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## **Attachment B -Terms and Conditions**

### **1. BUYER'S AUTHORIZED REPRESENTATIVE**

(a) Buyer's Authorized Purchasing Representative is the individual authorized by Buyer's cognizant procurement organization to administer and/or execute the agreement. Buyer's Authorized Purchasing Representative has sole authority to make contractual commitments on behalf of Buyer, to provide contractual direction, and to change contractual requirements as defined in the agreement.

(b) Buyer's engineering, technical personnel and other representatives may from time to time render assistance or give technical advice or discuss or effect an exchange of information with Seller's personnel concerning the supplies or services being provided under this agreement. No such action shall be deemed to be a change under the "Changes" clause of this agreement and shall not be the basis for an equitable adjustment.

### **2. ASSIGNMENT, SUBCONTRACTING, AND PLACE OF PERFORMANCE**

(a) Neither this agreement nor any payments hereunder are assignable or transferable, in whole or in part, without Buyer's written approval, which approval will not be unreasonably withheld provided, however, that either party may, upon written notice to the other, assign this agreement pursuant to a merger or a sale of all or substantially all of its assets or stock to a third party or to a parent, subsidiary, or affiliate.

(b) Neither the entirety nor any part of this agreement may be further subcontracted without the prior written consent of Buyer.

(c) This provision shall not apply to purchases of standard commercial articles or raw materials.

(d) Seller further agrees that no subcontract placed under this agreement shall provide for payment on a cost-plus-a percentage-of-cost-basis and to select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of this agreement.

(e) Seller shall notify Buyer of any change in the place of performance, including but not limited to change in design, manufacturing, assembly, integration, or testing location of components or lower subassemblies, with regard to the requirements of this agreement. Such notification shall be made to Buyer's Authorized Purchasing Representative not less than 30 days prior to the change to the place of performance.

(f) Buyer may charge Seller any additional cost of inspection or requalification in connection with any change in the place of performance of this agreement.

### **3. CHANGES**

(a) Buyer's Authorized Purchasing Representative may at any time, by written order, without notice to any surety, make changes or additions within the general scope of this agreement in any one or more of the following:

- (1) drawings, designs, statement of work or specifications, or other technical documents;
- (2) method of shipment or packing;
- (3) time and place of inspection, delivery or acceptance;
- (4) quantities, where reasonable;
- (5) delivery schedules, where reasonable; and
- (6) the amount of Buyer/Government-furnished property.



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Seller hereby acknowledges any such direction provided by anyone other than Buyer's Authorized Purchasing Representative is of no force and effect and Seller accepts all risks of accepting and/or otherwise proceeding with such unauthorized direction.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any work under this agreement, whether changed or not changed by any such written order, Seller shall notify Buyer in writing immediately and an appropriate equitable adjustment will be made in the price or time of performance, or both, by written modification of this agreement. Any claim by Seller for such adjustment must be asserted within fifteen (15) days, or such other period as may be agreed on in writing by the parties, after Seller's receipt of the notice of the change. Seller will make available its books and records for the U.S. Government's examination to verify any claim for adjustment by Seller. If Buyer and Seller are unable to agree upon an equitable adjustment in the event of any change directed by Buyer, the matter will be resolved in accordance with the Disputes provision of these terms and conditions. Pending resolution of any such adjustment, Seller will diligently pursue the performance of the order as changed.

### **4. CHOICE OF LAW**

Irrespective of the place of performance, this agreement will be construed and interpreted according to the federal common law of Government contracts as enunciated and applied by federal judicial bodies and by the boards of contract appeals of the federal Government. To the extent that the federal common law of Government contracts is not dispositive, the laws of the state of California shall apply.

### **5. COMPLIANCE WITH LAWS AND REGULATIONS**

(a) Seller shall comply with any applicable laws, Executive Orders, or regulations (including export administration regulations).

(b) Seller agrees to indemnify Buyer against any loss, cost, liability or damage by reason of Seller's violation of any applicable laws, Executive Order, or regulation.

