

**PURCHASE TERMS (END USER)**

**The following terms and conditions (“Agreement”) apply to any orders submitted by Customer in response to this proposal. Any additional or differing terms and conditions on Customer’s Purchase Order do not apply unless expressly agreed to in a writing signed by Brooks. A standard Brooks order acknowledgment form will not be considered to be such a writing. If Brooks does expressly agree in a writing, the writing applies only to the order that it references. Brooks and Customer hereby agree to exclude application of the Uniform Commercial Code.**

In consideration of the mutual covenants contained in this Agreement, Brooks and Customer agree as follows:

**1. DEFINITIONS**

In this Agreement,

(a) “Brooks Documentation” shall mean the operation and maintenance manual, diagrams, documents for installation and start-up, spare parts list, and any other documents customarily provided by Brooks with the Brooks Products.

(b) “Brooks Equipment” shall mean a hardware device manufactured by Brooks that supports only one (1) user of the Brooks Software, per license, at any given time, a subassembly of such device, or a spare part for such device.

(c) “Brooks Products shall mean all products manufactured by Brooks, including Brooks Equipment, Brooks Software and any related Brooks Documentation and services.

(d) “Brooks Software” shall mean Brooks proprietary computer software programs, firmware, and third party software, in machine readable object code form only, intended to be used solely on and with the Brooks Equipment supplied or designated by Brooks hereunder, and includes any Enhancements provided by Brooks to Customer pursuant to the terms of this Agreement.

(e) “Enhancement” shall mean modifications, refinements and improvements that Brooks makes to the Software and which Brooks elects to incorporate into and make a part of the Software and does not separately market. Brooks reserves the right to determine which modifications, refinements and improvements will constitute Enhancements.

(f) “Product” shall mean Brooks Products and Third Party Products.

(g) “System” means the control systems that consist of Brooks Equipment or Third Party Equipment and Brooks Software or Third Party Software; the precise type and quantity of which, that are subject to this Agreement, are set forth on the quotation accompanying this Agreement.

(h) “Third Party” means a party other than Brooks, herein also called the “Licensor”.

(i) “Third Party Documentation” shall mean the operation and maintenance manual, diagrams, documents for installation and start-up, and any other documents customarily provided by a Third Party for distribution withh the Third Party Products.

(j) “Third Party Equipment” shall mean a hardware device manufactured by a Third Party.

(k) “Third Party Products” shall mean all products manufactured by a Third Party and distributed by Brooks, including Third Party Equipment, Third Party Software and any related Third Party Documentation.

(l) “Third Party Software” shall mean Third Party proprietary computer software programs and firmware, in machine readable object code form only, intended to be used solely on and with the Third Party Equipment supplied or designated by Brooks hereunder.

## **2. PURPOSE**

In accordance with the terms and conditions hereinafter set forth, Brooks shall sell or license Products to Customer, and Customer shall purchase or license Products from Brooks, on a non-exclusive basis during the term of this Agreement.

## **3. TERM OF AGREEMENT**

The term of This Agreement shall commence on the date of execution hereof and shall remain in force unless sooner terminated pursuant to Article 21 hereof.

## **4. ORDER ACKNOWLEDGEMENT FORMS**

### **(a) General**

Each individual sales contract of the Products between Brooks and Customer, shall be made from time to time during the term of this Agreement by means of Customer placing a firm written order and Brooks acknowledging an acceptance thereto in writing through an Order Acknowledgement Form. No order will be binding on Brooks or Customer until so confirmed.

### **(b) Terms and Conditions**

Each Order Acknowledgement Form shall be subject to the terms and conditions stated herein. All other terms or conditions of purchase, sale or otherwise shall be binding only with the specific written mutual consent of the parties. In the event of a conflict or overlap between this Purchase Agreement and the provisions of an Order Acknowledgement Form or other related agreement, the provisions of this Purchase Agreement shall control. The parties acknowledge that quantities, price and delivery schedules will vary with each order as shall be agreed to by the parties at the time of such order.

### **(c) Cancellation**

In the event that Customer cancels the Order Acknowledgement Form on or after order acceptance by Brooks, the following cancellation charges, computed as a percentage of the price of the cancelled Products, shall be payable by Customer to Brooks for cancellation notices received by Brooks in the following time frames:

<u>Cancellation Received After</u>	<u>But On or Before</u>	<u>Cancellation Charge as a Percentage of Product Price</u>
Order Acceptance	Four (4) Weeks After Order Acceptance	30%
Four (4) Weeks After Order Acceptance	The mid-point of the Lead Time**	50%
The mid-point of the Lead Time	The date by which three-quarters (3/4) of the Lead Time has passed.	75%
The date by which three-quarters (3/4) of the Lead Time has passed.	The Scheduled Product Shipment Date	100%

\*\* "Lead Time" is defined as the period of time from Order Acceptance to Scheduled Product Shipment.

