proprietary right of McCrometer, except for the limited use licenses implied by law.

#### **ARTICLE 19: INSOLVENCY**

McCrometer may immediately cancel all or part of any Purchase Order, without any liability, in the event of: (a) Buyer's insolvency; (b) Buyer's filing of a voluntary petition in bankruptcy; (c) the filing of an involuntary petition to have Buyer declared bankrupt provided it is not vacated within ninety (90) days from the filing date; (d) the appointment of a receiver or trustee for Buyer provided such appointment is not vacated within ninety (90) days from the appointment date; or (e) Buyer's assignment for the benefit of creditors.

#### **ARTICLE 20: LAW AND ARBITRATION**

The law of the State of California shall govern the Contract. The Company, in its sole and absolute discretion, shall have the right to decide whether any disputes arising out of this Contract shall be resolved by binding arbitration in Riverside County, California, U.S.A., administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, including the Option Rules for Emergency Measure of Protection, and judgment on the award rendered by the arbitrator(s) shall be final and binding upon the parties and may be entered in any court having jurisdiction thereof. The language of the arbitration shall be English. The arbitrators are not entitled to award damages in excess of original Purchase Order price as said above in Articles 13 and 16.

Subject to the Company's discretion regarding arbitration set forth above, the parties agree that all actions or proceedings arising in connection with this Agreement shall be tried and litigated only in the courts of the State of California or courts of the United States of America sitting within the State of California. Each party irrevocably accepts for itself and in respect of its or his property, generally and unconditionally, the jurisdiction of such courts. Each party irrevocably consents to the service of process out of any such courts in any such action or proceeding by the mailing of copies thereof in accordance with this Agreement, such service to become effective ten (10) days after such mailing. Nothing in this Agreement shall affect the right of any party to service of process in any other manner permitted by law. Each party irrevocably waives any right it or he may have to assert the doctrine of forum non conveniens or to object to venue to the extent any proceeding is brought in accordance with the provisions of this Article 20.

#### **ARTICLE 21: WAIVER**

Any failure of McCrometer to enforce at any time any of the provisions, rights or remedies of this agreement, to exercise any election or option provided herein, or to require at any time performance by Buyer of any of the provisions hereof, shall in no way be construed to be a waiver of such provisions, rights or remedies, nor in any way construed to affect the validity or enforceability of this agreement, or any part thereof, or the right of McCrometer thereafter to enforce each and every such provision, right or remedy.





## **ARTICLE 22: SEVERABILITY**

In the event that any of the provisions of the Purchase Order or these standard terms and conditions shall be held by a court or other tribunal of competent jurisdiction to be invalid or unenforceable, the remaining portions of such Purchase Order and these standard terms and conditions shall remain in full force and effect, provided that in such event the parties agree to negotiate in good faith substitute enforceable provisions which most nearly affect the intent of the parties in entering into the Purchase Order and these standard terms and conditions. Provided, however, that if the parties are unable to agree upon a replacement provision which most nearly reflects the intent of the parties in entering into the Purchase Order and these standard terms and conditions, any provision of the Purchase Order or these standard terms and conditions prohibited by law or otherwise held invalid or unenforceable shall be ineffective only to the extent of such prohibition, invalidity, or unenforceability, and shall not invalidate or otherwise render ineffective or unenforceable any other terms, conditions, provisions or covenants of the Purchase Order and these standard terms and conditions.

## **ARTICLE 23: FURTHER ASSURANCES**

Each of the parties, without further consideration, shall perform in good faith such other acts, execute and deliver such other documents, and take such other action as may be reasonably required by the parties hereto to carry out the purpose or subject matter hereof. Nothing herein shall be deemed to render McCrometer and Buyer joint venturers or partners of any sort.

## **ARTICLE 24: EXPENSES**

If the Company shall commence legal proceedings against Buyer with respect to the terms, conditions or provisions hereof, including, without limitation, McCrometer's collection of any sums arising or due hereunder or under any agreement between McCrometer and Buyer, Buyer, if Buyer is the nonprevailing party, shall pay to the Company all expenses of said proceedings, including, without limitation, reasonable attorneys' fees and related costs, including costs of enforcement of any judgment rendered in said proceedings. In no event shall the Company be liable to Buyer for any expenses of any proceedings, including, without limitation, reasonable attorneys' fees and related costs, including costs of enforcement of any judgment rendered in said proceedings, whether the Company is the nonprevailing party or otherwise. In addition, Buyer shall pay to McCrometer all costs and expenses, including reasonable attorneys' fees, incurred by McCrometer in connection with responding or participating in discovery in any legal proceeding, whether or not McCrometer is a party to such action.

