

MEMSCAP Terms and Conditions of Sale

The Terms and Conditions of Sale and Software license (collectively "Agreement") contained herein constitute the entire agreement between MEMSCAP Inc., or its subsidiary, as set forth on the document referencing this Agreement, ("MEMSCAP") and you ("Customer"). MEMSCAP will not be bound by any terms of Customer's order. No form of acceptance except MEMSCAP's written acknowledgment sent to Customer, or MEMSCAP's commencement of performance shall constitute valid acceptance of Customer's order. Any such acceptance is expressly conditioned on assent to the terms hereof and the exclusion of all other terms. Customer shall be deemed to have assented to the terms hereof, whether or not previously received, upon accepting delivery of any Product (as defined herein) shipped by MEMSCAP. If tender of these terms is deemed an offer; acceptance is expressly limited to the terms hereof.

1. PRODUCTS

1.1 "Products" shall mean any products or services identified on (a) any of MEMSCAP's proposals, quotations or order acknowledgements, (b) current applicable price lists, (c) any of MEMSCAP's invoices or (d) the document referencing this Agreement, in each case having the MEMSCAP specification applicable to the relevant product.

1.2 Alterations to any Product which MEMSCAP deems necessary to comply with specifications, changed safety standards or governmental regulations, to make a Product non-infringing with respect to any intellectual property or other proprietary interest, or to otherwise improve a Product may be made at any time by MEMSCAP without prior notice to, or consent of, Customer and such altered Product shall be deemed fully conforming.

2. ORDERS: Customer shall purchase Products by issuing a written purchase order signed by an authorized representative, indicating specific Products, quantity, price, total purchase price, shipping instructions, requested delivery dates, bill-to and ship-to addresses, tax exempt certifications, if applicable, and any other special instructions. Any contingencies contained on such order are not binding upon MEMSCAP. All orders are subject to acceptance by MEMSCAP, who will accept or reject orders according to MEMSCAP's then current processes.

3. PRICES: All prices are (a) firm for thirty (30) days from the date of quotation, (b) FCA MEMSCAP factory [Incoterms, 2000] (shipping costs and risk of loss from the FCA point of shipment are the responsibility of Customer) and (c) exclusive of Taxes (as defined herein) and all handling or other charges including without limitation insurance, brokerage fees, transportation or special packaging ("Charges"). All sales are final. Title to Products (excluding services) shall pass from MEMSCAP to Customer upon delivery to the shipping carrier at the FCA point. Any tax or other charge which MEMSCAP is liable to collect on behalf of any governmental authority ("Taxes") as a result of the sale, use or delivery of Products, including without limitation, duties, value added and withholding taxes, is the responsibility of the Customer, and if paid by MEMSCAP shall be charged to Customer as a separate item on the invoice, to the extent possible.

4. TERMS OF PAYMENT: Upon credit approval by MEMSCAP, payment terms shall be net thirty (30) days from the date of the shipment, or in the case of services, net thirty (30) days from the date of completion. MEMSCAP reserves the right to require alternative payment terms including, without limitation, letter of credit or payment in advance. If at any time Customer is delinquent in the payment of any invoice or is otherwise in breach of this Agreement, MEMSCAP may, at its discretion, stop performance of services or withhold shipment (including partial shipments) of any order and may, at its option, require Customer to pre-pay for further performance or shipments. All payments not received when due shall be subject to an additional charge of one and one half percent (1.5%) per month (annual rate 19.56%) of the unpaid amount or the maximum rate permitted by law, whichever is less, until the date of payment. Customer grants MEMSCAP a security interest in Products (excluding services) purchased under this Agreement to secure payment for those Products purchased. If requested by MEMSCAP, Customer agrees to execute financing statements to perfect such security interest. There is no set-off right for the Customer.

