

# TERMS AND CONDITIONS

**1. ACCEPTANCE AND EFFECTIVE DATE.** This agreement is effective as of the date of its dispatch to Buyer, who is identified on the face hereof, by Everett Charles Technologies, LLC (hereafter "ECT"). ECT is a division of Xcerra Corporation, a Massachusetts corporation with its principal place of business at 825 University Avenue, Norwood, Massachusetts 02062, U.S.A. Buyer's acceptance of this agreement shall occur, or be deemed to occur, upon the earlier of the following (a) expiration of ten (10) days from date of its dispatch to Buyer, unless Buyer shall deliver written rejection hereof to ECT within such period, or (b) Buyer's acceptance of any product or service referenced herein, whichever occurs first.

## 2. QUOTES.

- A. Quote Number.** Correspondence of Buyer referring to any quote of ECT as to price or terms must bear ECT's quote number.
- B. Validity.** All quotes of price and terms are valid for sixty (60) days unless otherwise provided in writing by ECT

## 3. CONDITIONS OF SALE.

**A. Buyer Form.** If Buyer has submitted an offer in any form, including a purchase order, containing Buyer's own terms and conditions, then, unless Buyer shall assent to the terms and conditions hereof, this agreement shall constitute a rejection of Buyer's offer. If Buyer shall treat the terms and conditions hereof as a counter offer, Buyer may accept this "counter offer" only on the terms and conditions hereof, and any terms and conditions contained in Buyer's acceptance which are additional to, or not identical with, the terms of the "counter offer" will not become part of this agreement.

**B. Failure To Object.** Failure on the part of ECT to object to provisions contained in any order or other communication from Buyer shall neither be construed as a waiver of the terms and conditions hereof, nor an acceptance of any such provisions.

**4. TAXES.** Sales or other taxes are not included in the price. Applicable State Resale Certificate must be on file to support exemption from sales tax. Buyer shall pay all federal, state, county or other local taxes, levies, duties or assessments, however designated, levied or based, upon this agreements, the prices hereunder, the services hereunder, or any product or product use, and any taxes or charges in lieu thereof, paid or payable by ECT with respect to the foregoing, exclusive of taxes based on net income. All personal property taxes assessed or assessable on any product after delivery shall be borne by Buyer. In the event ECT is required to pay any such tax, levy, duty or assessment, Buyer shall forthwith reimburse ECT.

## 5. DELIVERY AND RISK OF LOSS.

**A. In General.** Delivery shall be F.O.B. origin, and, for this purpose, possession and title to all product ordered hereunder shall be deemed to pass to Buyer upon delivery to the carrier at the point of shipment. Buyer shall assume all risk of loss or damage upon delivery to carrier at point of shipment, except for loss resulting from negligence of ECT. All transportation charges or costs of insurance which may be assessed in connection with all product delivered hereunder shall be added to the price quoted to Buyer and shall be paid by Buyer.

**B. Choice of Carrier.** Buyer may apprise ECT of any choice of carrier. If none is specified at the time an order is placed, ECT will use standard surface transport.

**C. Export Shipments.** Export shipments will be made against the Buyer's instructions, which must be complete at least five (5) working days prior to shipment date. Any required import/export license must be obtained by Buyer.

**D. Partial Shipments.** ECT will make partial shipments, unless otherwise specified by ECT or Buyer.

## 6. TERMS OF PAYMENT.

**A. All Orders.** Buyer shall pay to ECT the amount stated on its invoice within thirty (30) days of the date of such invoice, subject to credit approval.

**B. Past Due Amounts.** Delinquent payments are subject to an interest charge at the rate of one and one half percent per month, or any lesser portion thereof as shall not exceed the maximum lawful rate. Furthermore, Buyer acknowledges that late payment by Buyer to ECT of any invoiced amount will cause ECT to incur costs not contemplated by this agreement, the exact amount of such costs being extremely difficult and impracticable to fix. Such costs include, without limitation, processing, handling and accounting costs. Therefore, if any invoiced amount due from Buyer is not received by ECT when due, Buyer shall pay to ECT an additional sum of 1% of the overdue amount as a late charge per month. The parties agree that this late charge represents a fair and reasonable estimate of the costs that ECT will incur by reason of late payment by Buyer. Acceptance of any late charge shall not constitute a waiver of Buyer's default with respect to the overdue amount.

