

Network Testing Division General Terms and Conditions

- General.** These general terms and conditions including specifications, quotation and/or supplemental terms and conditions provided by the InfoVista group legal entity with whom Customer is contracting ("Seller") exclusively governs the sale or licensing by Seller to Customer of all Network Testing TEMS branded products ("Products") and related services specified in the purchase order ("Services") whether such sale or licensing is effected by e-mail or paper-based transaction or via facsimile or other forms of electronic data interchange (EDI) or electronic commerce, and represents the entire agreement between Seller and Customer. In the event Seller and Customer are parties to a separate written agreement which is to apply to the provision of Products and/or Services, the terms and conditions of such agreement shall take precedent. Seller expressly objects to any different or additional terms of Customer in a purchase order unless agreed to in writing by Seller.
- Payment Terms.** Payment terms are net thirty (30) days from the date of invoice with ongoing credit as determined by Seller. Seller may render partial invoices and require progressive or installment payments. Seller reserves the right to render invoices electronically and to receive payment by way of electronic funds transfer. Payment by credit card, when permitted, is subject to credit card validation and authorization both at the time of the agreement and immediately prior to shipment. Seller reserves the right to suspend any further performance hereunder or otherwise in the event payment is not made when due. No payment by offset is permitted. Interest charges will be added to overdue invoices at the rate of 1.5% per month subject to any limit imposed by applicable law.
- Delivery; Title and Risk of Loss.** Products will ship according to Seller's standard commercial practices. Delivery terms are Ex Works (Seller's supply facility) (per current Incoterms) or as otherwise agreed in Seller's order acknowledgement, quotation or other writing by Seller. An anticipated delivery date will be estimated by Seller upon receipt of order. The delivery date is the best estimate possible based on receipt of all necessary information from the Customer and current and anticipated factory operations of when the Product will be delivered. Except for Software, title and risk of loss pass to the Customer Ex Works (Seller's supply facility) (per current Incoterms). Title to all intellectual property rights in the Software and associated with the Products remains with the Seller or its suppliers and licensors.
- Acceptance.** For Products, acceptance occurs upon delivery. For Products with installation and other related Services included in the purchase order, acceptance by Customer occurs upon completion of such included Services. Customer may not cancel, terminate or suspend for convenience, except with Seller's prior written consent and only then upon the terms that compensate Seller for its third party charges or expenses and any other costs relating to the cancellation, termination or suspension.
- Support.** In addition to these general terms and conditions, purchase orders providing for support of purchased Products are further subject to the applicable support services described in the Seller's current "Support Solution Description" documentation and any Support Services Agreement signed by Seller and Customer.
- Software Licenses.** Customer acknowledges that the Products offered hereunder include proprietary computer programs ("Software") and related technology which Seller, its affiliates or suppliers owns or licenses and are subject to Customer's acceptance of additional terms and conditions set forth in a third party license agreement or Seller's Software License Agreement that will control to the extent necessary to resolve any conflict with these general terms and conditions. Software may include software considered to be "open source" software under the Open Source Initiative with source code licensed under the GPL, LGPL and other applicable open source licenses. Such code is available in source code form and may be obtained upon written request to InfoVista Sweden AB, Attention: Technical Support, at NT.OSS@infovista.com. Seller reserves the right to charge a nominal fee covering the cost of performing such distribution, if any, such as the cost of media, shipping and handling. In the absence of a separate license agreement, Customer is granted a non-exclusive, non-transferable, royalty-free license to use the Software only in object code form and solely in conjunction with Seller provided Products and with no rights to sublicense, assign, disclose, disassemble, decompile, reverse engineer, access the source code or otherwise modify the Software or create derivative works. Customer does not acquire any right, title, or interest in the Software and there are no implied licenses in these general terms and conditions.
