



VORTEK INSTRUMENTS, LLC
8475 West I-25 Frontage Road
Suite 300
Longmont, CO 80504

TERMS AND CONDITIONS OF SALE

- 1. Scope.** VorTek Instruments, LLC ("Vortek") shall sell to Customer the hardware and service products and license the firmware and/or software products (collectively, the "Products") ordered by Customer from VorTek. VorTek shall accept purchase orders from Customer only in accordance with these general terms and conditions of sale.
- 2. Prices.** Prices will be based upon the current U.S. price list for shipments within the United States, and upon the current international price list for shipments outside of the United States. VorTek may change and adjust its price list upon thirty (30) days prior written notice to Customer. Purchase orders received prior to the effective date of the price change shall be invoiced at the price specified on the Purchase Order, not the adjusted price. Sales outside of the United States may be subject to a credit insurance fee, in VorTek's sole discretion.
- 3. Payment Terms.** Customer shall make full payment, without set-off, within thirty (30) days of the date of VorTek's invoice unless other terms are granted by VorTek. VorTek reserves the right to charge Customer interest on any delinquent balance in addition to all its other rights and remedies, including, without limitation, the right to refuse shipment. This interest shall be computed on a daily basis for each day that the payment is delinquent at the lesser of one and one half percent (1.5%) per month or the maximum rate permitted by law. Customer shall grant VorTek a security interest in the Products until receipt of payment in-full. Customer irrevocably authorizes VorTek to authenticate and file any financing statements deemed reasonably necessary or appropriate by VorTek to protect VorTek's interests in the Products.
- 4. Standard Order Procedure.** When ordering VorTek Products, Customer shall submit a purchase order to VorTek based upon a valid and current quotation by mail, fax or electronic submission referencing these Terms and Conditions. Each purchase order shall be subject to acceptance by VorTek, which shall not be unreasonably withheld. Each purchase order shall itemize the Product(s), quantity, appropriate "ship to" and "bill to" locations, requested delivery date and any applicable custom specifications requested by Customer. Any and all requested Customer specifications are subject to approval by VorTek. VorTek shall establish scheduled shipment dates based on the requested delivery dates, ordered Product availability, and manufacturing schedules. In the event VorTek is unable to meet the requested delivery schedule, notice shall be provided to Customer as soon as is commercially practicable. If VorTek fails to ship within a scheduled ship date, Customer's sole remedy shall be to reschedule or cancel at no charge.
- 5. Change Orders, Cancellation and Rescheduling.** Any and all Customer changes to submitted purchase orders must be in writing and are subject to approval by VorTek. Customer may reschedule a requested delivery date one (1) time per purchase order. All cancellations, deletions or modifications made by Customer to purchase orders within fifteen (15) days prior to any scheduled shipment date are subject to a restocking charge equal to twenty-five percent (25%) of the price of the affected Product.
- 6. Right of Return.** No Product may be returned to VorTek except under warranty (pursuant to [Section 12](#)), or for repair or in the instance of a shipping error.
- 7. Resale.** Customer agrees that it will only use Products purchased hereunder internally and that Products purchased hereunder are not for the purpose of resale or distribution unless otherwise disclosed to VorTek.
- 8. Delivery, Title and Risk of Loss.** Delivery of shipments to the Customer shall be in accordance with FOB (Freight On Board, Incoterms 2010) VorTek's facility, and title and risk of loss or damage to the Products shall pass to Customer on delivery to the common carrier.
- 9. Product Changes.** VorTek reserves the right to change, improve or discontinue any Product at any time.
- 10. Taxes and Duties.** Customer shall assume all responsibility for taxes on shipments (except taxes based on the net income of VorTek) or shall provide VorTek with tax exemption and income tax withholding certificates or other documentation acceptable to the taxing authorities within thirty (30) days of placing a purchase order. If Customer does not provide such documentation to VorTek, VorTek reserves the right to include such taxes in the invoice. On orders for shipment outside the United States of America, all required import duties, license fees and taxes shall be the responsibility of the Customer in addition to the stated prices. Customer shall also be responsible for costs of both exporting the Product outside the United States and importing the Product into any country outside of the United States. Customer shall also be responsible for costs of both exporting the Product outside the United States and importing the Product into any country outside of the United States. In the event that (a) Customer is required under local law to withhold taxes from payments made to VorTek and remit such taxes to the local tax authorities, or (b) Customer asserts that such withholding taxes apply, then Customer shall withhold and remit such taxes after grossing up the net payments due to VorTek under these Terms and Conditions by the applicable withholding taxes. The gross payments owed by Customer to VorTek by virtue of the withholding taxes shall be equal to the net payments due to VorTek under these Terms and Conditions (to the extent such payments are subject to withholding taxes or purported to be subject to withholding taxes) multiplied

by the fraction 100/[100-the applicable withholding tax rate]. Customer agrees to withhold and remit in a timely manner the difference between the gross payments owed to VorTek and the net payments due to VorTek and remit such amounts to the local tax authorities and further agrees to supply VorTek with a receipt for such withholding taxes remitted to the tax authorities.

