

NETAPP DEUTSCHLAND GMBH
NETAPP DEUTSCHLAND GMBH STANDARD PURCHASE ORDER TERMS AND CONDITIONS

1. General. The party providing NetApp Deutschland GmbH, a company organized and existing under the laws of Germany, having its registered office at Bretonischer Ring 6, Grasbrunn D-85630, Munich, Germany (hereinafter referred to as "NETAPP") with any goods and services, including software ("Seller") agrees to perform the services ("Services") and/or provide the goods, Service deliverables, and software (collectively referred to as "Goods"), described in any purchase order, in accordance with the applicable purchase order, scope of work and with these Terms and Conditions (together "Agreement"). Each purchase order shall be deemed to be an (counter-) offer by NETAPP to Seller to buy Goods and/or Services and the Agreement shall become effective at the moment the purchase order is accepted in writing by Seller. Notwithstanding the provisions mentioned above, where the Seller has sent or otherwise communicated a(n) (written) offer to which NETAPP responds with a purchase order, such purchase order is deemed to be accepted by Seller if such purchase order is not rejected in writing by Seller within five (5) days from the date the purchase order is received by Seller. However, if there is no formal written acceptance of the purchase order by Seller and Seller ships the Goods or Seller starts commencing the Services within the aforementioned period of five (5) days from the date the purchase order is received by the Seller, then the purchase order is deemed to be accepted on the date of shipment of Goods or the date of commencement of Services.

Acceptance or deemed acceptance of a purchase order by Seller as described hereinabove will be deemed to be acceptance of the provisions of this Agreement, including all provisions set forth on the face of any applicable purchase order irrespective whether Seller acknowledges or otherwise signs this Agreement or the purchase order, unless Seller explicitly objects to such terms in writing prior to acceptance or deemed acceptance of the purchase order.

Subject to any variation under Section 2, the terms and conditions contained in this Agreement are the only conditions on which NETAPP is prepared to deal with Seller and they shall govern the contract to the entire exclusion of any other terms or conditions. Any terms or conditions contained in any sales terms and conditions, acknowledgement, invoice or other communication of Seller 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, expressly rejecting all other terms, and acceptance or deemed acceptance of the purchase order by Seller shall constitute such assent.

2. Changes. NETAPP may, prior to acceptance or deemed acceptance of a purchase order by Seller, at any time by a written change order make changes in the general scope and terms of this Agreement; reschedule any delivery or cancel any purchase order. NETAPP shall not be subject to any charges, liability or other fees as a result of such changing; rescheduling or cancelling of a purchase order.

NETAPP may, after acceptance or deemed acceptance of a purchase order by Seller but prior to the scheduled shipment date of Goods or agreed date of commencement of Services, at any time by a written change order request changes or modifications to the Agreement. If Seller considers that the requested changes or modifications affect the agreed upon price and/or scheduled shipment date of Goods or date of commencement of Services, it shall notify NETAPP in writing as soon as reasonably possible but no later than five (5) days after notification of the requested changes or modifications. Implementation of NETAPP's requested changes or modifications without such notice automatically means that the price and the scheduled shipment date of Goods and/or date of commencement of Services remain unchanged. If NETAPP considers the Seller's request for change of price and/or date of shipment of Goods or commencement of Services to be unreasonable in relation to the proposed changes or modifications, NETAPP shall have the right to terminate the Agreement in writing and NETAPP shall not be subject to any charges, liabilities or other fees as a result of such termination.

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 or certificate of completion specifically accepting the Services and referencing the appropriate purchase order number.

5. Packaging and Shipment. 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.

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 transportation. Delivery shall be Delivery Duty Paid, as referred to in the Incoterms 2000, to the location indicated on the purchase order. 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 fails to deliver the Goods or perform the Services as scheduled, NETAPP, without limiting its other rights and remedies available under this agreement or in law, 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, terminate 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.

7. Seller assumes all risk of loss until receipt by NETAPP (Delivery Duty Paid) in accordance with Section 6. Ownership or title of property to the Goods shall pass free from any factual or legal encumbrances to NETAPP only upon actual receipt by it of the Goods at the designated destination. If the Goods ordered are destroyed prior to title passing to NETAPP due to an event other than the fault or negligence of the Seller (such as but not limited to a force majeure event), NETAPP may 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.

8. Invoice and Payment Terms. For Goods, Seller shall send the invoice to NETAPP upon the delivery of the Goods in conformity with the relevant delivery term as specified in Section 6. For Services, Seller shall send the invoice to NETAPP upon written acceptance by NETAPP of such Services. 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 shall assume all responsibilities for taxes on shipments or provide Seller with a tax exemption certificate acceptable to the taxing authorities. On orders for shipment outside the United States all required import duties, licenses and fees shall be payable by the Seller and shall be included in the quoted pricing to NETAPP.

