



**ENERGETIC MATERIALS AND PRODUCTS, INC. GENERAL TERMS AND  
CONDITIONS REV. 02/11/2014  
("EMPI Terms and Conditions")**

**TERMS AND CONDITIONS OF ACCEPTANCE**

- a) Seller shall offer "Quotations" for acceptance within ninety (90) calendar days from the date printed on the face of the Quotation, unless a longer time period is specified on the Quotation. The Quotation is withdrawn if not formally accepted by: (1) a return to Seller of a copy of the Quotation and EMPI Terms and Conditions signed by Buyer, or (2) a "Purchase Order" referencing the Seller's Quotation number and these EMPI Terms and Conditions, within the designated period. No other form of acceptance of a Seller's Quotation is valid or will be recognized or accepted. Seller shall commence work only after receipt of one of the above identified acceptance instruments. Additional or differing terms or conditions proposed by Buyer or included in Buyer's "Purchase Order", attachments thereto, or contract or acceptance are hereby objected to by Seller and shall have no effect unless expressly accepted in writing by Seller.
- b) Seller's acceptance of any purchase order is contingent upon Seller's continuing approval of Buyer's credit. Seller is under no obligation to enter an order acknowledgement and may rescind the Quotation at any time prior to Buyer's unqualified acceptance. Buyer agrees that Seller's acknowledgement of receipt of Buyer's Purchase Order or a signed Seller's Quotation is conditioned upon and subject to the terms and conditions contained herein, and no other terms or conditions shall apply.

**PRICES:**

The prices contained in Seller's Quotation are predicated upon the use of the terms and conditions contained in these "EMPI Terms and Conditions". The use of different or additional terms and conditions may result in higher prices. When a Quotation involves multiple items, the Quotation is non-severable. If the Quotation is made prior to receipt and review by Seller of all applicable specifications and proposed contract documents, prices quoted are subject to revision once missing documents are received. Prices quoted are "Market Prices" (defined as current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors), and are: (i) predicated upon the existence of viable competitors; (ii) for services offered to the general public and sold in substantial quantities in the commercial marketplace; (iii) valid only for the purpose of the Quotation. All pricing details are budgetary in nature, and may not be utilized as a basis for pricing similar, repeat, or subsequent work. All prices are Free on Board Seller's facility, unless otherwise specified. Buyer agrees that all taxes, interest and penalties thereon, if any, relating to the services performed or the products produced or sold hereunder, are to be paid when due by the Buyer.

**BUYER'S OBLIGATIONS AND RIGHTS:**

- a) Unless otherwise specified in Seller's Quotation, the prices in the Seller's Quotation are based upon the timely receipt of all technical information and "Buyer's Property", as defined in Article 0, in correct and operating condition prior to the date such items are required to support the "Project" schedule. Any Buyer supplied technical support labor must be available on the same date. If the Buyer-furnished items and labor are not so provided, the prices and schedule quoted shall be subject to change.
- b) Buyer personnel shall adhere to all Sellers' work rules, safety standards and security requirements that are reasonably provided to Buyer personnel who are on-site at Sellers' facilities. Buyer may inspect Seller's facilities and review Seller's quality controls from time to time upon reasonable notice.

**SELLER'S OBLIGATIONS:**



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- a) The Seller agrees to perform the services quoted in compliance with procedures and specifications furnished by Buyer and specifically incorporated into Seller's Quotation, if any, at the time of quotation, except for deviations as noted by the Seller in the Quotation. In any event or instance not covered by the Buyer's specifications, or a failure of Buyer to timely respond to inquiries by Seller, the Seller reserves the right to perform services in accordance with its standard practices. Seller shall not be responsible for errors or omissions due to the Buyer's supplied or approved procedures, specifications, or other supplied information.
- b) Buyer agrees that Seller's sole obligation is to perform services in a professional and workman-like manner, exercising a reasonable degree of care consistent with industry standard practices.

## **SCHEDULES:**

The estimated schedule and pricing in the Seller's Quotation are based upon on the Seller's current commitments at the time the Quotation is issued, Seller's standard business hours (nine (9) hours per day, Monday through Friday) and the Seller's acceptance of the Buyer's supplied documents and materials. Firm schedules will be acknowledged by the Seller from time to time. ALL WORK SCHEDULE DATES AND DURATIONS ARE APPROXIMATE. All orders are subject to reschedule due to the possibility of Government priority orders superseding a normal schedule. Performance of services is subject to delays caused by acts of God, labor difficulties, shutdowns, the availability of utilities or materials, equipment breakdown, unforeseen engineering problems, government regulations, priorities, preemption, or other causes beyond Seller's control.