**(d) Customer Rescheduling**

In the event that Customer reschedules an Order Acknowledgement Form on or after acceptance by Brooks, that rescheduling will incur cancellation charges under Article 4(c) in the same manner as if the rescheduling had been a cancellation. However, for up to 1 System out of every 8 Systems ordered by Customer, Customer may reschedule the delivery date for that 1 System without any payment of the cancellation charges required under Article 4(c), provided that: 1) the request for rescheduling is received at least 10 weeks before the scheduled ship date; and ii) the System is rescheduled to a date that is no later than the end of the calendar quarter following the date of the request for rescheduling.

**5. PRICE**

**(a) Price**

Customer agrees to pay Brooks for the Products purchased or licensed pursuant to the relevant Order Acknowledgement Form in accordance with price schedules then in effect when Brooks delivers such Order Acknowledgement Form to Customer. Discounts applied to such Products shall be based upon the quantity of each type of Product having an accepted delivery date within twelve (12) months of order submission contained in each separate Order Acknowledgement Form. Order Acknowledgement Forms shall not be combined for the purpose of determining applicable discounts. Applicable prices and discounts are set forth in a written quotation provided to Customer by Brooks. Prices are valid only if Customer executes this Agreement and submits it, along with its Purchase Order, to Brooks within the validity period specified in the Quotation. Brooks shall retain a security interest in the Systems until the purchase price is paid in full. Customer shall execute such further documentation as Brooks requests in order to carry out the intent of the previous sentence.

**(b) Price Increase**

Brooks shall give Customer at least ninety (90) days written notice prior to any price increase for Brooks Products which may be made by Brooks. Price increases shall not apply to a Customer order which has been accepted by Brooks, provided that such order has an agreed upon, committed delivery date within twelve (12) months of order submission.

## 6. TERMS OF PAYMENT

(a) The total price for the Products shall be invoiced by Brooks upon shipment of such Products. Subject to credit approval, the payment for the Products shall be made by Customer to Brooks within thirty (30) days after the date of invoice issued by Brooks. Late payments made by Customer shall be subject to interest of one percent (1.0%) per month for each month or portion thereof during which such payment is late.

(b) Taxes, in any country, now or hereafter imposed with respect to the transactions contemplated hereunder (with the exception of income taxes or other taxes imposed upon Brooks and measured by the gross or net income of Brooks) shall be the responsibility of Customer, and if paid or required to be paid by Brooks, the amount thereof shall be added to and become a part of the amounts payable by Customer hereunder.

(c) Payment for transportation, custom duties, taxes, installation and custom services shall be made upon receipt of Brooks' invoice.

(d) All payments, fees and charges under this Agreement are non-refundable, except as expressly set out in this Agreement. Except as expressly set out in this Agreement, Products are not returnable to Brooks.

## 7. DELIVERY

### (a) Delivery

Shipping terms are FCA Chelmsford, Massachusetts or other applicable Brooks facility. Delivery shall be deemed to occur at the FCA point. In addition, title (except for Software) and risk of loss shall pass at the FCA point. Customer shall have the right to select the carrier of its choice. All Third Party Products shall be packed for shipment and storage in accordance with Third Party's standard commercial practices. Unless Customer requests otherwise, all Brooks Products shall be packed for shipment and storage in accordance with Brooks' standard commercial practices. It is Customer's obligation to notify Brooks of any special packaging requirements for Brooks Products (which shall be at Customer's expense.) Customer will pay all charges for transportation.

### (b) Delivery Schedule

Brooks shall use reasonable commercial efforts to fill all orders promptly upon issuance of the Order Acknowledgement Form therefor. Delivery dates for the Products are estimates only.

### (c) Delay

#### (i) Brooks' Delay

If Brooks reasonably anticipates a delay in the delivery of the Products, Brooks shall notify Customer as soon as reasonably practical of such delay, the reason for such delay and the new scheduled delivery date, and follow the reasonable instructions of Customer in connection with such delivery delay. Customer agrees to take all commercially reasonable action to mitigate any additional costs or expenses that Customer may incur as a result of such delay. In the event that Brooks fails to deliver products within thirty (30) days of the agreed upon schedule, Customer shall have the right, as its sole and exclusive remedy, to cancel any Order Acknowledgement Form for such delayed Products, only, without any payment of the cancellation charges required under Article 4(c) hereabove.

