

1. General. The party providing NETAPP with any goods and services ("Seller") agrees to perform the services ("Services") and/or provide the goods or Service deliverables (collectively referred to as "Goods"), described in any purchase order, in accordance with the applicable purchase order, documents agreed to by the parties describing the Services and Deliverables provided by Seller to NetApp and with these Terms and Conditions ("Agreement"). Upon acceptance of a purchase order, shipment of Goods or commencement of a Service, Seller shall be bound by the provisions of this Agreement, including all provisions set forth on the face of any applicable purchase order, whether Seller acknowledges or otherwise signs this Agreement or the purchase order, unless Seller objects to such terms in writing prior to shipping Goods or commencing Services and such notice shall be given to NETAPP no later than seven (7) days after Seller's receipt of the purchase order. Other than with respect to any previously executed contracts between the parties concerning the same subject matter to which this Agreement is meant to serve as an exhibit or addendum (e.g., any Master Services Agreements, Statements of Work or other procurement contracts entered into by the parties prior to the effective date of this Agreement) (collectively, "Current Contracts"), which this Agreement shall not be deemed to supersede, any discrepancy between the terms on the face of an applicable purchase order and the terms hereof, the terms of such purchase order shall prevail. This writing does not constitute a firm offer and may be revoked at any time prior to acceptance. Any terms or conditions contained in any acknowledgment, invoice or other communication of Seller, which are inconsistent with the terms and conditions herein, are hereby rejected. To the extent that this Agreement might be treated as an acceptance of Seller's prior offer, such acceptance is expressly made on condition of assent by Seller to the terms hereof and shipment of the Goods or beginning performance of any Services by Seller shall constitute such assent.

2. Changes. NETAPP may at any time by a written change order make changes in the general scope and terms of this Agreement, and hereby reserves the right to reschedule any delivery or cancel any purchase order issued at any time prior to shipment of the Goods or prior to commencement of any Services. NETAPP shall not be subject to any charges or other fees as a result of such cancellation. Nothing herein shall excuse Seller from proceeding with the Agreement as changed. This Agreement shall not be deemed or construed to be modified, amended, rescinded, cancelled or waived in whole or in part, except by written change order signed by a NETAPP authorized purchasing representative. After NETAPP's approval or acceptance of the initial qualification prototypes of the Goods, Seller shall not make any changes in the design, material or processes that may affect the form, fit, function, interchangeability, quality or reliability of the Goods without NETAPP's prior written consent.

3. Purchase Order Number. NETAPP's purchase order number must appear on all invoices, packing lists and bills of lading and shall appear on each package, container or envelope on each shipment made pursuant to such purchase order.

4. Delivery Documentation. All deliveries of Goods to NETAPP must contain a packing list referencing Goods delivered. Each copy must show the NETAPP purchase order number, part number, and quantity of Goods shipped. Bills of Lading shall be mailed in triplicate to the destination address shown on the face of the NETAPP purchase order, or to the consignee of such purchase order on the day shipment is made. Delivery and acceptance of Services shall be evidenced by an authorized representative of NETAPP signing the submitted invoice specifically accepting the Services and referencing the appropriate purchase order number.

5. Packaging and Shipment. All articles are to be packed in accordance with sound commercial practice to obtain the lowest transportation rates unless otherwise specified in the NETAPP purchase order and comply with requirements of common carriers. Shipments will be valued so as to obtain the lowest transportation rate and must be made by NETAPP's choice of common carrier if specified in the purchase order. Transportation insurance for loss or damage will not be purchased by NETAPP unless specifically directed. Excess transportation costs resulting from failure to comply with the provisions of this paragraph will be debited to Seller's account. Unless otherwise specified in the NETAPP purchase order, packaging must conform to NETAPP's specifications and should be constructed for handling with a mechanical device. A complete packing list specifying NETAPP's applicable purchase order number, quantity of Goods shipped, and part number shall be enclosed with all shipments hereunder. Seller shall mark each container with necessary lifting, loading and shipping information, including the NETAPP purchase order number, date of shipment, and name and address of consignor and consignee. Seller shall bear the expense of any premium transportation charges unless otherwise agreed. Prepaid transportation charges appearing on Seller's invoice must be supported by a paid freight bill and bill of lading.