9. Inspection. Seller shall test the Goods to ensure that the Goods meet NETAPP's specifications and acceptance criteria, and Seller shall not ship any Goods that do not conform thereto. Unless agreed otherwise, NETAPP may, at its option, inspect all Goods (including raw materials, components, subassemblies and end products) or inspect a statistical sample selected from each lot within a period of fifteen (15) days of receipt of the Goods. 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 notify Seller and 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. If NetApp doesn't notify Seller of any evident defect or non-conformity within a period of fifteen (15) days of receipt of the Goods, the Goods shall be deemed to have been accepted by NetApp (leaving unaffected, however, NETAPP's right to assert non-evident defects or non-conformities). The rights and remedies of NETAPP provided in this Section 9 shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement. Payment shall not constitute acceptance and shall at all times be subject to a proper receipt and full acceptance by NETAPP of the Goods and Services. In no event shall NETAPP be liable for any reduction in value of any Goods used in connection with any inspection or test. 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.

10. Confidential Information. The Parties acknowledge and agree that during the term of this Agreement, each Party may acquire knowledge of the other Party's Confidential Information (as defined below) in connection with its performance hereunder and agrees to keep such Confidential Information in confidence during, and following termination or expiration, of the term of this Agreement. "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 or marked as such by the disclosing Party relating to the current or anticipated business or affairs of the disclosing Party which is disclosed directly or indirectly to the recipient Party. In addition, Confidential Information means any third party's proprietary or confidential information disclosed to the recipient Party in the course of fulfilling the Agreement. Confidential Information does not include any information (i) which the recipient Party lawfully knew without restriction on disclosure before the disclosing Party disclosed it to the recipient Party, (ii) which is now or becomes publicly known through no wrongful act or failure to act of the recipient Party, (iii) which the recipient Party developed independently without use of the Confidential Information, as evidenced by appropriate documentation, or (iv) which is hereafter lawfully furnished to the recipient Party by a third party as a matter of right and without restriction on disclosure. In addition, the recipient Party may disclose Confidential Information which is required to be disclosed pursuant to a requirement of a government agency or law so long as the recipient Party provides prompt notice to the disclosing Party of such requirement prior to disclosure.

The recipient Party agrees not to copy, alter or directly or indirectly disclose any Confidential Information. Additionally, the recipient Party agrees to limit its internal distribution of Confidential Information to the recipient Party's employees, agents or subcontractors who have a need to know, and to take steps to ensure that the dissemination is so limited, including the execution by the recipient Party's employees, agents or subcontractors of nondisclosure agreements with provisions substantially similar to those set forth herein. In no event will the recipient Party 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 Confidential Information.

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The recipient Party further agrees not to use the Confidential Information except in the course of performing hereunder, and agrees not to use such Confidential Information for its own benefit or for the benefit of any third party. The recipient Party agrees not to design or manufacture any products which incorporate Confidential Information of the disclosing Party. All Confidential Information is and shall remain the property of the disclosing Party. Upon the disclosing Party's written request or the termination of this Agreement, the recipient Party shall return, transfer or assign to the disclosing Party all Confidential Information, including all Work Product, as defined herein, and all copies thereof.

11. 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 therefore.

12. Termination for default. NETAPP may, after having given notice to Seller to cure any non-performance within a particular notice period as stipulated by NETAPP, as of right and without a prior court intervention being required, terminate the whole or any part of this Agreement if Seller fails to remedy its non-performance within the relevant notice period. However, if Seller fails to comply with any of its obligations under the Agreement for which a fixed term or date was agreed or an authorized extension of such term or date was granted, NETAPP may immediately - as of right and without a prior court intervention being required - terminate the whole or any part of this Agreement upon notice without any notice period being required. If this Agreement is only partly terminated by NETAPP, then in addition to any other rights provided in this Agreement, NETAPP may for the other part require Seller to transfer title and deliver to NETAPP in the manner and to the extent directed by NETAPP, any other 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 12, 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 13 hereof. The rights and remedies of NETAPP provided in this Section 12 shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

13. Termination for convenience. With regard to continuing obligations, NETAPP may, at any time after acceptance or deemed acceptance of a purchase order by Seller and with or without cause or giving any reason, terminate the Agreement giving a reasonable notice period. NETAPP's exclusive liability and Seller's exclusive remedy will be payment for the actual (labour and material) costs incurred by Seller. Seller shall make every reasonable attempt to reduce such costs. In no event will NETAPP's liability in the aggregate exceed the total price which would have been paid hereunder for the Goods and/or Services had it not been terminated. For the avoidance of doubt: With regard to Services that qualify as works within the meaning of Sections 631 et seq. of the German Civil Code (BGB), Section 649 BGB shall remain unaffected.

