

# SPACEDEV, INC.

## STANDARD COMMERCIAL PURCHASE ORDER TERMS AND CONDITIONS

(May 2008)

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### 1. Definitions

As used in this Purchase Order, the following terms shall have the meanings set forth below:

- (a) "Buyer" or "SDI" means SpaceDev, Inc., a corporation operating in the State of Colorado, as represented by an authorized representative.
- (b) "Purchase Order" means this order in its entirety, including all exhibits, attachments, Statements of Work and releases for any such work issued hereunder.
- (c) "Seller" means the addressee of this Purchase Order or inquiry.
- (d) "SDI Procurement Representative," means a person authorized by Buyer's cognizant procurement organization to administer and/or execute this Purchase Order.

- (e) "Supplies" means the labor, articles, materials, goods, services or other items purchased by this Purchase Order.

### 2. Contract Formation

Acceptance of this Purchase Order, by acknowledgement, receipt of goods or by beginning performance of services by Seller shall constitute acceptance of the conditions set forth below and on the face of this Purchase Order. Acceptance by Seller is limited to the terms of this offer and Buyer objects to, and is not bound by, any additional or differing terms stated in Seller's acceptance. Seller's acceptance of this Purchase Order creates a binding order between Seller and Buyer ("this Purchase Order"), which shall be governed by the terms and conditions herein. Any change to the terms and conditions of this Purchase Order by Seller shall have no legal effect unless expressly agreed to in writing by Buyer.

### 3. Acceptance and Rejection

- (a) Buyer shall accept the Supplies or give Seller notice of rejection or revocation of acceptance ("rejection" herein), notwithstanding any payment, prior test or inspection, or passage of title. No inspection, test, delay or failure to inspect or test or failure to discover any defect or other nonconformance shall relieve Seller of any obligations under this contract or impair any rights or remedies of Buyer.
- (b) If Seller delivers non-conforming Supplies, Buyer may at its option and at Seller's expense (i) return the Supplies for credit or refund; (ii) require Seller to promptly correct or replace the Supplies; (iii) correct the Supplies or (iv) obtain replacement Supplies from another source.
- (c) Seller shall not redeliver corrected or rejected Supplies without disclosing the former rejection or requirement for correction. Seller shall disclose any corrective action taken. Repair, replacement and other correction and redelivery shall be completed within the original delivery schedule or such later time as Buyer's Authorized Representative may reasonably direct.
- (d) All costs and expenses and loss of value incurred as a result of or in connection with nonconformance and repair, replacement or other correction may be recovered from Seller by equitable price reduction or credit against any amounts that may be owed to Seller under this contract or otherwise.

### 4. Delivery

- (a) Time is of the essence and failure to deliver in accordance with the delivery schedule under this Purchase Order, including quantities and times, if unexcused, shall be considered a material breach of this Purchase Order. If, for any reason, Seller does not comply with Buyer's delivery schedule, Buyer may, at its option and without liability, either approve a revised delivery schedule or cancel this Purchase Order. If Seller is late, Seller shall pay the difference between the shipping rate specified and the actual expedited rate. Supplies shall not be supplied in excess of quantities specified in this Purchase Order. No acts of Buyer, including, without limitation, modifications of this Purchase Order, acceptance of late deliveries or payment in any amount, shall constitute waiver of this provision. Buyer also reserves the right to refuse or return at Seller's risk and expense shipments made in excess of Buyer's orders or in advance of required schedules, or to defer payment on advance deliveries until scheduled delivery dates. Buyer may, from time to time, change or direct temporary suspension of delivery schedules.
- (b) Seller shall promptly notify Buyer in writing of any actual or potential delay to the performance of this Purchase Order. Such notice shall include a written recovery schedule, an explanation of the reasons for delay and the actions being taken to overcome or minimize the delay, but such notice and proposal, or Buyer's receipt or acceptance thereof, shall not constitute a waiver of Buyer's rights and remedies hereunder.
- (c) Neither party shall be liable for damages for delay in delivery arising out of causes beyond its reasonable control and without its fault or negligence. If the delay is caused by the delay of a

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subcontractor of Seller and if such delay arises out of causes beyond the reasonable control of both Seller and the subcontractor, and without fault or negligence or either, Seller shall not be liable to Buyer in damages unless the articles or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Seller to meet the required delivery schedule.

### 5. Late Delivery Penalties

In the event that any Supplies ordered under this Purchase Order are not delivered on or before the delivery date specified in this Purchase Order, then for each calendar day that such Supplies are not completely delivered the price of such Supplies shall be reduced by 5% until delivery of the Supplies is complete or the total price for each applicable delinquent delivery of Supplies has been reduced by 25%, whichever occurs first. These liquidated damages set forth herein reflect the mutual agreement of the parties and are considered a fair and reasonable assessment of the damages resulting from late delivery. In no event shall the provisions of this clause negate any other right, remedy or obligation provided to Buyer by this Purchase Order or applicable law. If liquidated damages are assessed as a result of late delivery, the total price of this Purchase Order shall be reduced by the amount of the liquidated damages incurred prior to payment of the invoice for the affected delivery.

### 6. Seller's Notice of Discrepancies

Seller shall immediately notify Buyer in writing when discrepancies in Seller's process or Supplies are discovered or suspected regarding Supplies delivered or to be delivered under this Purchase Order.

