

## University of North Dakota

### Standard Purchase Order Terms and Conditions (rev. October 2020)

#### 1. Applicability; Scope

Unless otherwise provided in a written and signed purchase agreement between the University of North Dakota ("UND") and the vendor identified in a UND purchase order ("Seller"), these Standard Purchase Order Terms and Conditions ("Terms") shall apply to all transactions resulting from such purchase orders (each, an "Order").

#### 2. Precedence

In the event of a conflicting term set forth on the face of an Order or in any plans, specifications or other documents incorporated by reference, these Terms shall govern. Acceptance by UND of any offer from Seller is expressly limited to these Terms as may be modified in an Order, and UND hereby objects to and shall not be bound by any additional, different or conflicting terms, whether printed or otherwise, in any other communication between the parties (including on any of Seller's forms, letter or papers).

#### 3. Acceptance and Limitations

An Order shall be deemed accepted by Seller on the earlier of (a) shipment of goods or rendering of services ordered, in total or in part, or (b) within 15 days of issuance by UND, absent written notification to UND of non-acceptance.

#### 4. Changes

UND may make changes to an Order at any time and Seller shall accept such changes. If a change by UND causes an increase or decrease in the cost or time required for Seller's performance, as soon as practicable, the parties shall agree to an equitable adjustment of the purchase price and/or delivery schedule, as applicable, and incorporate such changes as a revision change to the Order. No other form of notification or verbal agreement shall be binding on UND.

#### 5. Termination for Convenience

UND may, by written notice to Seller, terminate an Order, or any part thereof, for any or no reason, for UND's convenience. Upon notice of termination, Seller shall immediately stop all work and cause its suppliers and/or subcontractors to stop all work in connection with the Order. If UND terminates for convenience, UND shall pay Seller for goods and services accepted as of the date of termination, and, subject to Section 8 below, for Seller's actual, reasonable, out of pocket costs incurred directly as a result of such termination. UND shall have no responsibility for work performed after Seller's receipt of notice of termination.

#### 6. Termination for Cause

UND may, by written notice to Seller, terminate an Order, or any part thereof, if Seller breaches any of the terms and conditions of the Order, becomes insolvent or files for bankruptcy protection. By way of example, (a) failure by Seller to make timely, complete and conforming delivery of goods and services, or (b) breach of the representations or warranties set forth in the

Order, shall entitle UND to terminate the Order for cause. If UND terminates for cause, UND shall have no payment obligations to Seller. Should a court of competent jurisdiction subsequently determine that UND's termination for cause was wrongful or unjustified, then such termination shall be automatically considered a termination for convenience under Section 5 above and Seller shall have all rights under that provision, but no other rights or claims for damages.

#### 7. Damages

Without limiting UND's rights and remedies at law or in equity, UND reserves the right to charge Seller for any loss, expense (including reasonable attorneys' fees) or damage sustained as a result of Seller's failure to deliver conforming goods or services or other breach of an Order, including without limitation, expenses incurred in connection with UND's purchase of substitute goods, incidental damages and consequential damages resulting from Seller's failure or breach.

#### 8. Limitation of UND's Liability

UND shall not be liable to Seller, its employees, representatives, agents, suppliers, or subcontractors for any anticipated profits or incidental damages (except to the extent expressly provided in Section 5 above) or consequential damages. In any event, UND's liability for any claim arising directly or indirectly under or in connection with an Order shall be determined solely in accordance with Chapter 32-12.2 of the North Dakota Century Code, and subject to the conditions and limitations set forth therein. UND shall have no liability for penalties of any kind.

#### 9. Choice of Law; Venue for Disputes

All matters arising under or related to an Order shall be construed and enforced in accordance with the laws of the State of North Dakota, without regard to conflicts of law rules. Any lawsuit arising hereunder shall be brought exclusively in the Northeast Central Judicial District Court of North Dakota. Neither party waives its right to a jury trial.

#### 10. Compliance with Laws

Seller represents and warrants that, in the production and sale of goods to be delivered pursuant hereto, and in the provision of services hereunder, Seller has complied with all applicable federal, state, and municipal laws and regulations, including, without limitation, (a) all such laws and regulations pertaining to health, safety and environmental standards, (b) all such laws and regulations pertaining to design, manufacture, testing, labeling, and transportation of such goods, and (c) all such laws and regulations pertaining to affirmative action, nondiscrimination, and equal opportunity, including without limitation, the requirements of the Fair Labor Standards Act of 1938, as amended, and the rules and regulations of the Secretary of Labor issued pursuant to Executive Order Number 11246 of September 24, 1965.

