

GOING GLOBAL ONLINE: IMPORT AND CUSTOMS COMPLIANCE COURSE MATERIALS

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§5:85 Import planning

For any company serious about going global, importing must become a valued and appreciated management activity that captures the attention of senior executives and commands sufficient resources to address the many risks that arise in this area. While procuring goods and services globally can result in significant financial and business advantages, increased US regulation and ongoing political and business uncertainties in many foreign countries continues to generate new challenges for importers. For example, concerns about security and internal controls have led to new requirements with respect to collecting information about foreign business partners. As a result, importers must now implement detailed policies and procedures based on “know your customer” mandates. In addition, importing has become an essential element of company strategies for supply chain management and importers must adopt and use tools for managing foreign vendor relationships and tracking cross-border shipments. Finally, the US and other countries are continuously engaged in trade negotiations, including expanding free trade agreements, which promise to significantly alter the costs and benefits of importing and exporting. As such, companies must diligently monitor trends and activities in that area.

Once the importing activities of a company reaches a certain size, it essential that senior management implement formal planning and strategizing with respect to imports and their supporting business functions. There are several key steps in the import planning process, including development of import business plan, identification and vetting of foreign sources, logistics planning and design of an appropriate organizational structure. As with any planning exercise, the process requires support from a number of different departments within the company and ongoing communications once the plan is completed. The value of import planning is sometimes difficult to evaluate, since the output takes the form of penalties avoided and reduction of costs that are often difficult to isolate in the first place; however, the benefits to a truly global company are on a par with those identified in the export planning process.

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§5:86 --Developing an import business plan

As is the case with exporting, the first step in the import planning process is the development of a formal import business plan. The import business plan should focus on the reasons that the company is considering importing and then describe the steps that the company needs to take in order to launch and manage the activities necessary to support the importing strategy. The business planning process is an opportunity for the company to thoroughly research import opportunities and identify the risks and challenges associated with procuring products, materials and services from vendors located in foreign markets.

Companies engage in importing activities for a variety of reasons; however, the most common objectives appear to be the following:

- The product, material or service is not available on commercially reasonable terms in the US market and is deemed necessary for the company to pursue its overall business objectives in the US.
- The company believes that the product or service to be imported can be successfully marketed and sold by the company to exploit a lucrative and untapped US market.
- The imported product or service can be used to increase the overall competitiveness of the company in its US and global markets, a rationale that is typically used for outsourcing manufacturing and other operational activities to foreign vendors.

The import business plan should describe with specificity some of the key reasons for importing and then present supporting information for pursuing the objective. For example, if the company believes that importing is necessary to obtain certain materials on a cost effective basis, the plan should include a comparison of US sources to those that have been identified in foreign markets. When preparing the comparison, consideration must be given to additional costs associated with importing, notably tariffs on the imported goods and other expenses of importing such as packaging, transport and insurance. Similarly, when importing products for sale, attention must be paid to the possibility that such products are subject to quota restrictions to protect various US industries, or there might be restrictions because the product may be harmful to human, animal or plant health. Without properly researching this information, the company may discover that shipments will need to be returned or stored in bonded warehouses until they can be lawfully entered into the US for resale.

§5:87 --Foreign sourcing

The next step in the importing process is to identify potential foreign sources for the products, materials or services that the company wishes to import. In many cases, the company will have a source in mind before it begins the formal planning process and may even have already begun procurement activities with the source on a limited basis. In other situations, the company may have only a vague idea of what it is looking for and this part of the planning process will involve searching for leads among various sources, including information provided by the Federal government and state trade offices. The

company should begin the search by making preliminary decisions regarding the countries or regions that appear to be the best situated for importing into the US or to the foreign location where the company intends to use the products or materials. For example, importers may wish to make use of the Free Trade Area arrangements that make importing from countries like Mexico and Canada tariff free and relying on sources in these countries generally makes sense given their relative close proximity.

Foreign sourcing requires substantial attention to due diligence and assessment of the overall business and political environment in which the source conducts its operations and activities. Before entering into an arrangement with a foreign vendor, the company must qualify the vendor for future business by obtaining and checking business and financial references and evaluating the vendor's web site and organizational infrastructure. In addition, the company should evaluate competitive trends and conditions in the vendor's home country and determine how the vendor might be impacted by changes in technology and in the vendor's customer base. Importing is generally most cost-effective when the company is able to establish a close relationship with a single source that is willing to collaborate on decreasing costs and creating efficiencies in the movement of the imported items; however, this type of arrangement can become risky for the US company if the foreign partner is suddenly overcome by events in its home country.

§5:88 --Logistics

In addition to, and as part of, the import business plan, separate consideration needs to be given to creating a comprehensive logistics plan for physically importing the products and materials identified in the plan. Logistics planning must take into account a number of issues and activities, notably transport of the products and materials, export and import clearance on both sides of the transaction, packaging and labeling, insurance and negotiating and monitoring the trade-related terms in import contracts. As part of the planning process, the company needs to determine how each of the activities will be staffed. In some cases, the company will elect to develop its own in-house department; however, some activities may be outsourced to customs brokers and freight forwarders until the company has an opportunity to evaluate the plan and assess the level of investment it is willing to make on internal resources. When considering logistics planning, an effort should be made to identify opportunities for reducing or deferring duties on imported goods through drawbacks and use of foreign trade zones. Finally, logistics planning includes evaluation and selection of various technological tools that are now available for activities such as preparation and submission of import documentation and tracking of shipments.

§5:89 --Organizational structure

Import planning is not complete without agreement on how importing activities will be organized within the firm. Many companies elect to combine import and export activities in a single department, particularly when they are just beginning their efforts to grow the business globally. Such an organizational structure makes good sense in that importing

and exporting share certain functional requirements, including logistics management, market analysis and compliance. However, with one group there generally must be specialists that focus on issues specific to importing such as understanding and satisfying the regulatory requirements of Customs with respect to entry of goods into the US. Another factor that influences the size and scope of activities of an import/export department is the overall organizational structure of the firm and the responsibilities allocated to the following departments relating to imports and exports: sales, purchasing, finance, legal and administration.

The following is a comprehensive list of duties that might be assigned to an import/export department. Obviously, the list would need to be tailored to the specific situation and activities that are clearly export related (e.g., movement of products out of the country) would be removed when defining the work to be performed within a department that is exclusively dedicated to supporting importing and foreign procurement.

- (1) Manage the movement of goods/equipment/materials in and/or out of the US in accordance with policies and procedures established by the company and in compliance with all relevant laws and regulations;
- (2) Manage preparation of all required documentation for efficient, cost-effective and lawful execution of all import/export activities;
- (3) Maintain information regarding relevant import/export law and procedures; tariffs and duties; licenses and restrictions;
- (4) Communicate with all export and import and related authorities, and customers and suppliers, in all relevant territories and countries, as necessary to ensure efficient, positive and lawful relations, support and activities;
- (5) Participate in the planning and implementation of the company's import/export strategy and activities;
- (6) Anticipate, research and report on future changes in import/export laws and in relevant local territory practices, and ensure such knowledge is factored into the company's export/import planning processes and the department's own strategy, budget and procedures;
- (7) Liaise with other departments in order to establish and maintain effective and relevant export/import activities and support in relation to the company's sales, purchasing, materials management, production and overall operating functions;
- (8) Monitor, record, analyze and report on activities, trends, results and recommendations relating to import/export activities for strategic planning purposes;

(9) Prepare and submit relevant documentation in a timely and accurate manner, for example: shipping schedules; letters of credit; licenses; declarations; packing, routing, transport and safety documentation; and

(10) Ensure that all licenses, documents, files, logs and records are maintained in accordance with US Government regulations pertaining to exports and imports.