## **ARTICLE 25: SUCCESSORS AND ASSIGNS**

This agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns; provided, however, that Buyer shall not transfer, sell, assign, pledge or encumber any of its rights, interests, or obligations hereunder without the prior consent of McCrometer. For purposes of the foregoing, a transfer of Buyer's rights, duties and obligations hereunder shall be deemed to have occurred if (1) Buyer is party to a merger in which it is not the surviving entity, or (2) 50% or more of Buyer's voting securities are transferred in one transaction or a series of related transactions.

## **ARTICLE 26: NOTICE**

Any notice required or permitted under this Agreement shall be given in writing and shall be deemed



effectively given upon personal delivery to the party to be notified (or upon the date of attempted delivery where delivery is refused) or, if sent by telecopier, telex, telegram, or other facsimile means, upon receipt of appropriate electronic confirmation of successful transmission, or five days after deposit with the United States Postal Service, by registered or certified mail, or one day after deposit with next day air courier, with postage and fees prepaid and addressed to the party entitled to such notice at the address of the receiving party as designated in the applicable Purchase Order which is the subject of such notice or demand, or at such other address as such party may designate by ten days advance written notice to the other parties to this Agreement.

## **ARTICLE 27: ANTI-CORRUPTION**

Buyer will comply with all local, national, and other laws of all jurisdictions globally relating to anti-corruption, bribery, extortion, kickbacks, or similar matters which are applicable to Buyer's business activities in connection with this Agreement, including but not limited to the U.S. Foreign Corrupt Practices Act of 1977, as amended (the "FCPA"). Buyer agrees that no payment of money or provision of anything of value will be offered, promised, paid or transferred, directly or indirectly, by any person or entity, to any government official, government employee, or employee of any company owned in part by a government, political party, political party official, or candidate for any government office or political party office to induce such organizations or persons to use their authority or influence to obtain or retain an improper business advantage for Buyer or for McCrometer, or which otherwise constitute or have the purpose or effect of public or commercial bribery, acceptance of or acquiescence in extortion, kickbacks or other unlawful or improper means of obtaining business or any improper advantage, with respect to any of Buyer's activities related to this Agreement.

## **SECTION II: TERMS OF CONDITIONS FOR SUBSCRIBER LICENSE AND DATA DELIVERY SERVICES**

(All prior Articles are incorporated herein by reference to the extent they are applicable)

### **ARTICLE 28: TERMS AND CONDITIONS**

These "Terms and Conditions" mean collectively, the terms and conditions contained herein. Any Terms and Conditions originating with Customer are superseded by these Terms and Conditions and shall not be or become part of the contract between McCrometer and Customer unless specifically accepted in a writing signed by a duly authorized officer of McCrometer. McCrometer's commencement of work shall not be construed as acceptance of an order from Customer containing additional or different terms and conditions. McCrometer shall have no liability to Customer of any nature until Customer signs and delivers to the McCrometer the Service Order Form.

### **ARTICLE 29: LIMITED LICENSE**

McCrometer grants to Customer during the term hereof a non-exclusive, non-transferable, non-sublicensable, limited, revocable license to access Customer's Web Page when hosted through McCrometer's network, solely for (a) Customer's internal business operations and (b) accessing Customer Data retrieved from Customer's Monitoring Sites. McCrometer grants no rights other than those granted explicitly herein and reserves and retains for itself and/or its licensors all title, copyright and other proprietary rights in the Data Delivery Services and Customer's Web Page, including all updates, custom modifications and derivatives, all of which shall become the property of McCrometer.

### **ARTICLE 30: FEES; PAYMENTS; TAXES**

Customer shall pay all Fees specified in US dollars. Except as provided below, Fees are non-refundable.



Data delivery and hosting services may be invoiced in the following manner:

Monthly Plan: invoiced in advance;  
Annual Plan: invoiced in advance;  
Satellite Plans: invoiced in arrears based on actual usage; or  
Any other terms specifically stated in the Order.