6. Delivery. Time is of the essence. Deliveries are to be made in such quantities and at such times as are specified herein. If no delivery schedule is specified, the order shall be filled promptly and delivery will be made by the most expeditious form of land transportation. If no method of shipment is specified in the purchase order, Seller shall use the least expensive carrier. Upon request Seller shall provide NETAPP notice of the departure of any shipment of Goods from Seller's site. Seller shall provide NETAPP notice as soon as it is aware that any delivery will not be on time. At NETAPP's request, Seller will provide NETAPP with daily notification of shipping delays or of the progress of delayed Goods in transit. Such notification will include action plans for recovery or expediting of the affected Goods. If Seller's deliveries fail to meet schedule, NETAPP, without limiting its other rights and remedies, may, at its option, either: (a) direct expedited routing, and any excess costs incurred thereby shall be debited to Seller's account; or (b) in accordance with Section 12 hereof, cancel all or any part of the NETAPP purchase order in the event Seller fails to deliver Goods as scheduled. With regard to any Goods delivered in advance of schedule NETAPP may, at its option, either: (a) return the Goods at Seller's expense for proper delivery, or (b) accept the Goods with payment only in accordance with Section 8 below and with the right to charge Seller for storage of the Goods. Delivery terms are DDP NETAPP's dock or the dock of NETAPP's designated manufacturer.

7. Supply of Goods. Seller assumes all risk of loss until receipt by NETAPP. Title to the Goods shall pass to NETAPP upon receipt by it of the Goods at the designated destination. If the Goods ordered are destroyed prior to title passing to NETAPP, NETAPP may at its option cancel the Agreement or require delivery of substitute Goods of equal quantity and

quality. Such delivery will be made as soon as commercially practicable. If loss of Goods is partial, NETAPP shall have the right to require delivery of the Goods not destroyed. Unless stated otherwise in a specific purchase order, to the maximum extent permitted by applicable laws, invoices shall be due sixty (60) days from the end of the calendar month in which the invoice is dated. Invoices will be paid on the 3rd day of each month (or next business day) after they come due. Incorrect invoices will be returned to Seller for correction and/or credit. After Seller resubmits the corrected invoice, NETAPP will pay Seller sixty (60) days from the end of the calendar month in which NETAPP's Accounts Payable Department receives the corrected invoice. NETAPP agrees to pay any federal, state, provincial, or local indirect tax such as value added, goods and services, sales, services, business, consumption tax, due under the local tax law as the result of Seller's performance of Services or provision of Goods, except when NETAPP provides a valid tax exemption certificate. Seller must indicate clearly the tax amount billed to NETAPP, if any, and will be solely responsible for and will file, on a timely basis, all tax return with any taxing authority to keep NETAPP harmless with any tax issues. In no event shall NETAPP be liable to pay any direct, withholding tax levied in connection with Seller's income as the result of his performance of Services or provision of Goods. On orders for shipment outside Japan all required import duties, licenses and fees shall be payable by the Seller and shall be included in the quoted pricing to NETAPP.

8. Inspection. Seller shall test each lot to ensure that the Goods meet NETAPP's specifications and acceptance criteria, and Seller shall not ship any Goods that do not conform thereto. All Goods (including raw materials, components, subassemblies and end products) may be inspected and tested by NETAPP at all reasonable times and places before, during and after manufacture. If any Goods are defective in materials or workmanship, or are otherwise not in conformity with the requirements of this Agreement, it shall be at NETAPP's sole discretion, whether or not payment has been made, to reject such Goods, return them to Seller at Seller's expense, and receive a refund for the purchase price (if payment has been made), or require that such Goods be corrected or replaced promptly with satisfactory materials or workmanship. Payment shall not constitute acceptance. In no event shall NETAPP be liable for any reduction in value of any Goods used in connection with any inspection or test. If any inspection or test is made on Seller's premises, Seller shall, without additional charge, provide reasonable facilities and assistance for the safety and convenience of inspectors in such manner as not unduly to delay the work. Inspection of Goods at Seller's facility shall be without prejudice to NETAPP's right to inspect and reject such Goods upon delivery to NETAPP's facility. Where applicable, NETAPP may, at its option, inspect all Goods or inspect a statistical sample selected from each lot. Seller further agrees to maintain adequate authenticated inspection test documents that relate to work performed under this Agreement. Such records shall be retained by Seller for a period of three (3) years after completion of this Agreement or as otherwise specified by NETAPP and made available to NETAPP upon request. Seller agrees to supply NETAPP with inspection and test reports, affidavits, certifications or any other documents as may be reasonably requested.