In addition, the department will generally be responsible to selecting, and contracting with, outside providers to render services and support in connection with export and import activities. This will typically include arrangements with customs brokers, freight forwarders, carriers and insurance brokers/agents with respect to specialized coverage necessary for cross-border activities. In many cases, the department will also be involved in contract negotiations with foreign customers and/or suppliers; however, such negotiations are typically conducted in tandem with specialists in sales and procurement. At a minimum, the department must be made aware of the terms, conditions and requirements in foreign sales, distribution and supply contracts to be sure that the company is able to fulfill its obligations and monitor compliance by foreign parties.

Personnel employed within the department will need to develop and maintain expertise over the whole range of substantive legal and regulatory areas relevant to the specific export and import activities of the company. In most cases, this means that the department will employ specialists in various Federal import and export regulations, including the ITAR and EAR, and Treasury and Customs Regulations, as well as persons experienced in dealing with transfers of technical data and employment of foreign nationals. In addition, senior managers within the department should be expected to work closely with vice presidents, business area managers, program managers, and marketing staff from all divisions to identify their import/export requirements. Finally, the department must include staff capable coordinating and conducting internal control programs focusing on compliance with import and export laws and regulations and auditing various functional activities such as shipping and insurance.

§10:95 Checklist of questions for satisfying reasonable care standard under informed compliance principles

1. General considerations for all transactions

(a) Consider retaining an expert (e.g., lawyer, customs broker, accountant, or customs consultant) to assist the company in complying with Customs requirements. If an expert is retained, the company must be sure that it has discussed proposed import transactions with the expert in advance and provide him or her with complete and accurate information about the import transactions.

(b) Ensure that the company has access to the Customs Regulations [Title 19 of the Code of Federal Regulations], the Harmonized Tariff Schedule of the United States, the Customs Bulletin and Decisions, the Customs web site and/or other research services that provide information on compliance with Customs requirements.

(c) Ensure that a responsible, knowledgeable individual within the company has reviewed the Customs documentation to assure that it is full, complete and accurate.

(d) If the documentation is prepared by someone outside of the company, ensure that there is a reliable method to assure that the company receives copies of the information submitted to Customs, that it is reviewed for accuracy, and that Customs is advised of needed corrections in a timely fashion.

(e) If identical transactions or merchandise are handled differently at different ports or Customs offices within the same port, the company should bring this fact to the attention of Customs officials.

2. Merchandise description and tariff classification

(a) Ensure that a complete, accurate description of the merchandise has been provided to Customs in accordance with 19 U.S.C. 1481. [See also 19 CFR 141.87 and 19 CFR 141.89 for special merchandise description requirements.] If a merchandise description is not immediately available, establish a reliable procedure for obtaining it and providing it to Customs.

(b) Ensure that a correct tariff classification of the merchandise has been provided to Customs in accordance with 19 U.S.C. 1484. If a tariff classification is not immediately available, establish a reliable procedure for obtaining it and providing it to Customs.

(c) Consider the need to obtain a Customs ruling regarding the description of the merchandise or its tariff classification. [See 19 CFR Part 177.] If a ruling has been obtained, ensure that the company abides by the ruling and advises appropriate Customs officials of the ruling and the company's compliance.

(d) Consider participating in a Customs pre-classification of the merchandise in order to get it properly described and classified.

(e) Consult tariff schedules, Customs informed compliance publications, court cases or Customs rulings to properly describe and classify the merchandise.

(f) Consider the need to consult with an expert (e.g., lawyer, customs broker, accountant, customs consultant) to assist in the description and/or classification of the merchandise.

(g) Consider whether the merchandise qualifies for a claim for a conditionally free or special tariff classification or provision (e.g., GSP, HTS Item 9802, NAFTA). If so, ensure that the company has the documentation necessary to support the claim. When making a NAFTA preference claim, the company must have a NAFTA certificate of origin in its possession.

(h) Consider whether the nature of the merchandise requires that a laboratory analysis or other specialized procedure be used for proper description and classification.

(i) Develop reliable procedures to maintain and produce the required entry documentation and supporting information.

3. Valuation

(a) Ensure that Customs has been provided with a proper declared value for the merchandise in accordance with 19 U.S.C. 1484 and 19 U.S.C. 1401a.

(b) Ensure that all legally required costs or payments associated with the imported merchandise (assists, commissions, indirect payments or rebates, royalties, etc.) have been reported to Customs.

(c) Consider the need to obtain a Customs ruling regarding valuation of the merchandise (see 19 CFR Part 177). If a ruling is obtained, the company should be able to establish it has followed the ruling reliably.

(d) Consult the Customs valuation laws and regulations, Customs Valuation Encyclopedia, Customs informed compliance publications, court cases and Customs rulings to assist in valuing the merchandise.

(e) If applicable, report that the merchandise has been purchased from a “related” seller. In the case of a purchase from a related seller, the value reported to Customs must meet one of the “related party” tests.

(f) If the company is declaring a value based upon a transaction in which it was/is not the buyer, ensure that the transaction has been substantiated as a bona fide “sale at arm’s length” and that the merchandise was clearly destined to the United States at the time of sale.

(g) If the company is claiming a conditionally free or special tariff classification or provision for the merchandise (GSP, HTS Item 9802, NAFTA), ensure that the required value information has been reported and that the company has obtained the documentation necessary to support the claim.

4. Country of origin/markings/quota

(a) Ensure that the correct country of origin has been reported on Customs entry documents.

(b) Ensure that the merchandise is properly marked upon entry with the correct country of origin (if required) in accordance with 19 U.S.C. 1304 and any other applicable special marking requirements (watches, gold, textile labeling, etc).

(c) Consider the need to obtain a Customs ruling regarding the proper marking and country of origin of the merchandise (see 19 CFR Part 177). If a ruling is obtained, the company should be able to establish it has followed the ruling reliably.

(d) Consider the need to consult with a customs expert regarding the correct country of origin/proper marking of the merchandise.

(e) Ensure that the foreign supplier has been apprised of the Customs country-of-origin marking requirements prior to importation of the merchandise.

(f) If the company is claiming a change in the origin of the merchandise or claiming that the goods are of U.S. origin, ensure that the required measures have been taken to substantiate the claim (e.g., U.S. milling certificates or manufacturers' affidavits attesting to production in the United States).

(g) If the company is importing textiles or apparel, ascertain the correct country of origin in accordance with 19 U.S.C. 3592 (Section 334, P.L. 103-465) and ensure that no illegal transshipment or false or fraudulent practices were involved.

(h) Determine how the goods are made, from raw materials to finished goods, by whom and where.

(i) Determine whether the merchandise is subject to quota/visa requirements. If so, ensure that the quota category is correct.

(j) Check the Status Report on Current Import Quotas (Restraint Levels), issued by Customs, to determine if the goods are subject to a quota category with "part" categories.

(k) Ensure that the correct visas have been obtained for those goods subject to visa categories.

(l) For textile articles, prepare a proper country declaration for each entry, i.e., a single country declaration (if wholly obtained/produced) or a multi-country declaration (if raw materials from one country were transformed into goods in a second).