11. Proprietary Rights and Software License. VorTek grants to Customer a non-exclusive and nontransferable license to use the VorTek proprietary firmware supplied with any VorTek hardware Product and any applicable software (collectively, "Software"), in accordance with VorTek's user manual.

12. Warranties. VorTek's Products are sold subject to the following warranties:

(a) Hardware Products Warranty. Hardware Products shall have a warranty of eighteen (18) months from ship date, unless otherwise noted in specific Product documentation. All warranties begin on the date that VorTek ships the hardware Product to Customer. VorTek warrants that each hardware Product sold by VorTek will operate in accordance with VorTek's published specifications and accompanying documentation for the hardware Product on the date it is shipped, or VorTek will repair or replace the hardware Product, or refund the purchase price at VorTek's sole discretion, less depreciation amortized on a straight line basis over a two year period from ship date. Hardware Products may contain some refurbished parts warranted as new. Replacement parts shall be warranted for the remainder of the warranty period in effect on the original hardware Product, unless otherwise mandated by local law.

(b) Software Warranty. For a period of ninety (90) days from the date that VorTek delivers the Software to Customer, VorTek warrants that (a) the Software will materially conform to VorTek's then-current user manual and any applicable documentation and specifications, as may be published by VorTek, for such Software; and (b) that the media containing the Software is free from physical defects.

(c) Service Products Warranty. VorTek warrants that the service Products purchased by Customer will be performed by VorTek or its authorized service providers in a workmanlike manner in accordance with industry applicable standards and in accordance with the terms of these Terms and Conditions.

VorTek may subcontract certain portions of the work to third party service providers it is performing under these Terms and Conditions. VorTek agrees that all of the terms and conditions contained herein shall be binding upon VorTek's authorized service providers.

13. Exclusive Warranties. THE FOREGOING WARRANTIES AND REMEDIES ARE EXCLUSIVE AND ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, STATUTORY OR OTHERWISE INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT. VORTEK NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY OTHER LIABILITY IN CONNECTION WITH THE SALE, INSTALLATION, MAINTENANCE OR USE OF ITS PRODUCTS, AND VORTEK MAKES NO WARRANTY WHATSOEVER OF ANY NONSTANDARD OR THIRD-PARTY BRANDED PRODUCTS SUPPLIED BY IT HEREUNDER.

VORTEK SHALL NOT BE LIABLE UNDER THIS WARRANTY IF ITS TESTING AND EXAMINATION DISCLOSES THAT THE ALLEGED DEFECT IN THE PRODUCT DOES NOT EXIST OR WAS CAUSED BY CUSTOMER'S OR ANY THIRD PERSON'S MISUSE, NEGLIGENCE, IMPROPER INSTALLATION OR TESTING, UNAUTHORIZED ATTEMPTS TO REPAIR, OR ANY OTHER CAUSE BEYOND THE RANGE OF THE INTENDED USE, OR BY ACCIDENT, FIRE, LIGHTNING OR OTHER HAZARD OR EVENT OF FORCE MAJEURE.

The Products are not designed or intended for use in the design, construction, operation or maintenance of any nuclear facility[, *unless covered by a specific quotation where the conditions of such usage are detailed and VorTek agrees in writing to such usage*]. VorTek disclaims any express or implied warranty of fitness for such uses. Customer agrees that it will not use or license the Products for such purposes.

14. Regulatory Laws And/Or Standards. VorTek makes no representation or warranty that its Products conform to any state, provincial, municipal or other local laws, regulations, codes or standards, except as particularly specified and agreed upon in writing by VorTek. VorTek's prices do not include the cost of any related inspections, permits or associated fees.

15. Intellectual Property Indemnity. At VorTek's expense, VorTek shall defend and indemnify Customer against any claim brought against it by a third party alleging that VorTek Products infringe a U.S. patent, trademark or copyright granted or registered as of the date the VorTek Products are shipped, and shall pay all resulting costs, damages, and reasonable attorneys' fees that a court finally awards and settlements made by VorTek; provided, Customer gives VorTek prompt notice of the claim, reasonable assistance, and full authority and opportunity to direct the defense and settlement.

VorTek shall have no liability hereunder for claims resulting from (i) unauthorized modification or use of the VorTek Products when the claim would not have occurred but for such modification or use; (ii) combination, operation, or use of VorTek Products with any products not provided by VorTek when the claim would not have occurred but for such combination, operation or use; or (iii) Customer's failure to install an upgrade or new version available from VorTek when the claim would not have occurred but for such failure.

