



Ballard Power Systems standard global terms of purchase

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Revision History

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OE	CO39344	Removed individual names and "commercial" from Commercial confidential on the cover page. Updated the cover page. No change in the content.	May 31, 2023
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1.0 Purpose

The purpose of this policy is to define standard global terms of purchase as used by Ballard Power Systems in communications.

2.0 Scope

These terms and conditions and associated documents are issued on behalf of the Ballard company identified on the face of a Purchase Order as the "Buyer" and will apply to all orders issued to the Seller for parts and materials for inventory and non-inventory goods and services ("Supplies"). Purchase Orders and other associated purchasing documents will be valid without signature if issued by Buyer through its computer system or other electronic means. The reference to Purchase Order herein shall include a blanket Purchase Order, Release, Parts Notification Order, Purchase Notification, Claim Summary, Tooling Purchase Order, or similar documents issued by Buyer to Seller.

3.0 Definitions

3.1 OFFER, ACCEPTANCE

- a. A Purchase Order (or Release against a blanket Purchase Order) is an offer to Seller by Buyer to enter into the purchase and supply agreement it describes. Each Purchase Order will be deemed accepted by Seller as soon as Seller commences performance or ships material against the Purchase Order, unless the Seller rejects the Purchase Order in writing within five Business Days after the date thereof.
- b. Acceptance is expressly limited to the terms of Buyer's offer. Once accepted, such Purchase Order together with these terms and conditions will be the complete and exclusive statement of the purchase agreement. Regardless of whether Seller has provided Buyer with Seller's terms and conditions or whether Seller has based any quote on Seller's terms and conditions, the Buyer's terms and conditions will be the only terms and conditions applicable to a Purchase Order. Any modifications proposed by Seller are expressly rejected by Buyer and shall not become part of the agreement in the absence of Buyer's written acceptance.
- c. Notwithstanding any other provisions of this Purchase Order or any document referenced herein, Buyer's designated contract administrator or purchasing representative is the only individual authorized to make the changes in or redirect the work required by this Purchase Order. Where Buyer's approval is required under the terms of this Purchase Order, it will be construed to mean the approval of such contract administrator or purchasing representative. If the Seller effects any change at the direction of any other person, the change will be considered as having been made without authority and an adjustment will not be made in the purchase order price or delivery schedule as a result thereof. No agreement or understanding will be binding on Buyer unless made in writing and signed by the designated contract administrator or purchasing representative.

3.2 MODIFICATIONS

- a. Buyer, at any time, by way of written notice to Seller, may change the design (including drawings, materials and specifications), processing, method of packing and shipping, and the date or place of delivery of the Supplies.
- b. If any such change affects cost or delivery, Buyer and Seller will discuss adjusting the purchase price and delivery schedules equitably. Any claim for adjustment by Seller will be deemed waived unless requested and sent in writing to Buyer within 30 days from the receipt by Seller of the change.
- c. Seller will not make any change in the design, processing, packing, shipping or date or place of delivery of the Supplies unless done pursuant to Buyer's instructions or with Buyer's written approval.

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3.3 QUALITY

For orders initiated by a U.S. office of Buyer or if specified on Buyer's Purchase Order, Seller will supply all Supplies in accordance with Buyer's quality standard and/or its applicable supplements. Production parts are to be delivered in accordance with "Advanced Project Quality Planning (A.P.Q.P.)" and the "Production Part Approval Process (P.P.A.P.)".

3.4 BAILED PROPERTY

Seller bears all responsibility for loss of and damage to any property owned by Buyer and in Seller's possession or control for use in performing a Purchase Order, including responsibility for loss and damage which occur despite Seller's exercise of reasonable care, but excluding normal wear and tear. Seller will

- I. properly house and maintain such property on Seller's premises,
- II. prominently mark it Property of Buyer,
- III. refrain from commingling it with the property of Seller or with that of a third party,
- IV. adequately insure such property against loss or damage, and
- V. not move it to another location whether owned by Seller or a third party, without the prior written consent of Buyer, except in the case of an emergency, Seller may move such property provided that it gives Buyer notice that the property has been moved and the location of the property as soon as reasonably practicable. Buyer will have the right to enter Seller's premises at reasonable times to inspect such property and Seller's records pertaining thereto. Where permitted by law, Seller waives any lien that Seller might otherwise have on any of Buyer's property for work done thereon or otherwise. Seller will assign to Buyer any claims Seller has against third parties with respect to Buyer's property. Upon request, Seller immediately will deliver such property at Buyer's option F.O.B. Carrier Seller's facility (Ex Works Loaded) or F.O.B. Buyer's premises (C.I.F. Buyer Plant/Delivered Buyer Plant), properly packed and marked in accordance with the requirements of the carrier and Buyer. Seller will cooperate with Buyer's removal of the property from Seller's premises.