**C. Credit Limit.** Orders are subject to a maximum outstanding credit limit (measured counting all outstanding invoices, whether or not past due, combined with the value of all accepted orders) as reasonably determined by ECT. ECT may in its discretion refuse to accept purchase orders if such acceptance would result in Buyer exceeding such credit limit. The amount of credit or terms of payment may be changed or credit withdrawn by ECT at any time.

**D. Shipments Independent.** Each shipment shall constitute an independent transaction and Buyer shall pay for same in accordance with the specified payment terms.

**E. Delayed Shipments.** If shipments are delayed by Buyer, ECT may nevertheless invoice Buyer when ECT is prepared to ship.

**F. Termination of Change to Orders.** Buyer shall not terminate, suspend performance, reschedule or cancel delivery or issue a "hold" order under this agreement, in whole or in part without ECT's prior written consent and upon terms that will compensate ECT for any loss or damage resulting from such action. Buyer's liability shall include, but not be limited to, the price of any product delivered or held for disposition and the price of services already performed, plus ECT's loss of profits thereon, incurred costs, and a reasonable allocation of general and administrative expenses. Any such termination shall be subject to a minimum termination charge of twenty percent (20%) of the dollar amount of the sales terminated.

**7. WARRANTY. THE WARRANTIES PROVIDED IN THIS AGREEMENT ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.** All descriptions of Product in this agreement or descriptions, plans and specifications otherwise furnished to Buyer, are for the sole purpose of identifying Product, are intended to only suggest the nature of Product and are not part of the basis for the bargain, and do not warrant the nature of quality of Product.

**A. Product Manufactured by ECT.** ECT warrants that Product manufactured by ECT and delivered under this agreement will be free from defects in material and workmanship during the Warranty Period. In the event any component part of any Product manufactured by ECT becomes defective by reason of material or workmanship during the Warranty Period and Buyer immediately notifies ECT of such defect, then at ECT's sole election (i) Buyer shall return the defective part to ECT and ECT shall repair or replace the defective part, or (ii) Buyer shall conduct first echelon repairs on the defective Product using replacement materials supplied by ECT, (iii) Buyer shall return the defective Product containing the defective part to ECT for repair and/or (iv) ECT may repair the defective Product at the site thereof. ECT's sole obligation under the Warranty

shall be with respect to defective Product or parts therefore about which ECT actually receives written notice of defect during the Warranty Period. All returns to ECT are to be in accordance with Section 8 RETURNS below and in addition shall be at Buyer's expense, shipment, prepaid by Buyer, to the address specified by ECT. Buyer shall be responsible for proper packaging and undamaged arrival at the proper destination. ECT assumes no responsibility for improper or unauthorized returns. ECT will prepay shipment of repair parts, replacement parts and material provided or returned by ECT to Buyer under this Warranty.

**B. Product Purchased for Resale.** Buyer agrees that the sole and exclusive warranty for any Product or module of a Product purchased by ECT from another manufacturer for resale shall be limited to the warranty period, if any, extended by such manufacturer.

**C. Product Warranty Period:** ECT products will have a warranty period of no more than 90 days from the date of shipment.

**D. Warranties.** Except as provided in Section 7B, the Seller, by accepting this Contract, warrants (i) that all materials and/or services to be delivered or performed hereunder shall be merchantable and fit for the particular uses(s) for which intended, (ii) that such materials and/or services shall be free of defects or material, workmanship, or design, and (iii) that such material and/or services shall conform strictly to the specifications, drawings or samples (if any) supplied by Buyer and/or published or delivered by Seller. These warranties shall survive any inspection, delivery, acceptance and/or payment by Buyer.

**E. Limitation of Warranty.** The warranty shall not extend to any Product that has been subjected to misuse for any reason including but not limited to operation contrary to ECT's printed instructions, neglect, accident, improper installation, application of improper power, improper matching, or to repairs or modifications performed by anyone other than ECT's own or authorized service personnel and not authorized in writing by ECT. All warranty shall become null and void as to any particular ECT Product provided under this agreement upon connection thereof to equipment manufactured other than by ECT unless prior to such connection (i) ECT has published a written notice that such equipment is compatible with the particular ECT Product, or (ii) ECT's authorized representative inspects the equipment in an assembled and operative condition, determines that it is compatible with the particular ECT Product and gives written notice thereof. Equipment is not compatible if it either damages or deters the performance of the ECT Product. Service fees and expenses are charged by ECT to investigate equipment for compatibility with ECT Product and quotations therefore are given upon request. However, ECT reserves the right at its discretion to refuse to investigate any equipment and determine the timing of any such investigation.