9. Confidential Information. Seller will acquire knowledge of NETAPP Confidential Information (as defined below) in connection with its performance hereunder and agrees to keep such NETAPP Confidential Information in confidence during the term of this Agreement. "NETAPP Confidential Information" includes but is not limited to all information, whether written or oral, in any form, including without limitation, information relating to the research, development, products, methods of manufacture, trade secrets, business plans, customers, vendors, finances, personnel data, Work Product (as defined herein) and other material or information considered proprietary by NETAPP relating to the current or anticipated business or affairs of NETAPP which is disclosed directly or indirectly to Seller. In addition, NETAPP Confidential Information means any third party's proprietary or confidential information disclosed to Seller in the course of providing Services or Goods to NETAPP. NETAPP Confidential Information does not include any information (i) which Seller lawfully knew without restriction on disclosure before NETAPP disclosed it to Seller, (ii) which is now or becomes publicly known through no wrongful act or failure to act of Seller, (iii) which Seller developed independently without use of the NETAPP Confidential Information, as evidenced by appropriate documentation, or (iv) which is hereafter lawfully furnished to Seller by a third party as a matter of right and without restriction on disclosure. In addition, Seller may disclose Confidential Information which is required to be disclosed pursuant to a requirement of a government agency or law so long as Seller provides prompt notice to NETAPP of such requirement prior to disclosure. Seller agrees not to copy, alter or directly or indirectly disclose any NETAPP Confidential Information. Additionally, Seller agrees to limit its internal distribution of NETAPP Confidential Information to Seller's Assistants (defined in Section 14) who have a need to know, and to take steps to ensure that the dissemination is so limited, including the execution by Seller's Assistants of nondisclosure agreements with provisions substantially similar to those set forth herein. In no event will Seller use less than the degree of care and means that it uses to protect its own information of like kind, but in any event not less than reasonable care to prevent the unauthorized use of NETAPP Confidential Information. Seller further agrees not to use the NETAPP Confidential Information except in the course of performing hereunder, and agrees not to use such NETAPP Confidential Information for its own benefit or for the benefit of any third party. Seller agrees not to design or manufacture any products which incorporate NETAPP Confidential Information. All NETAPP Confidential Information is and shall remain the property of NETAPP. Upon NETAPP's written request or the termination of this Agreement, Seller shall return, transfer or assign to NETAPP all NETAPP Confidential Information, including all Work Product, as defined herein, and all copies thereof.

10. Tooling. Unless otherwise specified in this Agreement, all tooling and/or all other articles required for the performance hereof shall be furnished by Seller, maintained in good condition and replaced when necessary at Seller's expense. If NETAPP agrees to pay Seller for special tooling or other items either separately or as a stated part of the unit price of Goods purchased herein, title to same shall be and remain in NETAPP upon payment therefor.

11. Default-Cancellation. NETAPP may, by written notice of default to Seller, terminate the whole or any part of this Agreement if Seller fails to make delivery of the Goods or perform the Services within the time specified herein or in any authorized extension. If this Agreement or any part hereof is terminated by NETAPP, then in addition to any other rights provided in this Agreement, NETAPP may require Seller to transfer title and deliver to

NETAPP in the manner and to the extent directed by NETAPP, any completed or partially completed Goods and any materials, parts, tools, dies, jigs, fixtures, plans, drawings, information and manufacturing materials specifically produced or acquired for performance of this Agreement. If, after notice of termination of the Agreement under the provisions of this Section 11, it is determined for any reason that Seller was not in default or that the default was excusable, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Section 12 hereof. The rights and remedies of NETAPP provided in this Section 11 shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