- Limited Warranties.** Seller warrants that (a) TEMS branded Products will be free from defects in materials and workmanship and will materially conform to the then applicable specifications from the date of delivery for a period of twelve (12) months for hardware and three (3) months for software. Seller does not warrant the software or any portion thereof is error free. Seller will have no warranty obligation with respect to Products subjected to abuse, misuse, negligence, accident or service by unauthorized third party. To the extent permissible by law, Seller excludes any and all warranty with regard to third party products. SELLER MAKES NO OTHER EXPRESS OR IMPLIED WARRANTIES AND ALL OTHER WARRANTIES ARE SPECIFICALLY EXCLUDED, INCLUDING ANY WARRANTY AS TO MERCHANTABILITY OR FITNESS FOR PARTICULAR OR SPECIAL PURPOSES.
- Remedies.** Seller's sole liability and the Customer's exclusive remedy for breach of any of the Limited Warranties in Article 7 shall be to repair, replace or re-perform free of charge such faults in the Product or performance of Services causing the breach, provided that: (a) the Customer has used the Product in strict accordance with the Documentation and any other written instructions from Seller and provided that the Product has not been used for any other purposes than that for which it was designed, (b) Customer has not, or attempted to, amend, alter, modify or repair the Product in any way otherwise than as instructed in writing by Seller, (c) the fault is not a result of accidents, negligent or wilful acts or omissions of the Customer, (d) in rectifying any faulty Software, the Customer shall, when technically possible, allow Seller to remotely connect to Customer's system and the Software to facilitate quick diagnosis of the problem in question provided that Seller complies with Customer's network security procedures, (f) the hardware is returned, upon Seller's request, to Seller's designated delivery address at the Customer's cost and risk, and (g) the Customer has notified Seller in writing of the alleged fault specifying the fault within the above stipulated applicable warranty time period.
- Indemnification.** Seller shall indemnify and hold the Customer harmless against all actions or claims for infringement of Swedish patents, copyrights, registered designs or other rights related to Software by reason of the proper use of Products by the Customer, and Seller shall at its option and own expense, either: (a) procure for Customer the rights for continued use of the Software in its present form, (b) replace or modify the Software so that it no longer infringes any such rights, (c) settle or defend any further claim, suit or proceeding against the Customer arising out of such continued use of the Software, or (d) issue the Customer a pro-rated refund on a three year straight line basis upon return the Software to Seller. The liability of Seller and remedy of the Customer for Software in this Article 9 is strictly conditioned upon and provided that: (a) the Customer without delay informs Seller in writing of any claim made by reasons of alleged infringement as aforesaid and refrains from taking action on account of such claims without previous approval of Seller, (b) the Customer without delay informs Seller in writing if legal action is taken on account of such claims and turns control of the defence over to Seller so that Seller shall have full authority to defend or settle the same through its counsel, (c) Seller is informed of all circumstances which may be relevant in the legal action taken and the Customer refrains from all steps in any legal action which may prejudice Seller including without limitation settling unless Seller is forever released of all claims, (d) in case Seller fails to act against such claims or actions the Customer shall have the right to take appropriate legal action and shall be reimbursed any reasonable expenses in so doing, and (f) the infringement or alleged infringement is not arising out of the use of the Software in combination or conjunction with any other item, or the use thereof, not supplied or manufactured by Seller.
- Limited Liability.** (a) THE ENTIRE LIABILITY OF SELLER, AND THE SOLE AND EXCLUSIVE REMEDY OF THE CUSTOMER, FOR ANY CLAIM OR CAUSE OF ACTION ARISING HEREUNDER (WHETHER IN CONTRACT, TORT, OR OTHERWISE) SHALL NOT EXCEED THIRTY PERCENT (30%) OF THE PRICE OF THE DELIVERED PRODUCTS OR CHARGE FOR SERVICES, AS THE CASE MAY BE, WHICH IS THE SUBJECT OF SUCH CLAIM OR CAUSE OF ACTION OR TWO HUNDRED THOUSAND EUROS (€200,000), WHICH EVER IS THE LOWER. (b) IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY OR ANY OTHER PARTY UNDER THE AGREEMENT FOR LOSS OF PRODUCTION, LOSS OF USE, LOSS OF BUSINESS, LOSS OF DATA OR REVENUE OR FOR ANY SPECIAL, PUNITIVE, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, WHETHER OR NOT THE POSSIBILITY OF SUCH DAMAGES COULD HAVE BEEN REASONABLY FORESEEN.
