



Original Equipment Suppliers Association

Draft Model General Terms and Conditions

With Comments

October 2011

The Original Equipment Suppliers Association

www.oesa.org

248.952.6401

TABLE OF CONTENTS

1. The Contract	12. Term and Termination
1.1 <i>Offer and Acceptance</i> 1	12.1 <i>Generally</i> 9
1.2 <i>Changes</i> 2	12.2 <i>Long-Term Contracts</i> 9
1.3 <i>Other Changes</i> 2	12.3 <i>Short-Term Contracts</i> 10
2. Products and Services	12.4 <i>Property Orders</i> 10
2.1 <i>Quantity</i> 2	13. Default
2.2 <i>Current-Model Service Requirements</i> 3	13.1 <i>Events of Default</i> 10
2.3 <i>Past-Model Service Requirements</i> 3	13.2 <i>Remedies</i> 11
3. Delivery	14. Confidential Information 12
3.1 <i>Packing and Shipment</i> 3	15. Assignment and Subcontracting 12
3.2 <i>Delivery Schedules</i> 3	16. Excusable Non-Performance 13
4. Inspection 4	17. Labor Contracts 13
5. Taxes 4	18. Customs 14
6. Payment 4	19. Insurance 14
7. Product Warranties	20. Dispute Resolution
7.1 <i>Seller's Warranties</i> 5	20.1 <i>Negotiation and Mediation</i> 14
7.2 <i>Non-Conforming Products</i> 5	20.2 <i>Arbitration</i> 14
7.3 <i>Recalls</i> 5	20.3 <i>Litigation</i> 14
8. Product Liability	21. Miscellaneous
8.1 <i>Indemnification</i> 6	21.1 <i>Advertising</i> 15
8.2 <i>Procedure</i> 6	21.2 <i>Audit Rights</i> 15
9. Compliance with Laws 7	21.3 <i>Electronic Communication</i> 15
10. Intellectual Property Rights	21.4 <i>Relationship of the Parties</i> 15
10.1 <i>Buyer's Intellectual Property</i> 7	21.5 <i>Waiver</i> 15
10.2 <i>Seller's Intellectual Property</i> 7	21.6 <i>Entire Agreement</i> 15
10.3 <i>Infringement</i> 7	21.7 <i>Severability</i> 15
11. Property	21.8 <i>Interpretation</i> 16
11.1 <i>Buyer's Property</i> 8	21.9 <i>Notices</i> 16
11.2 <i>Seller's Property</i> 9	21.10 <i>Governing Law</i> 16

These Draft Model General Terms and Conditions were designed for use in connection with the purchase and sale of automotive original equipment parts. OESA developed the Model Terms to promote a more collaborative approach to supplier-customer relationships. The goal is to increase cooperation, communication, and trust between buyers and sellers, eliminate ambiguities in responsibilities, reduce transaction costs, increase certainty, and ultimately increase the industry's competitiveness. The Model Terms should serve as a reference guide and educational tool for buyers and sellers, and may help form the basis for fair and balanced contracts.

USE OF THE MODEL TERMS IS ENTIRELY VOLUNTARY. Price and other terms of sale are determined by the buyer and seller in every transaction, and the Model Terms and Conditions are not intended to affect that negotiating process. Buyers and sellers are always free to negotiate whatever terms or conditions they believe appropriate and are able to agree upon in the specific situation. Each buyer and seller should independently decide whether the Model Terms are appropriate for the company or transaction. Under no circumstances should buyers or sellers discuss with their competitors the specific terms and conditions they should adopt in particular negotiations, or agree collectively not to deal with a company refusing to adhere to the recommendations in this document or any other particular terms and conditions.

OESA DRAFT MODEL GENERAL TERMS AND CONDITIONS

Introductory Comment: *These General Terms and Conditions attempt to follow a more balanced approach to buyer-seller relations than many of the forms currently in use in the automotive industry, both at the OEM and supplier levels. The drafters considered the interests and needs of both buyers and sellers, and attempted to apply basic concepts of fairness and good faith dealing to navigate a course between the two. Where both parties had competing legitimate interests or needs, the drafters selected the alternate that appeared to represent the greater interest or need.*

There is, of course, no one "correct" approach that fits all situations and individuals may disagree about what constitutes "fairness" and "good faith." However, most would agree that the forms currently in use in the automotive industry are neither fair nor balanced. Rather they reflect the ability of the party with superior bargaining power, typically the buyer, to impose terms and conditions that provide maximum protection for that party and little, or no, protection for the other party. OESA believes that a more collaborative approach between buyers and sellers will pay long-term dividends to all parties in an increasingly global economy, and that a more balanced approach to contract terms and conditions is an important step in that direction.

1. **The Contract.**

1.1 Offer and Acceptance. Each purchase order Buyer issues ("**Purchase Order**") is Buyer's offer to purchase the products ("**Products**") and services ("**Services**") identified in that Purchase Order. Seller will be deemed to have accepted a Purchase Order as issued (1) if Seller fails to object to it in writing within 10 business days after receipt and has begun or later begins performance under the Purchase Order, or (2) if Seller acknowledges in writing its acceptance of the Purchase Order. Upon acceptance, the Purchase Order together with these General Terms and Conditions and any other documents specifically incorporated in the Purchase Order or separately agreed to in writing, such as specifications, drawings, requirements of Buyer's customer, or quality requirements, will become a binding contract between Buyer and Seller (collectively, the "**Contract**"). If Seller timely objects to a Purchase Order or proposes alternate or additional terms, the Purchase Order will become a Contract only if and when Buyer and Seller mutually agree in writing, even if Seller commences or has commenced performance under the Purchase Order. Specific terms and conditions on the Purchase Order and the other documents comprising the Contract will take priority over any inconsistent provision in these General Terms and Conditions.

Comment:

1. Section 1.1 is intended to promote early identification and resolution of differences between the parties. It is incumbent on both parties to consider carefully the documents that comprise the Contract and

the language contained in those documents (not just price and payment terms), to be sure that they accurately reflect the agreement between the parties. Most contract disputes arise because the parties skip this critical step.

2. Section 1.1 establishes the terms and documents that comprise the Contract between Buyer and Seller. Buyer's Purchase Order is the offer of a Contract. Included in that offer are any documents referenced in the offer as being part of the Contract, including these General Terms and Conditions. Suppliers should make sure that the reference to another document in the offer is specific enough to identify a particular document by date, release number, etc. Otherwise, Buyer may be free to argue that a later revision is part of the Contract.

*3. All documents and agreements not specifically incorporated in the offer are excluded (see Section 21.6). This means that Seller's bid or quotation documents are **not** part of the offer unless specifically referenced in the Purchase Order. The same is true of any technology agreement, sourcing agreement, confidentiality agreement, or other document that predates the Purchase Order. Once incorporated in the Purchase Order (or printed on the Purchase Order itself, if space permits), these General Terms and Conditions will govern the relationship between Buyer and Seller unless the parties otherwise specify.*

4. The offer contained in the Purchase Order may be accepted in one of two ways. First, the offer may be accepted by a written acceptance from Seller. Second, if there is no written acceptance, the offer will be deemed accepted if Seller begins performance or fails to object in writing within 10 days after receiving the Purchase Order, whichever is later. This formulation gives Seller the opportunity to raise an objection to the Purchase Order terms, even if it has already begun performance. However,

the time period is limited in order to promote certainty of contract, and Seller must review incoming Purchase Orders promptly if it wishes to preserve its right to object.