14. NETAPP's Property. Title in 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.

15. 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.

16. 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 in and to the Work Product upon its creation including all associated intellectual property rights to the maximum extent permitted by applicable laws. With regard to any non-assignable intellectual property right to a Work Product (in particular: copyrights under the German Copyright Act), Seller shall grant and hereby grants to NETAPP an exclusive, irrevocable, perpetual, world-wide, royalty-free, fully paid-up, transferable right to use, copy, edit, modify, store, publicly display, distribute, demonstrate, create derivative works of and otherwise exploit as well as

sublicense the Work Product, including the right to sublicense through multiple tiers of distribution. 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, design rights or trademark in its own name or to follow any other procedure that NETAPP deems appropriate.

Seller agrees: (a) to disclose promptly and upon its creation 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, design rights, trade marks, 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, including in particular, the right of reproduction (including the rights to copy, use, install and deploy), the right of performance, the right of modification (right to correct, fix, revise, translate, improve, adapt or perform any other modifications), the right to study and test, the right to decompile, the right to disclose to third parties, the right to commercialise and to sublicense, for the term of the legal protection of the applicable intellectual property rights and whatever the media whether present or future.

Seller will ensure that Seller's Assistants upon their creation appropriately waive any and all claims and assign to NETAPP any and all rights or any interests in any Work Product or original works created in connection with this Agreement to the maximum extent permitted by applicable laws. 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 Confidential Information of NETAPP, 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.

17. Indemnification. Seller shall indemnify and hold harmless NETAPP from and against any loss, claim, damage, liability, expense, or cost (including without limitation attorney's fees and court costs) awarded against or incurred or paid by NETAPP as a result of or in connection with: (a) defective workmanship, quality or materials; (b) any failure by Seller to fully comply with all applicable laws, rules, regulations and ordinances in the delivery of Goods or performance of Services under this Agreement; and (c) any claim made against NETAPP in respect of any liability, loss, damage, injury, cost or expense sustained by NETAPP's employees or agents or by any customer or third party to the extent that such liability, loss, damage, injury, cost or expense was caused by, relates to or arises from the Goods and/or Services as a consequence of a direct or indirect breach or negligent performance or failure or delay in performance of this Agreement by Seller or those acting on Seller's behalf.

18. LIMITATION OF LIABILITY. SUBJECT TO THE PROVISIONS IN THIS SECTION 18, NETAPP'S STATUTORY LIABILITY FOR DAMAGES SHALL BE LIMITED AS FOLLOWS:

NETAPP SHALL BE LIABLE ONLY UP TO THE AMOUNT OF DAMAGES AS TYPICALLY FORESEEABLE AT THE TIME OF ENTERING INTO THE PURCHASE ORDER CONCERNED IN RESPECT OF SUCH DAMAGES CAUSED BY A SLIGHTLY NEGLIGENT BREACH OF A MATERIAL CONTRACTUAL OBLIGATION (I.E. CONTRACTUAL OBLIGATIONS NON-FULFILMENT OF WHICH WOULD ENDANGER THE PURPOSE THAT THE PARTIES INTEND TO ACHIEVE THROUGH THE PURCHASE ORDER CONCERNED).

NETAPP SHALL NOT BE LIABLE FOR DAMAGES CAUSED BY A SLIGHTLY NEGLIGENT BREACH OF A NON-MATERIAL CONTRACTUAL OBLIGATION.

THE AFORESAID LIMITATION OF LIABILITY SHALL NOT APPLY TO ANY MANDATORY STATUTORY LIABILITY (IN PARTICULAR TO LIABILITY UNDER THE GERMAN PRODUCT LIABILITY ACT), LIABILITY FOR ASSUMING A SPECIFIC GUARANTEE OR LIABILITY FOR DAMAGES CAUSED BY NETAPP'S WILLFUL OR GROSSLY NEGLIGENT MISCONDUCT, OR ANY WILLFULLY OR NEGLIGENTLY CAUSED PERSONAL INJURIES.

19. 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.

20. 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 reasonably acceptable to NETAPP then NETAPP may terminate this Agreement in whole or in part as referred to in Section 12.

21. Services Warranty.

a) 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

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prohibited in any way by, any other agreement or statutory restriction to which Seller is bound.

b) With regard to services that qualify as works within the meaning of Sections 633 et seq. BGB, NETAPP's statutory warranty rights for defects shall remain unaffected.