3.5 DELIVERY DATES, RELEASES

If delivery dates are not specified in a Purchase Order, Seller will procure materials and fabricate, assemble, and ship Supplies or provide services only as authorized in shipment releases issued to Seller by Buyer. Buyer may return over shipments to Seller at Seller's risk and expense for all packing, handling, sorting, and transportation. At Buyer's sole discretion, early shipments will be returned at Seller's risk and expense. Buyer, at any time may change or temporarily suspend shipping schedules specified in a Purchase Order or shipment release or other written instructions issued by Buyer pursuant to this Section. Time and quantity are of the essence in any Purchase Order. If Seller has reason to believe that deliveries will not be made as scheduled, Seller will immediately provide to Buyer written notice setting forth the cause of the anticipated delay and the suggested new delivery date, which will be subject to negotiation by the parties. Unless otherwise agreed, delivery times specified are the times of delivery of the Supplies at Buyer's designated place of delivery or destination. Unless otherwise specifically provided on the face of the Purchase Order, the Supplies ordered will be delivered on Ex works term. The term "EXW" has the meaning ascribed in the Incoterms 2010 published by the International Chamber of Commerce.

3.6 PACKING, MARKING, AND SHIPPING

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- a. Seller will pack, mark and ship Supplies in accordance with all applicable packaging standards of Buyer and, as appropriate, the carrier transporting such Supplies. Buyer's standards for Supplies shipped to all other destinations may be requested from Buyer's representative. Seller will ensure that any third parties who supply packaging for Buyer's Supplies agree to comply with such standards. Seller will reimburse Buyer for all expenses incurred by Buyer as a result of improper packing, marking, routing, or shipping.
- b. Upon request, Seller will assist Buyer with regard to packing, marking, routing, and shipping that will enable Buyer to secure the most economical transportation rates.
- c. Seller will not charge separately for packing, marking, or shipping, or for materials used therein unless Buyer specifies in writing that it will reimburse Seller for such charges.
- d. Buyer may require shipment of any of the Supplies by a more expeditious method of transportation if Seller fails to meet the shipping requirements of a Purchase Order and Seller will bear the cost difference of such transportation unless such failure is due to an excusable delay as specified in Section 22.
- e. For Supplies that may contain potentially hazardous materials, if requested by Buyer, Seller shall promptly furnish to Buyer in whatever form and detail Buyer requests
 - i. a list of all potentially hazardous ingredients in the Supplies
 - ii. the quantity of one or more such ingredients and
 - iii. information concerning any changes in or additions to such ingredients. Before shipping the Supplies, Seller agrees to furnish to Buyer sufficient warning and notice in writing (including appropriate labels on the Supplies, containers and packing) of any hazardous material that is an ingredient or a part of any of the Supplies, together with such special handling instructions necessary to advise carriers, Buyer, and their respective employees how to exercise that measure of care and precaution that will best prevent bodily injury or property damage in the handling, transportation, processing, use or disposal of the Supplies, containers and packing shipped to Buyer.

Seller shall comply with all applicable federal, state, provincial and local laws and regulations pertaining to product and warning labels.

Unless otherwise specified, all Supplies will be packed, packaged, marked, and otherwise prepared for shipment in a manner which is

- a. in accordance with good commercial practice;
- b. acceptable to common carriers for shipment at the lowest rate for the particular Supplies; and
- c. adequate to insure safe arrival of the Supplies at the named destination. The Seller will mark all containers with necessary lifting, handling and shipping information, Purchase Order numbers, date of shipment and names of the parties. An itemized packaging sheet must accompany each shipment. No partial or complete delivery will be made prior to the date or dates shown on the Purchaser Order unless Buyer has given prior written consent.

3.7 SHIPPING DOCUMENTS

- a. For Supplies shipped to European destinations:
 - I. Bills of Lading and Advice Notes must accompany each material shipment.
 - II. Specific delivery terms applying to each Purchase Order will be stated thereon and on any other such documents as are referenced on the relevant order.

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- b. For Supplies shipped to North American destinations:
 - I. Seller will obtain a straight bill of lading from the carrier of the Supplies and will include on each packing slip and bill of lading the relevant Purchase Order number, contents, quantity and the destination address.
 - II. Seller will include a numbered master packing slip with each shipment. For shipments of less than a full carload or truckload, the slip will be included in one of the packages that will be marked "Packing Slip Inside." For full carload and truckload shipments the master packing slip will be enclosed in an unsealed envelope that is affixed near the door on the inside of the freight vehicles.
 - III. Seller will retain the original bill of lading for three years from the date of shipment unless otherwise directed by the Buyer.
- c. For each international shipment, Seller will comply with the customs invoicing and documentation requirements of the destination country. Seller will include a priced invoice (if required) with the master packing slip and upon request will furnish all other documentation required for export from Seller's country or import into Buyer's country. Any and all benefits or credits resulting from a Purchase Order with Buyer including but not limited to trade credits, export credits, customs drawbacks, rebate of taxes, fees, etc. will belong to Buyer (unless otherwise stated on a Purchase Order or a country's practice is to let credits remain with Seller). Seller upon request will furnish all documents required to obtain the foregoing benefits and credits and will identify the country of origin of the materials used in the Supplies and the value added thereto in each country. Additional customs information is available upon request from Buyer's customs department in the destination country.

3.8 INSPECTION

Buyer at its option may reject and return at Seller's risk and expense, or retain and correct, Supplies that fail to conform to the requirements of a Purchase Order even if the nonconformity does not become apparent until the manufacturing or processing stage. If Buyer elects to correct the Supplies, it will consult with Seller on the method of correction. Seller will reimburse Buyer for all reasonable expenses resulting from rejection or correction. Payment for any Supplies will not be deemed to be acceptance thereof.

