

Ballard Technology, Inc.

Terms and Conditions of Sale

The sale of products or services or licensing of software ordered by the customer ("Customer") is expressly conditioned upon the terms and conditions contained or referred to herein. Any additional or different terms and conditions set forth in the Customer's purchase order or other communication are objected to and will not be binding upon BALLARD TECHNOLOGY, INC. (BALLARD) unless specifically agreed to in writing by a BALLARD authorized representative. Any order or authorization by the Customer, whether written or oral, to furnish products or services or licensing of software shall constitute acceptance of these terms and conditions.

1. GENERAL PROVISIONS

- a. These Conditions of Sale, along with any Addendum referenced herein and any other terms and conditions or documents referenced herein, contain the complete agreement between the parties, and no modification, amendment, rescission, waiver or other change will be binding on BALLARD unless agreed to in writing by a BALLARD authorized representative. The terms "herein," "hereof," "hereunder," and the like shall refer to this agreement as a whole. Any oral or written representation, warranty, course of dealing or trade usage not contained or referenced herein will not be binding on BALLARD. The invalidity, in whole or part, of any sections or subsections hereof shall not affect the remainder of such section or subsection or any other section or subsection hereof.
- b. This agreement shall be governed by the laws of the State of Washington without regard to its conflict of law provisions. The provisions of the United Nations Convention on the International Sale of Goods shall not apply to this Agreement.
- c. BALLARD reserves the right to subcontract any of its work to one or more subcontractors.
- d. Customer may not assign any of its rights, duties, or obligations hereunder without the prior written consent of BALLARD.
- e. Customer shall not transmit to BALLARD any information, suggestions, or ideas claimed by Customer to be confidential except pursuant to a writing, signed by an authorized representative of BALLARD, which identifies such information and addresses its confidentiality.

2. WARRANTY AND RETURNS

- a. The warranty shall be as stated in BALLARD's Limited Warranty (document AD195) in effect at the time the Product was purchased from BALLARD.
- b. When Customer desires to return Product for repair, replacement, or credit, Customer shall notify BALLARD in writing and, after receipt of a Return Material Authorization (RMA) number, Customer may return the Product to BALLARD, transportation charges prepaid. Customer should provide all possible information regarding the trouble experienced and complete details of the installation in which the Product was used. BALLARD may charge an evaluation fee when no fault is found or when the Product is out of warranty. BALLARD will provide a quotation for the cost of non-warranty repair.
- c. BALLARD will not accept Product returned for credit without BALLARD having given written permission in advance to Customer. The value of any credit to be issued to Customer for returned Product shall be at BALLARD's sole discretion.

3. INTELLECTUAL PROPERTY AND CONFIDENTIALITY

- a. BALLARD shall retain exclusive rights to its products, intellectual property rights (including copyrights, trademarks, patents and trade secrets), software, schematics, logic diagrams, and manufacturing processes, and to all modifications thereto funded by Customer's purchase order. BALLARD shall retain ownership and does not convey, nor does Customer or Customer's final customer obtain any right, title, or interest in, software or firmware, specifications or data furnished or developed by BALLARD either prior to or in the performance of Customer's order.
- b. BALLARD warrants that any BALLARD Products sold hereunder, and any part thereof, shall be delivered free of any rightful claim of any third party for infringement of any United States patent. If promptly notified in writing and given full authority, information and assistance, BALLARD shall defend, or may settle, at its expense, any suit or proceeding against the Customer based on a claimed infringement which would result in a breach of this warranty, and BALLARD shall pay all damages and costs finally awarded therein against the Customer due to such breach, other than damages and costs arising from any willful infringement by Customer after receipt of notice of the claimed infringement. BALLARD shall not be responsible for any compromise or concession made by Customer without the prior written consent of BALLARD. In case any BALLARD products are in such suit held to constitute such an infringement and the use for the purpose intended of said products is enjoined, BALLARD shall, at its expense and option, either procure for the Customer the right to continue using said products, or replace same with non-infringing products, or modify same so they become non-infringing, or remove the products and refund the purchase price (less reasonable depreciation for any period of use) and any transportation costs separately paid by the Customer. The foregoing states the entire liability of BALLARD for patent infringement.
- c. BALLARD shall have no liability to Customer under the Patent Section above if the infringement or claim is based in whole or in part upon
 - i. a product not of BALLARD manufacture;
 - ii. a customized product or a product manufactured to Customer's design;
 - iii. a modification of the product not introduced or approved in writing by BALLARD; or
 - iv. the interconnection or use of the product in combination with equipment, software or other devices not made or supplied by BALLARD. As to any such product, modification, or use in such combination, BALLARD assumes no liability whatsoever for patent infringement and the Customer shall hold BALLARD harmless against any infringement claim arising therefrom.
- d. Many aspects of the design, production and operation of the Product, in any form, are proprietary information and trade secrets of BALLARD. Customer shall not, directly or indirectly, disclose copy or otherwise transfer such information and trade secrets to any third party at any time. Customer shall not, reverse engineer or assist a third party to reverse engineer any Product or parts thereof.