(m) Develop reliable procedures to maintain and produce the required certificates of origin.

5. Intellectual property rights

(a) If the goods or packaging bear a trademark registered in the US, ensure that it has been established that it is genuine and not restricted from importation under the "gray-market" or parallel-import requirements of US law (see 198 CFR 133.21), or that the company has permission from the trademark holder to import the merchandise.

(b) If the goods or packaging contain registered copyrighted material, ensure that it has been established that this material is authorized and genuine. If the company is importing sound recordings of live performances, it must verify that the recordings were authorized.

(c) Determine whether the merchandise is subject to an International Trade Commission or court-ordered exclusion order.

6. Miscellaneous

(a) Ensure that the merchandise complies with other agencies' requirements (e.g., FDA, EPA, DOT, CPSC, FTC, Agriculture, etc.) and that all required licenses or permits from such agencies have been obtained.

(b) Determine whether the goods are subject to a Commerce Department dumping or countervailing-duty investigation or determination. If so, ensure that the company has complied with Customs reporting requirements of this fact (e.g., 19 CFR 141.61).

(c) Verify that the company has the right to make entry under the Customs Regulations and the correct type of Customs entry (e.g., TIB, T&E, consumption entry, mail entry) has been filed.

§26:20 Key issues in negotiating purchase contracts

When negotiating a contract for the purchase of goods from a foreign supplier, a US company needs to take into account the potential impact of differences in legal systems and business practices. As such, the contracting process should be perceived as an opportunity to go beyond formalizing the essential elements of an enforceable agreement to actually establish the foundation for a trusting and lasting business relationship. Each contract for the cross-border purchase of goods has its own unique business issues; however, certain topics tend to come up continuously in this area. Obviously, the parties need to reach agreement on the type, amount and specifications of the goods covered by the contract. This is particularly important when purchasing goods from a supplier outside of the US since the purchaser may not have an opportunity to carefully inspect the goods and may be relying solely on written descriptions and representations made by representatives of the seller. Once that stage is completed, attention turns to the various steps for the transfer of goods in exchange for the agreed consideration to be completed, including transportation and logistics, compliance with export and import requirements, inspection and acceptance of the goods, and payment and financing.

The scope and length of negotiations will depend on the circumstances. In some cases, the purchaser will simply accept the foreign seller's terms with little or no negotiation when the terms are reasonable and the purchaser needs to complete the transaction quickly and receive delivery of the goods. If, however, the contract involves a significant dollar amount in the context of the purchaser's business or the parties are discussing a long-term term purchase agreement, more time should be allowed to complete the

contracting process. If necessary arrangements can be made for the seller to make a small initial shipment of the goods with the understanding that the parties will act in good faith to complete a formal agreement covering subsequent transactions within a specified period of time. Whenever negotiations are going on, the US purchaser should take steps to verify that the person purporting to represent the seller in the transaction has the actual authority to make binding and enforceable commitments on behalf of the seller.

§26:21 --Transportation and logistics

Each import transaction should have its own unique transportation and logistics plan for ensuring that the goods arrive safely and can be easily and quickly processed at the point of arrival in order to satisfy all applicable import requirements. For economy of discussion, this issue is assumed to cover several important areas that must be addressed in the contract, including delivery terms, transport procedures and compliance with import requirements, notably customs clearance procedures. The purchaser should also carefully consider the insurance requirements associated with the transport and delivery of the goods.

The “delivery terms” address the points in time, including the location, where title to the goods passes to the purchaser and it assumes the risk of loss or damage to the goods. While it is common for title and risk of loss to pass at the same time, the two events may be separated. For example, when the goods are sold on credit, the seller may retain title to the goods until it has received full payment even though the purchaser assumes responsibility for any loss or damage to the goods following delivery. The “delivery” may be subject to a variety of conditions, notably the right of the purchaser to inspect and formally accept the goods. From the purchaser’s perspective, it will seek specific shipment and delivery dates in the contract, or a means for objectively determining such dates, and strict penalties on the seller in the event that delivery does not occur in a timely fashion through no fault of the purchaser. If the delivery date must be firm, as might be the case when the goods are earmarked for re-delivery to one of the purchaser’s own customers, the contract should specify that “time is of the essence” and perhaps include various “early warning” provisions, such as progress reports from the seller, to ensure that the goods are being prepared and transported in accordance with an agreed schedule.

The “transport procedures” deal with the manner in which the goods will be moved from the seller’s facilities to the agreed point of delivery, which may be the purchaser’s US facilities, another agreed port of entry into the US or even directly to a customer or US supplier of the purchaser. There is no single standard or practice with respect to transportation and the type of goods and industry practice will be significant factors on this issue. In any case, the contract should address the manner in which the goods will be transported, the responsibilities of the parties with respect to various steps during the transportation process and the allocation of the costs associated with making arrangements for transportation. As with other issues, there will be overlap with other contractual provisions including delivery terms and insurance responsibilities. In general, the purchaser’s interest lies in making sure that the mode of transportation is reasonably calculated to result in timely and safe delivery of the goods. Consideration should be

given to how the goods will be loaded on to the designated carrier and which party will be responsible for loading.

Compliance with importation requirements is an activity that is sometimes referred to as “logistics management.” While there are certainly legal issues to be considered, the key focus at this point for the purchaser is making sure that qualified personnel have been designated to arrange for importation and making sure all documents have been received and are accurate and correct in content and form. Depending on the transaction, some or all of the following documents will need to be included with the goods when they are being shipped into the US:

- Customs entries;
- Invoice from the seller;
- Consular invoice;
- Certificate of Origin;
- Inspection certificates;
- Certificate of manufacture; and
- Insurance certificate.

Companies that are engaged in substantial import activities may have one or more in-house employees that perform these activities; however, it is also common to outsource responsibility to a customs broker or freight forwarder.

Finally, the contract should clearly identify the understanding of the parties with respect to the time and place that title to the goods, and the associated risk of loss, will pass from the seller to the purchaser. This is a key provision since the general rule is that the party with title to the goods at any point in time will bear the cost of any damage or loss to the goods and, as such, must carefully consider the need to obtain insurance to cover that risk. If title is to transfer in the seller’s home country, the purchaser must arrange for the goods to be insured while they are in transit to the desired location. If title and risk of loss is to remain with the seller while the goods are in transit, the contract should explicitly require that the seller obtain insurance for the goods during that period and provide the purchaser with satisfactory evidence that such insurance has been obtained and remains in effect. Even if the seller does insure the goods, the purchaser may want to obtain additional insurance to cover other risks associated with the goods and the particular transaction, such as insurance covering losses that the purchaser may suffer under contracts with third parties in the event that the goods are damaged in transit and thus cannot be integrated into products the purchaser intended to delivery to such third parties. The type of insurance that is best for a particular import transaction depends on the method of transportation.

§26:22 --Export and import requirements

The parties need to understand the requirements imposed under the export laws and regulations of the seller’s country and US laws and regulations pertaining to the import of goods and make sure that the responsibilities of the parties with respect to compliance are

clearly identified and allocated in the contract. As a general rule, the seller will handle compliance with the export regulations imposed by its own government; however, the purchaser should be familiar with those requirements and should understand in advance the steps that the seller intends to take in order to ensure that the requirements will be satisfied in a timely fashion so that shipment and delivery of the goods is not delayed. Unfortunately, there is no uniform scheme of export regulation and a particular transaction may require export licenses or permits and/or be subject to a wide array of possible export restrictions, including packaging, labeling, marking, quarantines or inspections. Specific controls may be imposed on certain types of goods and on exports to designated persons or countries. Governments may also impose export duties or other export-related fees and taxes. Finally, the seller may need to register as an exporter with the local government.