3.9 INVOICES, PAYMENT, CURRENCY

- a. Buyer's usual payment process is to pay the price for the Supplies in cleared funds to the bank nominated by the Supplier on or before the last Business Day of the month following the month of receipt by Buyer of the Supplies or invoice, whichever is later, such payment to be made by cheque or credit transfer. Invoices must reference the Purchase Order number under which it was issued.
- b. Any additional or special payment terms will be as specified in the relevant Purchase Order.
- c. Seller agrees that all its accounts with Buyer will be administered on a net settlement basis and that Buyer may set off and recoup debits and credits, including Buyer's attorney fees and costs of enforcement, against any of Seller's accounts regardless of the basis for such debits or credits and without additional notice. In this subsection 9
- d. "Buyer" includes Buyer's parent, subsidiaries and affiliates, and "Seller" includes Seller's parent and subsidiaries.
- e. Unless a Purchase Order specifically states otherwise, all payments for Supplies shall be made in U.S. dollars for deliveries to North American destinations, and Euro for deliveries to European destinations.

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3.10 SERVICE AND REPLACEMENT PARTS

- a. At Buyer's request, Seller will sell to Buyer
 - i. the Supplies necessary to fulfill Buyer's service and replacement requirements for such Supplies at the prices specified in the Purchase Order plus any actual cost differential for packaging, and
 - ii. if such Supplies are assemblies, service and replacement parts of the assemblies at prices such that the total price of all parts of the assembly does not exceed the price of the assembly specified in the Purchase Order less assembly costs, plus any actual cost differential for packaging
- b. At Buyer's request during the ten-year period after Buyer's purchase, Seller will sell to Buyer Supplies to fulfill Buyer's service and replacement requirements at the prices specified in a Purchase Order plus actual cost differentials for packaging and manufacturing. During the tenth year of such period, Buyer and Seller will negotiate in good faith with regard to Seller's continued manufacture of service and replacement Supplies.
- b. (Seller shall comply with Buyer's applicable Service Parts Guide for such Supplies, if issued.

3.11 APPLICABLE TAXES

The total price specified for Supplies on a Purchase Order will include all elements of duty and tax as specified in the relevant delivery terms (under Incoterms) with the exception of value added tax (V.A.T.) and/or any state or local sale or use tax, if applicable, which will be shown separately on Seller's invoice.

3.12 WARRANTY

- a. Seller warrants that Supplies under a Purchase Order will, during the warranty period specified below, conform to the applicable drawings, specifications, or other description furnished pursuant to the Purchase Order, regulations in force in countries where the Supplies or Buyer's products equipped with the Supplies are to be sold, be free of defects in design (to the extent that Seller furnished the design), materials, and workmanship and be suitable for the purpose intended.
- b. The warranty period for Supplies which are installed on or incorporated into new products produced by Buyer will continue for the same period as the new product warranty period offered by Buyer to its customers in the country in which the product is sold. For Supplies purchased by Buyer as service and replacement parts, the warranty period will be the greater of twelve months from delivery to Buyer's customer or the remainder of the warranty period on the product on which the part is installed as a service or replacement part. Seller may contact Buyer's representative for information regarding those countries in which products incorporating Supplies purchased from Seller will be sold.
- c. The warranty period for non-production Supplies shall be the greater of one year after final acceptance by Buyer, or the period specified on Buyer's Purchase Order.
- d. Seller will indemnify and hold Buyer harmless in respect of all costs associated with recall campaigns and other corrective service actions that, in Buyer's reasonable judgment, are required to rectify nonconformities in the Supplies that are the result of defects in design (to the extent that Seller furnished the design), materials, and workmanship.
- e. Where a Purchase Order provides for submittal of designs, components, or other items for approval of Buyer, such approvals will not be construed as a complete check as to the adequacy of said

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design, component, or item, nor as an agreement or acknowledgement that the design, component, or item will meet requirements of the Purchase Order. Such approvals are solely for the purpose of insuring Buyer's knowledge of Seller's plans and progress and will indicate only that Seller's approach towards meeting the requirements under the Purchase Order is satisfactory. Such approvals will in no way relieve the Seller of responsibility for any error or deficiency which may exist in the Supplies, as Seller will be responsible for meeting all the requirements under the Purchase Order.

- f. Seller represents and warrants that the prices for the Supplies will be no less favorable than those which Seller offers to any other customer for the same or similar goods or services for similar quantities. If Seller offers a lower price for the same or similar goods or services to any other customer during the term of a Purchase Order, then to the extent permitted by law, Seller will immediately offer Buyer the same price for the Supplies (including Supplies under an open purchase order) on the same terms and conditions as was offered to the other customer.