(ii) Delays Due to Customer Modification

Order Acknowledgement Forms shall be reconfirmed in writing by Brooks and Customer in the event of any modification requests by Customer with respect to the Products. Delays with respect to Brooks' originally committed shipment dates which result from Customer requested and Brooks approved modifications to the Products in question shall be considered Customer's responsibility and, in such cases, Customer waives its right to cancel the pertinent Order Acknowledgement Form without payment of the cancellation charges as defined in Article 4(c). Brooks reserves the right to alter delivery schedules, prices and discounts of any and all Products modified as agreed by Customer and Brooks, and shall notify Customer, in writing, of any such alteration as applicable. Within ten (10) business days of the sending of such written notice, Customer shall elect to either: a) cancel the affected Products and pay the cancellation charges required under Article 4(c); b) confirm, in writing, its acceptance of the alterations to delivery schedules, prices and discounts; or c) rescind, in writing, its request for modification.

(iii) Brooks' Limitation of Liability for Delay

IN NO EVENT SHALL BROOKS BE RESPONSIBLE FOR SPECIAL, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES RESULTING FROM A DELAY IN SHIPMENT.

(d) **Storage**

If Customer is unable to accept delivery of Brooks Equipment or Third Party Equipment at the scheduled time, Brooks shall be deemed to have delivered the Brooks Equipment or Third Party Equipment, and Brooks shall be authorized to invoice Customer for the Brooks Equipment and Third Party Equipment as if shipment had been made and: (a) if Brooks is able to store such Brooks Equipment or Third Party Equipment in its own facilities, Customer will pay Brooks reasonable transportation, handling, storage and insurance charges for the period of such storage; or (b) if Brooks is unable to store such Brooks Equipment or Third Party Equipment in its own facilities, Brooks reserves the right to arrange handling and storage in a suitable warehouse with a reputable company on behalf of Customer at Customer's expense. In either case, Brooks will maintain or arrange for insurance, on Customer's behalf and at Customer's expense, for the full purchase price of the Brooks Equipment and Third Party Equipment. If Brooks Equipment is stored for ninety (90) days or more, the Brooks Equipment will be returned to Brooks' facility to undergo quality assurance procedures prior to reshipment. The cost of transportation and the performance of the quality assurance procedures, at Brooks' then applicable field service rates, will be paid by Customer. In cases where handling and storage become necessary per above, it will be the responsibility of Customer to notify Brooks when shipment is to be made.

**8. TESTING**(a) **Testing by Brooks**

Brooks shall test the Brooks Products before shipment in accordance with Brooks' standard test procedure. Customer may attend such Brooks Product testing, or if Customer fails to attend, shall be deemed to have waived its right to observe such testing. Unless otherwise mutually agreed, the Brooks Products are deemed to be accepted by Customer upon completion of testing by Brooks. Third Party Products are deemed to be accepted upon shipment by Brooks or Third Party to Customer.

(b) **Rejected Products**

In the event that the Brooks Products are validly rejected by Customer, Brooks shall promptly repair or replace the Brooks Products at Brooks' expense provided that Brooks has received notice of such rejection upon completion of Brooks' testing thereof.

## 9. WARRANTY AND SERVICES

### (a) Warranty

(i) Brooks Products. Brooks shall warrant the Brooks Products to be free from defects caused by faulty materials or poor workmanship and to conform to specifications furnished or approved by Brooks for the period of twelve (12) months from the date of shipment from Brooks to Customer as set forth in Article 7(a) hereof. If any non-conformities are found in the Brooks Products by Customer, and reported to Brooks in writing, during the warranty period, Brooks shall provide Customer with the services described in paragraph (iv) below, at no charge (“Warranty Services”). The Warranty Services of this paragraph (i) shall only be provided during Brooks’ local normal business hours and at a Brooks facility selected by Brooks. If any Product fails within Brooks’ warranty period and must be returned to Brooks, the Customer is responsible for the return shipment of that Product. (Freight In to be paid by the customer under DAP Incoterms 2010.) Brooks is responsible for the return shipment of the repaired or replacement Product to the Customer, by economy method. (Freight Out to be paid by Brooks under DAP Incoterms 2010). Expedited shipping services are available to the Customer for a premium charge. Brooks will pay the cost of shipping Brooks Products for Warranty Services from Customer’s site to Brooks and the cost of shipping repaired or replaced Brooks Products from Brooks to Customer’s site provided that Customer ships the Brooks Products in accordance with Brooks’ shipping instructions. Should Brooks deem it necessary, Brooks will provide the Warranty Services at Customer’s site and at no charge for parts, labor or travel.

(ii) Third Party Products. Brooks does not warrant and is not responsible for any Third Party Products or services. Customer’s sole and exclusive rights and remedies with respect to any such Third Party Products or services are against Third Party and not against Brooks. However, to the extent permitted by Brooks’ agreement with Third Party, Brooks shall assign to Customer any Third Party repair warranties applicable to the Third Party Products.