5. *Timely objections to a Purchase Order (whether the objection seeks to eliminate or modify provisions in the Purchase Order or offers additional provisions or documents to the Contract) are treated as a counter-offer by Seller, which requires mutual written agreement by the parties in order to establish a Contract. In this respect it varies from the result in UCC Section 2-207, which generally would treat Seller's proposed additions or modifications as part of the Contract unless they are material or are objected to by Buyer. It also varies from the result in most current industry forms, which reject out-of-hand any counter-offer by Seller. Continued performance by Seller after raising a timely objection does not waive that objection but does leave Seller at risk for work performed without a Contract. Similarly, Buyer is at risk that Seller may elect to withdraw without a Contract, leaving Buyer to try to find a replacement. Accordingly, both parties should be incented to take prompt action to resolve any differences.*

6. *These, or any other contract provision or legal rules governing acceptance, cannot eliminate uncertainty and risk when the parties have not actually agreed on the terms. If the parties have actually begun buying and selling goods and a dispute later arises about those transactions, there must be some terms that apply. There are a number of ways that a court might decide what the terms are, but none are likely to meet either party's understanding or expectation of the business deal. A Buyer and Seller that do business without actual agreement on the contract terms do so at their own risk.*

1.2 Changes. Buyer may from time to time by notice to Seller make reasonable changes, within the scope of the Contract, to the drawings, specifications, materials, packaging, testing, quantity, time or method of delivery or shipment, or similar requirements prescribed in the Contract. At Seller's request with appropriate supporting documentation, the parties will agree upon an equitable adjustment to the Contract prices and times for performance as a result of Buyer's changes. Contract changes must be in writing signed by Buyer's authorized representative, and Buyer will not unreasonably withhold or delay consent to a Contract change proposed by Seller.

Comment: *Sections 1.2 and 21.6 govern changes to the Contract once the Contract has been formed. Under Section 1.2, Buyer may unilaterally impose changes, within the scope of the Contract, to drawings,*

specifications, and other Contract requirements listed, but Seller may request, and the parties are required to agree upon, appropriate modifications to the Contract prices and time for performance to reflect the changes imposed by Buyer. Seller may also request changes to the Contract, but they require Buyer's approval. All changes must be documented in writing. The differing treatment between the parties recognizes that Buyer must have the ability to make changes that are necessary to improve its products during the course of the Contract, while there is not generally a corresponding need by Seller to impose changes. Specific situations that might justify changes imposed by Seller (such as Seller's required use of costly materials that fluctuate greatly in price) would require separate provisions. Contract changes not covered by Section 1.2 require written approval by both parties—see Section 21.6.

1.3 Other Changes. Except for the changes described in §1.2, neither party may make any changes to the Contract during its term (as described in §12.1) without the written agreement of Buyer and Seller's authorized representative. If the General Terms and Conditions change during the term of the Contract, those changes shall not apply during the term, even if the Buyer has issued a purchase order revision during the term, unless expressly agreed in writing by Buyer and Seller's authorized representative.

Comment: *The typical industry purchase order says, in substance, that the purchase order is subject to the issuer's then current standard terms and conditions. If a new or revised purchase order is issued (for example, to reflect changes made under Section 1.2) and the standard terms and conditions have been modified since the original purchase, those modified terms may significantly change the deal that had been agreed to. The drafters believe that it is unfair to change an existing contract merely by posting different terms to a website. Section 1.3 reflects that belief.*

2. Products and Services.

2.1 Quantity. If quantities or delivery schedules are not specified in the Contract, they will be as reasonably determined by Buyer and stated in Buyer's firm releases issued to Seller from time to time. Whether quantities or delivery terms are "reasonably determined" shall take into account, without limitation: (i) any capacity limitations specified in the Contract or otherwise agreed to by Buyer and Seller in writing; (ii) unusual volume or timing fluctuations that are inconsistent with customary lead time requirements or any lead time requirements specified in the Contract or otherwise

agreed to by Buyer and Seller in writing. However, in all events, Seller shall use best efforts to meet Buyer's quantities and delivery schedules. Buyer may return over-shipments to Seller at Seller's expense. Unless otherwise specifically stated in the Contract, the Contract is not exclusive and Buyer may purchase similar products and services from third parties, subject to **Section 10.2**.

Comment:

1. A contract that lacks a written quantity term is not enforceable under the "statute of frauds," (with exceptions that do not change the basic point). Under the UCC, an obligation to purchase "requirements" is considered a quantity, so the typical industry contract that specifies "requirements" or the equivalent is enforceable. However, merely specifying "blanket PO," "per release," or the like might not be interpreted as a requirements obligation, and thus might not be sufficient to create an enforceable contract.

These Model Terms do not themselves provide a quantity term. Instead, it assumes that the quantity term will be specified in the purchase order. It is essential that the quantity term be specified in the purchase order.

2. The industry typically uses blanket purchase orders which allow the buyer to specify quantities and delivery dates through releases. Section 2.1 defaults to Buyer's firm releases for quantities and delivery terms that are not specified in the Contract, so long as the releases are reasonable. Section 2.1 recognizes that releases may be unreasonable if they are inconsistent with capacity limitations, or lead time requirements. However, the reasonableness limitation must also take account of the industry reality that Buyer requirements often are unpredictable in timing and quantity and that except in unusual circumstances, the Seller is expected to meet release requirements. Although the reasonableness limitation is helpful in dealing with unusual situations, it is prudent to expressly include in the Contract specific Seller requirements regarding quantity and delivery, such as minimum notice requirements for orders or changes to orders, and minimum or maximum quantities in each order, based on Seller's capacity to produce Products and the limitations of available tooling and equipment. See also Section 3.2.

2.2 Current-Model Service Requirements. During the term of a Contract, Seller will make Products covered by the Contract available to Buyer for Buyer's current-model service requirements at the then-current production prices under the Contract

plus any additional costs for special packaging, shipping and handling, and other related services.

Comment: *Section 2.2 provides for recovery of certain additional costs that Seller may incur to provide service parts during current model production.*

2.3 Past-Model Service Requirements. If a Contract remains in effect at the end of the vehicle production program in which Products covered by the Contract are incorporated, Seller will also make those Products available to Buyer for Buyer's past-model service requirements for a period of 10 years after the end of the vehicle production program. The parties will negotiate in good faith the prices, quantities, and delivery terms for past-model service Products based on the availability and cost of needed materials, supplies, and skilled workers, the additional costs for equipment setup, packaging, shipping and handling, related services, and other relevant factors.

Comment: *Section 2.3 balances Buyer's legitimate interest in securing a continuing source of service parts after regular production has ended with Seller's legitimate interest in recovering any added costs to produce small quantities at irregular intervals, often long after regular production has ended. The obligation to provide past-model service parts applies only if Seller is still supplying products at the end of current model production. Occasionally, even added costs will be insufficient if needed parts or components are no longer available in the marketplace, or if the design of those parts or components has changed. In that situation, the parties will need to agree upon modified specifications for substitute parts or components.*

3. Delivery.

3.1 Packing and Shipment. Buyer may specify the method of transportation and the type and number of packing slips and other documents to be provided with each shipment. Seller will pack and ship Products in accordance with Buyer's instructions, including labeling and hazardous materials instructions. If Buyer has not provided packing or shipping instructions, Seller will pack and ship Products in accordance with sound commercial practices. If Seller is required to use Buyer's returnable packaging, Seller will be responsible for cleaning and returning the returnable packaging. If returnable packaging is not available, Seller may use expendable packaging and Buyer will reimburse

Seller for the reasonable costs of expendable packaging.

Comment:

1. *Because packing and shipping requirements vary substantially among Buyers, Section 3.1 leaves to each Buyer the right to specify its own particular requirements. From Seller's standpoint, it is important to understand Buyer's packing and shipping requirements so that the costs can be reflected in Product pricing.*

2. *Following industry practice, Section 3.1 assumes that Buyer will provide returnable packaging for the Products. If returnable packaging is not available, Buyer will be responsible for either providing or paying for expendable packaging. Seller must reflect in its pricing the cost of cleaning and returning returnable packaging.*

3.2 Delivery Schedules. Seller will deliver Products and Services in strict accordance with the Contract terms. Unless otherwise stated in the Contract, Products will be delivered F.C.A. Seller's dock (Incoterms 2010) and title will transfer upon receipt of the Products by the freight carrier. If Products are not ready for delivery in time to meet Buyer's delivery schedules, the party causing the delay will be responsible for additional costs of any resulting expedited or other special transportation. Buyer will also be responsible for additional costs of expedited or other special transportation that Buyer may require as a result of changes to its firm releases or delivery schedules or for other reasons not caused by Seller.