3.13 DEFENSE AND INDEMNITY

- a. To the full extent permitted by applicable law, Seller will indemnify Buyer, its directors, officers and employees and authorized dealers for all expenses (including attorney fees, settlements, and judgments) incurred by Buyer in connection with all claims (including lawsuits, administrative claims, regulatory actions, and other proceedings to recover for personal injury or death, property damage, or economic losses) that are related in any way to Seller's representations, performance or obligations under a Purchase Order, including claims based on Seller's breach of warranty and claims for any related violations of any applicable law, ordinance or regulation or government authorization or order. Seller's obligation to indemnify under this Section will apply regardless of whether the claim arises in tort, negligence, contract, warranty, strict liability or otherwise except to the extent of the negligence of Buyer.
- b. If Seller provides services to Buyer on Buyer's premises, Seller will examine the premises to determine whether they are safe for such services and will advise Buyer promptly of any situation it deems to be unsafe. Seller's employees, contractors and agents will not possess, use, sell or transfer illegal drugs, medically unauthorized drugs or controlled substances, or unauthorized alcohol, and will not be under the influence of alcohol or drugs on Buyer's premises. Seller shall be exclusively responsible for, shall bear, and shall relieve Buyer from liability, and indemnify Buyer for all losses, expenses, damages or claims resulting from bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons, or on account of damage to or destruction of property, including that of Buyer, arising out of, or in connection with the performance of work on Buyer's premises except that Seller shall not be responsible for or relieve Buyer from liability or indemnify Buyer for claims arising from the willful misconduct or the sole negligence of Buyer. Seller will maintain Workman's Compensation Insurance and Employer Liability Insurance in the minimum amount of One Million Dollars (\$1,000,000) cover all such personnel while on Buyer's premises.

3.14 TITLE AND ENGINEERING DRAWINGS, SPECIFICATIONS

- a. Any documents, including drawings and specifications produced or acquired by Seller under a Purchase Order will belong to Buyer, subject only to Seller's patent rights, but without any other restrictions on Buyer's use, including reproduction, modification, disclosure or distribution of the documents or the information contained therein. To the extent such documents contain original work of authorship created in order to comply with a Purchase Order, the copyrights to such work shall be owned by Buyer in accordance with Section 17. Seller agrees not to label any such documents with a notice asserting that the documents contain confidential or proprietary

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information of Seller. Any engineering drawing that Seller is required to prepare and furnish to Buyer will conform to the requirements of the local computer aided design standards of the Buyer.

- b. All drawings, know-how, and confidential information supplied to Seller by Buyer and all rights therein will remain the property of Buyer and will be kept confidential by Seller in accordance with Section 16(e). Seller is licensed to use Buyer's drawings, know-how, and confidential information only for the purpose of fulfilling its obligations under a Purchase Order. In addition to the obligations of Section 16(e), Seller will not disclose such drawings, know-how and confidential information to third parties unless this is required for Seller to fulfill its duties under a Purchase Order, and in such case, Seller will ensure that such third parties agree to be bound by the same confidentiality obligation before receiving the confidential information. Seller will inform Buyer in writing of any third parties to whom Seller subcontracts any of the work required under a Purchase Order specifying in detail the work which has been subcontracted to such third party. Seller will ensure that any third party to whom Seller subcontracts any of the work hereunder is bound by all the terms and conditions relating to such work to which Seller is bound under a Purchase Order.

3.15 INFRINGEMENT AND PROPRIETARY RIGHTS

- a. Seller at its expense will indemnify and hold Buyer harmless with respect to every claim that may be brought against Buyer or others that use the Supplies of a Purchase Order, for any alleged infringement of any present or future patent, copyright, industrial design right or other proprietary right based on Seller's activity under a Purchase Order, or the manufacture, sale, or use of the Supplies
 - i. alone,
 - ii. in combination by reason of their content, design or structure, or
 - iii. in combination in accordance with Seller's recommendations. Seller will investigate and defend or otherwise handle every such claim, and at Buyer's request, assist Buyer in Buyer's investigation, defense, or handling of any such claim. Seller will pay all expenses and damages or settlement amounts that Buyer and others selling Buyer's products or using the Supplies of a Purchase Order may sustain by reason of each such indemnified claim. If by virtue of a patent infringement suit, an injunction is issued against Buyer which prohibits or limits the use of any Supplies purchased hereunder, the Supplier will, at Buyer's request, use best efforts to supply Buyer with non-infringing replacement items of a similar kind and quantity.

3.16 INFORMATION AND DATA

- a. At Buyer's request, Seller will furnish or discuss with Buyer or another party designated by Buyer, without restrictions on use or disclosure, all information and data which Seller invents or develops as a result of Seller's activities under a Purchase Order. At Buyer's request, Seller will also discuss with Buyer any potential design, quality or manufacturing problems with Supplies Seller worked on or produced pursuant to a Purchase Order.
- b. At Buyer's request, Seller will furnish to Buyer all information and data of Seller which Buyer deems necessary to understand the operation and to maintain the goods delivered under a Purchase Order.
- c. With respect to inventions which Seller conceives or first reduces to practice (the "Arising I.P.") as a result of Seller's activities under Buyer's Purchase Order, Seller grants to Buyer a perpetual, paid up, non-exclusive, worldwide license, with a right to sublicense, to make, have made, use, manufacture, sell and distribute the Supplies incorporating or using such Arising I.P.