### 7. Packaging and Shipment

- (a) Unless otherwise specified herein, the Supplies required under this Purchase Order shall be prepared for shipment and suitably packed to prevent damage or deterioration, and in compliance with transportation regulations. Seller is solely liable for packing design and all charges for design, boxing, drayage, bundling, dungaree, containers, preparation, packing, crating or cartage shall be included in the Purchase Order price. Buyer may charge Seller for any expense incurred by Buyer as a result of improper preservation, packaging, packing marking or method of shipping.
- (b) Buyer reserves the right to specify the mode of shipment. Unless stated otherwise herein, the price includes shipping charges for Supplies sold F.O.B. Destination, Freight Prepaid and Allowed and shall also include all federal state and local taxes and all charges for shipping, hauling, storage, and transportation to the point of delivery.
- (c) Seller shall ship all Supplies to the destination specified by Buyer in this Order. A complete packing list shall be enclosed with all shipments. Seller shall mark containers or packages with necessary lifting, loading and shipping information, including the Purchase Order number, item number, dates of shipment and the names and addresses of consignor and consignee. All shipping documents, shipping labels, packing sheets and bills of lading must show full and completed information, including this Purchase Order number.
- (d) If any transportation charges paid by Seller are subject to reimbursement under the terms of this Purchase Order, Seller shall show such charges on its invoice as a separate line item with the freight bill receipt attached accordingly.
- (e) If Seller is unable to comply with the shipping instructions in this Purchase Order, Seller will contact Buyer's authorized representative.

### 8. Cancellation

Buyer shall have the right to cancel this Purchase Order or any part thereof at any time.

- (a) **Without Cause:** Buyer may, by written notice to Seller, terminate this Purchase Order or work under this Purchase Order for convenience and without cause, in whole or in part, at any time, and such termination shall not constitute default. In

the event of partial termination, Seller is not excused from performance of the non-terminated balance of work under this Purchase Order. In the event of termination without cause by Buyer, Seller shall be reimbursed for actual, reasonable, substantiated and allocable costs, plus a reasonable profit (unless Seller would have sustained a loss on the entire Purchase Order had it been completed) for work performed to date of termination; provided, however, that no amount shall be paid to Seller for (i) any anticipatory profits related to work under this Purchase Order not yet performed, or (ii) costs incurred due to Seller's failure to terminate work as ordered on the effective date of cancellation. Any termination claim shall be submitted to Buyer promptly, but no later than sixty (60) days from the effective date of the termination. In no event shall the total amount paid under this provision exceed the respective prices set forth in this Purchase Order for the work. Buyer may take immediate possession of all work so performed upon written notice of termination to Seller. The provisions of this subparagraph shall not limit or affect the right of Buyer to cancel this Purchase Order for breach of contract and shall not apply to a breach of contract.

- (b) **Breach of Contract:** Buyer may, by written notice to Seller and without any liability to Seller on account thereof, terminate this Purchase Order for default, in whole or in part, if (i) Seller fails to deliver the Supplies within the time specified by this Purchase Order or any written extension; (ii) Seller fails to perform any other provision of this Purchase Order or fails to make progress, so as to endanger performance of this Purchase Order, and, in either of these two circumstances, does not cure the failure within ten (10) days after receipt of notice from Buyer specifying the failure or (iii) in the event of Seller's suspension of business, insolvency, appointment of a receiver for Seller's property or business or any assignment, reorganization or arrangement by Seller for the benefit of its creditors. If Seller fails to cure any failure listed in item (ii) above, Buyer may elect to reperform, repair, replace, or procure the work at Seller's expense. Seller is not excused from performance of the non-terminated balance of work under this Purchase Order.
- (c) Upon termination of this Purchase Order in whole or in part for any reason, Buyer may require Seller to transfer title and deliver to Buyer, as directed by Buyer, any (i) completed Supplies, and (ii) any partially completed Supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information and contract rights (collectively, "Manufacturing Materials") that Seller has specifically produced or acquired for the terminated portion of this Purchase Order. Upon direction from Buyer, Seller shall also protect and preserve property in its possession in which Buyer or its customer has an interest. Buyer shall pay the contract price for Supplies accepted. Payment for Manufacturing Materials accepted by Buyer and price determined in accordance with the "Without Cause" section of this Purchase Order, except that Seller shall not be entitled to profit. Buyer may withhold from any amount due under this Purchase Order any sum Buyer determines to be necessary to protect Buyer or Buyer's customer against loss because of outstanding liens or claims of former lien holders.
- (d) If, after termination, it is determined that Seller was not in default, the rights and remedies of the parties shall be as if this Purchase Order had been terminated according to the "Without Cause" section of this Purchase Order.

### 9. Force Majeure

Except for defaults of Seller's subcontractors at any tier, neither Buyer nor Seller shall be liable for any failure to perform due to any cause beyond their reasonable control and without their fault or negligence. Such causes include, but are not limited to, acts of God or of the public enemy, acts of the Government in its sovereign or contractual capacity, fires, floods, epidemics, terrorism, quarantine restrictions, strikes, freight embargoes and unusually severe

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weather. In the event that performance of this Purchase Order is hindered, delayed or adversely affected by causes of the type described above ("Force Majeure"), then the party whose performance is so affected shall so notify the other party's authorized representative in writing and, at Buyer's option, this Purchase Order shall be completed with such adjustments as are reasonably required by the existence of Force Majeure, or this Purchase Order may be terminated without cause.

### 10. Disputes

In the event that any claim or controversy arising out of this Purchase Order cannot be settled by the parties themselves, the parties agree to attempt in good faith to resolve such claim or controversy by mediation. Pending any decision, appeal or judgment in such proceedings or other settlement of any dispute arising under this Purchase Order, Seller shall proceed diligently with the performance of this Purchase Order in accordance with the decision of Buyer. Any dispute arising under this Purchase Order which is not settled by agreement or pursuant to this clause may be settled by appropriate legal proceedings.