## 8. RETURNS.

**A. Credit.** ECT may accept, at its sole discretion, the return of standard unmodified non-customized products, or parts for credit. A minimum re-stocking charge of 20% of invoice price will be applicable and all returns must be made in accordance with this Section 8.

**B. RMA Number: Prior Approval.** All Products returned for any reason to ECT shall bear an ECT return material authorization number. No product shall be returned to ECT absent ECT's prior approval.

**C. Freight.** All freight charges for returned products of parts, including warranty-claimed repair must be prepaid. In case of a return, the Buyer is responsible for proper packaging and possible damages and loss of goods.

**9. NO EXTENSION OF WARRANTY.** If any product, or part thereof, is replaced or repaired pursuant to its applicable warranty, such event shall not extend the warranty period for any product beyond the original warranty period for the original product.

## 10. LIMITATION OF LIABILITY.

Notwithstanding anything in this agreement suggestive to the contrary, under no circumstances shall ECT be liable to Buyer for incidental, indirect, special or consequential damages, or for lost profits, savings or revenues of any kind, whether or not ECT has been advised of the possibility of any such damages or the like.

**11. INDEMNITY FOR IMPROPER USE.** Buyer shall indemnify and hold harmless ECT in respect to any claims, demands, losses, costs, expenses, damages, recoveries, obligations, liabilities and the like incurred, suffered or threatened by ECT, including, without limitation, settlement costs and any legal, accounting and other expenses for investigating or defending any actions or threatened actions which shall arise, result from or relate to any direct or indirect injury, damage or loss, to any property or any person, arising out of the connection of product furnished hereunder to other equipment or product of another if ECT's product is, or has been, subjected to operation contrary to ECT's printed instructions, neglect, accident, improper power, improper matching or to repairs or modifications made by anyone other than ECT's own or authorized service personnel and not authorized in writing by ECT.

**PATENT INDEMNITY.**

**A. Indemnity as to Product Sold.** ECT shall indemnify and hold Buyer harmless with respect to the sale of or use of product furnished under this agreement, which is of ECT's standard manufacture or design, as to the infringement of any valid U.S. patent, provided that this indemnity shall only be effective if Buyer immediately gives ECT written notice of any assertion, claim, action or proceeding for patent infringement, that ECT shall have sole direction and control of any negotiations or of any suit that may be brought including the right to settle, and the Buyer shall assist ECT in any reasonable way required by ECT with respect thereto.

**B. No Indemnity as to Combinations.** ECT shall not indemnify Buyer, nor hold Buyer harmless from, and Buyer agrees to indemnify and hold ECT harmless from any actual or alleged infringement of the rights of others based on combination of product furnished hereunder by ECT with product of another, or arising out of any product manufactured or sold by ECT to meet Buyer's particular specification.

**C. Cases of Infringement.** Should product provided hereunder or the operation thereof become, or in ECT's opinion be likely to become, the subject of a claim of infringement of a U.S. patent, ECT shall at any time and at its option and its expense have the right to avoid or reduce alleged or actual infringement by (a) substituting for such product or a portion thereof other equally suitable replacements and/or (b) modifying such product or a portion thereof or (c) obtaining for Buyer the right to continue the use of such product and/or (d) taking back such product or a portion thereof and granting Buyer a credit for the portion taken back, less reasonable depreciation.

## 12. DEFAULT

**A. Default.** Buyer shall be deemed to be in default upon (a) failure to comply with any of the terms and conditions of this agreement or any other written agreement with ECT, or (b) the appointment of a receiver for its business or in the event Buyer shall become subject to an insolvency proceeding under any bankruptcy act.

**B. Remedies.** Upon such default in addition to any other remedies it may have at law or in equity, ECT may cancel any outstanding order from Buyer, refuse to make deliveries and declare all obligations immediately due and payable. Furthermore, ECT may recover possession of the product sold hereunder pursuant to its security agreement with Buyer above provided. Buyer hereby grants ECT a license to enter Buyer's premises wherever any subject

product may be housed for such purpose, and waives all claims for damages or trespass arising from any such entry and repossession.]