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- d. Seller grants Buyer a perpetual, paid up, non-exclusive, worldwide license, with a right to sublicense, to use and practice Seller's intellectual property in connection with the use, sale and distribution of the Supplies provided by Seller.
- e. Seller will use commercially best efforts to prevent disclosure to others and will use only for the benefit of Buyer
 - i. any technical information or data furnished by Buyer to Seller in connection with Buyer's Purchase Order, and
 - ii. any information relating to any aspect or portion of Buyer's business that Seller may acquire or learn in the course of Seller's activities under a Purchase Order. This obligation will continue so long as any Purchase Order for Supplies is in effect and for a period of 5 years thereafter. This obligation will not apply to information which is or become publicly known through no fault of Seller. Notwithstanding the above, Seller may disclose such information referred to in Sections 16 (e)(i) and 16 (e)(ii) to third parties only to the extent necessary for Buyer to fulfill its duties under a Purchase Order and such third parties have agreed to be bound by the terms contained herein.

3.17 COPYRIGHTS

- a. Any work of authorship created by Seller or Seller's employees under a Purchase Order which is specially ordered or commissioned by Buyer will be considered as a "work made for hire" and all copyrights for such works of authorship will belong to Buyer.
- b. In the event any portion of any work of authorship created by the Seller in performing the services under a Purchase Order does not qualify as "work made for hire", Seller hereby assigns, or if Seller has failed to previously secure ownership of all copyrights in such portion, Seller will obtain title and assign all copyrights, including moral rights, to such work to Buyer.
- c. All works of authorship subject to Sections 17(a) or 17(b) will bear a valid copyright notice designating Buyer as the copyright owner.
- d. Seller hereby grants to Buyer a permanent, non-exclusive, paid-up, worldwide license, with a right to grant a sublicense to any of its affiliates, under each copyright it owns and controls or has the right to license, in each work of authorship fixed in any tangible medium of expression furnished by Seller to Buyer, to use such work, to reproduce such work, to prepare derivative works, and to distribute or display copies of such work.

3.18 SUBCONTRACTS

In each subcontract of Seller's work performed pursuant to a Purchase Order, Seller will obtain for Buyer the rights and licenses granted in Sections 14, 16, and 17, and, if applicable, Section 29.

3.19 ADVERTISING

Except as may be required by law or applicable governmental authority, Seller will not, without the prior written consent of Buyer:

- a. issue any news release, public announcement, denial or confirmation of any Purchase Order or its subject matter; nor;
- b. in any manner advertise or publish the fact that Buyer has placed a Purchase Order with the Seller.

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3.20 AUDIT RIGHTS

Buyer will have the right at any reasonable time to send its authorized representatives to examine all pertinent documents and materials in the possession or under the control of Seller relating to any of Seller's obligations under a Purchase Order or any payments requested by Seller pursuant to a Purchase Order. Seller shall maintain all pertinent books and records relating to a Purchase Order for a period of three years after completion of services or delivery of Supplies pursuant to that Purchase Order.

3.21 ASSIGNMENT

Seller will not assign or delegate all or substantially all of its substantive duties under a Purchase Order without Buyer's prior written approval. Seller will provide Buyer with reasonable advance written notice of any assignment of Seller's right to receive payment under a Purchase Order. Any such assignment shall not prohibit Buyer from enforcing any of its rights against the assignee. Buyer will have the right to assign any benefit or duty under a Purchase Order to any third party upon notice to Seller.

3.22 EXCUSABLE DELAYS

Neither Buyer nor Seller will be liable for a failure to perform that arises from causes or events beyond its reasonable control and without its fault or negligence, including labor disputes. The party claiming the excusable delay shall give notice in writing as soon as possible after the occurrence of the cause relied on and after termination of the condition. In the event of an excusable delay in performance, Buyer at its option may acquire possession of all finished goods, work in process, and parts and materials produced or acquired for the work under a Purchase Order, and Seller will deliver such articles to Buyer, at Buyer's option, Seller's facility (Ex Works Loaded) or F.O.B. Buyer's facility (C.I.F. Buyer Plant/Delivered Buyer's Plant). Buyer may also obtain the Supplies covered by a Purchase Order elsewhere for the duration of the impediment and a reasonable period thereafter. Prior to the expiration of any directly related labor contract of Seller, Seller at its expense will take such actions as Seller may reasonably determine to ensure the uninterrupted production of supplies for a period of 30 days for Buyer during any anticipated labor disruption or slowdown resulting from the expiration of the labor contract.

3.23 REMEDIES, WAIVER

The individual remedies reserved in a Purchase Order will be in addition to any remedies provided by law. No waiver of any breach of any provision of a Purchase Order will constitute a waiver of any other breach of such or any other provisions.

3.24 TERMINATION/EXPIRATION

- a. Unless a Purchase Order specifically states otherwise, Buyer may terminate its purchase obligations under a Purchase Order, in whole or in part, at any time by a written notice of termination to Seller. Buyer will have such right of termination notwithstanding the existence of an Excusable Delay of Section 22.
- b. Buyer may terminate a Purchase Order without liability to Seller if Seller
 - I. sells, or offers to sell, a substantial portion of its assets used for the production of Supplies for Buyer,