(c) Seller agrees that performance of this agreement is subject to the laws and regulations of the Department of Defense, Department of Energy, or other Federal Government agency, including but not limited to those identified in these terms and conditions. Any knowing willful act to falsify, conceal, or alter a material fact, or any false, fraudulent, or fictitious statement or representation, in connection with the performance of work under this order may be punishable in accordance with applicable Federal statutes.

(d) Seller will not be required to implement Capability Maturity Model Integrated (CMMI) process improvement unless specifically stated in the Statement of Work (SOW).

### **6. DEFAULT OF SELLER**

The provisions of FAR 52.249-6, "Termination (Cost-Reimbursement) (May 2004)" in effect on the date of this order are incorporated in this paragraph by reference. Where necessary to make this FAR provision applicable to this agreement, "Contractor" shall mean "Seller," "Contracting Officer" shall mean "Buyer" and "Government" shall mean "Buyer" or "Government." If bankruptcy, insolvency, dissolution, receivership or equivalent proceedings shall be instituted by or against Seller, or upon Seller's making any assignment for the benefit of creditors or entering into any such arrangement or upon Seller's suspension of its business or becoming insolvent, Buyer shall have the right to terminate this agreement in accordance with FAR 52.249-6.



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### **7. INSPECTION**

(a) Buyer and its customer may inspect and test material, work in progress and supplies at all times and places, during manufacture and otherwise. Buyer's inspection may, in its sole discretion, include physical, visual and/or mechanical review, as well as any documentation necessary to substantiate the meeting of quality requirements or specific requirements set forth in the agreement. If inspection and test are made on Seller's premises, Seller, without additional charge, shall provide reasonable facilities and assistance for the safety and convenience of the inspectors in performing their duties. Inspections and tests by Buyer shall be performed in such manner as not to delay the work unduly. Buyer may charge to Seller any additional cost of inspection and test when material, work or supplies are not ready at the time such inspection and test is requested by Buyer. In case of rejection, neither Buyer, nor its customer, shall be liable for any reduction in value of samples used in connection with such inspection or test.

(b) The inspection, review or approval by Buyer of any work, or of any drawing, design, or other document, will not be deemed to relieve Seller of any of its obligations under any agreement, or to constitute a waiver of any defects or nonconformities. The acceptance by Buyer of any goods or services under any agreement will not be deemed to limit or affect any warranty or right of indemnity granted by Seller under such agreement, these terms and conditions or otherwise.

(c) Except as otherwise agreed in writing, all shipments and supplies furnished under this agreement shall be subject to final inspection and acceptance by Buyer after receipt by Buyer at destination notwithstanding any previous source inspection or any prior inspection of any type. Seller shall maintain an inspection and quality control system acceptable to Buyer and its customer.

### **8. RESPONSIBILITY FOR SUPPLIES**

Except as specifically otherwise provided in this agreement, Seller shall be responsible for supplies meeting the requirements of this agreement until final inspection and acceptance thereof by Buyer, and shall bear all risks as to rejected supplies or supplies requiring correction after notice of rejection.

### **9. SUBSTITUTIONS**

Seller shall not substitute materials or accessories without written consent of Buyer.

### **10. DEFECTIVE WORK**

Notwithstanding any prior acceptance, Buyer, at its option, may reject or require prompt correction (in place or elsewhere), of any supplies or services which are, in Buyer's judgment, defective in material or workmanship or otherwise fail to meet the drawings, designs, statement of work, specifications or other technical documents, or other requirements of this agreement. All supplies furnished under this agreement shall be subject to inspection at destination notwithstanding any previous source inspection, and Seller shall be given notice of any defects, other than latent defects, within a reasonable time after receipt of the supplies and all records (such as affidavits, test reports, drawings, etc.) required to be furnished therewith. Buyer may, in addition to any rights it may have by law, prepare for shipment and ship the supplies to Seller, require Seller to remove them, direct their correction in place or, with authorization by Seller, correct them and the expense of any such action, including transportation both ways, if any, shall be borne by Seller. Buyer may recover by set off or otherwise any and all costs, expenses and damages paid, incurred or suffered as a result of or relating to holding, returning, replacing, correcting or rejecting defective or nonconforming goods or services. If Seller fails promptly to remove such supplies and to proceed promptly to replace or correct them, Buyer may replace or correct such supplies at the expense of Seller, including any excess cost. Seller shall not again tender rejected or corrected supplies unless Seller discloses the former tender and rejection or requirement of correction.