(iii) THE FOREGOING WARRANTIES IN PARAGRAPHS (i) and (ii) ABOVE ARE IN LIEU OF AND EXCLUDE ALL OTHER WARRANTIES NOT EXPRESSLY SET FORTH HEREIN, WHETHER EXPRESSED OR IMPLIED BY OPERATION OF LAW OR OTHERWISE, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

(iv) Brooks' liability hereunder in any case is expressly limited to the repair or replacement (but not installation) of components or subcomponents of the Brooks Products not complying with this Agreement or at Brooks' election, to the repayment of, or crediting Customer with, an amount equal to the amounts received by Brooks for such Brooks Products, whether such liability is for breach of warranty or negligence. All replaced parts will become the property of Brooks or its representative on an exchange basis. The warranty under paragraph (i) above shall not apply to any Brooks Product which shall have been: (a) repaired or altered other than by Brooks or its authorized or approved service personnel; (b) subjected to physical or electrical or other environmental abuse or misuse, including, without limitation, improper storage or installation which is not in accordance with Brooks's specifications; (c) operated in any manner inconsistent with the applicable Brooks instructions for use; or (d) any reason not attributable to Brooks. Corrective services of any nature required from Brooks, or its representatives, for the Brooks Products due to inadequate or inaccurate information supplied by

Customer, changes in Customer's business requirements, or any of the conditions listed in the previous sentence, are not included as part of the Brooks obligations or warranties, and will be provided, depending on available resources, at Brooks' then current rates. Brooks' obligation under any warranty does not include, and Brooks shall not have any liability for, any work required to restore or rebuild files or other data or material destroyed due to Product malfunction.

(v) Warranty Services may be performed by Brooks' subsidiaries, branches or distributors ("Agent"). Brooks shall require Agent to keep the parts of the Brooks Products which are appropriate for the performance of Warranty Services by the Agent.

**(b) Installation and Training**

Brooks shall provide installation, installation assistance and training only to the extent expressly provided herein, or in a statement of work referencing this Agreement. Except as expressly provided, site preparation and installation are the sole responsibility of the Customer. Brooks does not accept responsibility for the connection of the Systems to non-Brooks Customer products. Should Customer connect or request Brooks to connect the Systems to any non-Brooks Customer products, Brooks shall have no liability for any malfunction or damage which may result.

**(c) Post-Warranty Services**

For Brooks Products, Post-Warranty services provided to Customer by Brooks shall be provided in accordance with Brooks then-applicable Terms and Conditions of Field Labor Services. For Third Party Products, Post-Warranty services provided to Customer shall be provided by Third Party, and shall be provided in accordance with the then-applicable Third Party service agreement.

**10. RETURN MATERIAL AUTHORIZATION NUMBER**

If Customer returns Brooks Products to Brooks subject to Article 8 or 9 hereabove, Customer shall request a Return Material Authorization number from Brooks.

**11. INFRINGEMENT**

(a) For Brooks Products, only, and subject to the limitations of liability stated in Section 13, Brooks agrees to: (1) defend any suit or proceeding against Customer, insofar as it is based on a claim or action by third parties alleging that a Brooks Product delivered to Customer directly infringes a U.S. trademark, copyright, mask works right or patent of a third party, and (2) pay all damages and costs, including legal fees, which may be assessed against Customer in such action that are attributable to such claim; provided, however, that Customer shall give Brooks prompt notice, in writing, of all such claims or actions instituted against it, and an opportunity to elect to take over, settle or defend the same through counsel of Brooks' own choice and under Brooks' sole discretion and at Brooks' own expense, and will make available to Brooks in the event of such election, all defenses against such claims or actions, known or available to Customer. If a Brooks Product become (or in Brooks' reasonable opinion is likely to become) the subject of any such action or claim, Brooks shall, at its option and expense, pursue one or more of the following options:

- (i) Procure for Customer the right to continue using such Brooks Product; or
- (ii) Replace or modify such Brooks Product so that it becomes non-infringing while providing equivalent performance; or

- (iii) Grant a refund for the payments made by Customer to Brooks for all units of such Brooks Product then in Customer's possession (upon Brooks' receipt of such units within ninety (90) days after notifying Customer of the granting of such refund), and terminate this Agreement with respect to such Brooks Product.

Notwithstanding the above, Brooks shall not be obligated to indemnify or hold harmless Customer if the alleged infringement arises out of : (1) any combination of Brooks Products with products not supplied or approved in writing by Brooks, where such infringement would not have occurred but for such combination; (2) the modification or customization of Brooks Products not performed by Brooks, where such infringement would not have occurred but for such modification or customization; (3) the use of a Brooks Product in an application for which it was not designed or intended, where such infringement would not have occurred but for such use; (4) a claim based on intellectual property rights owned by Customer or any of companies controlled by, controlling or under common control with Customer; or (5) where the Brooks Products were designed by Brooks to Customer's specification. Contributory infringement is specifically excluded from this indemnity.