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- II. sells or exchanges, or offers to sell or exchange an amount of its stock that would result in a change in the control of Seller,
 - III. fails to comply with the specifications, terms and conditions of the Purchase Order or fails to deliver the Supplies in accordance with Buyer's requirements as to quality, delivery, or pricing, or
 - IV. ceases to conduct its operations in the normal course of business, including inability to meet its obligations as they mature, or if any proceeding under the bankruptcy or insolvency laws is brought by or against Seller, or a receiver for Seller is appointed or applied for, or an assignment for the benefit of creditors is made by Seller, and in such cases Buyer is hereby granted continued access to any tooling, equipment or manufacturing information necessary for continued production of the Supplies, and a first right of refusal to purchase any tooling or equipment which Seller owned and used to produce the Supplies. Buyer shall give Seller written notice of the termination at least 30 days prior to the effective termination date. Pursuant to Section (b) (ii) above, Seller will notify Buyer no more than 10 days after completion of any sale or exchange of its stock or assets that results in a change of control of Seller.
- c. Upon receipt of the notice of termination, Seller, unless otherwise directed by Buyer, will
- I. terminate promptly all work under a Purchase Order;
 - II. transfer title and deliver to Buyer the finished work, the work in process, and the parts and materials which Seller produced or acquired in accordance with a Purchase Order and which Seller cannot use in producing goods for itself or for others;
 - III. verify/settle all claims by subcontractors for actual costs that are rendered unrecoverable by such termination and provided the recovery of materials in Seller's possession is ensured;
 - IV. take actions reasonably necessary to protect property in Seller's possession in which Buyer has an interest until disposal instruction from Buyer has been received; and
 - V. upon Buyer's reasonable request, cooperate with Buyer in effecting resourcing production of the Supplies to a different supplier.
- d. Upon termination by Buyer under this Section, other than termination under subsection (b) above, Buyer's obligation to Seller will be
- I. the Purchase Order price for all finished work and completed services which conform to the requirements of a Purchase Order;
 - II. Seller's actual cost of the work in process and parts and materials transferred to Buyer in accordance with subsection (c) (ii) hereof;
 - III. Seller's actual costs of settling the claims by subcontractors of subsection (c) (iii) hereof; and
 - IV. Seller's actual cost of carrying out its obligations of subsection (c) (iv) hereof, but Buyer's obligations will not exceed those Buyer would have had to Seller in the absence of termination. Unless otherwise stated in a Purchase Order, Buyer shall have no obligation for and shall not be required to make payments to Seller, directly or on account of claims by Seller's subcontractors, for loss of anticipated profit, unabsorbed overhead, interest on claims, product development and engineering costs, tooling, facilities and equipment rearrangement costs or rental, unamortized depreciation costs, and general and administrative burden charges from termination of a Purchase Order.

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- e. Seller will furnish to Buyer, within one month after the effective date of termination, Seller's termination claim, which will consist exclusively of the items of Buyer's obligation to Seller that are listed in subsection (c) hereof. Buyer may audit Seller's records, before or subsequent to payment, to verify amounts requested in Seller's termination claim.
- f. Buyer will have no obligation to Seller under (a), (c), (d), or (e) above if Buyer terminates its purchase obligations of a Purchase Order because of a default by Seller or a breach by Seller of any obligation hereunder.

3.25 COMPLIANCE WITH LAW

- a. Buyer may serve from time to time as a contractor for the United States government. The policy of the United States government expressed in Pub. L. 95-507, that small business concerns and small disadvantaged business concerns will have the maximum practicable opportunity to participate in performing contracts of the United States government, and its clause entitled "Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals," apply to Buyer and its U.S. suppliers. A copy of the foregoing clause is available from Buyer upon request. If Seller is a U.S. entity, Seller will comply with federal laws, rules, and regulations applicable to subcontractors of government contractors, including those relating to contracting with small and disadvantaged business concerns (Pub. L. 95-507); equal employment opportunity and affirmative action in the employment of minorities (Executive Order 11246); women (Executive Order 11375), the handicapped (29 USC 793), and certain veterans (38 USC 4212); contracting with business concerns operating in areas of surplus labor (41 C.F.R. 1-1.805); and contracting with women-owned business concerns (Executive Order 12138).
- b. Seller and the Supplies shall comply with applicable laws, rules, regulations, orders, conventions, ordinances or standards of the country of destination or which relate to the manufacture, labeling, transportation, importation, licensing, approval or certification of the Supplies, including those relating to environmental matters, wages, hours, and conditions of employment, subcontractor selection, discrimination, occupational health/safety, and product safety. At Buyer's request, Seller shall certify in writing its compliance with any or all of the foregoing. Seller represents that any Supplies purchased by Buyer under a Purchase Order will not be produced with forced labor either by Seller or Seller's Suppliers. Seller shall indemnify Buyer against any liability Buyer may incur if this representation is incorrect. Buyer requires strict compliance with this provision and has the right to immediately terminate a Purchase Order if there is a breach hereof.
- c. For Supplies shipped to European destinations Seller will notify Buyer of the 'Classification of Dangerous Goods' in conformity with the "European Agreement concerning the International Carriage of Dangerous Goods" prior to the first delivery of such Supplies.