5. PERFORMANCE AND SHIPPING: Performance and shipping dates specified or communicated by MEMSCAP to the Customer are approximate dates only and the failure to perform or ship on such dates shall not be considered a breach by MEMSCAP. Delivery shall be deemed made upon transfer of possession to the carrier at the FCA point. All claims for shortage of Products ordered or for incorrect charges must be presented to MEMSCAP within ten (10) days after receipt by Customer of the particular shipment of Products. Customer shall be responsible for all Charges. Unless given written instruction, MEMSCAP shall select the carrier. MEMSCAP shall not be liable for damages or penalty for delay in delivery or for failure to give notice of any delay, and the carrier shall not be deemed to be an agent of MEMSCAP. Notwithstanding any provision of this Agreement, each Product shall be deemed accepted by Customer upon delivery.

6. CANCELLATION: The Customer may not cancel, terminate, suspend performance of, or issue a hold on, any Customer order, in whole or in part, without the prior written consent of MEMSCAP, which consent, if given, shall be upon terms that will compensate MEMSCAP for any loss or damage therefrom, including but not limited to any work in process or services performed, the price of Products shipped to, manufactured for, or held separately for, the Customer, and loss of profits, incurred costs, and a reasonable allocation of general and administrative expenses relating to the Products.

7. LIMITED PRODUCT WARRANTY: Notwithstanding any provision to the contrary (but subject to the operation of any law to the extent it cannot be excluded), MEMSCAP's sole and exclusive obligations to the Customer for any Product (other than Software, as defined and warranted below and services as warranted below) made by MEMSCAP and sold hereunder are to repair returned Product or provide a replacement Product, at MEMSCAP's sole option, for any Product which has been returned to MEMSCAP under the RMA procedure (as defined below) and which in the reasonable opinion of MEMSCAP is determined to be defective in workmanship, material or not in compliance with the MEMSCAP specification applicable to the Product and has in fact failed under normal use on or before one (1) year from the date of original shipment of the Product. All Products, which are experimental Products, prototypes or Products used in field trials, are not warranted. All third parties' Products (including software) sold by MEMSCAP carry only the original manufacturer's warranty applicable to Customer. MEMSCAP will only accept for repair, replacement or credit under warranty Products made by third parties if expressly authorized to do so by the relevant third party. Any Product repaired or replaced under warranty is only warranted for the period of time remaining in the original warranty for the Product. MEMSCAP reserves the right, at its sole option, to issue a credit note for any defective Product as an alternative to repair or replacement. The warranty provided herein shall extend to any Product which has proved defective and has failed through normal use, but excludes and does not cover any Product or parts thereof which has been accidentally damaged, disassembled, modified, misused, used in applications which exceed the Product specifications or ratings, neglected, improperly installed or otherwise abused or is used in hazardous activities. Customer must claim under the warranty in writing not later than thirty (30) days after the claimed defect is discovered. MEMSCAP warrants that services will be performed in a good and workmanlike manner in accordance with standards reasonably applicable to the services, and will reperform any services which MEMSCAP determines are not in compliance with this warranty which Customer brings to MEMSCAP's attention, in writing, on or before thirty (30) days immediately following completion of the applicable service. The Customer must make all claims under these warranties and no claim will be accepted from any third party.

8. RETURN MATERIAL AUTHORIZATION PROCEDURES: MEMSCAP will only accept Products returned under the MEMSCAP Return Material Authorization process ("RMA"). Customer shall obtain a RMA number from MEMSCAP prior to returning any Product and return the Product prepaid and insured to MEMSCAP to the FCA point. Any Product which has been returned to MEMSCAP but which is found to meet the applicable specification for the Product and not defective in workmanship and material, shall be subject to MEMSCAP's standard examination charge in effect at the time which shall be charged to the Customer. Where any Product is returned without an itemized statement of claimed defects, MEMSCAP will not evaluate the Product but will return it to the Customer at the Customer's expense.