This Article 11(a) states Customer's sole and exclusive remedy in the event that a Brooks Product infringes on the intellectual property right of any third party.

(b) In the event a claim is based partially on an indemnified claim described in Article 11(a) above and partially on a non-indemnified claim , any payments and reasonable attorney fees incurred in connection with such claims are to be apportioned between the parties in accordance with the degree of cause attributable to each party.

(c) Obligations related to Third Party Products are expressly excluded from Brooks' obligations to Customer under this Section 11.

## **12. PRODUCT LIABILITY**

(a) For Brooks Products only, and subject to the limitations of liability stated in Section 13, Brooks shall, at its own cost and expense, indemnify and hold harmless Customer, its directors, officers, employees, and agents, from and against any and all losses, damages, liabilities, penalties, claims, demands, suits or actions, and related costs and expenses of any kind, including, without limitation, expenses of investigation and recall, counsel fees, judgments and settlements, for injury to or death of any person, property damage or any other loss suffered or allegedly suffered by any person or entity and arising out of or otherwise in connection with the Brooks Products delivered by Brooks to Customer hereunder not conforming to the warranties provided hereunder; provided, however, that Customer shall give Brooks prompt notice, in writing, of all such claims or actions, and an opportunity to elect to take over, settle or defend the same through counsel of Brooks' own choice and under Brooks' sole discretion and at Brooks' own expense, and will make available to Brooks in the event of such election, all defenses against such claims or actions, known or available to Customer.

(b) In the event a claim is based partially on an indemnified claim described in Article 12(a) above and partially on a non-indemnified claim, any payments and reasonable attorney fees incurred in connection with such claims are to be apportioned between the parties in accordance with the degree of cause attributable to each party.



(c) Obligations related to Third Party Products are expressly excluded from Brooks' obligations to Customer under this Section 12.

### **13. LIMITATIONS ON LIABILITY**

IN NO EVENT SHALL BROOKS BE LIABLE TO CUSTOMER FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, INCIDENTAL OR PUNITIVE DAMAGES. BROOKS' LIABILITY ARISING OUT OF THE MANUFACTURE, SALE OR SUPPLYING OF A PRODUCT OR ITS USE OR DISPOSITION, WHETHER BASED UPON WARRANTY, CONTRACT, TORT OR OTHERWISE, SHALL NOT EXCEED THE ACTUAL PURCHASE PRICE PAID BY CUSTOMER FOR SUCH PRODUCT.

Because of the hazardous nature of vacuum processing and Brooks' inability to control the scope or manner of data entry into the Products, neither Brooks nor its Licensors shall be held liable for any damages, costs, loss, or personal injury due to the implosion, explosion, burning, damage or other failure of any non-Brooks Products connected to the Systems. Customer shall be responsible for providing hardware interlocks which prevent unsafe control actions by the Systems.

### **14. CHANGES AND DISCONTINUANCE**

Brooks reserves the right to make changes in the specification of the Brooks Products or parts thereof, or to discontinue manufacturing the Brooks Products. Brooks shall provide sixty (60) days written notice to Customer prior to such change or discontinuance. Brooks shall not incur any liability thereby or any obligation to provide such changes or improvements on Systems previously purchased or sold by Customer.

### **15. CONFIDENTIALITY**

The Parties shall hold in confidence during the term of this Agreement, and thereafter, any and all information of a confidential nature regarding Brooks' or Customer's business or affairs, including without limitation, data provided or made available by Brooks or Customer, and shall not disclose the same to any person, firm or corporation, nor use such information except as contemplated herein or as otherwise required by applicable law. The following information shall not be considered confidential:

- (i) Information which is already generally available to the public.
- (ii) Information which hereafter becomes generally available to the public, through no fault of the receiving party.
- (iii) Information which was already known to the receiving party prior to the disclosure thereof.
- (iv) Information which is developed by a party independently of and without aid of the information received from the other party.

(v) Information which lawfully becomes known to a party through a third party which discloses such information to the receiving party without breaching confidentiality obligations to the disclosing party.

(vi) Information which is disclosed pursuant to court order or as otherwise required by law, after giving the disclosing party notice of such required disclosure and after assisting the disclosing party in its reasonable efforts to prevent or limit such disclosure.