#### 11. Conduct of Personnel

Seller shall to the fullest extent permitted under applicable law be responsible for the acts and omissions of its employees, agents, and subcontractors (collectively, "Seller's Personnel"). While at any UND location, Seller's Personnel shall comply with all reasonable requests, standard rules, and regulations of UND communicated to Seller regarding personal and professional conduct, including without limitation any security or privacy requirements, and shall otherwise conduct themselves in a businesslike manner.

## 12. Confidentiality

Each party shall preserve in strict confidence all confidential, sensitive or proprietary information received from the other party ("Confidential Information"), whether or not marked "Proprietary" or "Confidential," and whether oral or written, using the same degree of care as it takes to preserve and safeguard its own confidential or proprietary information (but in no event less than a reasonable degree of care.) Provided, in order to be deemed Confidential, information must qualify for at least one exception to North Dakota's open records laws. Confidential Information shall not include information that a party can demonstrate by written evidence was publicly available at the time of disclosure or was independently developed by that party without reference to Confidential Information. A party will not (i) disclose or cause to be disclosed at any time any Confidential Information obtained from the other party, or (ii) use or cause to be used any of such Confidential Information for any purpose, except as required in the performance of the services required by an Order. Each party represents, warrants and covenants that it shall maintain physical, electronic and procedural safeguards designed to (1) insure the security, integrity and confidentiality of all Confidential Information, (2) protect against any anticipated threats or hazards to the security, integrity or confidentiality of Confidential Information, and (3) protect against unauthorized access to or use or disclosure of Confidential Information.

## 13. Discount Terms

If cash discounts are offered and identified, such discount periods will be computed from the date of delivery of the goods or services ordered; or the date of UND's receipt of a correct and proper invoice, whichever is later. Payment or other terms identified on the Seller's invoice which are contrary to those of an Order shall have no force and effect unless acted upon or approved in writing by UND. UND will make every effort to pay invoices within the terms prescribed in the Order, however, in no event will UND be obligated to pay late fees or penalties for invoices paid outside the Order terms. Unless otherwise excepted from North Dakota's open records law, pricing information and discounts will be subject to public disclosure.

## 14. Entire Agreement

An Order represents the entire agreement between Seller and UND with respect to the goods and services described in the Order.

## 15. Freight Charges

Unless otherwise specified in an Order, delivery shall be FOB destination. Except as expressly provided in the Order, packing, shipping, unloading, assembling and installation are included in the purchase price and UND shall not be charged any additional amounts for such services. All shipments on which freight charges are due must be prepaid. Collect shipments cannot be accepted.

## 16. Government Contracts

If an Order [as denoted on the face of the Order] is made with funds obtained by UND directly or indirectly from a Federal grant or contract, Seller shall comply with any additional terms provided by UND.

17. Inspection; Quality

UND shall have the right to inspect and test all goods and/or services delivered under an Order. Neither receipt nor payment for goods and/or services shall constitute acceptance. UND may reject any or all items that are nonconforming, as determined by UND's sole reasonable judgment. UND's failure to inspect shall not relieve Seller of any of its responsibilities. Material shipped in quantities in excess of UND's stated requirements may be returned at Seller's expense. If goods are rejected, they will be held at Seller's risk and expense and Seller shall bear the risk of loss or damage to such goods until received by Seller. All products delivered shall be newly manufactured and the current model, unless otherwise specified.

18. Insurance

Seller shall maintain, at a minimum, workers compensation insurance as required the the laws of any jurisdiction in which Seller performs all or part of an Order, as well as general liability insurance in commercially reasonable amounts and coverages. Seller shall, upon request, provide to UND evidence of such insurance.

In lieu of general liability insurance, UND shall at all times remain a participant in the North Dakota state risk management fund.

19. Intellectual Property Indemnity

Seller shall indemnify, defend and hold UND harmless against all claims, liabilities, losses, damages, costs and expenses (including legal fees) resulting from or arising in connection with any actual or claimed infringement of any patent, copyright, mask work, trademark, trade secret or other intellectual property, proprietary or contractual right of any third party, with respect to the goods or services provided under the Order. Any defense tendered to UND hereunder shall comply in all respects with North Dakota law, including without limitation provisions concerning the appointment of legal counsel.

20. Invoice Payments; Availability of Funds

Unless otherwise specified in the purchase order, Payment terms will be Net 45. All quotes and amounts paid under an Order shall be in U.S. Dollars. Seller shall bear the risk of fluctuation in foreign exchange rate. UND shall have no obligation to pay any amount prior to UND's receipt of a correct and proper invoice for such amount prepared in accordance with the Order. Except as expressly provided in the Order, payment shall not be due until final acceptance by UND. UND shall have the right to reduce and set off against amounts payable under the Order any indebtedness or other claim which UND may have against Seller, however and whenever arising. Seller agrees to accept checks drawn on a UND account as well as purchasing cards.