Should the use of VorTek Products by Customer be enjoined, or in the event VorTek wishes to minimize its potential liability hereunder, Customer agrees to permit VorTek, at its option, to take any of the following actions: (i) substitute a functionally

equivalent non-infringing unit; (ii) modify the infringing VorTek Product so that it no longer infringes but remains functionally equivalent; (iii) obtain for Customer, at VorTek's expense, the right to continue use of such VorTek Product; or (iv) take back such infringing VorTek Product and refund to Customer the purchase price paid therefor, less depreciation amortized on a straight line basis over a three year period.

This provision sets out VorTek's entire obligation and Customer's sole remedy regarding any claim regarding intellectual property. In no event shall the provisions of this [Section 15](#) apply to any third-party branded Products.

16. Limitation of Liability. IN NO EVENT, WHETHER BASED IN CONTRACT OR TORT (INCLUDING NEGLIGENCE) SHALL VORTEK OR ITS SUBSIDIARIES, AFFILIATES, DIRECTORS, EMPLOYEES, OR VORTEK'S AUTHORIZED REPRESENTATIVES BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES OF ANY KIND, OR FOR LOSS OF REVENUE, LOSS OF BUSINESS OR OTHER FINANCIAL LOSS, OR LOST OR CORRUPTED DATA ARISING OUT OF OR IN CONNECTION WITH THE SALE, INSTALLATION, MAINTENANCE, USE, PERFORMANCE, FAILURE OR INTERRUPTION OF ITS PRODUCTS.

NOTWITHSTANDING ANY OTHER PROVISION OF THESE GENERAL TERMS AND CONDITIONS OF SALE, VORTEK'S MAXIMUM LIABILITY FOR DAMAGES HEREUNDER SHALL NOT EXCEED THE PURCHASE PRICE OF THE PRODUCTS PURCHASED.

THIS DISCLAIMER OF LIABILITY FOR DAMAGES WILL NOT BE AFFECTED IF ANY REMEDY PROVIDED HEREUNDER SHALL FAIL OF ITS ESSENTIAL PURPOSE. CUSTOMER HAS ACCEPTED THE DISCLAIMER OF LIABILITY FOR DAMAGES AS PART OF A BARGAIN TO LOWER THE PRICE OF THE GOODS AND UNDERSTANDS THAT THE PRICE OF THE GOODS WOULD BE HIGHER IF VORTEK WERE REQUIRED TO BEAR ADDITIONAL LIABILITY FOR DAMAGES.

17. General Indemnification. Customer shall defend and indemnify and hold harmless VorTek, its employees, officers, and directors against all claims and associated liability, damages, and expenses (including attorneys' fees and court costs) arising from or in connection with the sale or license to Customer of the Products or the performance or use of such Products, except with respect to claims caused solely by negligence or willful misconduct of VorTek or its employees, officers and directors.

18. Remedies for Non-Payment. No payment by Customer of a lesser amount than the amount of an invoice shall be deemed as acceptance of payment in full, nor shall any endorsement or statement on any check or letter accompanying any check or payment be deemed an accord and satisfaction, and VorTek may accept such check or payment without prejudice to VorTek's right to recover the balance of any amount due or pursue any other remedy provided for in these Terms and Conditions or by law or in equity. In connection with the foregoing, VorTek shall have the absolute right, in its sole discretion, to apply any payment received from Customer to any account of Customer's, which is due and/or delinquent. If Customer fails to make payment in accordance with the payment terms of [Section 3](#), then, in addition to any other available remedies, VorTek may decline to make further deliveries to Customer.

19. Government Contracts.

(a) Restricted U.S. Government Rights. If Customer is an agency or instrumentality of the United States Government: Software is provided with Restricted Rights under Department of Defense ("DOD") Supplement to the Federal Acquisition Regulations ("DFARS"); the Software has been developed at private expense; no portion of the Software has been developed with U.S. Government funds; the Software contains trade secrets and proprietary information of VorTek; and the ownership of the Software and any reproductions shall remain with VorTek. Use, duplication or disclosure by the U.S. Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 or subparagraphs (c)(1) and (2) of the Commercial Computer Software-Restricted Rights at 48 CFR 52.227-19, as applicable.