## **16. SOFTWARE LICENSES**

The terms and conditions set forth in Exhibit A, attached hereto and made a part hereof, are applicable in the event that Customer is licensing Brooks Software under this Agreement. The terms and conditions in Exhibit A are intended to supplement, and not replace, the terms and conditions in the rest of this Agreement. In the event of a conflict between the terms and conditions of Exhibit A and the terms and conditions in the remainder of this Agreement, the terms and conditions of Exhibit A shall prevail.

The terms and conditions of a Third Party Software License Agreement, between Third Party and Customer, are applicable in the event that Customer is purchasing Third Party Software Licenses under this Agreement. The terms and conditions of such Third Party Software License Agreement are intended to supplement, and not replace, the terms and conditions in the rest of this Agreement. In the event of a conflict between the terms and conditions of the Third Party Software License Agreement and the terms and conditions of this Agreement, the terms and conditions of this Agreement shall prevail.

## **17. COMPLIANCE WITH EXPORT LAWS**

(a) Customer hereby agrees: (i) to assist Brooks in obtaining any required export licenses or permits by supplying such documentation or information as may be requested by Brooks; (ii) to comply with such decrees, statutes, rules and regulations of the government of the United States and agencies or instrumentalities thereof; (iii) to maintain the necessary records to comply with such decrees, statutes, rules and regulations; (iv) not to re-export any Products except in compliance with such decrees, statutes, rules and regulations; (v) to obtain all governmental approvals and licenses necessary to import the Products; (vi) not to sell, transfer or otherwise dispose of the Products in violation of the export laws of the United States; and (vii) to indemnify, defend and hold harmless Brooks from any and all fines, damages, losses, costs and expenses (including reasonable attorneys' fees) incurred by Brooks as a result of any breach of this Article 17 by Customer.

(b) Customer hereby expressly acknowledges that the technical data and the direct product thereof contained in the Products may be subject to export controls of the United States and agrees that neither such technical data nor the direct product thereof will be transferred, directly or indirectly, to any destination contrary to the requirements of the law of the United States, including but not limited to the terms of any export license and the terms of Part 774 (re-exports) of the U.S. Export Administration Regulations. Further, Customer hereby provides its assurance that it will not participate in any transaction which may involve any commodity or technical data, or the direct product thereof, exported or to be exported from the United States, or in any re-export thereof, or in any other transaction that is subject to export controls of the United States, if a person denied export privileges from the United States

may obtain any benefit from or have any interest in, directly or indirectly, these transactions.

## **18. USE OF TRADEMARKS AND INTERNET**

Customer shall not alter, remove from the Brooks Products, or interfere with trademarks, trade names and service marks owned by Brooks (the "Marks"). Customer's use of the Marks hereunder shall be subject to such requirements as Brooks believes are appropriate to protect such Marks and Brooks' ownership rights therein, and Brooks shall have the right to monitor such use. Customer hereby does and shall at all times acknowledge Brooks' right, title and interest in and to the Marks and shall not in any manner represent that it has any ownership interest therein nor will it adopt or use any trademarks, trade names or service marks confusingly similar thereto. Customer shall not at any time do or permit any act to be done which may in any way impair the rights of Brooks in the Marks. Customer shall not use any of the Marks on or in connection with any goods or services other than the Products. Upon termination of this Agreement, Customer will discontinue any and all uses of the Marks.

## **19. INSURANCE**

Brooks and Customer shall each maintain:

- (i) Comprehensive general liability insurance covering bodily injury, property damage, contractual liability, products liability and completed operations, and
- (ii) Worker's compensation and employer's liability insurance.

Upon request of the other party, each party shall furnish to the other certificates evidencing such insurance. Each party shall notify the other at least thirty (30) days prior to the cancellation or change of any of the foregoing policies.

## **20. PROPRIETARY INFORMATION OF BROOKS**

Unless otherwise agreed to in writing by Brooks, all designs, specifications, drawings, software, materials, special dies, molds, patterns, jigs, fixtures and any other property used by Brooks to furnish the Products to Customer shall be and remain the sole property of Brooks. Nothing in this Agreement conveys to Customer any rights to make or have made the Products supplied by Brooks. No rights or licenses with respect to the Products are granted or deemed granted hereunder or in connection herewith, other than those rights expressly granted in this Agreement.

## **21. TERMINATION**

### **(a) General**

This Agreement may be terminated:

- (i) By an agreement in writing duly signed by the parties hereto,

(ii) By either party at will, with or without cause, upon not less than ninety (90) days notice in writing, given by registered or certified mail to the other party;

(iii) By either party in the event that the other party is in material breach of this Agreement and fails to cure such breach within thirty (30) days of receipt of notice thereof from the non-breaching party or if the other party goes into bankruptcy, liquidation, receivership of similar proceedings.