**C. Costs.** Buyer shall be liable for all of ECT's expense of retaking or repossessing, holding, preparing for sale, selling and the like, in the event of Buyer's default. Buyer waives all claims for damages or trespass arising from any such retaking. Buyer shall be notified in writing of any default other than the failure to pay money due hereunder and shall have a two (2) week period to cure such default.

**13. FORCE MAJEURE.** ECT shall not be liable for any delays in performance beyond the reasonable control of ECT, including without limitation, fire, flood, earthquake, epidemic, unusually severe weather, or other act of God, act of public enemy, public disorder, strike, restriction of civil or military authority in their sovereign or contractual capacities, failure of mode of transport, or inability to obtain labor to meet specifications beyond the "state of the art", inability to obtain materials or manufacturing facilities, or act of Buyer. In the event of any such delay, delivery schedules shall be appropriately adjusted.

**14. PRODUCT MAINTENANCE.** ECT shall have no obligation to repair or maintain any product furnished hereunder following the warranty period for such product, unless the Buyer and ECT shall have first entered into a separate maintenance agreement in writing with respect to such product.

**15. NO WAIVER OF CONDITIONS.** The failure of ECT to insist upon Buyer's strict performance of any of the terms and conditions hereunder or a delay by ECT in exercising any of its remedies hereunder shall not constitute a waiver of these terms and conditions or a waiver of any default or any remedy.

**16. PRODUCT.** The word "product" as used herein includes hardware, software and firmware, and may include new or re-conditioned parts.

**17. APPLICABLE LAW.** The laws of the State of California, United States of America, shall be the applicable law for the interpretation and enforcement of this agreement, and for purposes of choice of law.

**18. NOTICES.** Any notices provided for hereunder shall be given in writing and transmitted by personal delivery or prepaid first class postage fully addressed in the case of Everett Charles Technologies, 14570 Meyer Canyon Drive, Unit 1, Fontana, CA 92236 and in the case of Buyer at its address shown on the face hereof.

**19. ENTIRE AGREEMENT.** The agreement constitutes the entire agreement between the parties hereto and supersedes all other agreements between the parties in connection with the sale of product and services provided herein. In the event of any discrepancy or inconsistency between the agreement and any other form or agreement used by either party in connection herewith, the terms and conditions of this agreement shall govern.

**20. NO IMPLIED LICENSE.** The sale or other furnishing of any product, part, or information in the form of data, service, or application assistance (hereafter altogether referred to in this paragraph as "material or service") by ECT, or any of its affiliates, is not be construed as any express or implied license, or other grant of rights to use, by implication, course of dealing, estoppel, or otherwise, any patent, know-how, technical data, or other trade secrets or proprietary rights of ECT, or any of its affiliates, connected in any way to the material or service for any purpose other than that purpose which, as of the date hereof, Buyer has clearly caused ECT to understand as the purpose of Buyer in the execution, delivery and performance of this agreement.

## 21. RIGHTS IN INTELLECTUAL PROPERTY.

**A. ECT Exclusively.** ECT shall exclusively own all right, title and interest in and to any inventions, discoveries, improvements, methods, ideas, computer and other apparatus programs and related documentation, other works of authorship fixed in any tangible medium of expression, mask-works or other forms of intellectual property, whether or not patentable, copyrightable or subject to mask-work rights, or other forms of protection, which are made, created, developed written, conceived or first reduced to practice by ECT solely, jointly or on its behalf, whether in the course of, arising out of or as a result of work done under this agreement, or otherwise.

**B. Software.** Any software included in products will remain the property of ECT, or its original developer. Buyer shall receive only a non-exclusive, non-transferable right to use such software solely with the ECT hardware which it accompanies ("related product"), only for the period of time necessary to use of the related product. The software may not be made available to any third party without prior written consent of ECT or the original developer.

**C. Source Codes.** It is the policy of ECT that source code for software or firmware programs is not provided as part of product purchases and/or software licenses.

**22. ATTORNEYS' FEES.** If either party to this agreement incurs any legal fees, whether or not an action is instituted, in an effort to enforce the terms and conditions of this agreement or to recover damages or injunctive relief for breach of this agreement, it is agreed that the successful or prevailing party or parties shall be entitled to reasonable attorneys' fees, and other costs in addition to any other relief to which such party may be entitled.