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Seller shall immediately notify Buyer upon discovery of actual or potential non-conformances affecting delivered product.

### **11. DELIVERY**

(a) The Parties expressly agree that time is and shall remain a material element of this agreement and no acts of Buyer, including without limitation, modifications to this agreement or acceptance of late deliveries, shall constitute a waiver of this clause.

(b) Seller will deliver acceptable supplies and services in strict conformity with any delivery schedule and shipping instructions set forth in the agreement issued to Seller by Buyer. Unless otherwise provided in this agreement, delivery in whole or in part shall not be made more than ten (10) days prior to required delivery dates. Buyer may return earlier deliveries at Seller's risk and expense. Seller shall comply with the delivery schedule but shall not make material or production commitments in advance of such time as the Seller reasonably believes necessary to meet the schedule without prior written approval by Buyer. Representatives of Buyer, the Government or both shall at all reasonable times have access to Seller's plant for the purpose of assuring delivery in accordance with the schedule.

(c) If Seller is unable to meet the required delivery schedules for any reason, other than a change directed by Buyer, Buyer shall have the option to (1) terminate this agreement, or (2) fill such agreement or any portion thereof, from sources other than Seller and to reduce Seller's agreement quantities accordingly at no increase in unit price, without any penalty to Buyer. This condition shall not limit Buyer's rights or remedies under the Termination for Default clause contained herein.

### **12. QUANTITY**

Buyer need not accept any variation in quantity except as specified in this agreement. Over shipments may be returned to Seller at Seller's expense, which shall include a reasonable cost for Buyer's handling, or be retained by Buyer at no increase in price.

Physical Optics Corporation monitors the performance of critical suppliers and provides performance reports on a quarterly basis. Seller shall strive to meet or exceed the minimum performance rating of 98% quality acceptance and 98% on-time delivery.

### **13. DISPUTES**

Any dispute arising under this agreement which is not settled by agreement of the parties will be litigated in the state or federal courts of the state of California. During the settlement or litigation of any dispute arising under this agreement, Seller shall proceed diligently with the performance of this agreement unless otherwise agreed between Buyer and Seller.

### **14. FEDERAL, STATE AND LOCAL TAXES**

Except as may be otherwise provided in this agreement, the price includes all applicable Federal, State and local taxes and duties.

### **15. GOVERNMENT OR BUYER PROPERTY**

Seller shall establish and maintain a system in accordance with the provisions of FAR 52.245-1 for the control of the Government or Buyer owned property. Seller shall also notify Buyer if approval of its property system has been withdrawn by the Government. At all times the Government shall have access to Seller's facilities for the purpose of reviewing its compliance with the management of Government or Buyer property related to this purchase.



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### **16. INDEMNITY AND INSURANCE**

(a) Each party will defend, indemnify and hold harmless the other party and its affiliates, and their officers, agents, employees, successors and assigns, against any claims, loss, damage or expense, and expenses of defending claims, including attorneys' fees, for property loss and/or damage, and personal injury and/or death, which may be sustained by third parties and/or by Buyer, its agents, employees or subcontractors, at any tier, which results from performance or nonperformance of this agreement except for claims resulting from the sole negligence of the indemnifying party. The indemnifying party will inform the other party of any claim, demand or suit asserted or instituted against it and, to the extent of the indemnifying party's ability to do so, permit the other party to defend the same or make settlement in respect thereof.

(b) Buyer, at its option, may require Seller to furnish evidence of insurance reasonably satisfactory to Buyer covering the liabilities and indemnification provided above but no acceptance of such evidence by Buyer shall be deemed a waiver or release of such liabilities or duty to indemnify. Seller will at all times maintain with reputable insurance companies comprehensive general liability insurance (including coverage for any liability under any Buyer agreement and these terms and conditions) in the minimum amount of \$1.0 million, or such other minimum amount specified in the relevant agreement. Seller will maintain workers' compensation insurance sufficient to cover all of its general and special employees engaged in work pursuant to any Buyer agreement and insurance against liability for personal injury or death or destruction to property arising out of work in fulfillment of any Buyer agreement, and will provide prompt evidence to Buyer of such coverage upon Buyer's request.