**12. TERMINATION.** THIS AGREEMENT MAY BE TERMINATED IN WHOLE OR IN PART AT ANY TIME BY NETAPP FOR ITS OWN CONVENIENCE. ANY SUCH TERMINATION WILL NOT BE CONSTRUED AS A CANCELLATION FOR BREACH. NETAPP'S EXCLUSIVE LIABILITY AND SELLER'S EXCLUSIVE REMEDY FOR SUCH TERMINATION WILL BE AS FOLLOWS: (A) NETAPP WILL PURCHASE AND PAY FOR ANY GOODS THAT HAVE BEEN COMPLETED AS OF THE EFFECTIVE DATE OF THE CANCELLATION; (B) NETAPP WILL PAY SELLER FOR THE ACTUAL LABOR AND MATERIALS COSTS INCURRED BY SELLER IN CONNECTION WITH THE ASSEMBLY OF ANY GOODS THAT ARE PARTIALLY COMPLETED AS OF THE EFFECTIVE DATE OF CANCELLATION; AND (C) NETAPP WILL PAY SELLER FOR THE COSTS OF COMPONENTS AND OTHER MATERIALS PROCURED BY SELLER SPECIFICALLY ON ACCOUNT OF THE CANCELLED AGREEMENTS IF SUCH COMPONENTS CANNOT BE DIVERTED BY SELLER TO ANOTHER USE. IN NO EVENT WILL NETAPP'S LIABILITY IN THE AGGREGATE EXCEED THE TOTAL PRICE WHICH WOULD HAVE BEEN PAID HEREUNDER FOR THE WORK HAD IT NOT BEEN TERMINATED. NOTWITHSTANDING THE FOREGOING, TO THE EXTENT SUCH TERMINATION INVOLVES MATERIALS SELLER NORMALLY MANUFACTURES OR SUPPLY FOR DISTRIBUTION TO OTHER CUSTOMERS, AND NOT SPECIFICALLY MANUFACTURED TO THIS AGREEMENT, NETAPP'S EXCLUSIVE LIABILITY AND SELLER'S EXCLUSIVE REMEDY WILL BE PAYMENT FOR FINISHED GOODS AND SERVICES DELIVERED OR PERFORMED ACCORDING TO SCHEDULE PRIOR TO TERMINATION, SUBJECT TO NETAPP'S FINAL ACCEPTANCE AT THE APPLICABLE PRICE SPECIFIED. THE PROVISIONS OF THIS PARAGRAPH WILL NOT APPLY TO ANY PORTION OF THIS AGREEMENT CANCELED FOR SELLER'S BREACH. NO CANCELLATION CHARGES SHALL BE PAYABLE IF NOTICE OF CANCELLATION IS GIVEN OR DEEMED TO BE GIVEN AT LEAST THIRTY (30) DAYS BEFORE THE SCHEDULED SHIPMENT DATE. PRIOR TO NETAPP'S PAYMENT, NETAPP MAY AUDIT SELLER'S RECORDS AT REASONABLE TIMES OR REQUIRE SELLER TO PROVIDE REASONABLE DOCUMENTATION AND INVOICES TO SUBSTANTIATE ANY CANCELLATION CHARGES OR REQUIRE SELLER TO PRODUCE EVIDENCE THAT THE RELEVANT GOODS, MATERIALS, ASSEMBLIES AND COMPONENTS SHALL HAVE BEEN DISPOSED OF IN ACCORDANCE WITH NETAPP'S INSTRUCTIONS. NETAPP RESERVES THE RIGHT TO DIRECT THE DISPOSITION OF ANY WORK OR PROPERTY PAID BY NETAPP HEREUNDER. SELLER'S TERMINATION CLAIM MUST BE SUBMITTED IN WRITING NO LATER THAN THIRTY (30) DAYS FROM THE DATE OF RECEIPT OF TERMINATION NOTICE.

**13. NETAPP's Property.** Title and property furnished to Seller by NETAPP or paid for by NETAPP shall remain with NETAPP. Seller shall not alter or use such property for any purpose other than that specified by NETAPP, or for any other person, without the prior written consent of NETAPP. Seller shall keep adequate records of such property and such records shall be made available to NETAPP upon request, and shall store, protect, preserve, repair and maintain such property in accordance with sound commercial practice, all at Seller's expense. Unless otherwise agreed to by NETAPP, Seller shall insure NETAPP's interest in such material against loss or damage by reason of fire (including extended coverage), flood, accident, theft, riot or civil commotion. In the event that NETAPP's property becomes lost or damaged to any extent while in Seller's possession, Seller agrees to indemnify NETAPP or replace such property at Seller's expense, in accordance with NETAPP's request. At the completion or termination of this Agreement, Seller shall request disposition instructions for all such property or the remainder thereof, whether in its original form or in semi-processed form. Seller agrees to make such property available as directed by NETAPP, including preparation, packaging and shipping. The use of NETAPP's name, logo or reference to any association or partnership is expressly prohibited without NETAPP's written permission.