3.26 APPLICABLE LAW AND ARBITRATION

- a. A Purchase Order shall be governed by the law of Buyer's principal place of business without regard to conflict of laws provisions thereof, and litigation on contractual causes arising from a Purchase Order shall be brought only in that jurisdiction. The U.N. Convention for the International Sale of Goods is expressly excluded.
- b. If either party initiates litigation on such contractual causes, the other party shall have the right to initiate mediation and binding arbitration in accordance with the following:

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- i. In the case of Buyer's operations located in the U.S., the Model Procedure for Mediation of Business Disputes of the Center for Public Resources ("C.P.R.") and, in the case of arbitration, the C.P.R. Rules for Non-Administered Arbitration of Business Disputes;
- ii. In the case of Buyer's operations located in Europe, with the then-current International Arbitration Rules of the Zurich Chamber of Commerce, Zurich, Switzerland ("I.A.R.Z.");
- iii. in the case of Buyer's operations located in Canada, the C.P.R. and to the extent not inconsistent with C.P.R., the British Columbia International Commercial Arbitration Centre (the "Rules").

Each party will bear equally the costs of the mediation and arbitration.

- i. The parties will jointly appoint a mutually acceptable mediator or arbitrator, seeking assistance in such regard from C.P.R. or I.A.R.Z., as appropriate, if they have been unable to agree upon such appointment within 20 days.
- ii. The parties agree to participate in good faith in the mediation and negotiations related thereto for a period of 30 days, except that for any Ballard subsidiary, joint venture, or other operations in Europe, the parties will forward the dispute directly to arbitration under the I.A.R.Z. If the parties are not successful in resolving the dispute through the mediation, then the parties agree to submit the matter to binding arbitration by a sole arbitrator in accordance with the C.P.R. Rules for Non-Administered Arbitration of Business Disputes (in cases involving Buyer's operations and subsidiaries in the U.S.), or the Rules (in cases involving Ballard's operations or subsidiaries in Canada).
- iii. Unless otherwise agreed by the parties in writing, mediation or arbitration involving Ballard and any U.S. subsidiary, joint venture or other operation located in the U.S. shall take place in the city where Buyer resides and this clause 26 is subject to the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq. and judgment upon the award rendered by the Arbitrator, if any, may be entered by any U.S. court having jurisdiction thereof. Mediation or arbitration involving any of Ballard's Canadian subsidiaries, joint ventures or other operations located in Canada shall take place in Vancouver, B.C. The language shall be English. Mediation or arbitration involving any Ballard subsidiary, joint venture or other operation located in Europe shall take place in London and the language shall be English. Equitable remedies shall be available in any arbitration. Punitive and exemplary damages shall not be awarded.

3.27 NOTICE OF LABOR DISPUTES

Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of a Purchase Order, the Seller will immediately notify Buyer of such dispute and furnish all relevant details. Receipt by Buyer of such notice will not constitute a waiver of the delivery schedule hereunder.

3.28 ENUREMENT

The terms and conditions hereunder will enure to the benefit of and will be binding on any successors or assigns of the parties hereto.

3.29 CONFLICT

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If there exists a Supply Agreement between the Seller and Buyer, in the event of any conflict between any term of such Supply Agreement and the terms of a Purchase Order, the terms of the Supply Agreement will govern unless the terms of the Purchase Order specifically state otherwise.

4.0 Supplemental Provisions Applicable to Tooling

4.1 TOOLING ORDER

If Buyer issues a Tooling Purchase Order, Seller will design and fabricate, rework, or acquire from such sources as Buyer has given prior approval, and install the tools, dies, fixtures, molds, or patterns, described in such Tooling Order ("Tooling"), subject to the terms and conditions contained herein.

4.2 SAMPLES, STATUS

Seller shall, at its own expense, manufacture a reasonable number of sample parts on the Tooling for inspection and/or testing by Buyer to ensure the capability of the Tooling to produce parts which meet Buyer's quality standard QS9000. In addition to Seller's obligations under Section 12 (a), to the extent technically feasible, the Tooling shall be designed and fabricated to be sufficiently durable to support the manufacture of all production and service requirements through the production lifetime of the part and also permit the production of Buyer's subsequent service-only requirements. The Tooling will be deemed to be completed when the necessary samples have been submitted and approved by Buyer. Buyer may request Seller to furnish semimonthly (or more frequently at Buyer's option) status reports on the construction and acquisition of the Tooling. Each status report shall identify the Tooling, identify the subcontractors working on the Tooling, and designate the percentage of completion of the work. Seller will notify Buyer immediately upon becoming aware that the Tooling may not be completed by the completion date specified on the Tooling Purchase Order and Seller shall furnish to Buyer a schedule of the actions that Seller will take, at Seller's expense, to achieve completion on the specified completion date.

4.3 TITLE, IDENTIFICATION

All right, title, and interest in and to any part of Tooling to be paid for by Buyer ("Buyer-owned Tooling") shall pass to Buyer as soon as it is acquired or fabricated in accordance with a Tooling Purchase Order. During the term of a Purchase Order, all such Buyer-owned Tooling in the possession of Seller shall be deemed to be Bailed Property and shall not be deemed to be a fixture or a part of Seller's real property. Seller will

- (i) properly house and maintain such property on Seller's premises,
- (ii) prominently mark it Property of Buyer,
- (iii) refrain from commingling it with the property of Seller or with that of a third party, and
- (iv) adequately insure it against loss or damage and
- (v) not move it to another location whether owned by Seller or a third party, without the prior written consent of Buyer, except that in the case of an emergency, Seller may move the Tooling provided that it gives Buyer notice that the Tooling has been moved and the location of the Tooling as soon as reasonably practicable. Seller shall indemnify Buyer against any claim adverse to Buyer's ownership of the Buyer-owned Tooling, except as such claims may result from any acts or omissions of Buyer. To the extent permitted by