4. SHIPPING AND DELIVERY; TITLE

- a. Unless otherwise indicated on BALLARD's quotation, prices quoted do not include any shipping. Delivery of products will be made FCA BALLARD facility or other point of shipment (Incoterms 2000). The title and risk of loss or damage to the Product shall pass to Customer upon delivery of Product by BALLARD to the common carrier. Customer hereby grants BALLARD a security interest in the Product until the invoice covering the Product has been paid in full. BALLARD shall bear the risk of loss or damage until the Product is delivered to any common carrier. Title to services shall pass pro rata as the services are performed.

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- b. Unless otherwise agreed by the parties in writing:
 - i. BALLARD shall determine the method and routing of all deliveries;
 - ii. delivery dates and times are approximate and based on
 - 1. prompt receipt by BALLARD of all information necessary to permit BALLARD to proceed with work immediately and without interruption,
 - 2. Customer's compliance with the payment terms,
 - 3. prompt receipt by BALLARD of all evidence BALLARD may request that any required export or import License, as applicable, is in effect;
 - iii. the prices for the products include only BALLARD's usual factory quality tests; and
 - iv. partial deliveries shall be permitted.
- c. If BALLARD consents to delay shipments at the Customer's request, payment shall be due on the date when BALLARD is prepared to make shipment. In the event of any such delay, title shall pass and the products shall be held at Customer's risk and expense. If the Customer's request is for custom products, or is not received, in writing, at least 30 days in advance of BALLARD's originally scheduled ship date, BALLARD will assess a fee of one percent (1%) of the total value of the products per month for each month that the shipment is delayed in order to compensate for inventory and material handling/storage costs.
- d. Products shall be prepared, packed and shipped by or on behalf of BALLARD in accordance with good commercial practices unless otherwise agreed by the parties. A complete packing list shall be enclosed with all shipments. Customer agrees to reimburse BALLARD for any costs for any non-standard packing, marking or shipping directions contained in the purchase order.