McCrometer shall invoice Customer as per above and Customer shall pay McCrometer fees for the Services in the amount and on the following terms, free and clear of, and without any reduction for, any and all taxes (the "Fees"). Fees are due thirty (30) days from the invoice date. Delinquent payments shall bear interest at the rate of one and one half percent (1.5%) per month (or the highest rate permitted by law, if less) from the payment due date until paid in full. Payments may be applied first against interest and collection costs and then Fees. Customer agrees to pay all late charges imposed and all reasonable expenses (including attorneys' fees) incurred by McCrometer in collecting unpaid or delinquent amounts.

If Customer's account is thirty (30) or more days overdue, in addition to any of its other rights and remedies, McCrometer may suspend Customer's access to the Data Delivery Services without liability to Customer. Customer shall pay any taxes, including sales, use, personal property, value-added, excise, customs fees, import duties or stamp duties or other taxes and duties imposed by governmental agencies of whatever kind with respect to the Services, including penalties and interest, but specifically excluding taxes based upon McCrometer's net income. When McCrometer has the legal obligation to pay or collect such taxes, the appropriate amount shall be invoiced to and paid by Customer unless Customer provides McCrometer original or certified copies of all tax payments or other evidence of payment of taxes by Customer.

#### **ARTICLE 31: ACCEPTABLE USE**

McCrometer may, in its sole discretion, restrict, suspend, refuse access and/or terminate the access should McCrometer learn of any violation. Customer shall conform to and comply with all applicable laws, rules, regulations, orders and other governmental requirements, now or hereafter in force, related to the Services.

#### **ARTICLE 32: TERM AND TERMINATION**

This Agreement is effective on the date set forth in the Proposal, and shall continue for the term set forth therein. After the initial term, this Agreement shall continue on a month-to-month basis at McCrometer's then current applicable rates unless terminated by either party upon thirty (30) days written notice to the other party given prior to the expiration of the applicable term. Either party may terminate this Agreement in the event the Data Delivery Services are not accessible by Customer at least ninety-five (95%) percent of the time during three (3) consecutive months of any term. Should McCrometer contract with third parties for the provision of Services to Customer, the term shall continue for the length of any such third party contracts. Except as otherwise provided for herein, either party may terminate this Agreement upon the material breach of the other party, if such breach remains uncured for thirty (30) days following written notice to the breaching party. The foregoing notwithstanding, McCrometer may terminate immediately upon Customer's breach of Sections 28, 29, 30, 33 or 34.

Upon any termination of this Agreement, all rights to access the Data Delivery Services and Customer's Web Page terminate. McCrometer shall have no obligation to refund to Customer any Fees and any unpaid Fees shall immediately be due and payable upon termination. The foregoing notwithstanding, should either party terminate due to the unavailability of the Data Delivery Services as provided in this Section 5 above, Customer shall not be obligated to pay Fees for the pertinent months and if already paid, McCrometer agrees to refund to Customer Fees paid during the period of unavailability. The foregoing shall be McCrometer's sole obligation and Customer's exclusive remedy. McCrometer may destroy all backup and stored Customer Data within thirty (30) days of the expiration or termination of this Agreement. Termination of this Agreement for cause shall not limit McCrometer from pursuing other remedies available to it, including equitable relief, nor shall such termination relieve Customer of its payment obligations hereunder.