**(b) Sales after Termination**

The acceptance of any order from or the sale of any Products to Customer after the termination of this Agreement shall not be construed as a renewal or extension hereof nor as a waiver of termination.

**(c) Survival Clauses**

The expiration or termination of this Agreement shall not relieve either party of any liability which accrued prior to the termination or expiration date. Articles 1, 6, 7(d), 8, 9, 10, 11, 12, 13, 15, 16, 17, 20, 21(b) and (c), 22, 23, 24 and 25 and Exhibit A of this Agreement shall survive the termination or expiration hereof.

## **22. GOVERNING LAW**

This Agreement shall, in all respects, be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts, U.S.A, excluding: (i) its conflicts of laws principles; (ii) the United Nations Convention on Contracts for the International Sale of Goods; (iii) the 1974 Convention on the Limitation Period in the International Sale of Goods (the "1974 Convention"); and (iv) the Protocol amending the 1974 Convention, done at Vienna April 11, 1980.

## **23. ARBITRATION**

All disputes arising out of or relating to this Agreement shall be finally resolved by arbitration conducted in the English language in Boston Massachusetts, U.S.A. under the commercial arbitration rules of the United Nations Commission on International Trade Law. Each party shall appoint an arbitrator and the two arbitrators so appointed shall jointly appoint a third arbitrator; provided, however, that if they cannot agree (or if one party refuses to appoint an arbitrator), then this third arbitrator shall be appointed by the President of the American Arbitration Association. Both parties shall bear equally the cost of the arbitration. All decisions of the arbitrator(s) shall be final and binding on both parties and enforceable in any court of competent jurisdiction. Notwithstanding this, application may be made to any court for a judicial acceptance of the award or order of enforcement. Notwithstanding anything contained in this Article to the contrary, Brooks shall have the right to institute judicial proceedings against Customer or anyone acting by, through or under Customer, in order to enforce Brooks' rights hereunder through reformation of contract, specific performance, injunction or similar equitable relief.

## **24. FORCE MAJEURE**

Neither party hereto shall be liable for default of any obligation hereunder (other than payment

obligations) if such default results from the force majeure which includes, without limitation, governmental acts or directives; strikes; acts of God; war; insurrection, riot or civil commotion; fires, flooding or water damage; explosions, embargoes or delays in delivery, whether of the kind herein enumerated or otherwise, which are not within the reasonable control of the party affected.

## 25. MISCELLANEOUS

### (a) Entire Agreement

This Agreement constitutes the entire agreement between the parties with regard to the matters dealt with herein, and supersedes all prior representations, negotiations, understandings and agreements, oral or written, between the parties with respect thereto. All purchase orders, forms of acceptance, invoices and other documentation respecting the subject matter of this Agreement issued by Customer shall be deemed to be issued for its own internal purposes, and any provisions therein that are in addition to the terms of this Agreement shall be of no force and effect except and to the extent the information contained therein is, consistent with and required pursuant to this Agreement. The terms and conditions of this Agreement shall not be modified or amended except in a written agreement signed by both parties.

### (b) Assignment

This Agreement is not assignable or transferable by Customer in whole or in part, except with the written consent of Brooks. This Agreement and any of Brooks rights and obligations hereunder may be assigned by Brooks, upon giving written notice to Customer.

### (c) Notices

i) Any legal notices provided for under this Agreement shall be deemed effective when delivered in person or seven (7) days after deposit in the mails by registered or certified air mail (return receipt requested) postage prepaid and addressed to the respective address listed in the introduction of this Agreement, or to such different address as either party may designate in writing to the other pursuant to this Article.

ii) Any other notices provided for under this Agreement shall be directly sent to the individuals specified by each of Customer and Brooks on the signature page of this Agreement, or to such different individuals as either party may designate in writing to the other pursuant to this Article.

### (d) Waiver

The failure of Customer or Brooks to enforce any of the terms or conditions of this Agreement shall not be deemed a waiver of any right to enforce any terms and conditions of this Agreement.

### (e) Separability

In case any one or more of the provisions, or portions of provisions, of this Agreement shall be deemed by any governmental authority to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions, or portions of provisions, contained herein shall not be in any way affected or impaired thereby.

**(f) Relationship of Parties**

The parties hereto agree that Customer shall operate as an independent contractor and not an agent or employee of Brooks. Customer has no expressed or implied authorization to incur any obligation or in any manner otherwise make any commitments on behalf of Brooks. Customer shall employ its own personnel and shall be responsible for them and their acts and in no way shall Brooks be liable to Customer, its employees or third parties for any losses, injuries, damages or the like occasioned by Customer's activities in connection with this Agreement, except as expressly provided herein.

**(g) Government Approvals**

It is the responsibility of Customer to obtain, at its own expense, any non-United States government consents, authorizations, approvals, filings, permits or licenses required for each of it or Brooks to exercise its rights and to discharge its obligations under this Agreement.