## **CHANGE ORDERS, INTERRUPTIONS, AND TERMINATION:**

- a) Seller is not obligated to perform any additional services not specifically referenced in Seller's Quotation. If Seller agrees to perform additional services requested by Buyer's Change Order, the Seller's price and schedule shall be equitably adjusted for the additional work commensurate with the changed requirements, the status of Seller's work in progress at the time of the Seller's receipt of the Buyer's Change Order, and the Seller's written acceptance of the changed work.
- b) Termination or cancellation, whether partial or complete, may be made by Buyer, subject to payment of equitably cancellation charges based upon status of work completed or in process, commitments made and facilities allocated. Seller will make every effort to mitigate such termination charges. Notwithstanding the Service Warranty provisions of Article 0d) regarding the provision of non-conforming services, if Buyer should disagree, for any reason, with the results or conclusions of the Service hereunder, and require additional work for verification, Seller shall be entitled to the cost of the additional work required to verify results.
- c) Seller shall not be liable for any damages arising from delay in the performance of services, if such delay is due to a cause beyond reasonable control of the Seller. Any event beyond the Seller's reasonable control shall not constitute cause for cancellation of Buyer's Purchase Order, but shall extend the Seller's time to perform on a business-day for business-day basis for a period equal to the duration of the delay.
- d) Seller shall have the right to stop work and adjust prices or schedules, or terminate this Agreement, without default, breach or liability, if unforeseen engineering difficulties, impossibility to perform or commercial impracticability is in the sole determination of Seller, detected after the work is begun. In the event of such a termination, Buyer's liability is limited to payment for the work performed to date of termination, and termination costs to cover closure of the Work as equitably agreed between Seller and Buyer.

## **LIMITATIONS OF LIABILITY:**

- a) General: BUYER ACKNOWLEDGES AND UNDERSTANDS THAT THERE ARE HAZARDS ASSOCIATED WITH THE SERVICES AND PRODUCTS PROVIDED UNDER THESE EMPI TERMS AND CONDITIONS THAT THE SELLER CANNOT SAFEGUARD AGAINST. Buyer acknowledges and accepts a responsibility to warn and protect its employees and others exposed to such hazards. Buyer agrees that regardless of the claim, claimant, form or theory of law applied, including, but not limited to negligence, other torts, warranty, strict liability, reckless conduct



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or intentional conduct, under which any legal or equitable action may be brought against Seller by any party, Seller shall not be liable for any damages, costs (including attorney's fees) or expenses, whether direct, indirect, special, consequential, exemplary, punitive or compensatory, including, but not limited to, loss of profits, except as expressly set forth herein, and only when Seller is decided to be responsible for such loss by a court of competent jurisdiction. Seller is neither an insurer nor a guarantor and disclaims all liability in such capacity. Buyer is not a co-insured under Seller's insurance. BUYER ACKNOWLEDGES THAT IF SEEKING A GUARANTEE AGAINST LOSS OR DAMAGE, BUYER SHOULD OBTAIN APPROPRIATE INSURANCE.