In most cases, particularly when dealing with sellers located in industrialized countries, the process of complying with export laws and regulations generally goes smoothly provided that the seller has sufficient experience and expertise. However, the purchaser should nonetheless consider the impact of delays on the viability of the entire transaction. For example, if the seller encounters difficulties in satisfying the export requirements of its home country, the purchaser may find itself at risk with respect to various expenses already incurred based on the assumption that the goods would be delivered on a timely basis. If problems arise, the purchaser may need to seek indemnification from the seller for pre-sale promotional expenses, importing and receiving costs and even expense of obtaining replacement goods in order to meet commitments made to third parties. For its part, the seller will not want to be responsible for delays caused by changes in the specifications for the goods requested by the purchaser or for events that are well outside of the seller's reasonable control, such as natural catastrophes or unexpected government interference (e.g., imposition or increase of export duties) that makes the seller's performance of the contract unduly burdensome.

With respect to US laws and regulations pertaining to imports, the main issues for any particular contract will be as follows:

- What, if any, licensing requirements and restrictions apply to the transaction?
- Which party will be responsible for obtaining any required import licenses?
- Which party will be responsible for the costs of obtaining the required import licenses?
- Which party will be responsible for compliance with any applicable import restrictions and conditions, such as packaging, labeling, marking, pest control treatments or inspections?
- Which party will be responsible for the costs of complying with any applicable import restrictions?
- Which party will be responsible for payment of import duties or any other government-imposed fees or taxes on the imported goods?
- Which party will be responsible for preparing any required import documentation and otherwise ensuring the goods clear all relevant customs requirements?

Note that the list distinguishes between responsibility for completing a specific task or activity, such as obtaining the required import licenses, and paying for the costs associated with that task or activity. For example, it often makes sense for the purchaser to assume responsibility for obtaining US import licenses on the theory that it is more familiar with the requirements of its own country; however, the costs associated with that activity may be allocated to the seller perhaps with the caveat that the seller's liability is limited to "reasonable" costs and expenses.

If the seller has responsibility for certain aspects of the importation process, the purchaser must verify that the seller understands all of the requirements that may be imposed for customs clearance of the goods in the US. For example, the purchaser has an interest in making sure that the goods are packaged and marked correctly to ensure that they can be easily identified and inspected by customs authorities and that they are distinguishable from other packages at the US Customs facility. Goods that are not properly marked may trigger additional scrutiny from customs officers that will cause extensive delays in final delivery of the goods. If the purchaser is concerned about problems in this area, it should insist that the seller engage a customs broker that has been vetted by the purchaser or that a representative of the purchaser will have the right to inspect the packaging and markings before the goods are placed on the carrier for shipment at the seller's facilities. In addition, the purchaser must be sure that the seller is willing and able to comply with the heightened security requirements and procedures imposed by US Department of Homeland Security regulations.

§26:23 --Inspection and acceptance

It is common to build into the contract for purchase of goods a requirement that the purchaser have an opportunity to conduct a formal inspection of the goods before shipment and/or after the goods have arrived at the agreed port of destination. In fact, product inspections are often required, and generally recommended, when dealing with certain types of goods, exporters and modes of transport. For example, inspection rights are essential when the purchaser has no experience with the seller's goods and/or when the goods are being supplied without warranties. Even when warranties are provided, the purchaser should demand inspection rights in situations where it is apparent that warranty service will be costly and time-consuming if required at some point after the goods have been accepted. While the specifications for a particular inspection will depend on the circumstances, in general the focus will be on safety (i.e., compliance with applicable safety regulations), performance, appearance and packaging when the inspection occurs prior to shipment. At the port of destination, the inspection will be broadened to include identification of defects that may have arisen with respect to the goods while they were in transit. At either end, if the purchaser discovers problems and variations from the requirements of the contract between the parties, the purchaser should have the right to return the goods at the seller's expense, cancel the contract and perhaps sue the seller for damages arising out of the seller's failure to make timely delivery of conforming goods.

While inspection rights should be covered explicitly in the contract, transactions governed by the UCC will be subject to the default rules in Article 2 of the UCC with

respect to inspection which provide that unless the sale involves payment against documents or a C.O.D. (cash on delivery) obligation or similar terms, the purchaser must be afforded the right to inspect the goods before payment or acceptance at a reasonable place and time. [UCC § 2-513] The purchaser has the right to inspect the goods upon the tender, delivery or identification of the goods to the contract. [UCC § 2-513(1)] Where the contract requires payment prior to inspection, the nonconformity of the goods does not excuse the purchaser from making payment unless it appears without inspection. [UCC § 2-512] An agreement to pay against documents maybe construed as waiving the purchaser's right to inspection. [See UCC § 2-513(3)(b)] The right of inspection means the right to inspect goods in any reasonable manner. [UCC § 2-513(1)] It may include testing where the nature of the goods cannot be adequately determined otherwise. The cost of testing is borne by the purchaser, except where the goods are nonconforming. [UCC § 2-513(2)] In such a case, unless the parties have agreed to the contrary, the purchaser may recover the reasonable cost of inspection and testing from the seller as part of his incidental damage caused by the seller's breach. [UCC §§ 2-513(2), 2-715(1). See also 4 Uniform Commercial Code (Anderson, 3d ed) § 2-513:21]

From a contract perspective, the purchaser should be sure that the inspection rights are broad enough to allow the purchaser to have sufficient time and resources to complete the inspection. Ideally the purchaser should be able to inspect the goods on its own at the purchaser's facilities; however, in some cases it will be necessary to arrange for inspection by a third party if the contract calls for inspection and acceptance to occur at the first point of entry into the US even if that location is different from the purchaser's facilities. Inspection is not a cost-free activity and should be factored into the overall budget for the import transaction. While the purchaser would obviously like to have the ability to reject the goods for any reason, it is fair and common to include some form of objective standard that must be applied when determining if the goods conform to the warranties and specifications in the contract. In addition, the seller will often insist on the right to have a representative present during the inspection process. A more subtle issue is the scope of the sample and the purchaser may want to negotiate for the right to return the entire shipment if inspection of an agreed portion uncovers a problem.

While safety considerations are generally measured by reference to regulatory standards (and often require the use of measuring instruments or testing equipment), performance, appearance and packaging are usually judged from the point of view of a prospective customer; however, the difference is that the inspector is able to provide background and experience with respect to quality requirements and product performance in a specific market. When evaluating defects and the impact they might have on the salability of the goods, distinctions are often made between "any" customer and a "discriminating" customer. For example, a defect which, under normal conditions of use, results in a substantial reduction of electrical or mechanical performance may make it impossible to sell the product to any customer. On the other hand, while dirt or rust on a product, or the absence of an operating manual, may cause a discriminating customer not to purchase the product, less selective customers may still be willing to buy. Since it generally impossible for inspectors to evaluate each item in a shipment, statistically acceptable sampling procedures should be used.

