

# PHOTON CONTROL INC.

## STANDARD TERMS AND CONDITIONS OF SALE

As of April 27, 2022

### 1. Purchase and Sale of Products.

#### 1.1 Acceptance of Terms and Conditions.

All purchases of products, including all parts, spare parts and components thereof (the “Products”) and services (the “Services”) by the buyer identified in an accompanying Photon Control quote and/or order acknowledgment (the “Buyer”) from Photon Control or its direct subsidiaries or authorized distributors (collectively “Photon”) shall be made pursuant to such Photon Control quote and/or order acknowledgment and shall be governed by these Terms and Conditions. The Photon quote and/or order acknowledgment and these Terms and Conditions shall constitute the entire agreement between the parties pertaining to the subject matter hereof, and shall supersede all prior or contemporaneous oral or written negotiations, agreements, understanding or representations with respect thereto. These Terms and Conditions shall supersede any conflicting provision contained in any purchase order of Buyer and, unless otherwise agreed to in writing, nothing contained in any purchase order of Buyer shall in any way modify or add any provision to these Terms and Conditions. Any terms or conditions proposed by Buyer or included in Buyer’s purchase order are hereby objected to by Photon and have no effect unless expressly accepted by Photon in writing. These Terms and Conditions may not be amended or any provision hereof waived in any way except by an instrument in writing signed by both parties. **IN THE EVENT THAT THE ACCOMPANYING PHOTON QUOTE IS DEEMED AN OFFER, ACCEPTANCE BY BUYER OF SUCH OFFER IS EXPRESSLY LIMITED TO THE TERMS CONTAINED HEREIN. ISSUANCE BY BUYER OF A PURCHASE ORDER SHALL BE DEEMED AN ACCEPTANCE OF THESE TERMS AND CONDITIONS. IN THE EVENT THAT THE ACCOMPANYING PHOTON ORDER ACKNOWLEDGMENT IS DEEMED AN ACCEPTANCE OF BUYER’S PURCHASE ORDER, SUCH ACCEPTANCE BY PHOTON OF BUYER’S PURCHASE ORDER IS EXPRESSLY MADE CONDITIONAL ON BUYER’S ASSENT TO ANY ADDITIONAL AND DIFFERENT TERMS CONTAINED HEREIN. FAILURE BY BUYER TO SPECIFICALLY OBJECT TO THESE TERMS AND CONDITIONS IN WRITING WITHIN TWENTY (20) DAYS OF RECEIPT SHALL CONSTITUTE AN ACCEPTANCE HEREOF.**

#### 1.2 Products.

As used herein, the term “Standard Products” shall mean Products within Photon’s current catalog that have a listed part number and are manufactured based solely upon Photon’s specifications. As used herein, the term “Custom Products” shall mean (i) Products that are specially designed and manufactured for Buyer based upon Buyer’s specifications, and (ii) option configured Products. Photon shall manufacture and sell Standard Products and/or Custom Products to Buyer as set forth in the Photon quote and/or order acknowledgment.

#### 1.3 Blanket Purchase Orders; Forecasts.

In the event that Buyer orders the Products through the issuance of one or a series of blanket purchase orders, Buyer shall provide to Photon a rolling twelve (12) month forecast of its requirements for Products, updated by Buyer at least monthly (the “Forecast”). The Forecast shall reflect weekly quantities of Products for the thirteen (13) weeks immediately following the date of such Forecast, which the Buyer shall be obligated to purchase (the “Committed Purchases”), and monthly quantities of Products for the remaining months covered by such Forecast. For the



purposes of this obligation, the highest quantity of products reflected in the Forecast at any time for a particular week shall be used in determining the Committed Purchases. Buyer may, subject to the terms and limitations contained in Section 3.2 below, delay Photon's delivery of such Committed Purchases for up to three months from the original delivery date set forth in Buyer's purchase order or in the Forecast first provided by Buyer for a particular week for such Committed Purchases. Buyer agrees to take delivery of all remaining Committed Purchases prior to the end of such three month period. Failure by Buyer to take delivery of the Committed Purchases within such time period shall be deemed a cancellation, and Buyer shall be responsible to Photon for cancellation charges in accordance with Section 5.3 below. Buyer acknowledges that Photon will place binding orders to purchase raw and/or processed materials and components having procurement lead times that cause the lead time for the Products to exceed to Committed Purchases window (the "Long Lead Time Materials") at such times, and in such quantities, as may be required to meet the quantities and delivery dates set forth in Buyer's blanket purchase order and/or then-current Forecast. Further, if volume-based pricing has been quoted by Photon for the Products, Buyer acknowledges that to achieve reduced costs for materials and components in order to extend such volume-based pricing to Buyer, Photon will place binding orders for raw and/or processed materials and components in quantities corresponding to the applicable volume-based pricing level (the "Batch Material Purchases"). Buyer shall be responsible for such Long Lead Time Materials and Batch Material Purchases in accordance with Section 5.3 below.