- b) Bodily Injury: Each party hereby agrees to indemnify and hold harmless the other party from any form of action, lawsuit, claims, losses, costs (including attorney's fees), expenses or damages arising from the injury, illness or death of Buyer's customers, employees, agents or invitees directly or indirectly related to the services or products supplied by Seller under this Agreement, except to the extent such injury, illness or death is proven to have been caused by, resulted from, or contributed to the negligence of the party seeking to be indemnified.
- c) Property Damage: "Buyer's Property" as defined herein, includes but is not limited to: Buyer's owned, leased, borrowed or hired property furnished to Seller; and all similar property of Buyer's subcontractor's. Transfer of Buyer's Property to Seller's premises shall not constitute a bailment or transfer of title to Seller, and such property shall remain at all times under the stewardship, care, custody, control and primary insurance coverage of the Buyer and Buyer's property management system. Unless otherwise provided for in the quotation, the Seller shall not be liable for maintenance, loss, damage, destruction or theft of Buyer's Property while on Seller's premises, except where a court of competent jurisdiction shall decide that Seller acted with willful misconduct, negligently or with a lack of good faith on the part of the Seller's officers, directors and senior managers. Seller's liability for any claims relating to loss, damage, destruction or theft of Buyer's Property, regardless of claim, form or theory of law applied, shall be strictly limited to the lesser of the amount of reimbursement from Seller's insurance, or the stated unit replacement cost originally provided to the Buyer.
- d) Service Warranty: Seller warrants that the "Services" provided hereunder shall conform to the specifications and express warranties set forth in these EMPI Terms and Conditions and Seller's Quotation, and that at the time of delivery, Seller shall have the right to perform such Services and that the Services and any resulting report or other deliverable shall be delivered upon due payment, free of encumbrances. Services performed by Seller will be performed in a professional and workman-like manner exercising a reasonable degree of care consistent with industry standard practice. Seller will modify or correct any such Services that have not been so performed if written notice of any such failure is given to Seller within ninety (90) calendar days of the date of delivery of any final deliverable for such services. Seller warrants that the Services provided hereunder shall meet the specifications and requirements stated in the Seller's Quotation unless exception is taken to the applicable specification in writing by Seller. No claim of any kind with respect to the conformance of the Services to the foregoing specifications, whether or not based on negligence, warranty, strict liability or any other theory of law, will be greater than the Seller's price of the nonconforming Services in respect to which such claim is made. Seller shall be provided ample opportunity to re-perform the Services at its expense. If the Seller is unable to re-perform the services, Buyer and Seller shall mutually agree upon an equitable adjustment in price, which shall not exceed the Seller's price of the nonconforming Services. The foregoing constitutes the Buyer's exclusive remedies and Seller's sole obligation with respect to any such claim. **THERE ARE NO EXPRESS WARRANTIES BY SELLER OTHER THAN THOSE SPECIFIED IN THIS PARAGRAPH. NO WARRANTIES BY SELLER WILL BE IMPLIED OR OTHERWISE CREATED UNDER THE UNIFORM COMMERCIAL CODE OR ANY OTHER THEORY OF LAW, INCLUDING WITHOUT LIMITATION WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

## TERMS OF PAYMENT:

- a) Where credit terms are extended by Seller to Buyer, all invoices issued by Seller for any public or private contract or subcontract under this Agreement shall be: **net thirty (30)** calendar days from date of receipt of an undisputed invoice. Invoices not paid within thirty (30) calendar days after their due date will be subject to carrying charges.



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Carrying charges shall accrue and be added to the unpaid balance at the rate of **one and one-half percent (1.5%) per month of any overdue unpaid balance**, or the maximum rate permitted by law, whichever rate is less. Payment of Seller's invoices by Buyer shall not be delayed by, or contingent upon, approval or payment by Buyer's customer or any other third party. Failure to make such payments when due shall entitle Seller to discontinue Services without further notice and such failure may result in additional requirements or deposit requirements being imposed before work is resumed. Any Project or order requiring more than thirty (30) calendar days to complete will be billed on a Line Item or Milestone basis. Buyer must separately list the billable Line items or Milestones in the purchase order issued to Seller.

- b) Unless otherwise required by law, if a petition is brought by or against Buyer under any present or future bankruptcy or insolvency laws seeking any reorganization, arrangement, readjustment, liquidation, dissolution or similar relief with respect to Buyer, or if Buyer shall make any assignment for the benefit of creditors, or if a receiver is appointed for Buyer, or if Buyer shall fail to make payments in accordance with these EMPI Terms and Conditions, or if in Seller's opinion Buyer's credit has been impaired, Seller may, at its option, terminate Buyer's credit terms by written notice to Buyer or impose such new payment terms, including cash on delivery, auto pay or a security agreement as it deems adequate to protect its interest. Buyer agrees to pay costs associated with collection of any overdue amount including reasonable attorney's fees. Buyer acknowledges and agrees that until final payment, the Seller shall have a lien as a result of Services rendered on any and all reports or data generated and upon Buyer's Property in Seller's possession.

## **NOTICES:**

Notice shall be deemed effective when received or refused, if sent prepaid to the other party at the address provided on the face of Seller's Quotation.