Comment: *The default delivery standard in Section 3.2 is F.C.A. Seller's dock, which means that Seller's obligation is to deliver the Products at Seller's dock, cleared for export (if applicable), to the carrier selected by Buyer. Further information about F.C.A. and other Incoterms is available from the International Chamber of Commerce at <http://www.iccwbo.org/incoterms/>. Section 3.2 establishes a fault-based standard for additional transportation costs. If Buyer changes its firm releases, it will be required to pay for any resulting expedited transportation, but not overtime or other increased costs incurred by Seller. See also, Section 2.1.*

4. Inspection.

Buyer may, upon reasonable advance notice to Seller, inspect production processes and Property and, subject to Seller's prior written approval, conduct testing at Seller's premises for the sole purpose of verifying Seller's performance under the Contract.

Seller may restrict Buyer's access as necessary to protect proprietary information and may require appropriate indemnification and releases. Buyer is not required to inspect Products delivered or Services performed, and no inspection or failure to inspect will reduce or alter Seller's obligations under the Contract.

Comment: *Section 4 balances the need for Buyer to inspect production processes and its property with Seller's need to maintain the confidentiality of its and its other customers' proprietary information. Section 4 also clarifies that Buyer is not required to inspect Products upon receipt, and that Seller's obligations (such as under Section 7) are not affected by Buyer's inspection or failure to inspect.*

5. Taxes.

Unless otherwise stated in the Contract, the Contract price includes all applicable federal, state, provincial, and local taxes other than sales, value added, or similar turnover taxes or charges. Seller will separately invoice Buyer for any sales, value added, or similar turnover taxes or charges that Seller is required by law to pay or collect from Buyer.

Comment: *Section 5 divides the responsibility for taxes according to prevailing industry practice. The Contract price includes (and Seller must price for) all applicable taxes other than sales, value added, and similar taxes.*

6. Payment.

Payment terms are as set forth in the Contract. Seller will promptly submit correct and complete invoices or other agreed billing communications with appropriate supporting documentation and other information reasonably required by Buyer after delivery of Products and performance of Services, and Buyer may withhold payment until a correct and complete invoice or other required information is received and verified. Seller will accept payment by check or other cash equivalent, including electronic funds transfer. Buyer will pay Seller in the currency specified in the Contract or, if none is specified, in the currency of Seller's shipping or service location. Buyer may setoff or deduct from sums owed to Seller under the Contract those sums owed by Seller to Buyer and agreed to between the parties or upon final determination by dispute resolution. Unless Seller consents in writing, Buyer may not setoff or deduct amounts owed to Buyer by Seller's affiliates or others who are not parties to the Contract.

Comment:

1. The payment terms, including currency, are left for the parties to specify in the Purchase Order or other Contract documents. Section 6 requires Seller to provide all required information to support payment by Buyer.

2. Once the required information is provided, Buyer may setoff or deduct only those amounts that are determined to be owed by Seller, either by agreement of the parties or through dispute resolution. Accordingly, contrary to current industry practice, setoff cannot be invoked in a vacuum and Buyer is not permitted to setoff amounts that are in dispute or have not been discussed with Seller. The right of setoff is further limited to amounts owed by Seller to Buyer, and does not extend to amounts owed by Seller's affiliates, or to Buyer's affiliates, or others who are not parties to the Contract.

7. Product Warranties.

7.1 Seller's Warranties. Unless otherwise specified in the Contract, the warranty period is the period for which the automobile manufacturer warrants the Products to end users. During the warranty period, Seller warrants to Buyer that the Products will be free from defects in workmanship and materials, and will conform to the specifications, drawings, samples, and performance requirements specifically incorporated in the Contract. Seller also warrants to Buyer that it will transfer to Buyer ownership and good title to Products delivered and Services provided, free of all liens, encumbrances, and rights of third parties (except those created by Buyer). Unless otherwise specifically stated in the Contract, Seller does not warrant the design of the Products or their fitness for any particular purpose.

THE FOREGOING WARRANTIES ARE THE SOLE WARRANTIES AND ALL OTHER WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, ARISING BY LAW OR CUSTOM, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY DISCLAIMED.

Comment: Section 7.1 recognizes that an appropriate allocation of risk and responsibility for warranty claims often depends on the nature of the Product and Seller's role in its design and manufacture. It sets forth Seller's basic warranties concerning its Products and Services, including conformity to specifications and other Contract requirements and title to the Products and Services sold. Fitness and design warranties are excluded, but may be appropriate if Seller is design-responsible, in which case

this section should be modified or a separate warranty agreement should be used. Buyers should make sure that the language in Section 7 passes through the warranty obligations that they have undertaken in contracts with their customers. Any product warranties apply for the same period as any corresponding consumer warranty.

7.2 Non-Conforming Products. Except as otherwise specifically provided in the Contract and subject to **Sections 7.3, 8 and 13.2(c)**, Buyer's sole remedy for Products or Services that do not conform to the warranties in **Section 7.1** will be to (1) reject the non-conforming Products or Services, (2) require Seller, at Seller's option and expense (including applicable shipping costs), to either repair or replace the non-conforming Products or Services, and/or (3) require Seller to implement at its expense containment, inspection, sorting, and other quality assurance procedures if Buyer reasonably determines (through statistical sampling or other quality assessments) that a substantial quantity of incoming Products does not conform to the warranties in **Section 7.1**. To the full extent possible, Buyer will provide Seller with access to any available warranty data related to the Products and any available field-returned Products. Buyer will also provide Seller with an opportunity to participate in any root cause analysis performed by Buyer concerning the Products.

Comment: Section 7.2 generally limits remedies for warranty claims to rejection or repair or replacement of the non-conforming Products or Services. However, the Seller may also: (i) be responsible for Seller's recall expenses under Section 7.3; (ii) be required to indemnify Buyer for claims of third parties arising from the non-conforming parts under Section 8; and (iii) be subject to termination for material breaches under Section 13.2(c). In addition, Buyer may require quality assurance procedures if a substantial quantity of non-conforming Products are delivered. If different remedies are appropriate, they should be added in a separate warranty agreement. This is a departure from current industry terms and conditions, which typically impose no limit on remedies.

7.3 Recalls. This **Section 7.3** applies to any voluntary or government-mandated offer by Buyer (or the vehicle manufacturer) to vehicle purchasers to remedy an alleged defect that affects motor vehicle safety or to address an alleged failure of a vehicle to comply with an applicable motor vehicle safety

standard or guideline (a “**Recall**”). Except as otherwise stated in the Contract (including Section 13.2(e)), Seller will be liable for costs and damages resulting from a Recall only if the Recall results in whole or in part from a failure of the Products to conform to the warranties in **Section 7.1** during the warranty period specified in the Contract. If Seller is liable for a Recall, the extent of Seller’s liability will be negotiated on a case-by-case basis based on (1) a good faith allocation of responsibility for the Recall, (2) the reasonableness of the costs and damages incurred, (3) the quantity purchased and Contract price of the affected Products, and (4) other relevant factors. As a condition precedent to Seller’s liability under this **Section 7.3**, Buyer must (i) notify Seller as soon as practicable after Buyer learns that a Recall being considered implicates the Products, (ii) provide Seller with available performance evaluations, accident reports, engineering investigations, and other data relating to the potential Recall, (iii) provide Seller a reasonable opportunity to participate in inquiries and discussions among Buyer, its customer, and governmental agencies regarding the need for and scope of the Recall, and (iv) consult with Seller about the most cost-effective method of modifying or replacing vehicle systems or component parts, including the Products, in order to remedy the alleged defect or non-compliance.