## **2. Pricing and Payment.**

### **2.1 Product Prices.**

The prices for all Products and Services shall be as set forth in the Photon quote and/or order acknowledgment and such prices shall be exclusive of all taxes and other charges referenced in Section 2.3 below, all of which shall be paid by Buyer. Unless otherwise expressly agreed in writing, such prices do not constitute payment for any rights to any technical data, proprietary rights, or patent rights relating to the Products. Photon Control may impose additional surcharges to offset significant and unpredictable increases in the cost of manufacturing, shipping and servicing our products. By issuing an order for our Products, Software and/or Services, the Buyer agrees to pay these surcharges upon notification.

### **2.2 Adjustments.**

Unless otherwise stated in the Photon quote and/or order acknowledgment, any volume-based prices quoted by Photon for the Products are based upon, and subject to, receipt from Buyer of blanket purchase order(s) for the applicable quantities of Products to be delivered over a period not to exceed twelve (12) months. The twelve (12) month period shall commence on the first date of shipment of Products under such purchase order. If Buyer does not receive and pay for the quantity of Products within such twelve (12) month period, Photon reserves the right to require payment from Buyer of (a) any unearned discounts, pursuant to the discount schedule reflected in the Photon quote and/or order acknowledgment, based upon the actual quantities of Products delivered during the twelve (12) month period, and (b) an inventory carrying charge equal to one and one-half percent (1½%) per month of Photon's cost of all dedicated raw material, work in process and finished goods.

### **2.3 Taxes and Other Charges.**

Buyer shall pay all transportation, handling, insurance, taxes (except for taxes based on Photon's income), license fees, import, export and customs fees and duties, tariffs and other charges related

to the Products and Services purchased hereunder. If claiming tax exemption, Buyer must provide Photon with valid tax exemption certificates.

#### **2.4 Invoicing; Payment Terms.**

Photon shall submit an invoice to Buyer with each shipment of Products. Each invoice shall be due and payable in the currency set out on the invoice or, if no currency is specified, in US Dollars, net thirty (30) days from the date of shipment. Such payment terms are subject to credit approval. For credit card orders, Buyer's account will be charged upon shipment of the Products. If Buyer fails to pay any invoice when due, Photon may charge Buyer a late payment charge equal to the lesser of one and one-half percent (1½%), or the maximum permissible rate, per month on the past due balance. Photon may withhold delivery of any Products or Services at any time in which Buyer's account is past due or exceeds its approved credit limit.

### **3. Delivery.**

#### **3.1 Title and Risk of Loss.**

All Products shall be delivered EXW (Ex Works) Photon's designated factory (INCOTERMS 2010). Delivery shall occur, title to the Products (except for title to any Software, as defined below, which shall at all times remain with Photon) shall pass from Photon to Buyer, and Buyer shall assume all risk of loss, upon Products being placed at the disposal of Buyer at the loading dock of Photon's designated factory, unless otherwise agreed to by both parties in writing. In no event shall Photon be liable for any delay in delivery (provided that Photon timely delivers such Products as provided above), or assume any liability in connection with shipment, nor shall the carrier be deemed an agent of Photon.

#### **3.2 Delivery Schedule.**

Photon will deliver the Products in accordance with the lead times specified in the Photon quote and/or order acknowledgment. In the event that Buyer orders quantities of Products in excess of the quantities reflected in the Forecast, and such increased quantities will delay delivery of the Products, Photon shall notify Buyer of the new delivery date as soon as reasonably practicable following receipt of the order. If at any time Buyer requests an earlier delivery date than the originally requested date, Photon will use commercially reasonable efforts to meet Buyer's delivery change request. Subject to Buyer's obligations with respect to Committed Purchases, if Buyer requests a later delivery date than the originally requested date, such notice must be received by Photon at least ten (10) days before the originally scheduled shipment date for Standard Products, and thirty (30) days before the originally scheduled shipment date for Custom Products.

#### **3.3 Inspection and Acceptance.**

Products will be subject to inspection for conformance with the applicable specifications at Buyer's receiving facilities within a reasonable time, but in no event more than ten (10) days after receipt. Buyer will notify Photon promptly of defective or nonconforming Products and, to the extent reasonably feasible, the nature of the defect. In the event that Photon does not receive a written notice of defect or nonconformity within ten (10) days after receipt by Buyer, such Products shall be deemed accepted by Buyer, provided, that such deemed acceptance shall not relieve Photon of its warranty obligations hereunder. In the event that any Product is properly rejected by Buyer within the inspection period, Buyer may return the Product to Photon, and Photon shall repair or replace any Product found to be defective or non-conforming, and shall deliver to Buyer a repaired

or replacement Product EXW Photon's designated facility. Photon shall be responsible for payment of all shipping charges in connection therewith.