## **CONFIDENTIAL AND PROPRIETARY INFORMATION:**

- a) The respective proprietary knowledge of Buyer and Seller, as well as all other confidential commercial and operational information of Buyer and Seller, including the contents of contracts, (hereinafter called "Information") shall be treated as confidential information by both Parties. Both Parties shall take all necessary measures to protect the Information from unauthorized access, unauthorized release, copying, transmission or unauthorized use of the Information of the other Party using the same care as they would for their own confidential information. Information that is already publicly available prior to or following its transmission to either Party shall not be subject to these provisions.
- b) Both Parties shall use reasonable care to ensure that employees and third parties receiving access to the Information are subject to the same requirements of confidentiality as identified above.
- c) The Parties shall immediately notify each other in the event that either Party receives any court, government or other official and binding demand for the release of Information, where such notice is not prohibited by the court or government
- d) This Article 0 of this Agreement shall continue in effect for a period of three (3) years after the termination of this Agreement.

## **OWNERSHIP OF INTELLECTUAL PROPERTY:**

- a) Buyer acknowledges that all intellectual property rights relating to Services or Products provided by Seller are solely and exclusively owned by Seller. Any inventions (patentable or otherwise), discoveries, improvements, data, know-how or other results that are conceived, developed, discovered, reduced to practice, or generated by or for Seller, or jointly by Seller and Buyer, will be and will remain Seller's sole and exclusive intellectual property, except where the item or data are specifically identified as deliverable items in the Quotation.



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- b) Seller's sale of Services or Products to Buyer only grants Buyer a limited, non-transferable right, for Buyer to use the Services or Products bought from Seller in accordance with this Agreement. The act of Seller selling Services or Products to Buyer does not grant Buyer a license to Seller's intellectual property, or grant Buyer the right to make or have made any Product or any portion thereof.
- c) Seller shall retain any and all rights in and to the Seller IP, and Buyer shall retain any and all rights in and to the Buyer IP, and nothing set forth in the Agreement shall operate as a transfer or conveyance of such ownership rights.
- d) Buyer shall not remove, modify or destroy any proprietary markings of Seller, including, but not limited to, legends and notice of Seller's ownership and title to Seller IP placed upon or contained within a deliverable, and to reproduce all such markings upon or within authorized copies of a deliverables.

## **THIRD PARTY PROPERTY RIGHTS**

Either party shall immediately notify the other party of any third party industrial property rights of which it becomes aware during the performance of the Project and which could preclude the IP ownership rights as defined in Article 0. The contracting parties shall decide in joint consultation how such industrial property rights shall be taken into consideration in the further performance of the Project.

## **REVERSE ENGINEERING AND CREATION OF DERIVATIVES:**

Buyer shall neither reverse engineer, decrypt, disassemble, nor decompile any Products or Seller IP without Seller's prior written consent, which shall be revocable at any time upon written notice to Buyer. Buyer shall neither make nor create Derivatives to any Products or Seller IP without Seller's prior written consent, which shall be revocable at any time upon written notice to Buyer. Buyer agrees to notify and consult with Seller with respect to any proposed creation of any Derivatives to any Products or Seller IP prior to Buyer's creation of the same.

## **REUSE OF DOCUMENTS:**

All documents and drawings created by Seller for this Project are instruments of service. They are not intended or represented to be suitable for reuse by the Buyer or others on extensions of this Project or any other Project. Any reuse without written verification or adaptation by Seller will be at the Buyer's sole risk and without liability to Seller; the Buyer shall indemnify and hold harmless Seller from all claims, damages, losses and expenses, including attorney's fees, arising out of or resulting from Buyer's reuse of Seller drawings and documents.

## **APPLICABLE LAW AND REGULATIONS:**

- a) Seller's Quotation including these EMPI Terms and Conditions, Buyer's Purchase Order, and Seller's Order Acknowledgement (if given) shall constitute the contract between Buyer and Seller and shall be governed under the laws of the State of Texas without regard to conflict of laws provisions, or under Federal Procurement Law, as applicable.
- b) Seller warrants that all goods and services supplied pursuant to any Purchase Order will have been produced and supplied in compliance with all applicable federal, state and local laws, orders, rules and regulations. Seller also warrants that Seller has not violated any patent or copy write in the performance of any Purchase Order established under this Agreement. Seller shall indemnify Buyer against any liability caused by any non-compliance with this provision.
- c) If a government contract number appears on the face of the Purchase Order, Seller agrees to comply with all applicable flowed-down terms and conditions of such contract, which shall be appended to Buyer's Purchase Order and made a part hereof, and with any other pertinent laws, regulations or Presidential Executive Orders to the extent that they apply to the subject matter of such Purchase Order.