### 11. Labor Disputes

Whenever Seller has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this Purchase Order, Seller shall immediately give notice thereof, including all relevant information relating thereto, to Buyer's authorized representative.

### 12. Remedies

- (a) Except as otherwise provided herein, the rights and remedies of both parties hereunder shall be in addition to their rights and remedies at law or in equity. Failure of either party to enforce any of its rights shall not constitute a waiver of such rights or of any other rights and shall not be construed as a waiver or relinquishment of any such provisions, rights or remedies; rather, the same shall remain in full force and effect.
- (b) Buyer shall be entitled at all times to set off any amount owing at any time from Seller or any of its affiliated companies to Buyer, against any amount payable at any time by Buyer or any of its affiliated companies to Seller.

### 13. Buyer Property

Seller will clearly mark, maintain an inventory of and keep segregated or identifiable all Buyer property and all property to which Buyer acquires an interest by virtue of this Purchase Order. Seller assumes all risk of loss, destruction or damage to such property while in Seller's possession, custody or control and will not use such property, other than in performance of this Purchase Order, without Buyer's written consent. Upon request, Seller shall provide Buyer with adequate proof of insurance against such risk of loss. Seller will promptly notify Buyer if Buyer property is lost, damaged or destroyed. As directed by buyer, upon completion, termination or cancellation of this Purchase Order, Seller will deliver such property, to the extent not incorporated in delivered end products, to Buyer in good condition subject to ordinary wear and tear and normal manufacturing losses. Supplies made in accordance with Buyer's specifications and drawings shall not be furnished or quoted by Seller to any other person or concern without Buyer's prior written consent. Upon completion of this Purchase Order, Seller shall promptly return to Buyer all drawings, specifications and other data furnished by Buyer in connection herewith, together with all copies or reprints then in Seller's possession and control, and Seller shall thereafter make no further use or nor disclose to others, any such drawings, specifications, data or documents or any information derived therefrom without Buyer's prior written consent. Nothing in this clause limits Seller's use, in direct dealing with the Government, of property in which the Government has a vested interest. At the request of Buyer, Seller shall execute any documents, including but not limited to financial statements, required by Buyer to protect its interest in its property.

### 14. Release of Information

Seller shall not publish, distribute or use any information developed under or about the existence of this Purchase Order, or use the SDI

name (or the name of any division, affiliate or subsidiary thereof), logo, trademark, service mark or trade dress, for the purpose of advertising, making, denying or confirming a news release, creating a business reference, creating a website content or for products or service endorsement without prior written approval of Buyer. Seller shall include all provisions of this paragraph in all lower tier subcontracts under this Purchase Order.

### 15. Order of Precedence

All documents in this Purchase Order shall be read so as to be consistent. In the event of conflict, the order of precedence is:

- (a) the Schedule;
- (b) the Terms and Conditions contained herein;
- (c) the Buyer Specification, if any;
- (d) any documents incorporated herein by reference. Seller will not use any specification in lieu of those in this Purchase Order without the written consent of Buyer's authorized representative.

Buyer Specifications shall prevail over those of the Government, and both of the foregoing shall prevail over specifications of Seller.

### 16. Warranty

Seller warrants that the performance of work and services under this Purchase Order shall conform to the highest professional standards. Seller warrants the Supplies delivered hereunder to be free from defects in workmanship, and materials; to be new and of the most suitable grade of their respective kinds; to conform to application specifications, drawings, samples or other descriptions given; to be suitable for the purpose intended; to be of merchantable quality and, if of Seller's design, to meet all of the performance requirements and to be free from defects in design. Seller also warrants that the Supplies shall be so manufactured or constructed as to operate satisfactorily as specified. This warranty shall run to Buyer, its successors, assigns, customers and the users of Supplies covered by this Purchase Order. The aforesaid express warranties shall be in addition to any standard warranty or guarantee of Seller, shall be construed as conditions as well as warranties and shall not be exclusive. Seller agrees to replace or to correct any Supplies not conforming to the foregoing requirements when notified by Buyer within two (2) years after final acceptance or within one (1) year after installation, whichever is earlier, at no additional cost to Buyer. No inspection, test or approval of any kind, including approval of designs, shall affect Seller's obligation under this paragraph. Supplies which have been rejected shall not thereafter be tendered for acceptance unless the former rejection and correction are identified. Replaced or repaired Supplies shall be subject to the provisions of this paragraph to the same extent as the original Supplies, except that the warranty shall run from the last delivery date. Seller shall be liable for and save Buyer harmless from any loss, damage, or expense whatsoever that Buyer may suffer from breach of any of these warranties.

### 17. Inspection

Buyer and its customer may inspect all work at reasonable times and places, including, when practicable, during manufacture and before shipment, including at Seller's subcontractors' locations. Seller, or Seller's subcontractor, shall provide all information, facilities and assistance necessary for safe and convenient inspection without additional charge. If any Supplies are found to be defective in material or workmanship, or otherwise are not in conformity with this Purchase Order, Buyer has the right to reject such Supplies or require their correction. Failure to inspect Supplies, failure to discover defects in Supplies or payment for Supplies shall not constitute acceptance or limit any of Buyer's rights, including, without limitation, those under the warranty provisions of this Purchase Order. Seller shall maintain an inspection system acceptable to Buyer covering the Supplies furnished hereunder. Except as otherwise specified in this Purchase Order: (1) Seller is responsible for all Supplies and for the risk of loss thereof until they are delivered at the designated delivery point, regardless of the point of inspection, and (2) Seller shall bear all

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risks as to rejected Supplies after notice of rejection and (3) Seller shall pay all shipping costs on rejected Supplies.