#### **4. Product Changes.**

Buyer may request changes to the specifications for a Custom Product with Photon's written approval. Photon reserves the right to modify the price or delivery date for such Custom Product, and to charge Buyer a processing fee for such change. Buyer shall approve the adjusted price and delivery schedule relating to the requested change prior to commencement of work. Such change will not affect any Products that are scheduled for delivery at the time the request is approved by Photon. Buyer and Photon shall mutually agree on a time schedule for implementing such change. All such changes to product specifications, prices and delivery schedule, and the schedule for implementing such changes, shall be evidenced by a written change form signed by both parties. Buyer shall be responsible for all costs associated with such change, including but not limited to the burdened costs of all raw materials, work in process and finished goods inventory on-hand or ordered which are impacted by such change and will be invoiced for such costs pursuant Section 2.4 above. For Standard Products, Photon reserves the right to make changes or improvements to Photon's standard specifications, designs and/or manufacturing processes for the Standard Products or substitute other functionally equivalent Standard Products (provided that such changes or improvements do not adversely affect the form, fit or function of the Products) without notice and without any obligation to incorporate such changes or improvements in any Products previously delivered to Buyer.

#### **5. Cancellations.**

##### **5.1 Permitted Cancellation.**

Any order for Standard Products which does not exceed \$5,000 (it being agreed that any series of similar orders for Standard Products shall be aggregated and deemed one order for the purpose of determining such amount) may be cancelled by Buyer by providing written notice to Photon at least thirty (30) days prior to the scheduled shipment date.

##### **5.2 Cancellation with Prior Approval.**

Any order for Custom Products, or any order or series of similar orders for Standard Products which exceeds \$5,000, may be cancelled only upon Photon's prior written approval and will be subject to the cancellation charges set forth in Section 5.3 below. Photon must receive Buyer's cancellation request at least thirty (30) days prior to the scheduled shipment date of any such order. Orders may not be cancelled within thirty (30) days of the scheduled shipment date.

##### **5.3 Cancellation Charges and Responsibility for Materials.**

In the event that (i) Buyer cancels an order pursuant to Section 5.2 above, or (ii) Buyer fails to take delivery of the Committed Purchases within the time period specified in Section 1.3 above, Buyer shall pay to Photon the following amounts with respect to all cancelled Products and Committed Purchases (without duplication): (a) the contract price of all Products completed prior to such cancellation for which payment has not been made; (b) the burdened cost of all raw materials in Photon's possession or on order, which were acquired or ordered by Photon in order to timely deliver the cancelled Products and/or the Committed Purchases; (c) the burdened cost of all raw materials incorporated into, and all labor applied to, work in process which was assembled by Photon in order to timely deliver the cancelled Products and/or the Committed Purchases, plus profit thereon in accordance with Photon's published margins; and (d) other reasonable cancellation charges, including, but not limited to, non-recurring engineering expenses,

cancellation costs payable by Photon to its suppliers, and any other costs incurred by Photon relating to such cancellation. In addition, Buyer shall at all times be responsible for the following until consumed: (1) Photon's burdened cost of all Long Lead Time Materials and Batch Material Purchases ordered by Photon in order to meet Buyer's Forecast or extend volume-based pricing to Buyer, and (2) the amounts set forth in the foregoing subparagraphs (a)-(d) with respect to any additional stock of Products which Buyer has requested Photon to maintain in inventory in order to meet Buyer's requirements, and Photon reserves the right to require that Buyer pay for and take delivery of such items upon cancellation of an order for the Products or if not otherwise consumed to fulfill Buyer's orders for the associated Products within six months following the procurement, assembly or completion thereof (as the case may be). All raw materials and work in process paid for by Buyer pursuant to this Section 5.3 shall be delivered to Buyer in accordance with Section 3.1 above. Photon will use commercially reasonable efforts to reduce the cancellation costs by re-allocating materials to other projects and/or returning surplus material to its suppliers. In no event shall the Buyer be liable for more than the contract price (subject to adjustment pursuant to Section 2.2) of the affected Products and Committed Purchases, plus the cost of the Long Lead Time Materials and Batch Material Purchases. Such amounts shall be payable on the terms set forth in Section 2.4 above.

## **6. License to Use Software.**

Buyer acknowledges that the software or firmware components or applications, if any, accompanying the Products sold hereunder, or provided in connection with Services (collectively, the "Software") are licensed and not sold to Buyer. Upon receipt of full payment for a Product or other applicable license fee, Photon grants to Buyer a limited, nonexclusive, personal, nontransferable (except in connection with the sale of the Products in combination with Buyer's products to Buyer's customers), and royalty-free license to use and execute such Software and related documentation in object code form only and only in conjunction with the operation of the Products. Buyer shall not use the Software or related documentation for any other purpose without the express prior written consent of Photon. Buyer shall not, nor shall it permit any employee or agent of Buyer to, adapt, modify, copy (except to make a backup copy), reproduce, reverse engineer, decompile, disassemble, distribute, prepare derivative works based on, or demonstrate the Software or related documentation in any way without the express prior written consent of Photon. Buyer shall not license, sublicense, resell or otherwise transfer the Software or related documentation to any third party (except in connection with the sale of the Products in combination with Buyer's products to Buyer's customers) without the express prior written consent of Photon. As between Photon and Buyer, Photon shall retain all right, title, and interest in and to the Software, and Buyer shall receive no rights to the Software except as expressly provided herein. No license to use the source code of the Software is provided hereunder. Except as expressly set forth herein, Photon shall have no obligations to Buyer whatsoever with regard to the Software. Without limiting the generality of foregoing, Photon has no obligation to develop updates, upgrades or modifications to the Software or develop or provide Software development tools to Buyer. Buyer acknowledges and agrees that Photon will have no liability whatsoever to Buyer (or any third party through Buyer) as a result of any modification of the Software not made by Photon or any discontinuation of the Software.