22. Goods Warranty. 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 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. This warranty shall run to NETAPP, its successors, assigns, and the users of Goods covered by this Agreement. 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 Sellers 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, provided, however, that NETAPP shall notify Seller of any evident defects in materials or workmanship of the Goods in accordance with Section 9. 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 Sellers risk and expense, and may in either event charge Seller with costs of transportation, shipping, unpacking, examining, repacking, reshipping, and the like.

23. Software warranty. Seller 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. Seller 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. Seller warrants that the software is free from any computer "virus" or other malicious program code. This shall apply to 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. Seller 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. Seller shall advise NETAPP of any functionality in any program forming part of or allowing automated administration or record-keeping of the software. This applies 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. This shall include, without limitation, any functionality that potentially or actually undermines or circumvents any security provisions of the software or any third party software.

24. Other warranty. 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.

25. 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, design right, 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 be 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 therefore.

26. Data Protection. To the extent that personal data are being processed in the course of fulfillment of any Agreement NETAPP and Seller shall comply with all relevant data protection and data secrecy regulations in accordance with the German Federal Data Protection Act ("Bundesdatenschutzgesetz") and other applicable laws. NETAPP hereby notifies Seller that NETAPP automatically transfers all data it receives, including any personal data, to its central administration servers located in the United States of America, which data protection legislation may not ensure an adequate level of protection of personal data, as required under the German Federal Data Protection Act. Seller shall ensure that it will obtain any necessary authorisations, consents and permits to enable NETAPP to transfer any personal data to the United States of America.

27. Governing Law; Venue. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by the laws of Germany. The Courts of Munich shall have exclusive jurisdiction and venue over all controversies in connection herewith. The applicability of the United Nations Convention on Contracts for the International Sale of Goods (CISG) is excluded.

28. 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 telex, confirmed 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.

29. 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, export and environmental controls and laws. 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"). The delivery of Goods or Services to NETAPP is subject to the export licence, agreement or approval from the relevant governmental authority as required under applicable Export Control Regulations. The Seller shall not deliver any Goods or Services to NETAPP without the required export licence, agreement or approval.

The Seller is responsible for obtaining all necessary licences, 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 licence, 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. The Seller informs NETAPP promptly if the necessary licences, 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.

The Seller shall notify NETAPP if the supply to and/or use by NETAPP of any Goods or Services is covered by an appropriate US or other governmental licence, agreement or approval, and provide date, reference and full details of the issuing governmental authority of such licence, 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 Export Controls Regulations and/or required licence, agreement or approval.

Without prejudice to Seller's responsibility to obtain and retain licences, agreements or approvals as set out above, NETAPP will, upon request, at the Seller's expense endeavour to assist the Seller in obtaining licences, 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 licences, 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 in the shipping documentation as well. 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 has to provide assistance to NETAPP for the use of supplied Goods and Services by NETAPP which may include re-export of Goods or Services by NETAPP. This assistance shall include:

Providing all information necessary to obtain any relevant export licence, agreement or approvals;

Providing all information related to export licences, agreements or approvals including copies of export licences, approvals, classification numbers, copies of draft export applications for export licences, statement of origin of the Goods and United States documentation for Goods wholly or partially manufactured outside the United States;

Providing any other reasonable assistance that NETAPP reasonably requires from the Seller.

Neither Seller nor NETAPP shall disclose any information or technologies, partly or fully, acquired under this agreement or export or trade directly or indirectly, any Goods or Services utilizing any such information or technologies, partly or fully, to any country for which the United States Government or any agency thereof at the time of export requires an export licence or other government approval, without first obtaining such licence or approval. 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.

30. Compliance with Regulations on Hazardous Substances and Waste Electrical Engineering Components. Seller shall comply with all applicable laws relating to the restriction on the use of hazardous substances in electrical and electronic equipment ("ROHS") in connection with the manufacture by or for Seller of such Goods, and collection, treatment, recycling and disposal of waste electrical and electronic equipment ("WEEE") in connection with any disposal activities conducted by Seller for such Goods

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

32. Survival. Seller's obligations under Sections 10, 14, 15, 16, 17, 18, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 shall survive any termination of this Agreement.

If any provision of this Agreement is held to be invalid, illegal, or unenforceable, the remaining provisions of this Agreement will not in any way be affected or impaired, and the invalid, illegal, or unenforceable provision will be restated to reflect the original intentions of the Parties under this Agreement as nearly as possible in accordance with applicable law preserving to the fullest extent possible the intent and agreements of the Parties as set forth in this Agreement.

33. Entire Agreement. This Agreement, including all of these terms and modifications, if any, constitutes the exclusive and entire agreement between NETAPP and Seller and supersedes any and all prior discussions, correspondence, understandings and/or agreements pertaining to its subject matter.