Inspections may be conducted by employees or agents of the purchaser or both purchaser and the seller may agree to engage an independent inspector unaffiliated with either of the parties. The end product of the inspection process is an inspection report which sets out the number and type of defects identified, the sampling procedures used and an overall assessment of the quality of the shipment when evaluated against agreed standards of safety, performance, appearance and packaging, that will serve as a basis for the purchaser's decision as to whether the shipment should be accepted or rejected. In general, the inspector will identify major defects, minor defects and incidental defects. The report will describe and rate the discovered defects and the lot and sample sizes and the method used for selecting items to be included in the inspection. In some cases, the parties agree to limit the subjectivity of the importer's decision by agreeing in advance on the "acceptable quality level," which is expressed as a percentage that corresponds to the level of defects found during the inspection and sampling process. A low "AQL%" imposes stricter quality requirements on the seller; however, the trade off will come in the need for the seller to charge higher prices to cover costs of more stringent quality controls during production.

While rightfully considered separately, inspection rights are also related to the terms of payment for the goods. If the purchaser has sufficient leverage, it should insist on deferring payment for the goods until all material conditions to delivery and inspection of the goods have been satisfied. For example, the purchaser may require that the contract specify that its obligation to pay for the goods does not arise until the goods have been cleared through customs and the purchaser has had an opportunity to inspect the goods to determine whether they have arrived in satisfactory condition. This procedure should be considered when the purchaser has no prior experience with the seller and may be more palatable if the purchaser is willing to agree to more balanced payment conditions in the future once the purchaser is more familiar with the goods and the manner in which the seller performs its manufacturing and shipping obligations.

§26:24 --Payment and financing

The requirements in the contract with respect to the timing and manner of payment for the goods can have a significant effect on the overall cost of the transaction for the purchaser. Ideally the purchaser will be allowed to pay for the goods on open account, which means that payment will be due within a specified period of days following delivery of acceptance of the goods. In many cases, however, the seller is not willing to extend any form of credit to the purchaser and will demand that the purchase price be paid or set aside in escrow with a financial institution before the goods are shipped to the purchaser. In fact, this is a likely scenario when the seller has no prior business history with the purchaser unless the seller is particular anxious to launch a business relationship with the purchaser. If advance payment is required, the purchaser will need to make arrangements for the funds to be delivered in the currency required under the contract. In addition, the purchaser will need to be sure that it is adequately protected in the event that the goods are never delivered and it is unable to recoup the funds paid to the seller.

If the seller is willing to extend credit with respect to a particular transaction, the purchaser may be required to provide a letter of credit or other form of guaranty from a reputable financial institution. The seller may also require that the purchaser execute documentation to grant the seller a security interest in the goods pending receipt of full payment. If the purchaser has personal or real property assets located in the seller's home country, the seller may demand a lien on those local assets as an easy and effective way to liquidate a local judgment against the purchaser. Each of these payment instruments can add time and expense to the transaction and the purchaser should be sure that it will be able to satisfy any requirements imposed by the seller on a timely basis so that delivery of the goods is not delayed.

If the purchaser anticipates a heavy volume of import transactions, arrangements should be made with the purchaser's local bank for prompt processing of requests for issuances of letters of credit. Before approaching a bank or other financial institution for assistance in import financing, the purchaser should prepare an import business plan and be prepared to demonstrate a clear understanding of the costs and risks associated with importing goods from a foreign country. The goal of the relationship with the financial institution is to ensure that opportunities are not lost because the purchaser is unable to design a viable plan for paying the seller in an efficient manner either directly or through the third party financial institution. Recommendations for qualified financial institutions can be obtained from business partners and professional advisors, including counsel and accountants. Before the initial appointment, the purchaser should review information that might be available on the web site of the financial institution and come prepared to ask specific questions about the type of services available for import transaction and the costs associated therewith.

§26:36 Legal and regulatory issues to consider for international purchase of goods

The following legal and regulatory issues should be considered with respect to any international purchase of goods transactions:

- Determine whether US laws prohibit the importation of the goods or impose restrictions on the volume of imports through quotas, antidumping laws or countervailing duties.
- Verify that all documentation necessary for customs clearance in the US has been fully and accurately completed.
- Make arrangements for electronic customs filings, pre-shipment customs inspections and bonded warehouses in order to reduce the possibility of customs delays at the border.
- Review the US classification and valuation system for import to determine the amount of duties, ad valorem taxes and penalties associated with the proposed purchase.
- Determine whether the company must obtain any licenses or permits in order to import, transport, use or sell the goods.
- Identify any consumer, environmental, health or other regulations that may impact the labeling, marking, transport, storage, use and/or sale of the goods.

- Determine whether the company meets the qualifications for using a tax-free trade zone for its import activities.
- Determine whether the company is eligible for any US government programs that provide for reimbursement of duties (“drawback”).
- Determine whether the proposed import transaction qualifies for favorable treatment under any free trade agreement or preference system.
- Verify that the company is creating and maintaining proper books and records for tax and customs authorities.

§26:38 Standard terms and conditions for international purchases

1. Acceptance of Purchase Order

Agreement by Seller to furnish the materials or services hereby ordered, or its commencement of such performance, or acceptance of any payment, shall constitute acceptance by Seller of this Purchase Order subject to these terms and conditions. In the event that this Purchase Order does not state price or delivery, Buyer will not be bound to any prices or delivery to which it has not specifically agreed in writing. Any terms or conditions proposed by Seller inconsistent with or in addition to the terms and conditions of purchase herein contained shall be void and of no effect unless specifically agreed to by Buyer in writing. Modifications hereof or additions hereto, to be effective, must be made in writing and be signed by Buyer’s purchasing representative. These terms and conditions, together with any referenced exhibits, attachments or other documents, constitute the entire agreement between the parties with respect to the subject matter of this Purchase Order; and supersede any prior or contemporaneous written or oral agreements pertaining thereto.

2. Shipment and Shipping Instructions

(A) Unless otherwise specified on the face of the order, delivery of goods furnished hereunder is to be made FCA, but payment shall be made in accordance with Paragraph 9 hereof.

(B) No charges will be allowed for packing, crating, freight, local cartage, and/or any other services unless so specified in this Purchase Order.

(C) Seller shall at all times comply with Buyer’s written shipping instructions. Unless otherwise directed, all items shipped on the same day from and to a single location must be consolidated on one bill of lading or airbill, as appropriate. Seller shall submit all required shipping papers to Buyer prior to final payment. For material purchased F.O.B. origin, the Seller shall not insure and not declare a value except when transportation rates are based on “released value,” in which instance the Seller shall annotate on the bill of lading the lowest released value provided in applicable tariffs.

(D) Purchase Order number(s) must appear on all correspondence, shipping labels, and shipping documents, including all packing sheets, bills of lading, airbills, and invoices.

(E) Seller assumes all risk of loss until receipt by Buyer. Title to the goods shall pass to Buyer upon receipt by it of the goods at the designated destination. If the goods ordered are destroyed prior to title passing to Buyer, Buyer may at its option cancel the Purchase Order or require delivery of substitute goods of equal quantity and quality. Such delivery will be made as soon as commercially practicable. If loss of goods is partial, Buyer shall have the right to require delivery of the goods not destroyed.

3. Delivery; Notice of Delay

(a) Time is of the essence and failure to deliver in accordance with the delivery schedule under this Purchase Order, if unexcused, shall be considered a material breach of this Purchase Order and shall entitle Buyer to the right to cancel this Purchase Order without cancellation charge. No acts of Buyer, including without limitation modifications of this Purchase Order or acceptance of late deliveries, shall constitute waiver of this provision. Buyer also reserves the right to refuse or return at Seller's risk and expense shipments made in excess of Buyer's orders or in advance of required schedules, or to defer payment on advance deliveries until scheduled delivery dates.