### 18. Buyer Approvals and Reviews

The review or approval by Buyer of any work hereunder or of any designs, drawings, specifications or documents prepared hereunder shall not relieve Seller of any of its obligations under this Purchase Order, nor excuse or constitute a waiver of any defects or nonconformities in any Supplies furnished under this Purchase Order, nor change, modify or otherwise affect any of the provisions of this Purchase Order, including, but not limited to, the prices and delivery schedules contained herein.

### 19. Prices and Taxes

Unless this Purchase Order specifies otherwise, the price of this Purchase Order includes, and Seller is liable for and shall pay, all taxes, impositions, charges and exactions imposed on or measured by this Purchase Order except for applicable sales and use taxes that are separately stated on Seller's invoice. Prices shall not include any taxes, impositions, charges or exactions for which Buyer has furnished a valid exemption certificate or other evidence of exemption. To the extent that Buyer is required to do so under applicable U.S. law or tax regulations, Buyer may deduct from any payments due to Seller pursuant to this Purchase Order such taxes as Buyer is required to withhold from such payments and pay such taxes to the relevant tax authorities; provided, however, that Buyer provides Seller with relevant tax receipts or other suitable documentation evidencing the payment of such taxes promptly after such taxes are paid.

Seller warrants that the price of all goods and services set forth herein does not exceed that price which is charged by Seller to any other commercial customer purchasing similar services or goods of like quantity, quality and circumstance.

### 20. Invoice and Payment

Invoices shall be supported by such documents in such form as Buyer may reasonably request and bear such certification as may be required by law, regulations or this Purchase Order. All payments are contingent on acceptance of the Supplies by Buyer. Seller shall issue separate invoices for each shipment showing the amount of material shipped and Buyer's Purchase Order number. Part numbers shall appear on all invoices, packages, crates or boxes, bills of lading, express receipts, correspondence and other instruments used in connection with this Purchase Order. Seller shall forward its invoice to the address specified elsewhere in this contract. Payment due date, including discount periods, shall be computed from the later of the scheduled delivery of goods date, the actual delivery of goods date or the date of receipt of a correct invoice. Payment shall be deemed made on the date Buyer's check is mailed or payment is otherwise tendered. Seller shall promptly repay Buyer any amounts paid in excess of amounts due Seller.

### 21. Choice of Law

This Purchase Order shall be governed by and construed and enforced in accordance with the internal law of the state shown in Buyer's address printed on the face of this Purchase Order, including its provisions in the Uniform Commercial Code, but specifically excluding the provisions of the 1980 United Nations Convention on the International Sale of Goods.

### 22. Changes

- (a) Buyer may at any time, by a written notice, and without notice to sureties or assignees, if any, make changes within the general scope of this Purchase Order in any one or more of the following:
- (1) Drawing, designs or specifications
  - (2) Method of shipment or packing
  - (3) Place of delivery
  - (4) Description of services to be performed
  - (5) Time of performance
  - (6) Place of performance
  - (7) Delivery schedule
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the

work under this Purchase Order, Buyer shall make an equitable adjustment in the:

- (1) Price/estimated cost, the delivery or completion schedule, or both
  - (2) Amount of any fixed fee
  - (3) Other affected terms and this Purchase Order shall be modified in writing accordingly
- (c) Seller must submit any "proposal for adjustment" (hereinafter referred to as "proposal") under this paragraph within twenty (20) days from the date of receipt of the written notice of change. However, if Buyer decides that the facts justify it, Buyer may receive and act upon a proposal submitted before final payment of this Purchase Order.
- (d) If Seller's proposal includes the cost of property made obsolete or excess by the change, Buyer shall have the right to prescribe the manner of disposition of such property.
- (e) Failure to agree to any adjustment shall be a dispute under the "Disputes" paragraph. However, nothing in this paragraph shall excuse Seller from proceeding with the Purchase Order as changed.
- (f) Any action taken by Seller which affects any provision of this Purchase Order, including delivery and price, whether or not accomplished with the concurrence of Buyer's employees, shall not entitle Seller to an equitable adjustment in accordance with this paragraph unless such action has been specifically directed by written notice issued by Buyer.
- (g) Sole authority to make changes in the work herein specified is hereby vested to Buyer's authorized representative.
- (h) Notwithstanding the terms and conditions of subparagraphs (a) and (b) above, the estimated cost of this Purchase Order and, if this Purchase Order is incrementally funded, the funds allotted for the performance of this Purchase Order shall not be increased or considered to be increased except by specific written modification of this Purchase Order indicating the new estimated cost and, if this Purchase Order is to be incrementally funded, the new amount allotted to the Purchase Order. Until this modification is made, Seller shall not be obligated to continue performance or incur costs beyond the original estimated cost of this Purchase Order and, if this Purchase Order is incrementally funded, beyond the amount of funds originally allotted for the performance of this Purchase Order.
- (i) If Seller considers that Buyer's conduct constitutes a change, Seller shall notify Buyer's authorized representative immediately in writing as to the nature of such conduct and its effect upon Seller's performance. Pending direction from Buyer's authorized representative, Seller shall take no action to implement any such change.

### 23. Stop Work Order

Buyer may at any time, by written notice/order to Seller, require Seller to stop all or any part of the work called for by this Purchase Order for a period of up to ninety (90) days after the notice is delivered to Seller and for any further period to which the parties may agree. The order shall be specifically identified as a Stop Work Order issued under this paragraph. Upon receipt of the Stop Work Order, Seller shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of ninety (90) days after a Stop Work Order is delivered to Seller, or within any extension of that period which the parties shall have agreed, Buyer shall either:

- (a) Cancel the Stop Work Order, or
- (b) Terminate the work covered by such order as provided in the "Cancellation for Breach of Contract" or "Cancellation Without Cause" paragraphs of this Order.