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law, Seller waives its right to object to the repossession of the Buyer-owned Tooling by Buyer in the event Seller is involved in bankruptcy proceedings. While in its possession, Seller, at Seller's expense, shall maintain the Buyer-owned Tooling in first class condition and immediately replace any items which are lost or destroyed or become worn out. All repaired or replaced Buyer-owned Tooling shall be the property of Buyer. Wear and repair of the Buyer-owned Tooling is Seller's responsibility. Title to any modifications, changes or accessions to Buyer-owned Tooling shall vest in Buyer regardless of whether Buyer has reimbursed Seller for such modification, changes or accessions. Seller shall keep such records in relation to the Buyer-owned Tooling as Buyer may reasonably require. None of the Buyer-owned Tooling shall be used in the production, manufacture or design of any goods or materials except to the order of Buyer. Seller shall not sell or otherwise dispose of any product using Buyer-owned Tooling to any party other than Buyer except where specifically authorized by Buyer in writing. Seller's responsibility continues beyond the expiry date of the related parts Purchase Order. If the Buyer-owned Tooling is not utilized to produce any parts for Buyer for a period of two years, Seller shall so notify Buyer and request instructions as to the disposition of the Buyer-owned Tooling. If Seller subcontracts all or any portion of the manufacture of the Buyer-owned Tooling, Seller shall so notify Buyer in advance and obtain for Buyer all of the rights contained in this Section 32 from each such subcontractor used by Seller.

4.4 TOOLING INVOICES, PAYMENT FOR BUYER-OWNED TOOLING

- a. Payment for Buyer-owned Tooling will be made in accordance with Buyer's standard/normal payment terms unless stated otherwise on the Tooling Purchase Order.
- b. If a Tooling Purchase Order designates that it is noncompetitively placed or based on affordable targets, Buyer's payment obligation shall be no more than the specified maximum, if any, for
 - I. Seller's actual costs for purchased materials and services (including purchased Tooling and portions thereof), and
 - II. Seller's actual cost for direct labor and overhead. Seller shall establish a reasonable accounting system that enables ready identification of Seller's cost.
- c. as trustee in express trust for such subcontractors until Seller has paid the subcontractors in full for the Buyer-owned Tooling. Seller acknowledges and agrees that its subcontractor is an intended third party beneficiary of the terms of this section relating to the express trust and as such, the tooling subcontractors shall have the right to enforce these terms directly against Seller in their own name. Seller agrees that Buyer has no obligation to Seller or Seller's tooling subcontractor under this section other than making the payment to Seller in accordance with a Tooling Purchase Order. In the event Seller's tooling subcontractor brings an action against Seller under this section, Seller agrees that it will not join Buyer in any such action.

4.5 PROVISIONS APPLICABLE TO SELLER-OWNED TOOLING

- a. If Seller has been notified that the special tooling required to support production of Supplies for this Purchase Order is to be funded by Seller ("Seller-owned Tooling"), the following provisions shall apply:

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- b. Seller acknowledges that the Purchase Order price includes a cost element to help Seller recover the capitalization of Seller-owned Tooling. The Seller-owned Tooling will be properly maintained by the Seller at its own expense for so long as the Supplies are purchased by Buyer for its serial production as well as for its service and replacement part requirements. In addition, Buyer has the right to inspect the Seller-owned Tooling upon reasonable notice to Seller.
- c. If Seller uses the Seller-owned Tooling to produce the Supplies for other customers, including aftermarket customers, such Supplies shall not incorporate any of Buyer's logos, trademarks, trade names or unique part numbers. Seller shall not disclose or imply in its marketing efforts that the Supplies are equivalent to those purchased from Seller by Buyer or any of its Associated Companies. Seller shall indemnify and hold Buyer (including its employees) harmless from and against any claim, expense, loss or liability arising out its sale of Supplies to other customers or caused by or resulting from defects in design, materials or workmanship of the Supplies sold to such customers; the failure of Seller (or its subcontractors) to fully comply with applicable federal, state, provincial, or local laws, statutes, regulations or governmental directives which regulate the sale of Supplies to such customers; and from any and all claims, suits and liability for loss of or damage to any tangible property or persons (including death) caused by any act or omission, including negligent or willful conduct of Seller or its subcontractors, arising out of such sales of Supplies to other customers.
- d. In consideration of Buyer's Purchase Order for parts to be produced from the Seller-owned Tooling, Seller grants Buyer an exclusive, irrevocable option to purchase Seller-owned Tooling by paying the lesser of the outstanding unrecovered capitalization or the fair market value at the time Buyer exercises the option. Buyer may exercise this option at any time and in the event of termination or expiration of this Purchase Order, but only in the event that the Tooling is not being used by Seller to produce parts for another customer, and upon such exercise by Buyer, Seller will cooperate with Buyer's removal of the property from Seller's premises.

If Seller finances any portion of the Seller-owned Tooling, Seller will obtain for Buyer the rights granted in this subsection (d) from its financing source. B.P.S.: Ballard Power Systems Inc.

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