## **7. Warranties; Disclaimer of Warranties.**

### **7.1 Product Warranty.**

Except as otherwise expressly stated in the Photon quote and/or order acknowledgment, Photon warrants that, for the period of time set forth hereinbelow, the Products sold hereunder will be



free from defects in material and workmanship, and will conform to the published specifications (for Standard Products) or written specifications contained in the Photon quote and/or order acknowledgment (for Custom Products), under normal use and service when correctly installed and maintained. Photon shall repair or replace, at Photon's sole option, any defective or nonconforming Product or part thereof which is returned at Buyer's expense to Photon's facility, provided, that Buyer notifies Photon in writing promptly after discovery of the defect or nonconformity and within the warranty period. Products may only be returned by Buyer when accompanied by a return material authorization ("RMA") number issued by Photon's Return Material Department, with freight prepaid by Photon, and subject to the terms and conditions of Photon's RMA policy available online at <https://www.photoncontrol.com/customer-service.html>, which are incorporated in these Terms and Conditions by reference and are subject to change by Photon at any time. Photon shall not be responsible for any damage occurring in transit or obligated to accept Products returned for warranty repair without a RMA number. Buyer bears all risk of loss or damage to the Products until delivery at Photon's designated facility. Buyer shall pay for shipment back to Buyer for Products repaired under warranty by Photon. Repairs made or Products or components replaced under warranty are warranted for the remaining unexpired duration of the original warranty period for such Products or components. Products are warranted for a period of twelve (12) months from the date of shipment. The foregoing warranty does not apply to Products which are (a) repaired, modified or altered by any party other than Photon; (b) used in conjunction with equipment not provided or authorized by Photon; (c) subjected to unusual physical, thermal, electrical or optical stress, improper installation, misuse, abuse, tampering, accident, contamination, or negligence in use, storage, transportation or handling (including any failure to maintain appropriate environmental conditions as specified by Photon for a particular Product); or (d) considered a consumable item or an item requiring repair or replacement due to normal wear and tear. In addition, this warranty does not apply with respect to any defects to the extent due to (x) defects in Buyer's products or any components supplied by a third party thereof or (y) the negligence of Buyer or any other person providing goods or services in connection with the design, development, production and distribution of the Product (with the exception of Photon's assembly of the Product). The foregoing warranty will not apply if any "Warranty Void If Broken" seal located on any Product has been removed, broken or otherwise tampered with. The foregoing warranty does not apply to any Customer Furnished Material (as defined below) incorporated into the Products. The foregoing warranty does not apply to any prototype units of the Products.

## **7.2 Software Warranty.**

Except as otherwise expressly stated in the Photon quote and/or order acknowledgment or in the current operating manual or other written guarantee for any of the Products, Photon warrants that, for a period of twelve (12) months following the date of shipment, the Software shall be free from significant programming errors or defects when properly installed. During such warranty period, if Buyer promptly notifies Photon in writing of possible errors or defects in the Software, identifying any such error or defect in reasonable detail sufficient to allow Photon to identify and replicate such error or defect, Photon shall, at no cost to Buyer, use commercially reasonable efforts to repair and correct such errors or defects in the Software. The warranty set forth above shall not apply to any errors or defects in the Software to the extent caused in whole or in part by (a) any combination of the Software with functionality, software, hardware or other products not supplied or approved by Photon; (b) any modification of the Software not made by Photon or modifications made by Photon but to Buyer's written specifications; or (c) the failure of Buyer to use the most current release of the Software provided to Buyer or to follow the most current



instructions as may be provided by Photon from time to time with respect to the proper use of the Software. This warranty does not apply to, and does not obligate Photon to develop or to provide, any future releases, updates, upgrades or modifications to the Software or develop or provide Software development tools to Buyer. On-site repair service is not covered under the foregoing warranty.

### **7.3 DISCLAIMER OF WARRANTIES; EXCLUSIVE REMEDY.**

THE FOREGOING LIMITED WARRANTIES ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES. EXCEPT AS EXPRESSLY PROVIDED HEREIN, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAWS, PHOTON MAKES NO WARRANTIES AND EXPRESSLY DISCLAIMS ALL WARRANTIES, REPRESENTATIONS, CONDITIONS AND GUARANTEES, WHETHER EXPRESS, IMPLIED, LEGAL, STATUTORY OR OTHERWISE, REGARDING THE PRODUCTS, SOFTWARE OR SERVICES. SUCH DISCLAIMER INCLUDES ALL IMPLIED WARRANTIES OF MERCHANTABILITY, QUALITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, DURABILITY AND NON-INFRINGEMENT. WITHOUT LIMITING THE FOREGOING, PHOTON PROVIDES NO WARRANTY OR UNDERTAKING AND MAKES NO REPRESENTATION OF ANY KIND THAT THE SOFTWARE OR PRODUCTS WILL MEET THE BUYER'S REQUIREMENTS; ACHIEVE ANY INTENDED RESULTS; BE COMPATIBLE OR WORK WITH ANY OTHER SOFTWARE, APPLICATIONS, SYSTEMS, OR SERVICES; OPERATE WITHOUT INTERRUPTION; MEET ANY PERFORMANCE OR RELIABILITY STANDARDS; BE ERROR FREE; OR THAT ANY ERRORS OR DEFECTS CAN OR WILL BE CORRECTED. THE OBLIGATIONS OF PHOTON SET FORTH IN THIS SECTION 7 SHALL BE PHOTON'S SOLE LIABILITY, AND BUYER'S SOLE REMEDY, FOR BREACH OF THE FOREGOING WARRANTIES.