If a Stop Work Order issued under this paragraph is canceled or the period of this Purchase Order or any extension thereof expires, Seller shall resume work. Buyer shall make an equitable adjustment

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in the delivery schedule, or price, or both, and the Purchase Order shall be modified in writing accordingly, if:

- (a) The Stop Work Order results in an increase in the time required for, on or in Seller's cost properly allocable to the performance of any of this Purchase Order; and
- (b) Seller asserts its right to the adjustment within thirty (30) days after the end of the period of work stoppage; provided that, if Buyer decided the facts justify such action, Buyer may receive and act upon a proposal submitted at any time before final payment under this Purchase Order.
- (c) If a Stop Work Order is not cancelled and the work covered by such order is terminated without cause, Buyer shall allow all reasonable costs resulting from the Stop Work Order in arriving at the termination settlement.
- (d) If a Stop Work Order is not cancelled and the work covered by the order is terminated for breach of contract, Buyer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the Stop Work Order.

At the expiration of the Stop Work Order, Buyer shall either cancel the Stop Work Order, or cancel this Purchase Order as provided in the "Cancellation for Breach of Contract" or "Cancellation Without Cause" paragraphs of this Purchase Order.

### 24. Confidential or Proprietary Information

- (a) Unless otherwise expressly agreed in writing to the contrary, all specifications, information, data, drawings, software and other items supplied to Buyer by Seller shall be disclosed to Buyer on a non-proprietary basis and may be used and/or disclosed by Buyer without restriction. Buyer has executed a separate agreement restricting the use and disclosure of such information, data, software and the like.
- (b) Unless otherwise expressly agreed in writing to the contrary, all specifications, information, data, drawings, software and other items which are (i) supplied to Seller by Buyer or (ii) obtained or developed by Seller in the performance of this Purchase Order or paid for by Buyer shall be proprietary to Buyer, shall be used only for purposes of providing goods or services to Buyer pursuant to this Purchase Order and shall not be disclosed to any third party without Buyer's express written consent. All such items supplied by Buyer or obtained by Seller in performance of this Purchase Order or paid for by Buyer shall be promptly provided to Buyer on request or upon completion of this Purchase Order.
- (c) Unless otherwise expressly agreed in writing to the contrary, any invention or intellectual property first made or conceived by Seller in the performance of this Purchase Order or which is derived from or based on the use of information supplied by Buyer shall be considered to be the property of Buyer and Seller shall execute such documents necessary to perfect Buyer's title thereto. Unless otherwise expressly agreed in writing to the contrary, any work performed pursuant to this Purchase Order which includes any copyright interest shall be considered a "work made for hire."

### 25. Patent, Trademark and Copyright Indemnity

Seller will indemnify, defend and hold harmless Buyer and its customer from all claims, suits, actions, awards (including, but not limited to, awards based on intentional infringement of patents known at the time of such infringement, exceeding actual damages and/or including attorneys' fees and/or costs), liabilities, damages, costs and attorneys' fees related to the actual or alleged infringement of any U.S. or foreign intellectual property right (including, but not limited to, any right in a patent, copyright, industrial design or semiconductor mask work, or based on misappropriation or wrongful use of information or documents) and arising out of the manufacture, sale or use of Supplies by either Buyer or its customer. Buyer and/or its customer will duly notify Seller of any such claim, suit or action; and Seller will, at its own expense, fully defend such claim, suit or action on behalf of indemnitees. Seller will have no obligation under this article with regard to any infringement arising from (a) Seller's compliance with

formal specifications issued by Buyer where infringement could not be avoided in complying with such specifications or (b) use or sale of Supplies for other than their intended application in combination with other items when such infringement would not have occurred from the use or sale of those Supplies solely for the purpose for which they were designed or sold by Seller.

### 26. Infringement

- (a) Seller warrants that all work, materials, services, equipment, parts and other items provided by Seller pursuant to this Purchase Order, which are not of Buyer's design, shall be free from claims of infringement (including misappropriation) of third party intellectual property rights and that any use or sale of such items by Buyer or any of Buyer's customers shall be free from any claims of infringement.
- (b) Seller shall defend Buyer against any suit or proceeding brought against Buyer so far as based on a claim that any product, or any part thereof, manufactured by Seller and furnished under this Purchase Order constitutes an infringement of any patent of the U.S., any trademark, trade secret, copyright or other proprietary rights, if notified promptly in writing and given authority, information and assistance (at Seller's expense) for the defense of same with counsel of Seller's choice, and Seller shall pay all damages and costs awarded therein against Buyer. In case said product or any part thereof is in such suit held to constitute an infringement and the making, use and/or sale of said product or part is enjoined, or said suit is settled on the basis of an undertaking to terminate such making, use and/or sale as is alleged to constitute an infringement Seller shall, at its own expense, either procure for Buyer the right to continue using said product or part, or replace same with non-infringing product, or modify it so it becomes non-infringing or remove said product and refund the purchase price and the transportation and installation costs thereof. The foregoing states the entire liability of Seller for infringement of patent or other proprietary rights by the said products or any part thereof. Any payment made as a result of this provision shall not be considered an allowable cost under this Purchase Order.

### 27. Notice and Assistance

Seller shall report to Buyer promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this Purchase Order of which Seller has knowledge. In the event of any claim or suit against Buyer on account of any alleged patent or copyright infringement arising out of the performance of this Purchase Order or out of the use of any goods furnished or work or services performed hereunder, Seller shall furnish to Buyer, when requested, all evidence and information in possession of Seller pertaining to such suit or claim. Seller shall include all provisions of this clause in all lower tier subcontracts under this Purchase Order.