***Comment:** Recalls are safety related warranty claims that involve the ultimate vehicle purchasers and often a governmental agency. Section 7.3 provides a general framework for dealing with Recalls that assigns responsibility for Recall costs based on the relative fault of the parties and other factors listed, and contemplates that the actual liability will be negotiated between the parties in good faith based on these factors. Fault is an important consideration in these situations, as often the Recall results not from a defective Product but from a defective or inadequate design that may or may not be the responsibility of Seller. Seller’s responsibility for a Recall is limited to situations in which Products fail to conform to the warranties in Section 7.1 during the applicable warranty period. Finally, Section 7.3 requires that Seller be reasonably informed and reasonably involved in the Recall process as a condition of continuing liability for Recall costs.*

8. Product Liability.

8.1 Indemnification. Seller will indemnify and defend Buyer against third-party claims or demands for injury or death to persons, property damage, economic loss, and any resulting damages, losses,

costs, and expenses (including reasonable legal fees), regardless of whether the claim or demand arises under tort, contract, strict liability, or other legal theories, if and to the extent caused by Seller’s defective design (if Seller has warranted design) or manufacture of Products or provision of Services, delivery of non-conforming Products or Services, or its negligent acts or omissions in its performance under the Contract. This **Section 8** will not apply to the extent that the injury, loss, or damage results from (1) Buyer’s specification of materials in the Products, (2) Buyer’s design of the Products, (3) any alteration or improper repair, maintenance, handling, or installation of the Products by anyone other than Seller, or (4) the integration or interaction of the Products with systems or components not supplied by Seller.

***Comment:** Product liability arises when a defective Product or Product design causes injury or damage to the public, and generally begins with a claim asserted against the vehicle manufacturer. Section 8 also allows Buyer to seek indemnity if a non-conforming part results in claims from third parties, such as, for example, a claim by an OEM against the Buyer for the OEM’s costs of remedying non-conforming parts. Similar to the approach to Recalls in Section 7.3, Section 8.1 assigns responsibility for product liability based on fault.*

8.2 Procedure. Buyer will notify Seller promptly after Buyer becomes aware of the basis for a claim under this **Section 8**. The parties will cooperate with each other to determine the root cause of a defect in or failure of the Products (and related systems and components) and an equitable allocation of responsibility among all responsible parties. Seller may examine and test all available Products and related systems and components that are subject to a third-party claim. Buyer will endeavor to include Seller in settlement discussions where indemnity has been or will be sought from Seller, and Buyer may not settle or compromise any third-party claim that gives rise to an indemnification claim without Seller’s prior written consent, which will not be unreasonably withheld or delayed.

***Comment:** Section 8.2 affords Seller the opportunity to participate in any settlement process, and approve any settlement, where Buyer seeks indemnification.*

9. Compliance with Laws.

Seller will comply with applicable laws, rules and regulations of the country where the Products are manufactured or the Services are performed. Seller will provide Buyer with material safety data sheets regarding the Products and, upon Buyer's request, will provide Buyer with other information reasonably required in order to comply with applicable laws.

Comment: Section 9 is a typical provision that requires Seller to comply with applicable laws, but is limited to laws of the country where the Products are manufactured or Services performed. Section 9 also requires Seller to provide other relevant information needed to comply with applicable laws, such as material safety data sheets.

10. Intellectual Property Rights.

10.1 Buyer's Intellectual Property. Buyer does not transfer to Seller any patent, trade secret, trademark, service mark, copyright, mask work, or other intellectual property right ("**Intellectual Property Right**") of Buyer in information, documents, or property that Buyer makes available to Seller under the Contract, other than the right to use Buyer's Intellectual Property Rights to produce and supply Products and Services to Buyer.

Comment: Recognizing that Intellectual Property Rights represent a significant investment by many Buyers, Section 10.1 protects Buyer's Intellectual Property Rights except as needed to produce and supply Products and Services. See also Section 14.

10.2 Seller's Intellectual Property. Except as stated in this **Section 10.2**, Seller does not transfer to Buyer any Intellectual Property Right of Seller related to the Products or Services or incorporated in Buyer's Property, other than the right to incorporate Products purchased from Seller in vehicles and component parts and to sell those vehicles and component parts to the public. If the Contract is terminated by Seller or Buyer pursuant to **Section 12.1** (other than by Seller for Buyer's Default), Seller grants to Buyer a non-exclusive right and license to use Seller's Intellectual Property Rights during the Contract term that would have applied had it not been earlier terminated under Section 12.1, and subject to **Section 14**, to obtain from alternate sources products and services similar to the Products and Services for use in vehicles or component parts covered by the terminated Contract. There will be no fee for this license if (1) Buyer terminates the Contract for

Seller's Default, or (2) Seller terminates the Contract other than for Buyer's Default or pursuant to **Section 16**. Otherwise, the parties will negotiate a reasonable fee for use of Seller's Intellectual Property Rights.

Comment: Recognizing that Intellectual Property Rights represent a significant investment by many Sellers, Section 10.2 protects Seller's Intellectual Property Rights except as needed to use the Products incorporating those rights. In addition, if Seller or Buyer terminates the Contract (other than for Buyer's Default), Buyer may also use the Intellectual Property Rights to obtain alternate sourced products, but only for the remainder of the Contract term. Buyer is required to pay a reasonable license fee for this use unless Buyer terminates for Seller's Default or Seller terminates other than for Buyer's Default or for excusable non-performance (see Section 16). See also Section 14.

10.3 Infringement.

(a) Subject to **Section 10.3(b)**, Seller will indemnify and defend Buyer and its customers against claims, liabilities, losses, damages, costs, and expenses, including reasonable legal fees, arising out of the actual or alleged infringement by the Products of a third-party Intellectual Property Right (1) in the United States, the European Union, or Japan, and (2) in another jurisdiction if Seller is aware of the actual or alleged infringement in that other jurisdiction at the time the Purchase Order is issued and fails to disclose it to Buyer within 10 days after accepting the Purchase Order. If a claim under this **Section 10.3** results, or is likely to result, in an injunction or other order that would prevent Seller from supplying or Buyer from using Products for their intended purpose, Seller will at its option and expense either (i) secure a license of the Intellectual Property Right that permits Seller to continue supplying the Products to Buyer, or (ii) modify the Products so that they become non-infringing, so long as the modification does not materially alter the operation or performance of the Products, or (iii) replace the Products with non-infringing but practically equivalent Products.

(b) Seller will have no liability under this **Section 10.3** unless Buyer provides Seller with full information, cooperation, and assistance regarding, and authority to defend, a claim covered by this **Section 10.3**. Seller will have no liability under this **Section 10.3** if and to the extent that a claim of infringement is based on (1) a Product modification made by Buyer or a third party, (2) a Product modification made by Seller at Buyer's request, (3) use or interconnection by Buyer of the Product in

combination with other products not made or sourced by Seller, or (4) Products made to specifications not provided by Seller.