**14. Independent Contractor.** NETAPP is interested only in the results obtained under this Agreement; the manner and means of achieving the results are subject to Seller's sole control. Seller is an independent contractor for all purposes, without express or implied authority to bind NETAPP by contract or otherwise. Neither Seller nor its employees, agents or subcontractors ("Seller's Assistants") are agents or employees of NETAPP, and therefore are not entitled to any employee Benefits of NETAPP, including but not limited to, any type of insurance. Seller shall be responsible for all costs and expenses incident to performing its obligations under this Agreement and shall provide Seller's own supplies and equipment.

**15. Ownership of Work Product.** For purposes of this Agreement, "Work Product" shall include, without limitation, all designs, discoveries, creations, works, devices, masks, models, work in progress, Service deliverables, inventions, products, computer programs, procedures, improvements, developments, drawings, notes, documents, business processes, information and materials made, conceived or developed by Seller alone or with others which result from or relate to the Services performed hereunder. Standard Goods manufactured by Seller and sold to NETAPP without having been designed, customized or modified for NETAPP do not constitute Work Product. All Work Product shall at all times be and remain the sole and exclusive property of NETAPP. Seller hereby agrees to irrevocably assign and transfer to NETAPP and does hereby assign and transfer to NETAPP all of its worldwide right, title and interest, including, but not limited to, the rights under Articles 27 and 28 of the Copyright Law of Japan (as the same may be amended or recodified from time to time), in and to the Work Product including all associated intellectual property rights. NETAPP will have the sole right to determine the treatment of any Work Product, including the right to keep it as trade secret, execute and file patent applications on it, to use and disclose it without prior patent application, to file registrations for copyright or trademark in its own name or to follow any other procedure that NETAPP deems appropriate. Seller agrees to waive and release, to the fullest extent permitted by applicable

law, any and all moral rights and rights of restraint that Seller may possess in or to Work Product. Seller agrees: (a) to disclose promptly in writing to NETAPP all Work Product in its possession; (b) to assist NETAPP in every reasonable way, at NETAPP's expense, to secure, perfect, register, apply for, maintain, and defend for NETAPP's benefit all copyrights, patent rights, mask work rights, trade secret rights, and all other proprietary rights or statutory protections in and to the Work Product in NETAPP's name as it deems appropriate; and (c) to otherwise treat all Work Product as NETAPP Confidential Information as described above. These obligations to disclose, assist, execute and keep confidential survive the expiration or termination of this Agreement. All tools and equipment supplied by NETAPP to Seller shall remain the sole property of NETAPP. Seller will ensure that Seller's Assistants appropriately waive any and all claims and assign to NEAPP any and all rights or any interests in any Work Product or original works created in connection with this Agreement. Seller irrevocably agrees not to assert against NETAPP or its direct or indirect customers, assignees or licensees, or distributors any claim of any intellectual property rights of Seller affecting the Work Product. NETAPP will not have rights to any works conceived or reduced to practice by Seller which were developed entirely on Seller's own time without using equipment, supplies, facilities or trade secret or NETAPP Confidential Information, unless (i) such works relate to NETAPP's business, or NETAPP's actual or demonstrably anticipated research or development, or (ii) such works result from any Services performed by Seller for NETAPP. Except for works within (i) or (ii) of the preceding sentence which shall be works owned by NETAPP, for any other works within the preceding sentence not owned by NETAPP but which are necessary to use the Goods and Services for their intended purposes, Seller hereby grants NETAPP a non-exclusive, irrevocable, perpetual, worldwide, royalty free, fully paid-up license to make, have made, sell, demonstrate, use, reproduce, modify, create derivative works based on such works, and sublicense such works, including the right to sublicense through multiple tiers of distribution.

**16. Indemnification.** Seller shall, in the performance of work or services under this Agreement, fully comply with all applicable state, provincial and local laws, rules, regulations and ordinances and shall indemnify and hold harmless NETAPP from and against any loss, claim, damage, liability, expense, or cost (including without limitation attorneys fees and court costs) resulting from failure of such compliance, or out of any other negligence by Seller or those acting on Seller's behalf.

**17. LIMITATION OF LIABILITY.** TO THE EXTENT PERMITTED BY LAW, IN NO EVENT SHALL NETAPP BE LIABLE TO SELLER OR SELLER'S ASSISTANTS, OR ANY THIRD PARTY FOR ANY INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF, OR IN CONNECTION WITH, THIS AGREEMENT, WHETHER OR NOT NETAPP WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. IN NO EVENT SHALL NETAPP BE LIABLE FOR SUMS IN EXCESS OF THE VALUE OF THE GOODS AND SERVICES PROVIDED HEREUNDER.