**(h) Counterparts**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**(i) Headings**

Headings in this Agreement are for reference purposes only, and shall not be used to interpret or construe this Agreement.

**EXHIBIT A****SOFTWARE LICENSING TERMS AND CONDITIONS**

1. General. The following terms and conditions are applicable in the event that Customer is licensing Brooks Software under this Agreement. The terms and conditions in this Exhibit A are intended to supplement, and not replace, the terms and conditions in the remainder of this Agreement. In the event of a conflict between the terms and conditions of this Exhibit A and the terms and conditions in the remainder of this Agreement, the terms and conditions of this Exhibit A shall prevail.
2. License. The grant to Customer of rights to the Brooks Software embedded in the Brooks Products which Customer purchases from Brooks hereunder is a non-exclusive royalty-free perpetual license to use such Brooks Software in the operation of such Brooks Products. Customer may use the Brooks Software only in machine readable form. A separate license is required for each item of Brooks Equipment on which a copy of the Brooks Software will be used. Customer shall not sell, assign, transfer, copy or sublicense such Brooks Software, provided that a single copy may be made for archival and systems recovery purposes. Customer must reproduce and include the original copyright notice and other proprietary notices on any copy, in whole or in part, made of the Brooks Software programs and related documentation.
3. Ownership. It is recognized that in the course of the transactions contemplated by this Agreement, Brooks Software may be delivered to Customer on a licensed basis in printed form, or in any of several possible machine-readable forms, including but not limited to magnetic tape or disk, paper tape or read-only memory (ROM) device. Such Brooks Software and any copies thereof, and all copyright, trade secret, patent, trademark and other intellectual or industrial property rights therein, is and shall remain the sole property of Brooks. Customer's rights and licenses to use such Brooks Software shall be governed by the terms and conditions of this Agreement, including this Exhibit A. Brooks Documentation shall remain the property of Brooks.
4. Warranties. The Warranties described in Article 9(a)(i) of the Agreement shall only apply to the current release of the Brooks Software and shall not apply to any custom Brooks Software or customer specific changes to the Brooks Software.
5. Confidentiality. The Brooks Software is valuable to Brooks and shall be treated as confidential information of Brooks subject to the confidentiality provisions of Article 15 of the Agreement. The ideas and the expressions thereof contained in the Brooks Software are confidential and proprietary information and trade secrets of Brooks and/or its Licensors that are disclosed to Customer in confidence. Customer shall not cause or permit reverse engineering, disassembly or decompilation of the Brooks Software or disclosure, copying, display, loan, publication, transfer of possession (whether by sale, exchange, gift, operation of law or otherwise) or other dissemination of the Brooks Software, in whole or in part, to any third party without prior written consent of Brooks. Customer shall not modify, enhance or otherwise change or supplement the Brooks Software. Customer shall limit use of and access to the Brooks Software to such of Customer's employees as are directly involved in the utilization of the Brooks Software and who are bound in writing to preserve the confidentiality thereof. Customer shall take all reasonable steps to safeguard the Brooks Software and to ensure that no unauthorized persons have access to the Brooks Software, and to ensure that no persons authorized to have such access shall take any action which would be in violation of this Agreement if taken by Customer. Customer shall promptly report to

Brooks any actual or suspected violation of this Paragraph and shall take further steps as may reasonably be requested by Brooks to prevent or remedy any such violation.

6. Modifications by Brooks. It is understood and agreed by Customer that the Brooks Software, and any Enhancements thereto, including without limitation, unless otherwise expressly agreed to in writing between Brooks and Customer, those resulting from any tasks, work, assignments or services supplied by Brooks to Customer or its suppliers or customers (including training), shall be and remain the sole and exclusive property of Brooks and/or its Licensors, subject to the use thereof by Customer only under the terms of this Agreement.

7. Termination. The licenses granted under this Agreement shall remain in effect until (i) a refund is made pursuant to Article 9(a)(iv) "Warranty" or Article 11 "Infringement", above, (ii) Brooks terminates the licenses by reason of Customer's breach of any of the terms or conditions of this Agreement and then its failure to cure such breach in accordance with the provisions of this Agreement, or (iii) Customer terminates the licenses in writing. Upon termination of this Agreement, Customer shall forthwith pay all sums invoiced to Customer by Brooks and return or destroy all copies of the Brooks Software at Brooks' instruction and shall certify in writing by an officer of Customer that all copies and systems recovery copies thereof have been destroyed and/or deleted from Customer's computer libraries or storage facilities and are no longer in use.

8. Customer's obligations under this Agreement shall survive expiration or termination of this Agreement.