5. PRICE, PAYMENTS AND FINANCIAL CONDITION

- a. The prices for Product are set forth in BALLARD's quotation, which can be changed at any time upon notice to Customer. BALLARD quotations are valid for a period of 60 days, unless otherwise stated therein.
- b. Unless otherwise agreed by the parties in writing, the following payment terms shall apply: (a) if BALLARD grants credit terms, payments shall be due in U.S. dollars without setoff net thirty (30) days from the date of invoice; (b) payment for international transactions will be per Letter of Credit; and (c) payment for product shall become due pro rata as shipments are made and payment for services shall be due as services are performed. Payment shall be made to BALLARD's address as shown on BALLARD's invoice.
- c. Customer shall pay a monthly late payment charge computed at the rate of 1.5%, or the maximum interest rate permitted by law, whichever is less, on any past due amount for each calendar month (or fraction thereof) that the payment is overdue, and Customer shall pay, indemnify and save BALLARD harmless from any and all costs and expenses of BALLARD's collections efforts including reasonable attorney's fees, and costs associated with compromises and judgments arising therefrom. BALLARD retains a security interest and right of possession in the articles until Customer makes full payment, and Customer agrees to sign documentation at BALLARD's request as reasonably necessary to perfect such interest.
- d. Unless provided otherwise in BALLARD's quote, fifty percent (50%) of any non-recurring engineering charges ("NRE") shall be due and payable at acceptance of the purchase order or contract execution. The balance of such NRE (the "NRE Balance") shall be due and payable within thirty (30) days after completion of the NRE work. In the event of a cancellation of the NRE contract or purchase order after commencement but prior to completion of NRE work, BALLARD shall be entitled to payment of a percentage of the NRE Balance equal to the percentage of NRE work completed prior to cancellation, as reasonably determined by BALLARD. All NRE charges are nonrefundable.
- e. Any requests for changes shall be performed only if BALLARD and the Customer agree in writing on the specifications of the change and the corresponding changes to pricing and/or schedule.
- f. If at any time BALLARD determines that the Customer's financial condition does not justify continued performance on the terms of payment previously agreed upon, BALLARD may require full or partial payment in advance or shall be entitled to terminate this agreement without liability therefor. In the event of the insolvency of the Customer or in the event any proceeding is brought by or against the Customer, voluntarily or involuntarily, under bankruptcy or insolvency laws, BALLARD shall be entitled to suspend or terminate this agreement without liability therefor.

6. TAXES AND DUTIES

- a. Customer shall pay, or reimburse BALLARD for, the gross amount of any present or future sales, use, excise, income, value-added or other similar tax applicable to the price, sale or furnishing of any services or products hereunder, or to their use by BALLARD or the Customer, or the Customer shall provide BALLARD with evidence of exemption acceptable to the taxing authorities.
- b. Unless otherwise indicated on BALLARD's quotation, prices quoted do not include any taxes, export/import duties, customs fees or brokerage fees, all of which shall be the responsibility of the Customer.

7. LIMITATIONS OF LIABILITY

- a. BALLARD'S ENTIRE LIABILITY ON ALL CLAIMS OF ANY KIND, WHETHER BASED ON CONTRACT, INDEMNITY, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, FAILURE OF A REMEDY TO ACCOMPLISH ITS ESSENTIAL PURPOSE, OR OTHERWISE, FOR ALL LOSSES OR DAMAGES ARISING OUT OF, CONNECTED WITH, OR RESULTING FROM THIS AGREEMENT, OR THESE TERMS AND CONDITIONS, OR FROM THE PERFORMANCE OR BREACH THEREOF, OR FROM ANY PRODUCTS OR SERVICES COVERED BY OR FURNISHED UNDER THIS AGREEMENT OR ANY EXTENSION OR EXPANSION THEREOF (INCLUDING REMEDIAL WARRANTY EFFORTS), SHALL, IN THE AGGREGATE, IN NO CASE EXCEED THE CONTRACT PRICE OF THE PRODUCT OR SERVICE GIVING RISE TO THE CLAIM. EXCEPT AS TO TITLE TO ANY PRODUCTS FURNISHED, ALL SUCH LIABILITY SHALL TERMINATE UPON THE EXPIRATION OF THE WARRANTY PERIOD REFERENCED IN SECTION 2 ABOVE.
- b. IN NO EVENT, WHETHER BASED ON CONTRACT, INDEMNITY, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, FAILURE OF A REMEDY TO ACCOMPLISH ITS ESSENTIAL PURPOSE, OR OTHERWISE, SHALL BALLARD, ITS EMPLOYEES OR SUPPLIERS BE LIABLE FOR INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF PROFITS OR REVENUE,