### 28. Intellectual Property Rights

Seller will promptly disclose to Buyer in writing any invention, works or authorship, improvement, development, discovery or mask conceived or reduced to practice by Seller, either solely or in collaboration with others, hereinafter referred to as intellectual property, using funds paid by Buyer under this Purchase Order. Seller will assign such intellectual property to Buyer. Seller shall execute all documents and do whatever is reasonably necessary to:

- (a) Ensure Buyer will obtain full title to such intellectual property, and
- (b) Enable Buyer to secure copyright protection, or
- (c) File and prosecute applications for patents at Buyer's expense.

### 29. Indemnity

- (a) Seller shall keep its work and all items supplied by it hereunder at Buyer's premises free and clear of all liens and encumbrances, including mechanic's liens, in any way arising from performance of this Purchase Order by Seller or by any of its vendors or subcontractors. Seller may be required by Buyer

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to provide a satisfactory release of liens as a condition of final payment.

- (b) Seller shall, without limitation, indemnify and save Buyer and its customer(s) and their respective officers, directors, employees and agents harmless from and against (i) all claims (including claims under Worker's Compensation or Occupational Disease laws) and resulting costs, expenses and liability which arise from personal injury, death or property loss or damage attributed to, or caused by, the goods, services or other items supplied by Seller pursuant to this Purchase Order, including, without limitation, latent defects in such goods, services or other items, except to the extent that such injury, death, loss or damage is caused solely and directly by the negligence of Buyer, and (ii) all claims (including resulting costs, expenses and liability) by the employees of Seller or any of its subcontractors.

### 30. Assignments and Organizational Changes

- (a) Seller shall not assign any rights or obligations hereunder without the prior written consent of Buyer. Any purported assignment without Buyer's written consent shall be void. Seller agrees to obtain Buyer's written approval before subcontracting this Purchase Order or any portion thereof; provided, however, that this limitation shall not apply to the purchase of standard commercial goods or raw material.
- (b) No assignment, delegation or subcontracting by Seller, with or without Buyer's consent, shall relieve Seller of any of its obligations under this Purchase Order or prejudice any of Buyer's rights against Seller whether arising before or after the date of any assignment.
- (c) Buyer shall not be authorized to pay any proceeds due under this Purchase Order to Seller until Buyer receives written notification that the amount (reasonably identified) has been assigned and that payment is to be made to the assignee. If required by Buyer, assignee must furnish reasonable proof that the assignment has been made and unless he does so, Buyer may pay only Seller.
- (d) Any amounts assigned, pursuant to subparagraph (a) herein, shall be subject to offset or recoupment for any present or future claims of Buyer against Seller. Buyer shall have the right to make settlements and/or adjustments in the estimated cost and fee without notice to any assignee.
- (e) Buyer may assign this Purchase Order to (i) any affiliated company, (ii) any successor in interest or (iii) Buyer's customer.
- (f) Seller shall promptly notify Buyer in writing of any organizational changes made by Seller, including name or ownership changes, mergers or acquisitions.

### 31. Bankruptcy

Buyer may terminate this Purchase Order for default, in whole or in part, by written notice to Seller if (i) Seller becomes insolvent or makes a general assignment for the benefit of creditors or (ii) a petition under any bankruptcy act or similar statute is filed by or against Seller and not vacated within ten (10) days after it is filed.

### 32. Waiver/Approval

- (a) Any action or inaction by Buyer or the failure of Buyer, on any occasion, to enforce any right or provision of this Purchase Order, or the granting of an extension for performance hereunder, will not be construed to be a waiver by Buyer of its rights hereunder and will not prevent Buyer from enforcing such provision or right on any future occasion.
- (b) Buyer's approval of Seller's technical documents and data shall not constitute any waiver of Seller's obligation to comply with the requirements of this Purchase Order or any contract at this or any lower tier.

### 33. Insurance

- (a) Seller shall be solely responsible for any and all Third Party Liability incurred by it in connection with the performance of this Purchase Order.
- (b) Seller shall maintain insurance, and as evidence of acceptance of responsibility, furnish to Buyer Certificates of Insurance,

which shall be obtained and held on file at the facility where the work is being performed.

- (c) If the nature of the work is such that Seller will require use of additional contractors, each subcontractor will be required to maintain insurance coverage in the same amounts and likewise shall furnish Certificates of Insurance evidencing such coverage, to Buyer, before performing any work on the subcontract.
- (d) The following types of insurance and limits are required:
  - (1) Worker's Compensation and Employer's Liability insurance in accordance with all applicable Worker's Compensation, Occupational Disease and Occupational Health and Safety statutes
  - (2) Property Damage
  - (3) Professional Errors and Omissions
  - (4) Motor Vehicle Liability (Personal Injury and Property Damage)
  - (5) Employer's Liability Insurance coverage with limits of \$1,000,000.
- (e) Commercial General Liability Insurance, *shall name SpaceDev, Inc. as an additional insured*, and with not less than the following limits required:
  - (1) Bodily Injury \$1,000,000 per person, \$1,000,000 per occurrence
  - (2) Property Damage \$1,000,000 per occurrence
  - (3) Automotive \$1,000,000 per occurrence
  - (4) Completed operations \$1,000,000 aggregate
  - (5) The insurance requirements pursuant to the provisions stated above shall be in such form and for the full period of this Purchase Order. Ten (10) days' advance written notice by mail to Buyer shall be required, in event of any change or cancellation of said insurance.
- (f) Upon request Seller shall provide Buyer one (1) or more certificates evidencing that all required coverage is in place and shall not be altered or terminated without at least thirty (30) days prior written notice to Buyer from the carrier or carriers. Such certificate(s) shall also indicate that Buyer has been named as an additional insured on all such coverage required herein and that the rights of subrogation have been waived.
- (g) Seller shall include all provisions of this paragraph in all lower-tier subcontracts under this Purchase. Seller shall maintain a copy of all subcontractor's evidence of required insurance and shall make copies available to Buyer upon request.
- (h) Buyer's insurance shall be secondary to any insurance policy carried by Seller.