**18. Assignments and Subcontracts.** Seller shall not assign or subcontract this Agreement or any right or obligation hereunder without the prior written consent of NETAPP. NETAPP may from time to time assign this Agreement or any rights, obligations, or benefits hereunder to its related, affiliated, or successor corporations.

**19. Delays.** Whenever any cause delays or threatens to delay the timely performance of this Agreement or any work or service hereunder, Seller shall immediately notify NETAPP of all relevant information with respect to such cause. If Seller is or will be delayed in any performance or delivery by more time than is acceptable to NETAPP in NETAPP's sole judgment, then NETAPP may terminate this Agreement in whole or in part and such termination shall not be a breach of this Agreement and shall be without penalty or payment.

**20. Price Warranty.** Seller warrants that the prices specified in this Agreement do not exceed the prices charged for like quantities of the same or substantially similar articles to any other purchaser. If prices are lowered for any other customer purchasing similar articles in similar quantities, NETAPP's price shall be lowered to such price. Seller agrees to notify NETAPP of such lower prices within ten (10) days of such sale. Seller will give NETAPP the benefit of any price declines to actual time of shipment. This Agreement must not be filled at higher prices than last quoted or charged without prior written consent of NETAPP. Prices include and Seller shall bear all duties, fees, and taxes including sales, use, property, excise, value added and gross receipts levied on this Agreement or the Goods prior to delivery to the DDP Point. Seller agrees that if any of the above is paid by NETAPP, Seller shall immediately reimburse NETAPP for the amount paid plus any related expenses and interest.

**21. Services Warranty.** 1) Seller represents and warrants that all Services shall be completed in a professional, workmanlike manner, with the degree of skill and care that is required by current, good and sound professional procedures. Further, Seller represents and warrants that the Services shall be completed in accordance with applicable specifications and shall be correct and appropriate for the purposes contemplated in this Agreement. Seller represents and warrants that the performance of Services under this Agreement will not conflict with, or be prohibited in any way by, any other agreement or statutory restriction to which Seller is bound. (2) The aforesaid expressed warranties shall be in addition to any warranty implied by law and any standard warranty or guarantee of Seller shall be construed as conditions as well as warranties and shall not be exclusive.

**22. Goods Warranty.** (1) Seller warrants that all Goods provided will be new and will not be used or refurbished. Seller warrants that all Goods delivered shall be free from defects in materials and workmanship and shall conform to all applicable specifications, drawings, samples or other descriptions given, including those set forth in this Agreement and Seller's sales literature, to be of merchantable quality, to correctly process, provide, and/or receive data data within and between the twentieth and twenty-first centuries, and, if of Seller's design, to be suitable for the purpose intended, to meet all of the performance requirements and to be free from defects in design. Seller agrees to replace or to correct any Goods not conforming to the foregoing requirements when notified by NETAPP or its successors within three (3) years after final acceptance. Seller hereby agrees that it will make spare parts available to NETAPP for a period of five (5) years from the date of shipment at Seller's then current price, less applicable discounts. If Seller, upon notice of defect, fails promptly to correct or replace the Goods, NETAPP may do so without further notice and Seller shall

reimburse NETAPP for all costs incurred thereby. No inspection, test or approval of any kind, including approval of designs, shall affect Seller's obligation under this Section. Goods which have been rejected shall not thereafter be tendered for acceptance unless the former rejection and correction are identified. Replaced or repaired Goods shall be subject to the provisions of this Section 22 to the same extent as the original Goods except that the warranty shall run from the last delivery date. NETAPP may return rejected Goods or hold them at Seller's risk and expense, and may in either event charge Seller with costs of transportation, shipping, unpacking, examining, repacking, reshipping, and the like. (2) To the extent that the purchase order in question involves the supply of software (including without limitation all CD's, tapes, PC hard drives and any other form of program and file delivery whether tangible or intangible including any software delivered electronically via a telecommunications network) by the Seller, Seller (a) warrants that the software will perform in accordance with the agreed functional specifications and its documentation and that the documentation will be fit for its purpose and the documentation shall accurately describe the software; (b) shall for a warranty period of one year from the delivery of the software provide NETAPP free of any charge with corrective maintenance, releases, and first-line and second-line support; (c) warrants that the software is free from any computer "virus" or other malicious program code; (d) warrants that there is no functionality designed into or otherwise included in any software to be supplied which could be harmful to or shall prevent the operation in whole or in part of the software or any computer system on which the software is intended to run; and (e) shall advise NETAPP of any functionality in any program forming part of or allowing automated administration or record-keeping of the software and this obligation shall apply in particular to any functionality that provides access to functions and resources (whether part of the software or not) that NETAPP may reasonably be expected to wish to use or control and shall include, without limitation, any functionality that potentially or actually undermines or circumvents any security provisions of the software or any third party software. (3) This warranty shall run to NETAPP, its successors, assigns, and the users of Goods covered by this Agreement. (4) The aforesaid expressed warranties shall be in addition to any warranty implied by law and any standard warranty or guarantee of Seller shall be construed as conditions as well as warranties and shall not be exclusive.