Comment:

1. *Section 10.3(a) requires Seller to indemnify Buyer for infringement if the Products infringe third-party Intellectual Property Rights in the major automotive markets (the United States, the European Union, and Japan), recognizing that many Sellers lack the resources to search for third-party Intellectual Property Rights worldwide. Section 10.3(a) also requires Seller to take appropriate action to enable Buyer to use the Products for their intended purpose, once a claim covered by Section 10.3(a) appears likely to limit Buyer's ability to use the Products as intended.*

2. *Section 10.3(b) imposes two conditions to Seller's liability. First, it requires that Seller be afforded the opportunity to control defense of the third-party claim. Second, it excludes liability in the circumstances listed, of which the most significant is to exclude Products made to Buyer's specifications.*

11. Property.

11.1 Buyer's Property.

(a) Buyer will own the tooling, jigs, dies, gauges, fixtures, molds, patterns, supplies, materials, and other equipment and property used by Seller to manufacture, store, and transport Products or provide Services ("**Property**") if (1) the Property is so designated in the Contract, or (2) Buyer or its customer has provided or paid for the Property ("**Buyer's Property**"). Seller will assign to Buyer contract rights or claims in which Seller has an interest with respect to Buyer's Property and execute bills of sale, financing statements, or other documents reasonably requested by Buyer to evidence its or its customer's ownership of Buyer's Property. Seller will indemnify and defend Buyer against claims or liens adverse to Buyer's or its customer's ownership of Buyer's Property except those that result from the acts or omissions of Buyer or its customer. Seller will hold Buyer's Property on a bailment basis and will be responsible for loss or damage to Buyer's Property while in its possession or control. To the extent permitted by law, Seller waives any lien or similar right it may have with respect to Buyer's Property. Buyer will be responsible for personal property taxes assessed against Buyer's Property.

(b) Seller will (1) at its expense maintain Buyer's Property in good condition and repair, normal wear and tear excepted, throughout the useful life of

Buyer's Property, (2) use Buyer's Property only for the manufacture, storage, and transport of Products for Buyer unless Buyer otherwise approves in writing, (3) at Buyer's request and expense, mark Buyer's Property as belonging to Buyer or its customer, and (4) not remove Buyer's Property (other than shipping containers and the like) from Seller's premises without Buyer's written approval. All replacement parts, additions, improvements, and accessories to Buyer's Property will become part of Buyer's Property unless they can be removed without damaging Buyer's Property.

(c) Buyer will pay for Buyer's Property that it is required to purchase at the amount specified in the Contract or, if no amount is specified in the Contract, at (1) Seller's actual cost of the Buyer's Property, if manufactured by a third party, or (2) Seller's actual cost of purchased materials, components, and services plus Seller's actual cost of labor and overhead allocable to the Buyer's Property, if manufactured by Seller. Unless otherwise stated in the Contract, final payment for Buyer's Property is due (i) on the vehicle manufacturer's PPAP (Production Part Approval Process) approval date, or (ii) within 90 days after the Property is tendered for PPAP approval if no action has then been taken on the request for PPAP approval.

(d) Subject to **Section 11.1(e)**, Seller will immediately release to Buyer upon request, and Buyer may retake immediate possession of, Buyer's Property and other property of Buyer or its customers at any time, with or without cause and without payment of any kind unless otherwise provided in the Contract. Seller will release the requested Property and other property to Buyer F.C.A. Seller's plant (Incoterms 2010), properly packed and marked in accordance with the requirements of Buyer's carrier. If the release or recovery of Buyer's Property or other property renders Seller unable to produce a Product, the release or recovery will be deemed a termination of the Contract with respect to that Product pursuant to **Section 12** or **13**, as applicable.

(e) Seller's obligation to release and allow Buyer possession of Buyer's Property under Section 11.1(d) shall be conditioned on payment by Buyer of all amounts owed for Buyer's Property under **Section 11.1(c)**, except that if Buyer and Seller dispute the amount owed under Section 11.1(c), Seller shall release and allow Buyer possession upon payment by Buyer of the undisputed portion of the amount claimed by Seller to be owed. Seller's relinquishment

of possession shall not prejudice any claim or right to payment of Seller for the disputed amounts.

Comment:

1. *Section 11.1 covers tooling and other property of Buyer that is placed in Seller's custody in order to perform the Contract. It clarifies that Buyer's Property includes only Property that Buyer has provided or paid for. It does not include Property ordered from or through Seller unless and until it has been paid for. See also Sections 11.1 (d) and (e) regarding the relationship between payment and Buyer's right in the property.*

2. *Section 11.1(b) requires that Seller properly maintain Buyer's Property and return it to Buyer upon request.*

3. *Section 11.1(c) sets the price established in the Contract as the purchase price for Property that has been purchased by Seller for resale to Buyer. Only if the Contract does not establish a fixed price will Seller's acquisition costs become relevant. Note that Seller's acquisition costs do not include profit, so it is incumbent on a Seller wishing to recover a profit on tooling to fix a price in the Contract that includes an element of profit. Section 11.1(c) also sets forth the default payment provisions, which may be modified in the Purchase Order.*

4. *Section 11.1(d) and (e) together allow the Buyer to obtain possession of its property once it has paid for it, except that if there is a dispute about what is owed, Buyer can obtain possession by paying the undisputed amount, with the dispute to be resolved later.*

11.2 Seller's Property. Seller will own all Property that is not Buyer's Property ("**Seller's Property**"). Seller will at its expense furnish, maintain in good condition, and replace when necessary Seller's Property needed to perform the Contract. While a Contract for Products remains in effect, Buyer may purchase Seller's Property used exclusively to produce those Products and not needed by Seller to produce Products or products for other customers, for a purchase price equal to the greater of fair market value or Seller's unamortized acquisition cost.

Comment: *Section 11.2 affords Buyer the opportunity to purchase Property (as defined) owned by Seller, so long as Seller no longer needs that Property.*

12. Term and Termination.

12.1 Generally. Each Contract will remain in effect for the term specified in the Contract (or until terminated if no term is specified) unless earlier

terminated by either party (1) by reasonable (but not less than 60 days) notice to the other party, or (2) pursuant to **Section 13** or **16**. Upon termination of a Contract, Seller will assist Buyer in locating an alternative source for the Products and Services and in moving production to the alternate source selected by Buyer.

Comment:

1. *Section 12.1 provides a general right for either party to terminate without cause, in addition to the termination rights granted in Sections 13 (Default) and 16 (excusable non-performance). This right may be modified by the Purchase Order or by use of a long-term agreement.*

2. *Once a Contract has been terminated early, Sections 12.2, 12.3 describe various rights of the parties upon termination, depending on whether it is a long term or short term contract. Section 12.4 addresses these rights in contracts for Buyer's Property. Note, however, that these rights apply only to an early termination—they do not apply if the Contract simply expires and is not renewed. Since Purchase Orders are typically issued for a one-year term, the parties are vulnerable at the end of each one-year term if the Purchase Order is not renewed and accepted. Section 12.2 treats certain Contracts as long term contracts even if the Purchase Order is issued for 1 year or less. However, a Buyer wishing to protect pricing and other favorable terms or a Seller wishing to best protect its investment in research and development, capital equipment, etc. should consider establishing an express long-term Contract which expressly recognizes that the parties supply relationship will continue for life of the program, or some other period longer than the term of a particular purchase.*

12.2 Long-Term Contracts. If Buyer terminates a Contract issued for a term of more than one year ("**Long-Term Contract**") before the end of its specified term (other than for Seller's Default), Buyer will (1) purchase completed Products at the Contract price and work-in-process and raw materials at Seller's actual cost, in each case to the extent reasonably necessary to satisfy Buyer's firm releases, and (2) reimburse Seller for reasonable costs actually incurred by Seller as a result of the early termination, including the cost to store the items to be purchased and relocate production to an alternate source and the cost of unreimbursed and unamortized research and development costs, engineering costs, capital equipment, Seller's Property, and supplies that are unique to the Products. If Seller terminates a Long-Term Contract before the end of its specified term

(other than for Buyer's Default), (i) Seller will reimburse Buyer for reasonable costs actually incurred by Buyer to relocate production to an alternate source, and (ii) Buyer may purchase completed Products at the Contract price and work-in-process and raw materials at Seller's actual cost. For purpose of this provision, if Buyer and Seller have agreed in writing to pricing for more than one year or have agreed in writing that the Products or Services will be supplied for the life of the program, the Contract shall be a Long-Term Contract, even if a particular Purchase Order expires in one-year or less.