9. SOFTWARE LICENSE AND WARRANTY: For software developed by MEMSCAP and contained in any Product and all related documentation (collectively "Software"), MEMSCAP does not transfer ownership (which shall remain solely with MEMSCAP) but only grants the Customer a perpetual, non-exclusive license to use the Software restricted to use related only to the operation of the single Product. Such license is transferable only with the transfer of ownership of the Product in which it is used. Except for making a backup copy or as permitted by law, Customer shall not (a) modify, reproduce, copy, reverse engineer, decompile or disassemble all or any portion of the Software, (b) distribute, market, disclose, rent, lease or create derivative works, or sublicense the use of, the Software to any third party, or (c) permit or authorize

anyone within Customer's reasonable control to do any acts in (a) or (b). MEMSCAP warrants that the Software under normal use and service as originally delivered to Customer will function substantially in accordance with the functional description set out in the Product specification and/or user manual supplied with the Software for a period of ninety (90) days from the date of shipment. MEMSCAP's sole liability and Customer's sole remedy for a breach of this Software warranty shall be MEMSCAP's good faith efforts to rectify the non-conformity or, if after repeated efforts MEMSCAP is unable to rectify the non-conformity, MEMSCAP shall accept return of the Product containing the non-conforming Software and shall refund to Customer all amounts paid in by Customer in respect thereof. This warranty is void if failure of the Software has resulted from accident, misuse, abuse, misapplication or modification. MEMSCAP's Software is provided to non-Department of Defense (DOD) agencies of the United States Government with RESTRICTED RIGHTS and its supporting documentation is provided with LIMITED RIGHTS. Use, duplication, or disclosure by the United States Government is subject to the restrictions as set forth in subparagraph "C" of the Commercial Computer Software - Restricted Rights clause at FAR 52.227-19. In the event the sale is to a DOD agency, the Government's rights in Software, supporting documentation, and technical data are governed by the restrictions in the Technical Data Commercial Items clause at DFARS 252.227-7015 and DFARS 227.7202.

10. LIMITATION OF LIABILITY: EXCEPT FOR THE WARRANTIES STATED HEREIN FOR THE CUSTOMER, NO WARRANTY, CONDITION OR REPRESENTATION, EXPRESS, IMPLIED, ORAL OR STATUTORY, IS PROVIDED TO THE CUSTOMER OR ANY THIRD PARTY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY, CONDITION OR REPRESENTATION: (A) OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, SATISFACTORY QUALITY, OR ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE; (B) THAT THE PRODUCTS WILL BE FREE FROM INFRINGEMENT OR VIOLATION OF ANY RIGHTS, INCLUDING INTELLECTUAL PROPERTY RIGHTS, OF THIRD PARTIES; OR (C) THAT THE OPERATION OF THE SOFTWARE WILL BE UNINTERRUPTED OR ERROR FREE. THIS DISCLAIMER AND EXCLUSION SHALL APPLY EVEN IF THE EXPRESS WARRANTY HEREIN FAILS OF ITS ESSENTIAL PURPOSE. THE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES HEREUNDER AND THE ONLY LIABILITY OF MEMSCAP IS EXPRESSLY LIMITED TO THE TERMS OF THE AGREEMENT. MEMSCAP SHALL NOT BE LIABLE TO THE CUSTOMER, OR ANY THIRD PARTY, FOR ANY OTHER SPECIAL, CONSEQUENTIAL, INCIDENTAL, EXEMPLARY OR INDIRECT COSTS OR DAMAGES, INCLUDING WITHOUT LIMITATION, LITIGATION COSTS, INSTALLATION AND REMOVAL COSTS, LOSS OF DATA, PRODUCTION OR PROFIT ARISING FROM ANY CAUSE WHATSOEVER, REGARDLESS OF THE FORM OF THE ACTION, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH COSTS OR DAMAGES. FOR PURPOSES OF THIS PROVISION, MEMSCAP INCLUDES MEMSCAP'S DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUBCONTRACTORS AND SUPPLIERS. IN NO EVENT SHALL THE TOTAL COLLECTIVE CUMULATIVE LIABILITY OF MEMSCAP, ITS EMPLOYEES, OFFICERS, AGENTS AND DIRECTORS EXCEED THE AMOUNT PAID TO MEMSCAP FOR PRODUCTS FROM WHICH SUCH LIABILITY AROSE DURING THE TWELVE (12) MONTH PERIOD PRECEDING THE DATE OF THE MOST RECENT CLAIM.