(c) Seller shall comply with the provisions of FAR 52.215-10, 52.215-11, 52.215-12, and 52.215-13 which are incorporated herein by reference to the extent that such clauses are or become applicable to this agreement. Seller shall indemnify and hold harmless Buyer from any amount, loss and expense, including interest assessed by the Government under 10 U.S.C. § 2306a, by which this agreement is determined by the Government to have been defectively priced because of Seller's or Seller's subcontractor's failure to comply with such provisions. The rights of the parties hereunder shall survive completion or termination of this agreement.

### **17. INTELLECTUAL PROPERTY INDEMNITY**

(a) This article shall not apply if Buyer is operating under the protection of an Authorization and Consent clause in its prime contract.

(b) Seller shall indemnify Buyer, Buyer's customer and/or the Government and their respective officers, agents and employees against liability and losses, including costs, for infringement of any United States or foreign patent, copyright, trademark, or other intellectual property arising out of the manufacture or delivery by Seller of supplies or performance of services under this agreement or out of the use or disposal by, or for the account of, Buyer, Buyer's customer and/or the Government of such supplies or services. The foregoing indemnity shall not apply if products are supplied pursuant to Buyer's specification or design.

### **18. INVOICING AND PAYMENT**

When invoices are otherwise required, a separate invoice shall be issued for each shipment, and should include the relevant Buyer agreement number. Unless otherwise specified in this agreement, no invoice shall be issued prior to shipment of goods and no payment will be made prior to receipt of goods and correct invoice. Payment due dates, including Buyer's entitlement to take a discount, will be computed from the date of receipt of acceptable goods or the date of receipt of a correct invoice (whichever is later).



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Unless freight and other charges are itemized, any discount taken will be taken on the full amount of the invoice.

### **19. LIENS**

Seller warrants that it has title to the goods to be delivered under this agreement and shall deliver same free of all liens, claims and encumbrances.

### **20. MILITARY SECURITY REQUIREMENTS**

(a) Seller shall be responsible for safeguarding all classified information in accordance with the provisions of Seller's Security Agreement with the Department of Defense and with all applicable Government requirements including, without limitation, FAR 52.204-2, "Security Requirements," which is incorporated herein by reference.

(b) Seller shall insert in all subcontracts under this agreement that require access to classified information, terms which conform substantially to the language of this clause, including lower-tier subcontracts.

### **21. NEWS OR ADVERTISING RELEASES**

No news release in any way relating to Buyer or Seller concerning the agreement shall be made by either party to any news media or to the general public without the prior approval of the other party. Seller will not, and will require its suppliers and subcontractors to not, advertise or publish the fact that Buyer has ordered supplies or services from Seller, or the terms or nature of such order. Seller will not, and will cause its employees and other representatives to not, disclose such information in company periodicals, press releases, public lectures, sales or other promotional literature, or otherwise. The parties agree that in the event a news release is so approved and made, such news will recognize Buyer and Seller.

### **22. NOTICE TO BUYER OF POTENTIAL DELAYS**

(a) Whenever Seller has knowledge that any occurrence is delaying or threatens to delay the timely performance of this agreement, Seller shall immediately give notice thereof, including all relevant information with respect thereto, to Buyer. Such occurrences shall include, but not be limited to: (1) actual or potential labor disputes or strikes; (2) fires, floods, or unusually severe weather; (3) acts of nature; (4) acts of the Government in either its sovereign or contractual capacity, and any other cause for delay. Neither receipt of such notice by Buyer nor any provision of these terms and conditions will be deemed to be a waiver by Buyer of any of its rights under any agreement, these terms and conditions, at law or otherwise.

(b) Seller agrees to insert this clause, including this Subparagraph (b), in any agreement or subcontract hereunder.