Comment:

1. *When a Long-Term Contract is terminated by Buyer (other than for Seller's Default), Section 12.2 requires Buyer, among other things, to reimburse Seller for unreimbursed and unamortized research and development costs, engineering costs, capital equipment, Seller's Property, and supplies that are unique to the Products. A departure from most current industry terms and conditions, this provision is intended to protect Seller's investment in those items that Seller reasonably expects to recover over the life of the Long-Term Contract. Note that this provision applies only to Long-Term Contracts and is not repeated in Section 12.3. Sections 12.2 (and 12.3) also require the terminating Buyer to purchase materials and work in progress, limited to the quantities reasonably necessary to satisfy firm releases. "Reasonably necessary" is not always limited to the material or work in progress that will be specifically incorporated in the firm releases. If lead time requirements or other commercial reasons make it reasonably necessary for Supplier to purchase more materials than the amount to be used for the firm releases, then the Buyer must purchase those reasonable amounts.*

2. *The final sentence of Section 12.2 addresses a common arrangement in the industry which can create confusion and conflict regarding the term and related rights. Buyers and Sellers frequently agree to multi-year pricing, but do not expressly address whether that means that the supply relationship will continue beyond the term of a one year or shorter purchase order. The final sentence reflects the drafters' belief that in these situations the long term pricing usually reflects a commitment to a long term supply relationship and should be considered a long term contract in determining the parties' rights and obligations on termination. If that does not reflect the parties' intentions, they should expressly say so in the multi-year pricing agreement or purchase order.*

3. *When a Long-Term Contract is terminated by Seller (other than for Buyer's Default), Section 12.2*

requires Seller to reimburse Buyer for the cost of relocating production, as well as allowing Buyer at its option to purchase completed Products, work-in-process, and raw materials.

12.3 Short-Term Contracts. If Buyer terminates a Contract issued without a definite term or for a term of one year or less ("**Short-Term Contract**") before the end of its specified term (other than for Seller's Default), Buyer will purchase completed Products at the Contract price and work-in-process and raw materials at Seller's actual cost, in each case to the extent reasonably necessary to satisfy Buyer's firm releases. If Seller terminates a Short-Term Contract issued without a definite term or before the end of its specified term (other than for Buyer's Default), Buyer may purchase completed Products at the Contract price and work-in-process and raw materials at Seller's actual cost. For purpose of this provision, a Contract that is a Long Term Contract under the final sentence of Section 12.2 shall not be a Short-Term Contract.

Comment: *The rights upon termination of a Short-Term Contract are more limited. Section 12.3 requires Buyer to purchase completed Products, work-in-process, and raw materials if Buyer terminates (other than for Seller's Default), and provides Buyer the option to purchase those items if Seller terminates (other than for Buyer's Default).*

12.4 Property Orders. If Buyer terminates a Contract for Buyer's Property before it is fully performed (other than for Seller's Default), Buyer will (1) purchase the completed Buyer's Property at the Contract price and work-in-process and raw materials related to the uncompleted work at Seller's actual cost, and (2) reimburse Seller for reasonable costs actually incurred by Seller as a result of the early termination, including the cost to store the items to be purchased and to relocate the work to an alternate source.

Comment: *Section 12.4 provides rights similar to those provided for termination of a Long-Term Contract if Buyer terminates a Contract to supply tooling or other Buyer's Property.*

13. Default.

13.1 Events of Default. Time is of the essence and, subject to **Section 16**, either party will be in "**Default**" under the Contract if it (1) fails to perform any obligation under the Contract and, if the non-

performance can be cured, fails to cure the non-performance within 15 business days after notice from the other party specifying the non-performance, (2) admits in writing its inability to pay its debts as they become due, commences a bankruptcy, insolvency, receivership, or similar proceeding, or makes a general assignment for the benefit of creditors, (3) becomes a debtor in a bankruptcy, insolvency, receivership, or similar proceeding commenced by a third party that is not dismissed within 30 days after commencement, or (4) fails to provide adequate assurance of performance under the Contract within three business days after written demand by the other party.

Comment:

1. *Section 13.1 should be read in conjunction with Section 12.1, which permits either party to terminate without cause, and Section 16, which excuses non-performance caused by an event beyond the control of the affected party. The difference is the time period to effect termination (60 days in Section 12.1 and 30 days in Section 16; much shorter in Section 13.1) and the rights available upon termination (favoring the non-terminating party in Sections 12 and 16; favoring the terminating party in Section 13).*

2. *Section 13.1 attempts to strike a balance between giving the non-performing party a reasonable opportunity to cure a non-performance that is capable of cure and giving the performing party the opportunity to begin exercising its remedies.*

3. *The first type of Default is the traditional default based on a failure to perform obligations. Although some current industry terms and conditions allow less time or no opportunity to cure, the drafters believe that fairness requires a right to cure, that 15 business days is a reasonable time period, and that a shorter time period could effectively render the right to cure useless in many situations.*

4. *The second, third and fourth types of Default are more aggressive in that they do not require non-performance of any Contract obligation. Instead, they provide the non-defaulting party the opportunity to exercise remedies quickly when future performance is at substantial risk and the need to begin exercising remedies is critical. While susceptible of abuse, the drafters believe these events of Default have generally been used prudently in the past and are appropriate to prevent greatly increased damages to the non-defaulting party.*

13.2 Remedies. Subject to **Section 13.3:**

(a) Subject to **Sections 7 and 8** (which provide the exclusive remedies for breach of warranty, Recalls, and products liability) and to the limitations in this **Section 13.2**, either party may exercise the remedies provided in this **Section 13.2**, which are cumulative and are in addition to all other rights and remedies available elsewhere in the Contract or by law.

(b) Either party may recover from the other party actual out-of-pocket damages or costs directly caused by the other party's breach of the Contract, regardless of whether the breach subsequently becomes a Default with the passage of time or giving of notice or both. All damages under this **Section 13.2** will be reasonably determined based on the nature, type, price, and profitability of the Products or Services, industry practices, and the overall volume, scope, and profitability of other business relationships between Seller and Buyer.

(c) Upon the occurrence of a Default and while that Default is continuing, the non-defaulting party may terminate the Contract by notice to the defaulting party. If Seller is in Default, Buyer's damages will include the reasonable costs actually incurred to relocate the work to an alternate source, and Buyer may purchase completed Products at the Contract price and work-in-process and raw materials at Seller's actual cost. If Buyer is in Default, Seller's damages will include (1) the Contract price for completed Products and Services and the actual cost of work-in-process and raw materials (which will become Buyer's property upon payment in full), and (2) the cost of unreimbursed and unamortized research and development, capital equipment, Property, and supplies that are unique to the Products.

(d) If Seller does not release or deliver Buyer's Property or other property of Buyer or its customers in accordance with **Section 11.1(d)**, Buyer may at Seller's cost (1) obtain an immediate court order for possession, and (2) enter Seller's premises, with or without legal process, and take immediate possession of Buyer's Property and the other property. To the extent permitted by law, Seller waives any right to object to Buyer's repossession of Buyer's Property and the other property in a bankruptcy or other proceeding.

(e) **EXCEPT AS OTHERWISE EXPRESSLY AUTHORIZED IN THE CONTRACT, ALL INDIRECT, SPECIAL, CONSEQUENTIAL (INCLUDING LOST PROFITS OR MARKET SHARE OR DAMAGE TO BRAND VALUE),**

INCIDENTAL, PUNITIVE, AND EXEMPLARY DAMAGES, WHETHER OR NOT FORESEEABLE, ARE EXCLUDED UNDER THESE GENERAL TERMS AND CONDITIONS TO THE EXTENT PERMITTED BY APPLICABLE LAW.