### **ARTICLE 33: OWNERSHIP OF WEBPAGE, DATA DELIVERY SERVICES AND INTELLECTUAL PROPERTY**

The Customer's Web Page (when hosted by McCrometer), Data Delivery Services, including all Intellectual Property Rights therein, created or developed under this Agreement are, will be and remain the sole and exclusive property of McCrometer and/or its licensors or suppliers. For purposes herein, "Intellectual Property Rights" shall mean any and all now known or hereafter known tangible and intangible (A) rights associated with works of authorship throughout the universe, including but not limited to copyrights, moral rights, and mask-works; (B) trademark and trade name rights and similar rights; (C) trade secret rights; (D) all Data Delivery Services data, content, software, text, typefaces, graphics, logos, button icons, images, interfaces, audio and video chips/files, designs, illustrations, photographs, configurations, displays, screens, concepts and other materials or information appearing on, displayed in connection with, embodied in, contained within or relating to Data Delivery Services and Customer's Web Page including selection and arrangement of materials therein and "look and feel" thereof (but excluding Customer Data); (E) patents, designs, algorithms and other industrial property rights; and (F) all other intellectual and industrial property rights, whether arising by operation of law, contract, license, or otherwise. Neither Customer, its employees, Administrator, Authorized Users nor agents shall assert or claim any ownership interest in the Services, the Flowmeter Equipment, Data Delivery Services, or Customer's Web Page. Customer further agrees to assist McCrometer in every reasonable way to obtain and enforce all Intellectual Property Rights relating to the Flowmeter Equipment, Data Delivery Services or Customer's Web Page.

### **ARTICLE 34: NON-DISCLOSURE OF INFORMATION**

Customer Data is confidential and proprietary information to Customer. McCrometer acknowledges that it will have access to Customer Data in the course of providing the Services and agrees to hold Customer Data in confidence and not to release or give access to Customer Data to any third party unless such individual or entity has a need for such knowledge to perform Services in the furtherance of this Agreement. McCrometer further agrees not to make use of Customer Data for its own benefit or for the benefit of any third parties, other than for the performance of this Agreement. Notwithstanding the foregoing, McCrometer may retain Customer Data for the purpose of analysis and research and to aggregate it with that of other McCrometer customers for statistical analysis, trends or other industry-related purposes so long as such use does not result in the identification of Customer.

The flow meter equipment and all components thereof, such as data transmitting registers, antennae, related software and documentation, Data Delivery Services technology and architecture, terms of this Agreement, Service Order Form including pricing, and any information that comes into Customer's possession of knowledge in connection with McCrometer's processes, methods, equipment, architecture, formulae, financial information, forecasts or marketing and sales information (collectively "McCrometer Confidential Information") consists of confidential and proprietary information of McCrometer, its affiliates, licensors, or third parties. Customer agrees to hold McCrometer Confidential Information in confidence and agrees not to release such information to any individual whether employee, subcontractor or subcontractor employee, customer unless such individual has a need for such knowledge either during the term or after the termination of this Agreement. Customer further agrees not to make use of McCrometer Confidential Information for its own benefit or for the benefit of any third parties other than as specifically required in the performance of this Agreement.

The above limits on disclosure do not include information which (A) is or becomes known publicly through no fault of a party; (B) is learned by a party from a third party entitled to disclose it; (C) is already known to a party before receipt from the disclosure; or (D) is independently developed by a party.

In the event of any breach of these confidentiality obligations, each party acknowledges that the non-breaching party would be irreparably injured and shall be entitled to seek equitable relief, including injunctive relief and specific performance, in any court of competent jurisdiction. Such remedies shall not be deemed to be the exclusive remedies for a breach of this Agreement.

Upon termination of this Agreement, such Confidential Information shall, upon request of the party who disclosed the information, be returned thereto. The party receiving and returning such Confidential Information may make





**ARTICLE 37: GENERAL**

- a. As between themselves, the parties are independent contractors with no authority to contract for or in any way to bind or to commit the other to any agreement of any kind or to assume any liabilities of any nature in the name of or on behalf of the other.
- b. Neither this Agreement nor any license granted hereunder may be assigned by Customer without the prior written consent of McCrometer which may be withheld for any reason and any such assignment is void.
- c. The captions are for convenience and in no way define, limit or enlarge the scope of this Agreement or any of its Sections.
- d. Customer agrees to comply fully with all relevant export laws and regulations of the United States to assure that neither the McCrometer Intellectual Property Rights nor any direct product thereof are (a) exported directly or indirectly, in violation thereof; or (b) are intended to be used for any purposes prohibited thereby.
- e. Any claim by a Customer arising out of or in connection with this Agreement shall be brought within one (1) year of the date on which the claim first arose. In the event any legal action is taken by either party to enforce the terms of this Agreement, the non-prevailing party shall pay all related court costs and expenses, including without limitation, the prevailing party's reasonable consultants' and attorneys' fees.
- f. In dealings between McCrometer and Customer, McCrometer shall be entitled to rely upon any assent by a person using its assigned Password and User ID.

END OF DOCUMENT.