### **7.4 Technical Support.**

For a period of twelve (12) months from the date of shipment of the Products, Photon will provide reasonable telephone technical support services relating to the Products to Buyer during normal business hours at no additional cost. Such support does not include support relating to the integration of a Product with any other product or software, which shall be provided at Photon's discretion at its then-current rates.

### **7.5 Non-Warranty Repair Service.**

On-site repair service is not covered under the foregoing warranties and is generally not provided by Photon. Photon may elect to provide on-site repair service at the request of Buyer at Photon's sole and entire discretion. For any such on-site repair service, or for any other repair service for the Products or the Software that is not covered by the foregoing warranties, Buyer shall pay for the repair service (including travel time, if applicable) at Photon's then-current time and materials rates, and shall reimburse Photon for its reasonable travel and lodging expenses. Out-of-warranty repairs are warranted for 90 days following shipment of the repaired Product to Buyer.

## **8. LIMITATION OF LIABILITY.**

TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAWS, IN NO EVENT SHALL PHOTON BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES WHATSOEVER, OR DAMAGES FOR LOSS OF PROFITS, LOSS OF GOODWILL, LOSS OF DATA, BUSINESS INTERRUPTION OR INCONVENIENCE, ARISING OUT OF OR RELATED TO THESE TERMS AND CONDITIONS OR BUYER'S USE OR INABILITY TO USE THE PRODUCTS, SERVICES OR SOFTWARE, HOWEVER CAUSED, REGARDLESS OF THE THEORY OF LIABILITY (CONTRACT, CIVIL LIABILITY, TORT OR OTHERWISE) AND EVEN IF PHOTON HAS BEEN ADVISED OR SHOULD BE AWARE OF THE POSSIBILITY OF SUCH DAMAGE. TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAWS, PHOTON'S TOTAL AGGREGATE LIABILITY

FOR ANY CLAIM, LOSS OR DAMAGES SHALL NOT EXCEED THE AMOUNT PAID BY BUYER FOR THE PARTICULAR PRODUCTS, SOFTWARE OR SERVICES FROM WHICH SUCH LIABILITY ARISES.

## 9. Indemnity.

### 9.1 Photon's Indemnity.

Photon shall indemnify and hold harmless Buyer from any final award of damages in any suit or proceeding instituted against Buyer based upon a claim that a Product or Software sold or licensed hereunder infringes any patent or copyright of a third party. Photon shall defend, at its expense, any such suit or proceeding provided that: (a) Buyer gives Photon prompt notice in writing of any such suit and permits Photon through counsel of its choice, to answer the charge of infringement and defend such suit; and (b) Buyer gives Photon all the needed information, assistance and authority, at Photon's expense to enable Photon to defend such suit. Photon shall not be responsible for payment of any amounts under any settlement made without its prior written consent. The foregoing indemnity shall not apply to the extent such alleged or actual infringement arises as a result of (i) the use or incorporation of such Product or Software with Buyer's specific product or application, or in combination with any other products, devices or parts, not specified in Photon's published product literature or otherwise approved in writing by Photon, (ii) modifications of such Product or Software made by Buyer or any party (other than Photon) which were not approved in writing by Photon, or (iii) Photon's compliance with any of Buyer's designs, specifications or instructions. In the event that a court of competent jurisdiction determines in a final, non-appealable order that the Product or the Software is infringing in a manner for which Photon is obligated to indemnify Buyer pursuant to this Section 9.1, Photon shall, at its option, either (1) procure for Buyer the right to continue using such infringing Product or Software; (2) replace the infringing Product or Software with a non-infringing item of like form, fit or function; (3) modify the Product or Software so that it no longer infringes; or (4) remove the Product or Software and refund the purchase price to Buyer. **THIS SECTION STATES PHOTON'S SOLE RESPONSIBILITY AND LIABILITY, AND THE BUYER'S SOLE REMEDY, FOR ANY ACTUAL OR ALLEGED INFRINGEMENT OF ANY PATENT OR COPYRIGHT BY ANY PRODUCT OR SOFTWARE DELIVERED HEREUNDER OR ANY PARTS THEREOF. THIS SECTION IS IN LIEU OF AND REPLACES ANY OTHER EXPRESS, IMPLIED OR STATUTORY WARRANTIES AGAINST INFRINGEMENT. IN NO EVENT SHALL PHOTON BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES RESULTING FROM ANY SUCH INFRINGEMENT.**