(b) Seller shall notify Buyer in writing immediately of any actual or potential delay to the performance of this Purchase Order. Such notice shall include a proposed revised schedule but such notice and proposal or Buyer's receipt or acceptance thereof shall not constitute a waiver to Buyer's rights and remedies hereunder.

4. Assignment

(a) Seller may not assign any rights or delegate any of its obligations due or to become due under this Purchase Order without the prior written consent of Buyer. Any purported assignment or delegation by Seller without such consent shall be void. Buyer may assign this Purchase Order to (i) any affiliated company, (ii) any successor in interest, or (iii) Buyer's customer. Buyer shall have the right at any time to set off any amount owing from Seller to Buyer or Buyer's subsidiaries and/or affiliates against any amount due and owing to Seller or any of its subsidiaries and/or affiliates pursuant to this Purchase Order or any other contractual agreement between Buyer and Seller or their respective subsidiaries and/or affiliates.

(b) Seller shall promptly notify the Buyer in writing in advance of any organizational changes planned by Seller, including name or ownership changes, mergers or acquisitions.

5. Warranty

(a) Seller warrants the goods delivered on this order to be as represented by Seller, including any specific representation agreed to by Seller at Buyer's request, to be free from defects in workmanship, materials and design and to be in accordance with Buyer's specifications, drawings and samples in all respects. All warranties shall survive acceptance and payment. Goods supplied hereunder can only be regarded as accepted by Buyer after final examination and approval by Buyer.

(b) Seller warrants that the materials to be furnished and the services to be rendered under this Purchase Order shall be manufactured, sold, used and rendered in compliance with all relevant federal, state, local law, orders, rules, ordinances, and regulations and in compliance with applicable international prohibitions on child labor; and Seller further agrees to save Buyer harmless from any loss, damage, fine, penalty, or expense whatsoever that Buyer may suffer as a result of Seller's failure to comply with this warranty.

(c) This warranty entitlement shall inure to the benefit of both Buyer and Buyer's customers. As used in this Purchase Order, Buyer's customer(s) shall include its direct and indirect customers such as direct sale end-users, higher tier subcontractors, prime contractors and the ultimate user under relevant prime contract(s).

(d) Seller shall be liable for and save Buyer harmless from any loss, damage, or expense whatsoever that Buyer may suffer from breach of any of these warranties. In the event of the goods not being in conformity with the warranty contained herein, Buyer shall be entitled within reasonable time either to require replacement by Seller of nonconforming goods or to reject the order, in whole or in part. Goods so rejected shall be returned at Seller's expense, or, upon instruction by Seller, shall be scrapped by Buyer. Such rejection and return or scrapping shall be without prejudice to any other rights of Buyer.

6. Taxes

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

7. Packing

Unless otherwise specified, all goods supplied by Seller to Buyer under this contract shall be suitably packed for the type of export shipment designated in the shipping instructions on the face hereof. In all cases, Seller shall package all items in suitable containers to permit safe transportation and handling. Each delivered container must be labeled and marked to identify contents without opening and all boxes and packages must contain packing sheets listing contents. Buyer's Purchase Order number must appear on all shipping containers, packing sheets, delivery tickets and bills of lading.

8. Indemnity

Seller shall defend Buyer and hold Buyer harmless against all claims of infringement of the rights of others and against all claims of injury or damage arising out of any act or failure to act by Seller in connection with Buyer's purchase hereunder.

9. Payment

Unless otherwise specified on the face hereof, Buyer will, within [~ number (e.g., 30) ~] days after acceptance of goods at Buyer's place of business, effect payment in U.S. dollars.

10. Changes

(a) Buyer shall have the right by written order to suspend work or to make changes from time to time in the services to be rendered or the materials to be furnished by Seller hereunder or the delivery date. If such suspension or changes cause an increase or decrease in the cost of performance of this Purchase Order or in the time required for its performance, an equitable adjustment shall be negotiated promptly and the Purchase Order shall be modified in writing accordingly. Any claim by Seller for adjustment under this Section 15 (a) must be asserted in writing within twenty (20) days from the date of receipt by Seller of notification of the change or suspension and shall be followed as soon as practicable with specification of the amount claimed and supporting cost figures. However, nothing herein shall excuse the Seller from proceeding with this Purchase Order as changed pending resolution of the claim.

(b) Information, advice, approvals or instructions given by Buyer's technical personnel or other representatives shall be deemed expressions of personal opinion only and shall not affect Buyer's and Seller's rights and obligations hereunder unless set forth in a writing which is signed by Buyer's purchasing representative and which states it constitutes an amendment or change to this Purchase Order.

11. Termination for Convenience

(a) Buyer may, by notice in writing, terminate this Purchase Order or work under this Purchase Order for convenience and without cause, in whole or in part, at any time, and

such termination shall not constitute default. In the event of partial termination, Seller is not excused from performance of the non-terminated balance of work under the Purchase Order.

(b) In the event of termination for convenience by Buyer, Seller shall be reimbursed for actual, reasonable, substantiated and allowable costs, plus a reasonable profit for work performed to date of termination; provided, however, that the total amount of any reimbursement shall in no event exceed the total Purchase Order price reduced by the Purchase Order price of the work not terminated. Buyer may take immediate possession of all work so performed upon written notice of termination to Seller.

(c) Seller's obligations, including but not limited to obligations under the warranty, proprietary rights, infringement, and indemnity against claims provisions of this Purchase Order, shall survive such termination.

(d) Nothing in this Paragraph 11 shall effect the right of the Buyer to cancel this Purchase Order under the provisions of Paragraph 3 hereof.

12. Termination for Default

(a) Buyer may, by notice in writing, terminate this Purchase Order in whole or in part at any time for breach of any one or more of its terms, for failure to make progress so as to endanger performance of this Purchase Order, or failure to provide adequate assurance of future performance. In the event of partial termination, Seller is not excused from performance of the non-terminated balance of work under the Purchase Order.

(b) In the event of Seller's default hereunder, the Buyer may exercise any or all rights accruing to it, both at law, including without limitation, those set forth in Article 2 of the Uniform Commercial Code, or in equity.

(c) Seller's obligations, including but not limited to obligations under the warranty, proprietary rights, infringement, and indemnity against claims provisions of this Purchase Order, shall survive such termination.

13. Waiver

Buyer's failure to assert its rights under any provision of these terms shall not be deemed a waiver of such rights, nor shall any waiver be implied from the acceptance of or payment for any goods ordered hereunder. No waiver by Buyer shall be valid unless made in writing and signed by an authorized officer of Buyer.

14. Dispute Resolution

(A) If a dispute arises out of or relates to this Purchase Order, and cannot be resolved through good faith negotiations by the parties, the parties agree to submit the dispute to a sole mediator selected by the parties or, if the parties are unable to agree on a sole

mediator, the parties agree to submit the dispute to mediation under the Rules of the Supreme Court of the State of [~ name of state ~] or the Commercial Mediation rules of the International Chamber of Commerce (ICC). If not thus resolved and if both parties agree to binding arbitration, the dispute will be referred to arbitration.