### 34. Independent Contractor

Seller is an independent contractor in all its operations and activities hereunder. The employees used by Seller to perform work under this Purchase Order shall be Seller's employees exclusively without any relation whatsoever to Buyer. Seller shall be responsible for all losses, costs, claims, causes of action, damages, liabilities and expenses, including attorneys' fees, all expenses of litigation and/or settlement and court costs, arising from any act or omission of Seller, its officers, employees, agents, suppliers or subcontractors at any tier, in the performance of any of its obligations under this Purchase Order.

### 35. International Transactions

- (a) Payment will be in U.S. dollars unless otherwise agreed to by specific reference in the Purchase Order.
- (b) Seller agrees that Buyer, its subsidiaries, affiliates or its designees may exclusively use the value of this Purchase Order to satisfy any international offset obligations that Buyer may have with Seller's country, subject to the offset qualifying laws, rules and regulations of that country.

### 36. Export/Import Controls

- (a) If Seller is a U.S. company that engages in the business of either manufacturing or exporting defense articles or furnishing defense services Seller hereby certifies that it has registered with the U.S. Department of State Directorate of Defense Trade

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Controls and understands its obligations to comply with International Traffic in Arms Regulations ("ITAR") and the Export Administration Regulations ("EAR").

- (b) Seller shall control the disclosure of and access to technical data, information and other items received under this Purchase Order in accordance with U.S. export control laws and regulations, including but not limited to the ITAR. Seller agrees that no technical data, information or other items provided by Buyer in connection with this Purchase Order shall be provided to any foreign persons or to a foreign entity, including without limitation, a foreign subsidiary of Seller, without the express written authorization of Buyer and Seller's obtaining the appropriate export license, technical assistance agreement or other requisite documentation for ITAR-controlled technical data or items. It shall be the sole responsibility of Seller to determine whether the information provided by Buyer is technical data as outlined in the ITAR (22 CFR 120-130) prior to any release to a third party abiding by the terms outlined herein. Seller shall indemnify Buyer for all liabilities, penalties, losses, damages, costs or expenses that may be imposed on or incurred by Buyer in connection with any violations of such laws and regulations by Seller.
- (c) Seller shall immediately notify Buyer if it is or becomes listed on any Excluded or Denied Party List of an agency of the U.S. Government or its export privileges are denied, suspended or revoked.
- (d) Should Seller's products or services originate from a foreign location, those products may also be subject to the export control laws and regulations of the country in which the articles or services originate. Seller agrees to abide by all applicable export control laws and regulations of that originating country. Seller shall indemnify Buyer for all liabilities, penalties, losses, damages, costs or expenses that may be imposed on or incurred by Buyer in connection with any violations of such laws and regulations by Seller. Buyer shall be responsible for complying with any laws or regulations governing the importation of the articles into the U.S.
- (e) Buyer may be required to obtain information concerning citizenship or export status of Seller's personnel. Seller agrees to provide such information as necessary and certifies the information to be true and correct.

### 37. Quality Control

Seller shall establish and maintain a quality control system acceptable to Buyer or the Government for Supplies purchased under this Purchase Order, and Seller shall permit Buyer or the Government to review procedures, practices, processes and related documents to determine such acceptability. Seller shall have a continuing obligation to promptly notify Buyer or the Government of any violation of or deviation from Seller's approved inspection/quality control system and to advise Buyer of the quantity and specific identity of any Supplies delivered to Buyer during the period of any such violation or deviation.

### 38. Quality Assurance Provisions

The Quality Assurance provisions contained in document number D10133 apply when specified by number on the Purchase Order. Suppliers shall impose specified requirements on lower-tier suppliers of parts, materials, and services.

### 39. Quality and Workmanship

Unless otherwise specifically stipulated in this Purchase Order, all equipment, material and articles incorporated into any Supplies shall be new, free from defects and of the most suitable grade for the purpose intended. All work under this Purchase Order shall be performed in a skillful and workmanlike manner and shall be consistent with the best practices of Seller's industry. If at any time Buyer notifies Seller that any such equipment, material, article or workmanship fails to meet the foregoing standards, Seller shall, at its expense, promptly take all remedial steps required to meet those standards.

### 40. Compliance with Laws

Seller warrants that it will comply with all federal, state and local laws, including, but not limited to, any statute, rule, regulation, judgment, decree, order or permit applicable to its performance under this Purchase Order.

### 41. Fair Labor Standards Act

Seller represents that all Supplies sold under this Purchase Order have been manufactured in compliance with all terms, rules and regulations issued under the Fair Labor Standards Act of 1938, as amended. The administration and enforcement of the Fair Labor Standards Act are the responsibility of the U.S. Department of Labor, and any question as to the requirements of the Act or its applicability to work required by this Purchase Order should be addressed to the Administrator, Wage and Hour and Public Orders Division, U.S. Department of Labor, Washington, D.C., 20210, or to a Labor Department Regional Office.