**23. Patents.** Unless an infringement arises exclusively from a design that is proprietary to NETAPP and provided by NETAPP, Seller shall, at its expense, hold harmless and defend NETAPP, its customers, and all persons claiming under NETAPP against any suit or suits for the infringement of any patent, trade secret, copyright, trademark or other intellectual property right of a third party and shall indemnify the aforesaid parties against all damages, claims, losses, liabilities, costs and expense of any kind or nature (including without limitation attorney's fees and court costs) arising there from by reason of the manufacture, sale or the normal and intended use of the articles covered by this Agreement. Where performance under this Agreement includes experimental, developmental or research effort and such work is paid for in whole or in part by NETAPP, Seller agrees to disclose to NETAPP all confidential processes, know-how and trade secrets resulting there from and, on request, to assign to NETAPP each invention and property right resulting there from. Should the use by NETAPP or its customers of any of the Goods enjoined, or in the event Seller desires to minimize its liabilities hereunder, Seller may, at its option, either: (a) substitute a fully equivalent non-infringing item; (b) modify the infringing item so that it no longer infringes but remains functionally equivalent; (c) obtain for NETAPP or NETAPP's customers, at Seller's expense, the right to continue use of such item. If none of the foregoing is feasible, NETAPP may, at its option, require that Seller take back such infringing item and refund to NETAPP or its customers the purchase price therefor.

**24. Data Protection.** To the extent that Seller receives any information that relates to an identified or identifiable individual ("Personal Data") from or on behalf of NETAPP in connection with any Agreement, Seller will process such Personal Data solely for the purpose of providing the goods and services specified in such Agreement, in accordance with all applicable agreements with NETAPP, including without limitation any applicable data processing agreement, and in compliance with all applicable laws and regulations. Without limiting the foregoing, Seller will not retain, use, or disclose such Personal Data for any purpose other than providing the goods or services specified in such Agreement, including without limitation for any commercial purpose other than providing such goods or services to NETAPP, and in no event may Seller sell such Personal Data to any third party. Seller certifies that it understands the foregoing restrictions and will comply with them. To the extent Seller provides any Personal Data to NETAPP, Seller shall ensure that it has provided all required notices and obtained any required consents to enable NETAPP to receive, transfer, and otherwise process such Personal Data in accordance with the NETAPP Privacy Policy, as may be amended from time to time, the current version of which is posted at [www.netapp.com](http://www.netapp.com).

**25. Governing Law; Venue.** This agreement shall be construed in accordance with, and all disputes hereunder shall be governed by the laws of Japan. The courts of Japan shall have jurisdiction and venue over all controversies in connection herewith.

**26. Attorney's Fees.** The prevailing party in any action to enforce this Agreement shall be entitled to receive its reasonable court costs and attorney's fees in addition to any other damages.

**27. Notices; Manner of Giving Notice.** All notices hereunder shall be in writing and shall be deemed to have been duly given if delivered personally, two days after delivery to an internationally or nationally recognized overnight delivery service, charges prepaid, five days after sent by registered or certified mail, postage prepaid, or when receipt is confirmed by facsimile or other telegraphic means to such address as shall be provided by the parties from time to time in writing. Any party may change its address for such communications by giving notice thereof to the other party in conformance with this Section.