Comment:

1. *Section 13.2(a) clarifies that Sections 7 and 8 provide the exclusive remedies for breach of warranty, Recalls, and products liability.*

2. *Section 13.2(b) recognizes that, even if the non-performance does not ripen into a Default (with the requisite notice and passage of time), the performing party should still be able to recover any damages directly resulting from the non-performance. Section 13.2(b) also requires that the overall nature and extent of the commercial relationship be considered when awarding damages under Section 13.2.*

3. *Section 13.2(c) establishes the basic remedies once a Default has occurred, in addition to the right to recover damages. If Seller is in Default, Buyer may purchase completed Products, work-in-process, and raw materials.*

4. *Section 13.2(d) establishes the remedies for Seller's failure to return Buyer's Property when it is entitled to possession under Section 11.1(d). Recognizing that Buyer may have immediate need for this Property, it provides for repossession and an injunction to recover the Property.*

5. *Section 13.2(e) limits the types of damages that can be recovered by either party under the Contract (including Sections 7 and 8), excluding such indirect damages as lost profits and punitive damages. By limiting damages to those directly resulting from a Default, Section 13.2 attempts to balance the goal of making the performing party "whole" with the recognition that a significant imbalance in financial resources and rewards often exists between the parties.*

14. Confidential Information.

Trade secrets, specifications, drawings, notes, instructions, engineering data and analyses, compositions of matter, financial data, and other technical and business data which are supplied or disclosed by Buyer or Seller in connection with the Contract, in each case that are marked or otherwise identified as confidential or where their confidential nature is apparent at the time of disclosure ("**Confidential Information**"), will be deemed confidential and proprietary to, and remain the sole property of, the disclosing party. The receiving party

may not disclose Confidential Information or use Confidential Information for any purpose other than as contemplated under the Contract without in each case the written consent of the disclosing party. Confidential Information will not include information that (1) is or becomes generally available to the public other than as a result of a violation of this **Section 14** by the receiving party, (2) was obtained by the receiving party on a non-confidential basis from a third party who had the apparent right to disclose it, or (3) is legally required to be disclosed. Buyer and Seller will each use the same degree of care to safeguard Confidential Information that it uses to protect its own confidential information from unauthorized access or disclosure (but not less than a reasonable degree of care). Upon request by the disclosing party, the receiving party will promptly return or destroy the original and all copies of Confidential Information received.

Comment: *Section 14 protects Confidential Information, including information about Intellectual Property Rights (see Section 10), disclosed by either party. To provide a measure of certainty and recognize the responsibility of the disclosing party to take reasonable steps to protect it, "Confidential Information" is limited to information that is marked as such or where the confidential nature of the information is apparent at the time of disclosure. Prudent practice would dictate that the best way to assure confidential treatment is to always identify the information as confidential, thus removing all doubt. The standard of care specified is the same degree of care as the recipient uses to safeguard its own Confidential Information, but not less than a reasonable degree of care.*

15. Assignment and Subcontracting.

Neither party may assign or subcontract its duties or responsibilities under the Contract without the prior written consent of the other party, which will not be unreasonably withheld or delayed. Unless otherwise stated in the consent, any assignment or subcontracting by either party, with or without the required consent, will not relieve that party of its duties or obligations under the Contract or its responsibility for non-performance or Default by its assignee or subcontractor. If Buyer requires Seller to subcontract all or a portion of its duties or obligations under the Contract to a designated subcontractor, Seller will not be responsible for a breach of the Contract caused by that subcontractor's failure to meet its warranty, delivery, or other contractual obligations.

Comment: Section 15 requires approval for **any** assignment or subcontracting, which makes it incumbent on Seller to seek specific approval from Buyer for all subcontractors. Generally, the party making the assignment or subcontract remains responsible for the actions of its assignee or subcontractor unless the consent provides otherwise. Where the subcontractor is a directed source by Buyer, however, Seller is not liable for a breach caused by that directed source.

16. Excusable Non-Performance.

A delay or failure by either party to perform its obligations under the Contract will be excused, and will not constitute a Default, only if (1) caused by an event or occurrence beyond the reasonable control of that party and without its fault or negligence, including a labor dispute, and (2) the party unable to perform gives notice of the non-performance (including its anticipated duration) to the other party promptly after becoming aware that it has occurred or is reasonably likely to occur, followed by prompt notices of any material changes in the facts relative to its ability to perform and/or the anticipated duration of the non-performance. Seller and Buyer shall share information, confer, seek agreement and otherwise act cooperatively to avoid or mitigate the effects of the potential or actual excused non-performance. If Seller is unable to perform for any reason, Buyer may purchase Products and Services from other sources and reduce its purchases from Seller accordingly without liability to Seller. Within three business days after written request by the other party, the non-performing party will provide adequate assurances that the non-performance will not exceed 30 days. If the non-performing party does not provide those assurances, or if the non-performance exceeds 30 days, the other party may terminate the Contract by notice given to the non-performing party before performance resumes. If Seller reasonably incurs extraordinary costs in order to maintain or restore supply in response to an inability to perform (or what would be an inability to perform except for those extraordinary costs), the cost shall be allocated between the parties in an equitable manner.

Comment:

1. Section 16 references "excusable nonperformance" rather than the more limiting "force majeure." It specifically includes labor disputes (see also Section 17). Prompt notice of the inability to perform is a pre-condition to coverage.

2. Section 16 also clarifies that notice should be given if the inability is reasonably likely; it is unreasonable to withhold information until a disruption has occurred, since earlier notice might have lessened the harm. It also requires ongoing information sharing and cooperation by both parties, with the same goal of avoiding or minimizing the impact of a disruption.

3. A Seller must use diligent efforts to maintain or restore supply, but sometimes that is possible only by incurring extraordinary expenses. Section 16 provides that those extraordinary expenses, if reasonably incurred, should be equitably shared. The drafters believe that equitable sharing is fairer than requiring one party or the other to absorb the entire cost and is more likely to encourage the prompt restoration of supply.

4. When Section 16 applies, the non-performance will not be deemed a Default under Section 13, but Section 16 gives the other party the right to terminate the Contract if the non-performance extends beyond 30 days (in which case Section 12 will govern). During a period of excused non-performance by Seller, Buyer may also obtain Products and Services elsewhere.

17. Labor Contracts.

Seller will notify Buyer of the contract expiration date at least six months before the expiration of a current labor contract that has not been extended or replaced. Buyer may thereafter direct Seller in writing to manufacture up to 30 days of additional inventory of Products, specifying the quantities of Products required and any packaging and storage requirements. Seller will use commercially reasonable efforts to comply with Buyer's written directions prior to expiration of the current labor contract and until the current labor contract has been extended or a new contract completed. By authorizing the additional inventory, Buyer commits to buy the entire quantity of conforming Products requested and produced. Seller is responsible for carrying costs and any additional costs of manufacture.

Comment: Section 17 recognizes that a labor dispute involving Seller's employees may significantly impact Buyer's ability to continue to operate. Accordingly, Section 17 allows Buyer to require that Seller build a bank of up to 30 days additional inventory to help insulate Buyer from the effects of a potential labor stoppage by Seller's employees. However, by requiring the additional inventory, Buyer commits to purchase that inventory.

18. Customs.

Transferable credits or benefits associated with Products purchased, including trade credits, export credits, or rights to the refund of duties, taxes, or fees, belong to Buyer unless otherwise prohibited by applicable law. Seller will provide Buyer with all information and records relating to the Products necessary for Buyer to (1) receive these benefits, credits, and rights, (2) fulfill any customs obligations, origin marking or labeling requirements, and certification or local content reporting requirements, (3) claim preferential duty treatment under applicable trade preference regimes, and (4) participate in any duty deferral or free trade zone programs of the country of import. Seller will obtain all export licenses and authorizations and pay all export taxes, duties, and fees unless otherwise stated in the Contract, in which case Seller will provide all information and records necessary to enable Buyer to obtain those export licenses or authorizations.