(b) Government Acquisition. If Customer is acquiring the Software and accompanying documentation on behalf of the U.S. Government, special provisions apply. If the Software is supplied to the DOD, the Software is subject to "Restricted Rights," as that term is defined in the DFARS in paragraph 252.227-7013(c)(1). If the Software is supplied to any unit or agency of the United States Government other than DOD, the Government's rights in the Software will be defined in paragraph 52.227-19(c)(1) or (2) of the Federal Acquisition Regulations ("FAR"), as applicable. Use, duplication, reproduction or disclosure by the Government is subject to such restrictions or successor provisions. Contractor/Manufacturer is: VorTek Instruments, LLC, 8475 West I-25 Frontage Road, Suite 300, Longmont, CO 80504. Except as expressly licensed hereunder, all rights are reserved.

20. General Provisions.

(a) Force Majeure. VorTek shall not be liable to Customer for any alleged loss or damages resulting from the delivery of the Products or Services being delayed by acts of Customer, acts of civil or military authority, governmental priorities, fire, floods, earthquakes, epidemics, quarantine, energy crises, strikes, labor trouble, terrorism, war, riots, accidents, shortages, delays in transportation, or any other causes beyond the reasonable control of VorTek.

(b) Data and Recovery. Customer will be solely responsible for management of its data back-up, data recovery, and disaster recovery measures. VorTek will not be responsible or held liable for any Customer internal processes, procedures, or requirements to insure the protection, loss, confidentiality, or security of Customer data or information.

(c) Compliance with Law. Customer shall comply with all applicable federal, state, local and foreign laws and regulations affecting the acquisition or use of the Products, including, but not limited to, all export laws, restrictions and regulations of the Department of Commerce or other United States or foreign agency or authority.

(d) Notice. Any notice required or permitted to be given under these Terms and Conditions shall be given in writing and delivered in person or by express courier, or shall be deposited postage prepaid via registered or certified United States mail, at the address first stated in these Terms and Conditions or at such other address as shall be given by either one to the other in writing. All notices shall be deemed to have been given and received on the earlier of actual delivery or three (3) days from the date of postmark.

(e) Survival. The sections of these Terms and Conditions which by their essential purpose shall survive any expiration or termination, will survive such expiration or termination.

(f) Waiver. A waiver by either party of any default, or of any of the terms and conditions of these Terms and Conditions, shall not be deemed to be a waiver of any other default or of any other term or condition. Either party's exercise of any right or remedy provided in these Terms and Conditions shall be without prejudice to its right to exercise any other right or remedy.

(g) Assignment. Neither party shall assign these Terms and Conditions without the express written consent of the other party, except that VorTek reserves the right to subcontract any service, maintenance or warranty obligation. VorTek may assign these Terms and Conditions upon thirty (30) days notice to the other in instances when such assignment is to an entity acquiring all or substantially all of the business of VorTek, whether by merger, consolidation, or acquisition of assets. Any other attempted assignment in violation of this provision shall be null and void. These Terms and Conditions shall be binding upon and inure to the benefit of the parties hereto and their respective successors and lawful assigns.

(h) Independent Contractors. Both parties are acting solely as independent contractors and not as an agent of the other party. Consultants and independent contractors furnished by the respective parties shall be solely the employees or agents of such parties, respectively, and shall be under the sole and exclusive direction and control of such parties. They shall not be considered employees of the other party for any purpose.

(i) Governing Law; Venue. This Agreement will be governed by the laws of the State of Colorado, without regard to conflicts of law principles. Any action or proceeding arising from or relating to this Agreement must be brought in a federal court located in Denver, Colorado or in any state court located in Colorado, and each party irrevocably submits to the exclusive jurisdiction and venue of any such court in any such action or proceeding.

(j) UN Convention on Contracts for the International Sale of Goods. The parties agree to disclaim the UN Convention on Contracts for the International Sale of Goods.

(k) Severability. In the event any provision of these Terms and Conditions shall be adjudged by any court of competent jurisdiction to be unenforceable or invalid, that provision shall be limited or eliminated to the minimum extent necessary so that the obligations of the parties shall remain in full force and effect and enforceable and the rights of the parties shall not in any way be affected or impaired thereby.

20. Entire Agreement. THESE TERMS AND CONDITIONS ARE THE ENTIRE AGREEMENT, AND SUPERSEDE ANY AND ALL OTHER AGREEMENTS BETWEEN THE PARTIES RELATING TO THE SUBJECT MATTER HEREOF, AND SHALL GOVERN ALL SALES TRANSACTIONS IN LIEU OF ANY PURCHASE ORDER OR OTHER DOCUMENT SUBMITTED BY CUSTOMER. ANY CHANGES TO THE TERMS STATED HEREIN IN A PURCHASE ORDER, OR ANY OTHER MODIFICATIONS, MUST BE MADE IN WRITING BY NON-PREPRINTED AGREEMENTS CLEARLY UNDERSTOOD BY BOTH PARTIES TO BE AN AMENDMENT OR WAIVER, AND MUST BE SIGNED BY AN AUTHORIZED REPRESENTATIVE OF EACH PARTY.