### 9.2 Buyer's Indemnity.

Buyer shall indemnify and hold harmless Photon from and against any expense or loss resulting from any actual or alleged infringement of any patent or copyright arising as a result of (a) Photon's compliance with any of Buyer's designs, specifications or instructions, (b) the use or incorporation of such Product or Software with Buyer's specific product or application, or in combination with any other products, devices or parts not specified in Photon's specifications therefor, or (c) modifications of such Product or Software by Buyer or any party (other than Photon) which were not approved by Photon. Buyer shall defend, at its expense, any suit brought against Photon alleging any such infringement provided that Photon (i) gives Buyer prompt notice of any such suit and permits Buyer, through counsel of its choice, to defend such suit and (ii) gives Buyer all information, assistance and authority, at Buyer's expense, necessary for Buyer to defend any such suit.



## 10. Confidentiality.

Each of Buyer and Photon acknowledges that in connection with the business relationship between the parties, each party will make available to the other party certain confidential and proprietary business and technical information and materials, including but not limited to information pertaining to its respective customers, procedures, patents, patent applications, trade secrets, inventions, ideas, concepts, techniques, methods, know-how, and processes (the “Confidential Information”). Confidential Information shall be clearly marked with proprietary legends of the disclosing party at the time of disclosure. If Confidential Information is orally or visually disclosed, it shall be reduced to writing and clearly marked with proprietary legends by disclosing party within 30 days of disclosure. All of the protections and restrictions in these Terms and Conditions as to the use and disclosure of Confidential Information shall apply during such 30-day period. Notwithstanding the foregoing, any information or material which by its nature and under the circumstances surrounding its disclosure is generally considered proprietary and confidential shall be deemed Confidential Information regardless of whether it is properly marked with legends or properly reduced to writing. Each party agrees that it will, for a period of five (5) years following the date of receipt of Confidential Information, with respect to the Confidential Information received from the other Party: (a) hold the Confidential Information in strict confidence and use its reasonable efforts to prevent the unauthorized disclosure of the Confidential Information; (b) not disclose the Confidential Information in any manner whatsoever, except as required by applicable law; (c) use the Confidential Information only for the purpose of performing its obligations hereunder or in conjunction with the operation of the Products, Services or Software and for no other purpose; (d) not copy, reproduce, modify, alter, disassemble, reverse engineer or decompile any of the Confidential Information; and (e) provide access to the Confidential Information to only those of its employees or representatives who need to know the Confidential Information for the purpose of performing their duties in connection with these Terms and Conditions. Without limiting the foregoing, neither party shall manufacture or produce, or have manufactured or produced, any devices, components, assemblies, software, control codes, firmware, or related items, for itself or any third party using the other party’s Confidential Information (other than Photon’s manufacture or production of products or software or provision of services for Buyer). As between Photon and Buyer, all Confidential Information shall remain the sole property of the disclosing party. These obligations shall not apply to information that: (i) was independently developed by or for the receiving party without use of the disclosing party’s Confidential Information, in whole or in part, as demonstrated by written evidence; (ii) is or becomes generally available to the public without breach of confidentiality obligations by the receiving party; (iii) was in the receiving party’s possession or was known by the receiving party without restriction at the time of disclosure by disclosing party, as demonstrated by written evidence; or (iv) is lawfully received by the receiving party on a nonconfidential basis from a third party without breach by such third party of any legal, contractual, or fiduciary obligation to the disclosing party. In the event of any conflict between the provisions of this Section 10 and the terms of any applicable confidentiality agreement between Photon and Buyer, the terms of such other confidentiality agreement shall prevail.

## 11. Customer Furnished Material.

In the event that Buyer, with Photon’s prior approval, provides products, raw materials, fixtures or tools (collectively, the “Customer Furnished Material” or “CFM”) to Photon for incorporation into, or use in the manufacture of, the Products, or in conjunction with the Services, Buyer shall retain title to, and shall continue to bear all risk of loss or damage to, such CFM. **CFM IS PROVIDED BY BUYER AT BUYER’S RISK. IN NO EVENT SHALL PHOTON BE LIABLE FOR ANY LOSS OR DAMAGE TO SUCH CFM RESULTING FROM ANY CAUSE WHILE IN PHOTON’S POSSESSION. BUYER SHALL BE SOLELY RESPONSIBLE FOR**



**INSURING THE CFM AGAINST ANY SUCH LOSS OR DAMAGE.** CFM certification and quality are the responsibility of Buyer. All CFM is subject to inspection by Photon upon receipt, and Photon reserves the right to refuse the CFM and/or requote the order based upon such inspection. CFM is not guaranteed to yield Buyer's total order quantity. If material shortages occur due to yield, Buyer shall, at its option, either supply additional CFM to complete the order or close the order short. Any CFM not used by Photon will be returned to Buyer, at Buyer's risk and expense.