**28. Export Law Compliance.** Seller shall fully and unconditionally comply with all applicable export laws in the performance of this Agreement. The Seller shall notify NETAPP if the delivery of any supplied Goods or Services to NETAPP is subject to US International Traffic in Arms Regulations ("ITAR"), US Export Administration Regulations ("EAR"), EU Export Controls Regulations (including Regulation EC (No) 1334/2000) and/or any other national and/or international Export Controls regulations (hereafter "Export Control Regulations"). Neither Seller nor NETAPP shall export or import directly or

indirectly, any information acquired under this Agreement or any Goods utilizing any such information to any country or entity for which any export or import authority, or any agency thereof, at the time of export or import either prohibits or requires a license or other government authorization without first obtaining such license or approval. The Seller is responsible for obtaining all necessary licenses, agreements or approvals needed for the delivery of Goods and Services pursuant to the NETAPP purchase order to NETAPP from the appropriate authorities. If the Seller fails to obtain or to retain such license, agreement or approval, the delivery of the Goods or Services shall be cancelled and NETAPP is entitled to terminate the Agreement without incurring any liability versus Seller and the Seller must compensate NETAPP for all direct and indirect damages consequential to the Seller's failure to deliver the Goods or Services. Seller must inform NETAPP promptly if the necessary license, agreements or approvals are not issued, delayed or withdrawn as well as of any circumstances which may give cause for such non-issuance, delay or withdrawal. Seller shall notify NETAPP if the supply to and/or use by NETAPP of any Goods or Services is covered by an appropriate U.S. or other governmental license, agreement or approval, and provide date, reference and full details of the issuing governmental authority of such license, agreement or approval. Seller shall indemnify NETAPP for any claims, costs, penalties and/or damages (including reasonable attorney's fees) incurred by NETAPP consequential to Seller's failure to comply with applicable Import or Export Controls Regulations and/or required license, agreement or approval. Without prejudice to Seller's responsibility to obtain and retain licenses, agreements or approvals as set out above, NETAPP will, upon request, at the Seller's expense endeavour to assist the Seller in obtaining licenses, agreements or approvals from the governmental authorities, but NETAPP will not be liable in the event of non-issuance, withdrawal or non-renewal of any licenses, agreements or approvals. If applicable, the Seller shall adequately mark all Goods and Services supplied to NETAPP pursuant to the purchase order and Agreement (if applicable) as "ITAR-controlled", "EAR-Controlled" or "EU-controlled" by specifying (if applicable) the Technical Assistance Agreement reference number and Export Controls Classification Number and include these with the relevant Harmonized System number in the shipping documentation. The Seller is responsible for complying with any legislation governing the import of Goods and Services including but not limited to payment of customs duties, unless parties have agreed otherwise in writing. The Seller must provide assistance to NETAPP for the use of supplied Goods and Services by NETAPP which may include export, re-export, or transfer of Goods or Services by NETAPP. This assistance shall include: providing all information necessary to obtain any relevant export or import license, authorization or approvals; providing all information related to export or import license, authorizations or approvals including copies of license, approvals, classification numbers, copies of draft license applications, statements related to the country of origin of the Goods; and providing any other reasonable assistance that NETAPP reasonably requires from the Seller.

**29. Compliance with laws on Dangerous Substances.** Seller shall comply with all applicable laws, regulations and other relevant requirements relating to the transport, packaging, storage, handling and use of dangerous substances, to the extent the same are applicable to the Goods. All information held by or reasonably available to the Seller regarding any potentially dangerous substances known or believed to exist in the Goods shall be immediately communicated to NETAPP.

**30. Compliance.** Seller shall fully and unconditionally comply with all applicable laws in the performance of this Agreement including, but not limited to, employment, tax, import, and environmental controls and laws. With respect to any transactions under these purchase order terms and conditions, both parties will cooperate in any reasonable manner to affect compliance with foreign sales corporation rules as set forth under the applicable tax regulations.

**31. Disclaimer of Trademark Rights.** Seller hereby disclaims any interest in any trademark, tradenames, or good will associated therewith belonging to NETAPP and further hereby assigns to NETAPP any such rights Seller may acquire in such trademarks, tradenames or goodwill, however acquired, whether by operation of law, estoppel or otherwise.

**32. Survival.** Seller's obligations under Sections 10, 15, 16, 17, 18, 19 and 21 through 32 shall survive any termination of this Agreement.

**33. Entire Agreement.** In the absence of a Master Agreement, this Agreement, including all of these terms and conditions, constitutes the exclusive and entire agreement between NETAPP and Seller and, hereby supersedes all other prior discussions, correspondence, understandings and/or agreements between the parties pertaining to its subject matter. In the event of a conflict between the terms of this Agreement and any Current Contract, the terms of the Current Contract shall govern.

**34. Severance.** If any provision of this Agreement shall be found by any court or administrative body of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other provisions of this Agreement, which shall remain in full force and effect.