### 42. Compliance with Occupational Safety and Health Act (OSHA)

If Seller furnishes equipment, goods or materials pursuant to this Purchase Order such equipment, goods or materials shall comply with the Occupational Safety and Health Act of 1970 ("OSHA") and regulations issued pursuant thereto. Seller agrees to repair, modify or replace any equipment, goods or materials not complying with OSHA at its sole cost and expense and to hold harmless and indemnify Buyer from any liability and expense (including attorneys' fees) by reason of property damage or personal injury (including death) occasioned in whole or in part from a violation of OSHA standards.

### 43. Hazardous Materials List

Seller agrees to submit, in triplicate, a list of the hazardous materials (including those considered as ingredients) with their common chemical names and percentage of content of each to be incorporated into the goods under this Purchase Order. A statement will be made to the effect that the degree of toxicity will not be increased by making any change in the composition without first advising Buyer's authorized purchasing representative. All shipments containing hazardous materials will be clearly marked in accordance with all applicable federal, state and local regulations.

### 44. Dangerous Goods and Hazardous Materials

Packaging, packing, marking, labeling, shipping paper designations and certifications, handling and movement of materials ordered herein will be in accordance with all relevant and applicable U.S. laws and regulations, including 49 C.F.R. Subt. B, Ch. I, Subch. C, and all international regulations (e.g., IATA or IMDG) covering shipments of dangerous goods or hazardous materials.

### 45. Hazardous Material - Material Safety Data Sheet (MSDS)

- (a) Prior to shipping hazardous materials (solids, liquids, cryogenic liquids, gases) hereunder, Seller shall provide Buyer with two copies of the Material Safety Data Sheet ("MSDS") for each material, inclusive of all required information as described in 29 CFR 1910.1200.
- (b) DEFINITIONS - A hazardous material is a material which:
  - (1) Is defined as a hazardous material by OSHA, DOT, EPA, IATA or any other federal, state or local environmental or health agency.
  - (2) In the course of normal operations or foreseeable emergencies, may produce dusts, gases, vapors, mists, fumes or smoke.
  - (3) If used without special precautions, would constitute a health or physical hazard to humans.
- (c) Where two or more hazardous materials are supplied separately or in kit form for the purpose of combining such materials to form an end compound, which is the result, in whole or in part, of a chemical reaction, Seller will provide an MSDS for the end compound as well as for each component part.
- (d) Seller will send one copy of the MSDS to Buyer's authorized purchasing representative prior to shipment and include one copy with the shipment.

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- (e) Proprietary or trade secret information about products containing a hazardous material, as defined above, will be disclosed as required by 42 USC 11043, 40 CFR 372.45 and 29 CFR 1910.1200(i).
- (f) Mandatory resubmission of an MSDS is required with each change in formulation of the material that affects its hazardous characteristics, with each change in information regarding the material's hazardous characteristics, and with each change in information regarding handling procedures for the material.
- (g) The following additional information will be included in an attachment to the MSDS:
  - (1) NFPA (National Fire Protection Association) hazard identification signal numbers and symbols.
  - (2) Proper DOT shipping name, UN number, hazard-class number, packing-group number, labeling requirements and any specialized container requirements.

the work specified herein is hereby granted by Buyer to the SDI Procurement Representative of this Purchase Order. All contractual direction in order to be valid must be written and signed by the SDI Procurement Representative.

### 46. Gratuities/Kickbacks

- (a) No gratuities (in the form of entertainment, gifts or otherwise) or kickbacks shall be offered or given by Buyer, to any employee of Seller for the purpose of obtaining or rewarding favorable treatment as a supplier.
- (b) By accepting this Purchase Order, Seller certifies and represents that it has not made or solicited and will not make or solicit kickbacks. Seller further warrants that neither it nor any of its employees, agents or representatives has offered or given any gratuities to Buyer's employees, agents or representatives with a view toward securing this Purchase Order or securing favorable treatment with respect thereto.

### 47. Entire Agreement

The terms and conditions set forth herein, including all referenced documents, exhibits and attachments, constitute the entire agreement of the parties and supersede all previous verbal or written representations, agreements and conditions with respect to the subject matter hereof. No modification of the requirements of this Purchase Order, and no communications which vary from or add to any terms of this Purchase Order will be binding unless in writing and signed by Buyer's authorized representative.

### 48. Severability

If any provision of this Purchase Order or application thereof is found invalid, illegal or unenforceable by law, the remainder of this Purchase Order will remain valid, enforceable and in full force and effect, and the parties will negotiate in good faith to substitute a provision of like economic intent and effect.

### 49. Competition in Subcontracting

Seller shall select lower tier subcontracts (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of this Purchase Order and shall include all necessary terms in such subcontract.

### 50. Standards of Business Ethics and Conduct

By the acceptance of this Purchase Order, Seller represents that it has not participated in any conduct in connection with this Purchase Order that violates the Standards of Business Ethics and Conduct of SDI (available at [www.spacedev.com](http://www.spacedev.com)) or, alternatively, equivalent Business Ethics and Conduct Standards of Seller. If, at any time, Buyer determines that Seller is in violation of the applicable Standards of Business Ethics and Conduct, Buyer may cancel this Purchase Order upon written notice to Seller and Buyer shall have no further obligation to Seller.

### 51. Survivability

Seller's obligations, including but not limited to obligations under the Cancellation Without Cause, Cancellation for Breach of Contract, Proprietary Rights, Release of Information, Warranty, Infringement, Compliance with Law, Responsibility and Insurance, Indemnity Against Claims and Export/Import Controls provisions of this Purchase Order, shall survive termination, expiration or completion of this Purchase Order.

### 52. Contractual Direction

Sole authority to make changes in or amendments to this Purchase Order and to effect deviations (by way of addition or deletion) from