(B) Any resolution reached through mediation or award arising out of arbitration:

- (1) Shall be limited to a holding for or against a party, and affording such monetary remedy as is deemed equitable, just and within the scope of this Purchase Order;
- (2) May not include special, consequential or punitive damages;
- (3) May, in appropriate circumstances, include injunctive relief; and
- (4) May be entered in court in accordance with the [~ name of state ~] Arbitration Act.

(C) Arbitration shall not be deemed a waiver of any right of termination under this Purchase Order and the arbitrator is not empowered to act or make any award other than based solely on the rights and obligations of the parties prior to and including such termination.

(D) The arbitrator may not limit, expand or otherwise modify the terms of this Purchase Order.

(E) Each party shall bear its own expenses incurred in any mediation or arbitration, but any expenses related to the compensation and the costs of any mediator or arbitrator shall be borne equally by the parties.

(F) All disputes not resolved in accordance with Paragraph (A) of this clause shall be referred to and finally resolved by arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Rules, which rules are deemed to be incorporated herein by reference. The appointing authority shall be the International Chamber of Commerce (ICC). There shall be a panel of three arbitrators who shall be appointed by agreement between the parties or failing such agreement in accordance with ICC rules. The parties will be entitled to conduct “discovery” pursuant to the Federal Rules of Civil Procedure and Evidence applicable in the USA. The chairperson of the arbitration panel shall, among other things: (a) have authority to resolve discovery disputes and issue appropriate subpoenas and orders to facilitate discovery; and (b) conduct the arbitration in the English language according to the Federal Rules of Evidence applicable in the USA. The arbitration panel shall render its decision in the English language and have authority to award injunctive and other emergency relief, which shall be enforceable by either the panel or any court with jurisdiction over the enjoined party or its assets. The arbitration panel shall not have authority to award punitive, special or consequential damages. Any monetary award of the panel shall be payable in U.S. Dollars free of any tax and reductions and shall include interest from the date of breach of this Agreement to the date when the award was paid in full at a rate determined by the arbitral panel.

(G) Pending any prosecution, appeal or final decision referred to in this Clause, or the settlement of any dispute arising under the agreement, the Seller shall proceed diligently as directed by Buyer with performance of the Purchase Order.

15. Applicable Law and Venue

(A) Both parties agree that, irrespective of the place of performance of this Purchase Order, it will be construed and interpreted according to the laws of the State of [~ name of state ~] exclusive of its conflict of laws provision. The applicability of the UN Convention on Contracts for the International Sale of Goods is hereby expressly waived by the parties and it shall not apply to the terms and conditions of this Purchase Order. Unless otherwise agreed to in writing by the parties, venue and jurisdiction for all legal proceedings of any kind or nature brought to enforce any provisions of this Purchase Order shall lie within the [~ name of state judicial district ~] of the State of [~ name of state ~] or the U.S. District Court for the [~ name of federal judicial district ~] District of [~ name of state ~].

(B) The parties further agree, to the extent permitted by law, to waive all rights to a trial by jury of any action relating to any dispute or interpretation of this Purchase Order. The parties specifically acknowledge that this waiver is made knowingly and voluntarily after an adequate opportunity to negotiate its terms.

16. Export Regulations

The Buyer shall supply to the Seller on a timely basis all necessary information and documentation requested by the Seller in order to permit the Seller to export the Purchased Goods with respect to any sale or order solicited by the Buyer hereunder, in accordance with the terms of this order. The Seller shall at its own expense be responsible for obtaining all necessary export licenses and authorizations.

17. Right to Independent Inspection

The Buyer has the right, at its expense, to engage an independent inspection organization, to inspect and/or test the purchased goods prior to shipment. The Seller shall provide all reasonable facilities and assistance for the safety and convenience of such inspectors in the performance of their duties. Based upon such inspection, the Buyer has the right to reject nonconforming or defective Purchased Goods and/or packaging or to require their correction.

18. Right to Inspect

Regardless of whether an inspection has taken place prior to shipment, the Buyer has the right to inspect the Purchased Goods upon delivery to the Buyer's place of business and, in addition to any other rights which it may have, the right to reject any defective Purchased Goods, which fail to conform to the descriptions and specifications set forth in this order. The Buyer will promptly notify the Seller in writing of all claimed defects and

nonconformities, and such defective or nonconforming Purchased Goods will be held for the Seller's instruction and, if the Seller so directs, will be returned at the Seller's expense. The failure to inspect, either prior to shipment or upon delivery to the Buyer's warehouses, shall not be deemed a waiver of any of the rights of the Buyer under any provision of this Order.

19. Inspection of Production Facilities and Samples

The Buyer, or an independent inspection organization of the Buyer's choosing, shall have the right to inspect at any time during normal business hours the production facilities where the Purchased Goods are being produced and to inspect the Purchased Goods during production. The Seller shall cooperate with such inspections. In addition, if so requested in writing by the Buyer, the Seller shall send to the Buyer at the Seller's expense, prior to, and at reasonable intervals during production of the Purchased Goods production samples of the Purchased Goods for the Buyer to test and approve. In the event that the Buyer is not satisfied with either the Purchased Goods being produced at the time of such inspection or with the said production samples, the Buyer shall notify the Seller in writing of its dissatisfaction. The Seller shall immediately seek to cure any such dissatisfaction. In the event that corrections are not immediately made to the satisfaction of the Buyer, Buyer may, at its option, require that production and delivery be suspended pending timely corrections, and such action by the Buyer shall not excuse the Seller from any delays or failure to ship the Purchased Goods on time.

20. Force Majeure

Except for defaults of Seller's subcontractors at any tier, neither Buyer nor Seller shall be liable for any failure to perform due to any cause beyond their reasonable control and without their fault or negligence. Such causes include, but are not limited to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, terrorism, quarantine restrictions, strikes, freight embargoes, and unusually severe weather. In the event that performance of this Purchase Order is hindered, delayed or adversely affected by causes of the type described above ("Force Majeure"), then the party whose performance is so affected shall so notify the other party's authorized representative in writing and, at Buyer's option, this Purchase Order shall be completed with such adjustments as are reasonably required by the existence of Force Majeure or this Purchase Order may be terminated for convenience.

21. Export Control Compliance

The Seller agrees to comply with all U.S. Government regulations, as found in 22 CFR 120-130, International Traffic in Arms Regulations (ITAR), and 15 CFR 730-774, Export Administration Regulations (EAR). Without limiting the generality of the foregoing, Seller shall control the disclosure of and access to technical data, information and other items received under this Purchase Order in accordance with U.S. export control laws and regulations. Whenever granting access to equipment or technology to a foreign vendor/Subcontractor, or before assigning any Foreign Person (as defined in 22 CFR

120.16) to perform work under this Contract, the Seller also agrees to notify Buyer in writing prior to assigning or granting access to a Foreign Person to any work, equipment, or technical data in performance of this Contract. Failure to comply may be deemed a material failure to perform under this Contract or Purchase Order and shall subject Seller to termination in accordance with Article 11, Termination. Seller shall indemnify Buyer for all liabilities, penalties, losses, damages, costs or expenses that may be imposed on or incurred by Buyer in connection with any violations of such laws and regulations by Seller.

22. English Language

The Parties confirm that it is their wish that this Order, as well as any other documents or proceedings conducted hereunder or relating hereto including notices, have been and shall be drawn up and interpreted in English only.