***Comment:** Section 18 adopts the current industry practice that transfers to Buyer credits or benefits associated with Products purchased, to the extent that they are transferable.*

19. Insurance.

Prior to commencing work on Buyer's premises or utilizing Buyer's property (including Buyer's Property), Seller will maintain and upon request furnish to Buyer a certificate evidencing (1) general liability insurance with coverage limits reasonably acceptable to Buyer and naming Buyer as an additional insured, (2) all risk property perils insurance covering the full replacement value of Buyer's Property while in Seller's care, custody, or control and naming Buyer as loss payee, and (3) worker's compensation insurance as required by applicable law.

***Comment:** Section 19 requires Seller to provide general liability insurance coverage when performing work at Buyer's premises or using its property, and to provide property perils coverage protecting Buyer's investment in Buyer's property that is utilized by Seller. Note that Seller will need to contact its insurance carriers to add Buyer as an additional insured and loss payee on the relevant policies.*

20. Dispute Resolution.

20.1 Negotiation and Mediation. Buyer and Seller will first endeavor to resolve through good faith

negotiations any dispute arising under the Contract. If a dispute cannot be resolved through good faith negotiations within a reasonable time, either party may request non-binding mediation by a mediator approved by both parties or, absent that approval, by the National Center for Dispute Resolution.

20.2 Arbitration. If mediation fails to resolve the dispute within 30 days after the first mediation session, either party may submit the dispute to binding arbitration by notice to the other party. The arbitration proceedings will be conducted, and a single arbitrator will be selected, in accordance with the rules of the National Center for Dispute Resolution or other rules approved by the parties, and will be governed by the *United States Arbitration Act*, 9 U.S.C. §§1-16, and this **Section 20**. The arbitration will be conducted at an agreed location or at a location selected by the arbitrator if the parties are unable to agree. The arbitrator will issue a written opinion setting forth the basis for the arbitrator's decision, which may include an award of legal fees and costs. The arbitrator's award will be final and non-appealable absent fraud or manifest error, and judgment on the arbitrator's award may be entered in any court having jurisdiction. While arbitration proceedings are pending, the parties will continue to perform their obligations under the Contract without setoff for any matters being contested in the arbitration proceedings.

20.3 Litigation. The parties have selected binding arbitration as the sole means to resolve a dispute between them over monetary claims that cannot be resolved through mediation. Either party may pursue through litigation claims that also involve third parties who have not consented to arbitration, claims in litigation commenced by third parties, and claims for injunctive or other non-monetary relief.

***Comment:** Section 20 provides a roadmap for dispute resolution that attempts to avoid litigation when possible. Negotiation and mediation are offered as first steps for all disputes and, if they are not successful, binding arbitration or litigation. Arbitration was selected as the exclusive means for resolving most monetary disputes because it is often less expensive and less time-consuming than litigation. Arbitration is also private and may be more attractive to businesses that do not wish to air their disputes publicly. Litigation is permitted in Section 20.3 where third parties are involved who have not consented to arbitration or where non-monetary relief (such as an injunction) is sought. The drafters recognize that the parties may prefer the expanded discovery rights,*

opportunities for appeal, and other features of litigation, in which case this section should be deleted or modified accordingly.

21. Miscellaneous.

21.1 Advertising. During and after the term of the Contract, Seller will not advertise or otherwise disclose its relationship with Buyer or Buyer's customers without Buyer's prior written consent, except as may be required to perform the Contract or as required by law.

***Comment:** Section 21.1 adopts the current industry practice of prohibiting Seller from advertising its relationship with Buyer. Even though both parties sometimes ignore this provision in practice, the drafters believe that it may have value in certain situations, such as in developing markets where quality suppliers are scarce.*

21.2 Audit Rights. Seller will maintain records as necessary to support amounts charged to Buyer under the Contract in accordance with Seller's document retention policies. Buyer and its representatives may audit Seller's records of transactions completed within one year prior to the audit date, to the extent needed to verify the quantities shipped and that the prices charged match the Contract prices. Any audit will be conducted at Buyer's expense (but will be reimbursed by Seller if the audit uncovers material errors in the amounts charged), at reasonable times, and at Seller's usual place of business.

***Comment:** Section 21.2 adopts the current industry practice of allowing Buyer to audit Seller's records, but limits the audit scope to those records needed to verify quantities and prices. It does not permit a wide-ranging review of Seller's costs (unless the Contract prices are directly tied to costs), financing, business plans, and the like. Seller should protect any Confidential Information disclosed in an audit by marking that information accordingly (see Section 14).*

21.3 Electronic Communication. Seller will comply with the method of electronic communication specified by Buyer in Buyer's request for quotation and confirmed in the Contract, including requirements for electronic funds transfer, purchase order transmission, electronic signature, and communication. Seller will also make commercially reasonable efforts to comply with any modification to Buyer's specified method of electronic

communication after the date of the Contract, subject to **Section 1.2.**

***Comment:** Section 21.3 clarifies that the required method of electronic communication is a Contract term. Any changes are subject to Section 1.2, in order to assure that, to the extent they impact Seller's costs, they are addressed like other Contract changes imposed by Buyer.*

21.4 Relationship of the Parties. Buyer and Seller are independent contractors, and nothing in the Contract makes either party the agent or legal representative of the other party for any purpose. Neither party has authority to assume or to create any obligation on behalf of the other party.

***Comment:** Standard contract language.*

21.5 Waiver. The failure of either party to enforce any right or remedy provided in the Contract or by law on a particular occasion will not be deemed a waiver of that right or remedy on a subsequent occasion or a waiver of any other right or remedy.

***Comment:** Standard contract language. See also Section 13.*

21.6 Entire Agreement. The Contract constitutes the entire agreement between the parties with respect to its subject matter, and supersedes all prior oral or written representations or agreements by the parties with respect to the subject matter of the Contract, including Buyer's request for quotation and Seller's quotation unless specifically incorporated in the Contract. Except as authorized in **Section 1.2**, no subsequent terms, conditions, understandings, or agreements purporting to modify the terms of the Contract will be binding unless in writing and signed by both parties.

***Comment:** Standard contract language. Also known as an "integration clause," Section 21.6 clarifies that the Contract consists of the documents referenced in Section 1.1 and excludes all other prior written and oral agreements and understandings. If an important concept is not already addressed in the Contract, the parties should make sure that it is put in writing and made part of the Contract. Special consideration should be given to the various types of agreements which often precede the first production purchase order and which may contain terms that were intended to carry over to the parties' production relationship. If so, they should be identified in the purchase order.*

21.7 Severability. A finding that any provision of the Contract is invalid or unenforceable in any

jurisdiction will not affect the validity or enforceability of any other provision of the Contract or the validity or enforceability of that provision in any other jurisdiction.

***Comment:** Standard contract language. Some courts will invalidate an entire contract upon finding one section unenforceable. Section 21.7 attempts to preserve as much of the Contract as is enforceable.*

21.8 Interpretation. When used in these General Terms and Conditions, “including” means “including without limitation” and terms defined in the singular include the plural and vice versa.

***Comment:** Standard contract language.*

21.9 Notices. Any notice or other communication required or permitted in the Contract must be in writing and will become effective on the date of actual receipt if the date of actual receipt is a business

day or on the next business day if the date of actual receipt is not a business day.

***Comment:** Standard contract language. Note that notices become effective upon **receipt**, not when sent. Accordingly, the party giving notice must take delivery time into account when sending required notices and should arrange for proof of receipt.*

21.10 Governing Law. Unless otherwise agreed in writing, the Contract will be governed by and interpreted according to the internal laws of Michigan. The *United Nations Convention on Contracts for the International Sale of Goods* will not apply to the Contract.

***Comment:** Standard contract language. Most courts will uphold a choice of law provision if the chosen jurisdiction bears a reasonable relationship to the Contract. Michigan law was chosen as most automotive companies are domiciled in Michigan. Those domiciled outside Michigan should consider substituting their state of domicile.*