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LOSS OF USE OF ANY PROPERTY, COST OF CAPITAL, COST OF PURCHASED POWER, COST OF SUBSTITUTE EQUIPMENT, FACILITIES OR SERVICES, DOWNTIME COSTS, OR CLAIMS OF CUSTOMERS OF THE CUSTOMER FOR SUCH DAMAGES, AND THE CUSTOMER WILL INDEMNIFY BALLARD, ITS EMPLOYEES AND SUPPLIERS AGAINST ANY SUCH CLAIMS FROM THE CUSTOMER'S CUSTOMERS. IF THE PRODUCTS OR SERVICES BEING PROVIDED BY BALLARD WILL BE FURNISHED BY THE CUSTOMER TO A THIRD PARTY BY CONTRACT OR RELATE TO A CONTRACT BETWEEN THE CUSTOMER AND A THIRD PARTY, THE CUSTOMER SHALL OBTAIN FROM SUCH THIRD PARTY A PROVISION AFFORDING BALLARD AND ITS SUPPLIERS THE PROTECTION OF THIS SECTION 7b AND THE PRECEDING SECTION 7a.

- c. The products to be licensed or sold hereunder are not intended, warranted or certified for any particular use or application. Further, these products are not intended for use in any nuclear, chemical or weapons production facility or activity, any life-support equipment, or any other application where failure of the products could lead directly to death, personal injury or severe physical or environmental damage. If so used, BALLARD disclaims all liability for any damages arising as a result of the hazardous nature of the application in question, including but not limited to nuclear, chemical or environmental damage, injury or contamination, and Customer shall indemnify, hold harmless and defend BALLARD, its officers, directors, employees and agents against all such liability, whether based on contract, warranty, tort (including negligence), strict liability, or any other legal theory, regardless of whether BALLARD had knowledge of the possibility of such damages.
- d. The Customer is responsible for establishing and assuring suitability of use, proper usage, and the obtaining and maintaining of certification and clearance requirements of the products to be licensed or sold hereunder for their particular use or application. If BALLARD furnishes the Customer with advice or assistance concerning any products or systems which is not required pursuant to the agreement, the furnishing of such advice or assistance will not subject BALLARD to any liability, whether in contract, indemnity, warranty, tort (including negligence), strict liability or otherwise.

8. EXCUSABLE DELAYS

BALLARD shall not be liable for breach of its obligations hereunder to the extent performance of such obligations is delayed or prevented, directly or indirectly, due to causes beyond its reasonable control, including but not limited to acts of God, acts (or omissions) of the Customer or its suppliers or representatives, prerequisite work by others, acts of civil or military authority, government priorities, fires, strikes or other labor disturbances, floods, epidemics, war, terrorist-related activities, riot, delays in transportation, or inability to obtain or delay in obtaining, due to causes beyond its reasonable control, suitable labor, materials, or facilities, including any vendor's alleged infringement of third party intellectual property rights. In the event of any such delay, the time of performance shall be extended for a period equal to the time lost by reason of the delay. In the event BALLARD is delayed by acts of the Customer or by prerequisite work by other contractors or suppliers of the Customer, BALLARD shall be entitled to an equitable price adjustment in addition to extension of the time of performance.

9. EXPORT

If Customer exports (or re-exports), directly or indirectly, any products or technical data supplied hereunder or any portion thereof, it is Customer's responsibility to assure compliance with U.S. and other applicable export control laws and to obtain any required licenses or approvals in its own name. The Customer is also responsible for the accuracy and completeness of any information or certification provided by Customer for purposes of export control compliance.

10. GOVERNMENT CONTRACTING

In the event that the Customer elects to sell products or services provided hereunder to the U.S. Government or to a prime contractor selling to the U.S. Government, Customer does so solely at its own option and risk, and agrees not to obligate BALLARD as a subcontractor other than under the provisions of FAR 52.244-6, Subcontracts for Commercial Items and Commercial Components. Customer remains solely and exclusively responsible for compliance with all other statutes and regulations governing sales to the U.S. Government. BALLARD makes no representations, certifications or warranties whatsoever with respect to the ability of its goods, services or prices to satisfy any such statutes and regulations, including without limitation DFAR 252.225-7014, Alt. 1, Preference for Domestic Specialty Metals, other than those contained herein. With respect to Equal Employment Opportunity/Affirmative Action requirements, BALLARD represents that it complies with the following FAR clauses:

FAR CLAUSE TITLE

- 52.222-21 Certification of Non-segregated Facilities
- 52.222-22 Previous Contracts and Compliance Reports
- 52.222-25 Affirmative Action Compliance
- 52.222-26 Equal Opportunity
- 52.222-35 Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans
- 52.222-36 Affirmative Action for Workers with Disabilities

Use, duplication or disclosure of certain BALLARD software and BALLARD technical data by the U.S. Government is subject to the terms regarding limited rights as set forth in the Rights in Technical Data and Computer Software of DFAR 252.227-7013, subdivision (b)(3) and with respect to technical data as set forth in Technical Data—Commercial Items, DFAR 252-227-7015.

11. TERMINATION/CHANGE/ RETURN

- a. Customer shall not terminate, change or modify any order after acceptance by BALLARD without BALLARD's prior written consent. Should Customer desire to terminate an order, Customer shall provide BALLARD with a written termination notice at least thirty (30) days prior to the termination date for standard Products ordered in small quantities, or at least sixty (60) days prior to the termination date for any quantity of custom or customized Product or standard Product ordered in quantities of 10 or more units. In the event BALLARD agrees to terminate any unshipped portion of an order, such agreement is subject to the condition that the Customer pays BALLARD the sum of:
- i. The price of all Product shipped (and which remains unpaid as of the termination date), and
 - ii. A cancellation fee of 20% of the balance of the order (unshipped) as of the termination date.
- b. Scheduled Product ship date cannot be modified within sixty (60) days of the scheduled ship date without prior authorization in writing from BALLARD. Ship dates extended out more than ninety (90) days may be subject to a surcharge.

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- c. Customer may return a standard product for credit within thirty (30) days of receipt only if Product is complete in unopened original packaging with all manuals, disks, cables and other accessories for credit. All returned Product is subject to a minimum twenty-five percent (25%) restocking fee. Used, open, custom or customized Product is not returnable.

12. ADDITIONAL PROVISIONS FOR SERVICES

- a. BALLARD shall perform any non-product development related services ("Professional Services") hereunder, and Customer shall make payment to BALLARD therefor, in accordance with the schedule and specifications in BALLARD's quotation therefor. Upon completion of a Professional Services deliverable, and at BALLARD's request, Customer shall provide a certificate of acceptance of each deliverable. Upon final completion of the Professional Services, and at BALLARD's request, Customer shall provide a certificate of final completion.
- b. Either Customer or BALLARD may terminate an agreement for Professional Services hereunder for cause, and seek all remedies available to it at law and consistent with this agreement, if the other of them: (a) becomes insolvent, makes an assignment for the benefit of its creditors, has a receiver or trustee appointed, or is the subject of a proceeding under bankruptcy or insolvency law; (b) fails to make payment hereunder when due which failure continues for fifteen (15) days after written notice thereof; or (c) breaches this agreement in any other material respect and such breach is not cured within sixty (60) days after written notice thereof is given by the non-breaching party (plus reasonable additional time if such breach cannot reasonably be cured within such period and a cure is promptly commenced and diligently pursued).
- c. BALLARD may suspend its performance of Professional Services hereunder if it has the right to terminate for cause pursuant to Section 12b above (without waiving its right to terminate for cause). Customer may for its convenience direct BALLARD to suspend its performance of services hereunder, provided that it gives at least fifteen (15) days prior written notice thereof to BALLARD. In the event of a suspension under this subsection, BALLARD shall be entitled to an equitable price adjustment to reflect its expenses associated with such suspension, plus a reasonable profit.
- d. The provisions of this agreement which by their nature extend beyond the period hereof for the performance of Professional Services, including without limitation those concerning warranty, intellectual property, limitations of liability, excusable delays, payment obligations, and confidentiality, shall survive termination or expiration.