## **12. Ownership and Grant of Rights.**

Unless otherwise specifically agreed in writing by the Buyer and Photon, as between the Buyer and Photon, Buyer retains all right, title and interest in and to any specifications and drawings provided by Buyer to Photon, and all inventions, ideas, processes, methods, know-how, skills, techniques and intellectual property independently developed, discovered or conceived by Buyer or its employees (the "Buyer Rights"). Such rights include, but are not limited to, patent rights, copyrights, trade secret rights, trademark rights and other proprietary rights throughout the world. Buyer hereby grants to Photon a nonexclusive, worldwide, royalty-free, limited license to use and exploit the Buyer Rights solely to the extent required for Photon to perform its obligations and exercise its rights hereunder, including without limitation the use and exploitation of the Photon Rights (as defined below). Unless otherwise specifically agreed in writing by the Buyer and Photon, as between the Buyer and Photon, Photon retains all right, title and interest in and to all specifications, drawings, inventions, ideas, processes, methods, know-how, skills, techniques and intellectual property independently developed, discovered or conceived by Photon or its employees or contractors, including without limitation those developed and/or used in connection with the Products, Software or Services hereunder (collectively, the "Photon Rights"). Such rights include, but are not limited to, patent rights, copyrights, trade secret rights, trademark rights and other proprietary rights throughout the world. Photon hereby grants to the Buyer a nonexclusive, nontransferable (with no right to sublicense), worldwide, limited license to use and exploit the Photon Rights solely to the extent required for the Buyer to use, operate or incorporate into Buyer's end products the Products, Software or Services sold, licensed or provided hereunder. Except as otherwise expressly provided in this Section 12, no interest to any Buyer Rights or Photon Rights is granted, transferred, licensed, or implied or agreed to be granted by these Terms and Conditions. Each party shall from time to time promptly execute and deliver or cause to be executed and delivered all further documents and instruments and shall do or cause to be done all such further acts and things in connection with these Terms and Conditions that the other party may reasonably require as being necessary or desirable in order to effectively carry out or better evidence or perfect the full intent and meaning of this Section 12.

## **13. Agreement Not to Replicate.**

Buyer agrees not to copy, replicate or reverse engineer the Products, use the Products as tools or molds, or to permit such actions by any third party. **THE PARTIES ACKNOWLEDGE AND AGREE THAT THEY ARE ENTERING INTO THIS AGREEMENT ON THE UNDERSTANDING THAT THE PRICE FOR THE PRODUCTS TO BE PROVIDED HAS BEEN SET TO REFLECT THE FACT THAT BUYER AGREES NOT TO COPY OR REPLICATE PRODUCTS, TO USE PRODUCTS AS TOOLS OR MOLDS, OR TO PERMIT SUCH ACTIONS BY ANY THIRD PARTY, AND IF NOT SO ACKNOWLEDGED AND AGREED, THE PRICES FOR THE PRODUCTS WOULD HAVE BEEN SUBSTANTIALLY HIGHER.**

## **14. Order Termination or Delay.**

Photon shall have the right to terminate any order, or to delay the shipment thereof, by reason of (a) Buyer's bankruptcy or insolvency, or the pendency of any proceedings against Buyer under any statute



for the relief of debtors; (b) Buyer's breach of these Terms and Conditions; (c) Photon's learning that the ultimate destination of the Products is other than that set forth in the Photon quote and/or order acknowledgment, or (d) failure of Buyer to meet any other reasonable requirements established by Photon (including acts or omissions of Buyer which may delay production).

#### **15. Exceptions to Performance.**

In the event that Photon is prevented from performing its obligations under these Terms and Conditions in whole or in part by riots, fire, flood, earthquake, explosion, epidemics, war, strike or labor disputes, embargo, civil or military authority, act of God, changes in law, regulation or governmental policy, acts or omissions of vendors or suppliers, transportation difficulties or delays, or other causes beyond its reasonable control, Photon's performance of its obligations will be excused or the timeframe for performance will be extended as is reasonably necessary under the circumstances. In the event that Photon is prevented from or delayed in performing its obligations for reasons beyond its control, such performance shall take place as soon thereafter as is reasonably practicable. Failure of the Buyer to provide timely response to technical information requests from Photon may also result in delivery delays. In this case, Photon shall inform the Buyer in writing as soon as practicable of the reason for the delay and the anticipated new delivery date.

#### **16. Release of Information.**

In the event that, within three (3) years following the delivery of Custom Product(s), Photon decides to discontinue or make obsolete the Custom Products, or becomes insolvent, then Photon shall for the remainder of such period, at its option, either (a) continue to make available at its then-current rates technical support for the Custom Products and to supply related spare parts to Buyer, (b) secure an agreement with a third party to provide technical support for the Custom Products and supply related spare parts to Buyer, or (c) provide Buyer, at Buyer's expense, with a limited license to use all necessary designs, drawings, tooling and technology only for the purpose of, and only to the extent required for, allowing Buyer to support such Custom Products and manufacture related spare parts for itself and for no other third party. Release of any proprietary information shall be subject to the confidentiality obligations contained herein, and may only be used by Buyer to the extent required to support the Custom Products and manufacture related spare parts for Buyer's benefit only and for no other third party. The rights and obligations set forth in this Section 16 shall not apply with respect to any Standard Products, unless expressly agreed upon by both parties in writing. For greater certainty, Buyer acknowledges and agrees that Photon may discontinue or make obsolete any Standard Products at any time.