11. EXPORT RESTRICTIONS: Customer shall obtain all licenses, permits and approvals required by any government and shall comply with all applicable laws, rules, policies and procedures of the applicable government and other competent authorities. Customer will indemnify and hold MEMSCAP harmless for any violation or alleged violation by Customer of such laws, rules, policies or procedures. Customer shall not transmit, export or re-export, directly or indirectly, separately or as part of any system, the Products or any technical data (including processes and services) received from MEMSCAP, without first obtaining any licence required by the applicable government, including without limitation, the United States Government and/or any other applicable competent authority. Customer also certifies that none of the products or technical data supplied by MEMSCAP under this Agreement will be sold or otherwise transferred to, or made available for use by or for, any entity that is engaged in the design, development, production or use of nuclear, biological or chemical weapons or missile technology.

12. RIGHTS IN INTELLECTUAL PROPERTY AND TOOLING: All right, title and interest in and to any inventions, discoveries, improvements, methods, ideas, computer and other apparatus programs and related documentation, other works of authorship fixed in any tangible medium of expression, mask works, or other forms of intellectual property, whether or not subject to statutory protection, which are made, created, developed, written, conceived or first reduced to practice by MEMSCAP solely, jointly or on its behalf, in the course of, arising out of, or as a result of work performed under an order, and any related tooling, set-up, fitting-up and preparation charges whether or not invoiced, shall belong to and be the sole and exclusive property of MEMSCAP. Customer agrees not to reverse engineer all or any portion of any Product nor allow or assist others to do so. Customer agrees not to remove, alter, erase, deface or cover over any markings on the Product or its packaging.

13 GENERAL TERMS:

13.1 The validity, interpretation and performance of this Agreement shall be governed by and construed under the applicable laws of the State of New York and the United States of America, as if performed wholly within the state and without giving effect to the principles of conflict of laws. The parties specifically disclaim the application of the United Nations Convention on Contracts for the International Sale of Goods. MEMSCAP and Customer hereby irrevocably and unconditionally submit to the courts of the State of New York and all courts competent to hear appeal therefrom.

13.2 MEMSCAP shall not be liable for any delay or failure in performance whatsoever due to acts of God, earthquakes, shortage of supplies, transportation difficulties, labor disputes, riots, war, fire, explosion, epidemics, or other occurrences beyond MEMSCAP's reasonable control or due to unforeseen circumstances.

13.3 Waiver by MEMSCAP of any provision herein must be in writing and shall not be deemed to be a waiver of such provision in the future or of any other provision.

13.4 Customer shall hold confidential and shall not use, disclose or permit others to use any confidential information identified as such in writing or orally by MEMSCAP or information which Customer knows or ought to reasonably know is confidential, proprietary or trade secret information of MEMSCAP, including, without limitation, trade secrets embodied in Products.

13.5 Neither this Agreement nor any rights under this Agreement, other than monies due or to become due, shall be assigned or otherwise transferred by Customer (by operation of law or otherwise) without the prior written consent of MEMSCAP. This Agreement shall bind and inure to the benefit of the successors and permitted assigns of the parties.

13.6 In the event that any of the terms of this Agreement, apart from payment, become or are declared to be illegal by any court of competent jurisdiction, such terms shall be null and void and shall be deemed deleted from this Agreement, but only to the extent that such term is illegal, it being the intent and agreement of the parties that the Agreement shall be deemed amended by modifying such term to the extent necessary to make it legal while preserving its intent or, if that is not possible, by substituting therefor another term that is legal and achieves the same objective. All remaining terms of this Agreement shall remain in full force and effect.

13.7 Neither party has the right or authority to, and shall not, assume or create any obligation of any nature whatsoever on behalf of the other party or bind the other party in any respect whatsoever.

13.8 MEMSCAP neither assumes nor authorizes any third party, person or entity to assume or accept any liability or obligation, or to make any commitment for MEMSCAP with regard to MEMSCAP services or the Products.

13.9 This Agreement constitutes the entire agreement between the parties hereto concerning the subject matter of this Agreement, apart from existing non-disclosure agreements, and there are no understandings, agreements, representations, conditions, warranties, or other terms, express or implied, which are not specified herein. This Agreement may only be modified by a written document executed by authorized representatives of MEMSCAP and Customer.