- Assignment.** Neither Party may assign the purchase order or the general terms and conditions, in whole or in part, to any other party without the prior written consent of the other Party, except that Seller may assign the Agreement to any other legal entity in the InfoVista group of companies.
- Notices and Contacts.** All notices and other communication between Seller and the Customer shall be in writing in the English language and be sent to the address/es stated in the purchase order. Either Seller or the Customer may change its address/es by written notice to the other party.
- Force Majeure.** Neither Seller nor the Customer shall be liable in any way for any damage, loss, cost or expense arising out of or in connections with any delay, restriction, interference or failure in performing any obligation hereunder caused by any circumstance beyond its reasonable control, including without limitation, acts of God (such as earthquake, flood, fire, eruption or explosion), accident, natural disaster, embargo, acts of government including non-availability of an export license or visa and permits for a Party's personnel, terrorism, strikes, labour disputes, and defects or delays from suppliers ("Force Majeure"). In case of Force Majeure, the affected party shall promptly notify the other party in writing and furnish it with all relevant information thereto.
- Export Restrictions.** Except as otherwise provided in the applicable purchase order or quotations, the Customer shall be responsible for all required export and import licences, permits and customs fees or duties. Customer shall not export, re-export, transfer, directly or indirectly, any Product or technical data received hereunder, to any country or user to which such export, re-export or transfer is restricted by the United States of America or local country law or regulation. In the event that the provision of any Product or any part thereof is prohibited by applicable export control laws or regulations, then: (a) Seller shall have no obligation whatsoever to deliver the Product or any part thereof to the Customer and (b) Seller shall have no liability to the Customer or any third party for its failure to deliver the Product or any part thereof to the Customer except to refund any amount pre-paid by the Customer.
- Severability.** If any provision of these general terms and conditions is held to be invalid, illegal, void or for any reason unenforceable, then the provision shall be deemed severable and shall not affect the validity and enforceability of the remaining provisions of these general terms and conditions. Seller and the Customer shall endeavour in good-faith negotiations to replace the invalid provision with a valid provision, which shall, to the utmost possible extent, closely correspond to the legal and economic contents of the invalid or unenforceable provision.
- Waiver.** Failure by either Seller or the Customer to enforce at any time any term or condition of these general terms and conditions shall not be construed as a waiver of such term or condition or the right to enforce any such prior or subsequently failed term or condition.
- Governing Law; Dispute Resolution.** These general terms and conditions shall be governed by the domestic law of the country of Seller without regard to the conflicts rules of law thereof or the United Nations Convention on Contracts for the International Sale of Goods. All disputes, differences or questions between Seller and Customer with respect to any matter arising out of or relating to these general terms and conditions shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules. The proceedings shall take place in the capital city of the country of Seller's legal-registered address and be conducted in the English language. The English language version of these general terms and conditions prevails over any other language version. Seller and the Customer undertake and agree that all arbitral proceedings conducted under this Article 17 shall be kept strictly confidential, and all information, documentation, materials in whatever form disclosed in the course of such arbitral proceeding shall be used solely for the purpose of those proceedings
- Amendments.** These general terms and conditions may not be modified or amended except by written agreement of Seller and the Customer.
- Proprietary Information.** Absent a separate agreement governing disclosure of confidential or proprietary information, all confidential and proprietary information disclosed by Seller hereunder shall be received in confidence by the Customer, may not be disclosed to third parties without Seller's prior written consent and shall remain the exclusive property of Seller or its affiliates. Customer shall exercise the same level of care with Seller's confidential information as if it were Customer's own confidential information but in no event less than reasonable care. The Customer shall not use confidential or proprietary information except in connection with the applicable purchase order and shall only disseminate or disclose confidential and proprietary information to its employees, consultants, or subcontractors on a need to know basis. Nothing contain in this Article 19 shall be construed as granting or conferring upon the Customer any rights or licenses of any intellectual property right. The obligations of the Customer in this Article 19 shall survive the termination or fulfilment of this purchase order.