#### **17. Export Controls and Economic Sanctions.**

Photon's sale and delivery of the Products and/or Software are subject to compliance with all applicable export control and economic sanctions laws and regulations, including but not limited to the Export and Import Permits Act (Canada), the Export Control List (Canada), the Area Control List (Canada) (collectively, "Export Control Laws"), the Special Economic Measures Act (Canada), the United Nations Act (Canada), the Justice for Victims of Corrupt Foreign Officials Act (Canada) and the Freezing Assets of Corrupt Foreign Officials Act (Canada) (collectively, "Sanctions Laws"), as well as the equivalent legislation of any other applicable country. Photon's compliance with the Export Control Laws and the Sanctions Laws may result in a delay in delivery and/or additional costs or, if export authorization is denied by the relevant government authority, may prevent the sale and delivery of the Products. The quoted lead time for delivery of the Products may be impacted by the length of time required to obtain any requisite export authorizations. Photon will not have any liability to Buyer for any failure or delay



in delivery resulting from Photon's compliance with the Export Control Laws and the Sanctions Laws. Buyer acknowledges and agrees that if the Products, Software and/or associated technical data delivered by Photon hereunder are to be exported, re-exported or transferred, Buyer shall comply with all applicable Export Control Laws and Sanctions Laws. Without limiting the foregoing, Buyer acknowledges and agrees that, unless there is prior written authorization from the applicable government agency, Buyer will not: (1) use such Products for any end use activities prohibited under the Export Control Laws or the Sanctions Laws; or (2) directly or indirectly sell, distribute, export, re-export, transfer or otherwise make available any Products to any person or entity designated under the Sanctions Laws and/or a country targeted by the Export Control Laws or the Sanctions Laws. Buyer shall ensure that its forwarder or agent shall comply with the Export Control Laws and the Sanctions Laws. Buyer agrees to defend, indemnify, and hold harmless Photon from and against any claim, loss, liability, expense, or damage (including liens or legal fees) incurred by Photon with respect to any export or re-export activities of Buyer and/or Buyer's forwarder or agent which are contrary to the provisions in this section.

#### **18. Remedies.**

Buyer acknowledges that any violation of the terms of these Terms and Conditions would result in damages to Photon which could not be adequately compensated by monetary award alone. In the event of any violation by Buyer of these Terms and Conditions, including, without limitation, of Photon's proprietary rights and ownership of rights, confidentiality provisions, and Buyer's agreement not to replicate Products, and in addition to all other remedies available at law and at equity, Photon shall be entitled as a matter of right to apply to a court of competent equitable jurisdiction for relief, waiver, restraining order, injunction, decree or other remedy as may be appropriate to ensure compliance of Buyer with these Terms and Conditions.

#### **19. Severability.**

If any provision of these Terms and Conditions is invalid, unenforceable, in conflict with or in violation of, the law of the governing jurisdiction or any other relevant jurisdiction, such provision shall be inoperative and the validity of the remaining provisions shall not be affected, and these Terms and Conditions shall remain binding upon the parties to the fullest extent permitted by law.

#### **20. No Waiver.**

A waiver of any breach or any provision of these Terms and Conditions shall not be construed as a continuing waiver of other breaches of the same provision or a waiver of any other provisions of these Terms and Conditions. The failure on the part of either party to complain of any act or failure to act of the other party or to declare the other party in default shall not constitute a waiver by such party of its rights pursuant to these Terms and Conditions. No waiver of any rights pursuant to these Terms and Conditions shall be effective unless in writing and signed by a duly authorized officer of the party purporting to give the same.

#### **21. Headings.**

The headings of these Terms and Conditions are for convenience only and shall not affect the meaning of the terms of these Terms and Conditions.

**22. Notices.**

Any notice and any other communication required to be given under these Terms and Conditions shall be in writing and may be given by personal delivery, registered mail or other means of recorded, electronic transmission at the addresses set forth in the Photon quote and/or order acknowledgment. Such communication shall be deemed to have been given on the day of delivery, if delivered personally or if transmission is electronic (provided that if the delivery or transmission occurs on a day other than a business day, the deemed delivery date shall be the next business day); and on the fifth business day after mailing, if mailed. The parties may change their contact information for service by notice given to the other party in accordance with this section.

**23. Governing Law; Jurisdiction and Venue.**

These Terms and Conditions are governed by and construed in accordance with the laws of the Province of British Columbia and the federal laws of Canada applicable therein, excluding any conflicts or choice of law rule or principle that otherwise might refer construction or interpretation of these Terms and Conditions to the substantive law of another jurisdiction, and without regard to the United Nations Convention of Contracts for International Sale of Goods (CISG). Any dispute arising under these Terms and Conditions shall be submitted exclusively to the courts of competent jurisdiction in the city of Vancouver, British Columbia.