### **23. ORDER OF PRECEDENCE**

The various documents constituting this purchase shall, insofar as is possible, be interpreted so as to be consistent with one another. In the event that a conflict or ambiguity arises in the interpretation of this agreement, said conflict or ambiguity shall be resolved in accordance with the following order of precedence, with the first listed item having a higher precedence than later listed items: (a) provisions required by statute, regulation or Government contract; (b) typed agreement form; (c) this terms and conditions document; (d) Statement of Work; (e) specifications; and (f) drawing(s).



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### **24. INTELLECTUAL PROPERTY RIGHTS**

(a) The rights of the U.S. Government in technical data, computer software and inventions pertaining to the supplies and/or services delivered under this agreement are set forth in the applicable FAR and DFARS clauses incorporated by reference. Buyer shall have the right to utilize the supplies and/or services in performance of Buyer's contractual obligations to its customer, including the right to copy and modify any technical data and computer software delivered under this agreement and the right to deliver such technical data and computer software to Buyer's customer if it is required as a deliverable under Buyer's contract with its customer.

(b) This agreement does not confer or grant to Seller, in any manner whatsoever, any license or right under any patent, trademark, trade secret, maskwork, copyright or other intellectual property right held by Buyer, except as needed to perform the work ordered by Buyer under this agreement.

### **25. PROTECTION OF INFORMATION**

(a) If a separate confidentiality, nondisclosure, or proprietary information agreement exists between Buyer and Seller which relates to the subject matter of this agreement, then confidential or proprietary information furnished by one party to the other party shall be protected pursuant to such agreement, and paragraphs (b) through (g) of this clause shall not apply.

(b) If no separate confidentiality, nondisclosure, or proprietary information agreement exists between Buyer and Seller, paragraphs (c) through (g) of this clause apply.

(c) For purposes of this clause, "Information" shall mean information disclosed to Seller by Buyer in connection with this agreement, which is either identified to Seller as being proprietary or which is information a reasonable person would understand to be such information. Examples of Information include, but are not limited to, customer lists, pricing policies, market analyses, business plans or programs, software, specifications, manuals, print-outs, notes and annotations, performance data, designs, drawings, dimensions, processes, data, reports, photographs, and engineering, manufacturing or technical information related to Buyer's products, services, equipment or processes, as well as duplicates, copies or derivative works thereof. Information shall not mean any information previously known to Seller without obligation of confidence, or which becomes publicly disclosed, or which is rightfully received by Seller from a third party without obligation of confidence.

(d) Information furnished to Seller shall remain Buyer's proprietary property, shall be duplicated only as authorized in writing by Buyer, and shall be returned to Buyer upon request or when no longer required for the performance of this agreement. Seller shall not disclose Information to any third party, and shall take all reasonable precautions to prevent the disclosure of Information to third parties, including any foreign national, firm or country, and foreign nationals employed by or associated with Seller's company except as specifically authorized by Buyer. Seller agrees not to use Information to develop any product, service or system, or to support any third party in the development of any product, service or system.

(e) Data and information provided by Seller shall be considered proprietary only when marked as proprietary. Seller's proprietary data and information will be used by Buyer only upon approval by Seller.

(f) Seller's obligations with respect to Information disclosed hereunder prior to the performance in full, termination or cancellation of this agreement shall not, except as expressly set forth herein, be affected by such performance in full, termination, or cancellation.

(g) Buyer or its authorized representatives may at any time audit all pertinent books, records and files of Seller in order to verify compliance with this clause.



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### **25.1. EXCLUSION OF CONSEQUENTIAL DAMAGES**

In no event shall either party or their affiliates, or its or their directors, officers, employees, shareholders, vendors, subcontractors, representatives and agents, be liable for any consequential, indirect, incidental or other special damages of any kind arising under or in relation to this agreement, however caused, including loss of profits or revenue, loss of data, work interruption or increased cost of work, regardless of whether arising under contract, tort (including negligence), strict liability or otherwise, and regardless of whether such party knew, had reason to know or should have known of the possibility of such damages.