23. Foreign Persons

The Seller acknowledges that the technical data, as defined by 22 CFR 120.10 and 15 CFR 772, obtained, needed, generated, or delivered in performance of this Purchase Order is controlled by the International Traffic in Arms Regulation (ITAR) (22 CFR 120-130) or the Export Administration Regulations (EAR) (15 CFR 730-774), and will require U.S. Government export authorization before assigning any Foreign Person (as defined in 22 CFR 120.16, which includes foreign governments, business entities, groups and international organizations) to perform work under this Purchase Order or before granting access to Foreign Persons to any technical data obtained, used, generated, or delivered in performance of this Purchase Order. Any request for export authorization must include the information required by applicable export laws and regulations (reference ITAR, EAR or Chapter 10 of the National Industrial Security Program Operating Manual).

24. Proprietary Rights

(A) Unless otherwise expressly agreed in writing to the contrary, all specifications, information, data, drawings, software and other items supplied to Buyer by Seller shall be disclosed to Buyer on a non-proprietary basis and may be used and/or disclosed by Buyer without restriction, unless (i) otherwise required by the U.S. Government Regulations referred to below, or (ii) the Buyer has executed a separate agreement restricting the use and disclosure of such information, data, software and the like.

(B) Unless otherwise expressly agreed in writing to the contrary and subject to Section 23(d) below, all specifications, information, data, drawings, software and other items which are (i) supplied to Seller by Buyer or (ii) obtained or developed by Seller in the performance of this Purchase Order or paid for by Buyer shall be proprietary to Buyer, shall be used only for purposes of providing goods or services to Buyer pursuant to this Purchase Order, and shall not be disclosed to any third party without Buyer's

express written consent. All such items supplied by Buyer or obtained by Seller in performance of this Purchase Order or paid for by Buyer shall be promptly provided to Buyer on request or upon completion of this Purchase Order.

(C) Unless otherwise expressly agreed in writing to the contrary and subject to Section 23(d) below, any invention or intellectual property first made or conceived by Seller in the performance of this Purchase Order or which is derived from or based on the use of information supplied by Buyer shall be considered to be the property of Buyer; and Seller shall execute such documents necessary to perfect Buyer's title thereto. Unless otherwise expressly agreed in writing to the contrary and subject to Section 23(d) below, any work performed pursuant to this Purchase Order which includes any copyright interest shall be considered a "work made for hire".

25. Buyer's Property

(A) All drawings, tools, jigs, dies, fixtures, materials, and other items supplied or paid for by Buyer shall be and remain the property of Buyer; and Buyer shall have the right to enter Seller's premises and remove any such property at any time without being liable for trespass or damages of any sort.

(B) All such items shall be used only in the performance of work under this Purchase Order unless Buyer consents otherwise in writing.

(C) Material made in accordance with Buyer's specifications and drawings shall not be furnished or quoted by Seller to any other person or concern without Buyer's prior written consent.

(D) Seller shall have the obligation to maintain any and all property furnished by Buyer to Seller and shall be responsible for all loss or damage to said property except for normal wear and tear.

26. Title to Work Product

All inventions (whether patentable or unpatentable), improvements, ideas, discoveries and creations, which Seller shall conceive or first reduce to practice alone or in conjunction with others in the course of performing work under this Purchase Order or with the use of facilities or materials of Buyer, and all records relating thereto (in written, or machine readable, or other form), shall be the property of Buyer. Seller agrees to promptly make full written disclosure of all inventions it may conceive or first reduce to practice in the course of performing work under this Purchase Order or with the use of facilities or materials of Buyer, and to submit such disclosures and related records to the proper designated representative of Buyer. Further, on request of Buyer at any time, Seller will, without charge but at Buyer's expense, execute and deliver applications for patents in the United States or any foreign countries on such inventions, improvements, discoveries and creations, together with assignment to Buyer of Seller's entire interest

therein, and will give to Buyer such reasonable assistance as may be requested in securing, enforcing and protecting such applications and patents.

27. Definitions

As used in this Purchase Order:

(A) “This Purchase Order” or “this Contract” or “this Agreement” or “This Order” means the contractual instrument in which these General Provisions are incorporated.

(B) “Seller” means [~ name of seller ~].

(E) “Buyer” means [~ name of buyer ~], the legal entity issuing this order.

28. Quality Specification

The Seller’s Quality system shall be compliant to the requirements of ISO 9001 unless otherwise specified in this Purchase Order. MRB delegation to the Seller is not authorized unless specifically stated in the Purchase Order.

29. Indemnity against Claims

(A) Seller warrants that all work, materials, services, equipment, parts and other items provided by Seller pursuant to this Purchase Order, which are not of Buyer’s design, shall be free from claims of infringement (including misappropriation) of third party intellectual property rights and that any use or sale of such items by Buyer or any of Buyer’s customers shall be free from any claims of infringement. Seller shall indemnify and save Buyer, and its customers harmless from any and all expenses, liability, and loss of any kind (including all costs and expenses including attorneys’ fees) arising out of claims, suits, or actions alleging such infringement, which claims, suits, or actions Seller, hereby, agrees to defend, at Seller’s expense, if requested to do so by Buyer. Seller may replace or modify infringing items with comparable goods acceptable to Buyer of substantially the same form, fit, and function so as to remove the source of infringement, and Seller’s obligations under this Purchase Order including those contained in Section 5 [Warranties] and in this Section 26 shall apply to the replacement and modified items. If the use or sale of any of the above items is enjoined as a result of such claim, suit or action, Seller, at no expense to Buyer, shall obtain for Buyer and its customers the right to use and sell said item.

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

claims (including resulting costs, expenses and liability) by the employees of Seller or any of its subcontractors.

30. Release of Information

Seller shall not publish, distribute, or use any information developed under or about the existence of this Purchase Order, or use the _____ [company name of purchaser] name (or the name of any division, affiliate or subsidiary thereof), logo, trademark, service mark, or trade dress for the purpose of advertising, making a news release, creating a business reference, creating a website content or for products or service endorsement without prior written approval of Buyer.

31. Standards of Business Ethics and Conduct

By the acceptance of this Purchase Order, Seller represents that it has neither received or given any gifts or gratuities, nor participated in any other conduct in connection with this Purchase Order that violates the Standards of Business Ethics and Conduct of _____ [company name of purchaser] (available at _____ [web site address]). If, at any time, Buyer determines that Seller is in violation of such Standards, Buyer may cancel this Purchase Order upon written notice to Seller and Buyer shall have no further obligation to Seller.

32. Entire Agreement

This Purchase Order constitutes the entire agreement between the parties with respect to its subject matter and to all transactions related thereto and supersedes all proposals, oral or written, all negotiations, and all other communications, prior or contemporaneous thereto, between the parties with respect to such subject matter or such transactions including, without limitation, any prior to contemporaneous course of dealing, usage of trade or course of performance. The parties acknowledge and agree that entering into this transaction they have not relied upon any representations other than those explicitly set forth in this Purchase Order and each party acknowledges and agrees that the representatives or agents of the other party cannot make any warranties or representations not specifically included within the written provisions of this Purchase Order. Any term or condition which is, or may be, asserted as material by any party, and which is not expressly stated in this Purchase Order, shall not be within this Purchase Order or binding on the parties hereto. Each party waives all defenses with regard to any such term and condition and no amendment to this Purchase Order shall be valid and binding unless in writing and signed by each party hereto. If any provision of this Purchase Order or application thereof is found invalid, illegal or unenforceable by law, the remainder of this Purchase Order will remain valid, enforceable and in full force and effect, and the parties will negotiate in good faith to substitute a provision of like economic intent and effect.