## **ENTIRE AGREEMENT:**



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Seller's Quotation incorporating these EMPI Terms and Conditions, the Buyer's Purchase Order, and the Seller's acknowledgement of the Buyer's Purchase Order (if given) form the contract for the sale and purchase of the Services or materials described in the Seller's Quotation, and supersedes any and all previous instruments or agreements which are hereby made null and void. Notwithstanding the foregoing, the Buyer and Seller may have executed certain separate Non-disclosure Agreements that also form a part of these EMPI Terms and Conditions. No modification or waiver of these EMPI Terms and Conditions in this contract shall bind Seller or Buyer unless written, signed, and accepted by Authorized Representatives of both Seller and Buyer. The contract so formed is valid only if in writing and bilaterally executed by Authorized Representatives of Seller and Buyer. In the absence of a definitive written warrant or statement of authority or statement of limitation of authority, an Authorized Representative shall be any employee, consultant or representative of the party to this Agreement having the apparent authority to legally bind that party.

### **DISPUTES:**

- a) Any dispute between the parties relating to the contract between Buyer and Seller that cannot be resolved with reasonable promptness shall be referred to each party's senior manager in an effort to obtain prompt resolution. Neither party shall commence any action against the other until the expiration of fifteen (15) business days from the date of referral to such senior managers, provided, however, this shall not preclude a party from instituting an action seeking injunctive relief to prevent irreparable damage to such party.
- b) All disputes under this Contract (including any question regarding its existence, validity and termination) which are not disposed of by mutual agreement following good faith negotiations within a period of thirty (30) days from the notification of a dispute shall be finally resolved at Buyer's sole discretion either by submitting the claim to (i) a court in Travis County, Texas or (ii) binding arbitration, before a mutually acceptable arbitrator in the County of Travis, State of Texas, in accordance with the Commercial Arbitration Rules of the American Arbitration Association. In any dispute resolved by the aforementioned methods, the prevailing party shall be entitled to all reasonable attorney's fees and costs.
- c) Buyer acknowledges that it has read these EMPI Terms and Conditions, and has had the opportunity to clarify these EMPI Terms and Conditions with Seller, and is satisfied that it reflects the intent of the parties. Accordingly, the rule of *contra preferendum* shall not apply to the contract formed between Buyer and Seller, and Buyer agrees and acknowledges that any ambiguity, inconsistency or conflict that remains in the contract between Buyer and Seller after its execution by both parties shall not be construed for or against either party.

### **SEVERABILITY:**

If any provisions of these EMPI Terms and Conditions are held invalid by any law and/or regulation, all other provisions hereof shall continue in full force and effect. A waiver of any provision of these EMPI Terms and Conditions shall not constitute a waiver of any other provision. Any failure of Seller or Buyer to enforce a provision of these EMPI Terms and Conditions shall not constitute a waiver of any other provision of these EMPI Terms and Conditions and all other provisions shall remain in full force and effect.

### **ASSIGNMENT:**

Buyer may not assign the Agreement between Seller and Buyer without the prior written consent of Seller.

### **HEADINGS:**

The headings contained herein are for the convenience of the reader and they are not intended to be all-inclusive nor shall they be considered for any other purpose in construing these EMPI Terms and Conditions.

### **ELECTRONIC SIGNATURE VALID:**



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The parties agree that the contract between the Buyer and Seller may be executed: (i) pursuant to the process set forth in the Electronic Signatures in Global and National Commerce Act (15 USC §7001 et seq.), or (ii) in as many counterparts as may be required to reflect all Parties' assent; all counterparts shall collectively constitute a single agreement. A legible facsimile signature that can be authenticated will constitute an original and binding signature of a Party.

This Agreement is made by and between Energetic Materials and Products, Inc. ("Seller"), and "Buyer". The effective date shall be the date of Seller's receipt of either (i) this written interim contract acceptance or (ii) Buyer's Purchase Order, confirming the terms of the Seller's quotation, whichever shall occur first.