Financial obligations of UND payable after the two-year period ending on June 30 of any odd-numbered year are contingent upon funds for that purpose being budgeted and appropriated or otherwise made available. If an Order is funded in whole or in part with federal funds, it is subject to and contingent upon the continuing availability of federal funds for the purposes hereof. UND represents that it has set aside sufficient funds to make payment for goods delivered in a single installment, in accordance with the terms of the Order.

21. Force Majeure

Neither party shall be held responsible for delay or default caused by fire, riot, terrorism, acts of God, or war if the event is beyond the party's reasonable control and the affected party gives notice to the other party promptly upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default.

22. No Assignment

Seller may not assign, transfer or subcontract any part of an Order without the prior written consent of UND, and any assignment in violation of this provision shall be null and void.

23. Notice

Except for notice of claims for money damages against UND or the State of North Dakota, which shall be governed by applicable North Dakota statutes, any notices or communications to UND required by or related to an Order shall be emailed to UND at: [und.pps@und.edu](mailto:und.pps@und.edu). The Order number shall be included in the subject line and/or in the body of the email.

Any communication to the Seller required by or related to an Order shall be delivered to Seller at an address or email address provided by Seller prior to Order issuance, if any, or to an address or email address maintained by Seller for such purposes as may be communicated by Seller to the public.

24. Packing

UND's purchase order number and specific delivery location must appear on the outside of each package and on all packing slips, invoices, and allied papers. A packing slip must be included with each shipment. Except as expressly provided in an Order, Seller shall pack, mark and prepare all shipments to meet the carrier's requirements, at Seller's expense.

25. Proprietary Rights

Seller agrees that all work created by Seller solely or in collaboration with others in the course of performing services under this Agreement or designing or developing materials to be delivered, including all intermediate and partial versions ("Work Product") shall automatically be the sole property of UND upon their creation or (in the case of copyrightable works) fixation in a tangible medium of expression, and UND shall own all rights, including all proprietary and intellectual property rights, title and interest. Seller hereby assigns to UND all of its right, title and interest in and to all of the Work Product and all copies of any of the foregoing, including, without limitation, all copyright and other proprietary rights thereto throughout the world (and all renewals and extensions). In addition to the warranties set forth in Section 32 below, and insofar as Work Product includes content sourced from one or more third-parties, Seller warrants that it has obtained sufficient rights and permission in such content to deliver such Work Product to UND, and that any licenses are fully transferable.

26. Risk of Loss

Seller shall bear the risk of loss of or damage to all goods purchased pursuant to an Order until they are received by UND.

## 27. Severability

If any provision of an Order is determined to be invalid, illegal or unenforceable, the remaining provisions of this Agreement remain in full force, if the essential terms and conditions of this Agreement for each party remain valid, binding, and enforceable.

## 28. Tax Exemption

UND is generally exempt from federal, state and local taxes for purchases made in furtherance of its exempt mission. Seller shall not charge UND for any taxes in connection with an Order to the extent permitted by law. Without limiting the foregoing, UND will not be responsible directly or indirectly (including by reimbursement to Seller) of any property taxes assessed on any leased property under the Order. Seller is familiar with and shall comply with the requirements applicable to claiming such exemptions. UND shall provide copies of exemption certificates upon request.

## 29. Timely Delivery

Time is of the essence in fulfillment of an Order. Shipment and delivery shall be made in accordance with the Order; provided, that if not addressed in the Order, delivery shall be made within ten (10) days of UND's issuance of the Order. UND may, at its option, and without limitation of any of its other rights, cancel any unfilled part of the Order if complete, conforming delivery is not made within the times specified. UND is not required to accept partial or incomplete delivery. Acceptance of any part of the Order shall not bind UND to accept any future shipments.

## 30. Use of UND's Name

Seller agrees not to use (a) UND's name, (b) the name of any employee, student or agent of UND, or (c) any trademarks, service marks or trade names owned or controlled by UND, in any sales, promotional, advertising or other publication, without the express prior written permission of UND. In no event shall Seller or its employees, agents or subcontractors represent themselves as employees or agents of UND.

## 31. Waiver

No waiver by UND of any provision of an Order or any breach hereunder shall be deemed a waiver of any other provision or subsequent breach, nor shall any such waiver constitute a continuing waiver. Delay or failure of UND to insist on strict performance of any provision of the Order or to exercise any rights or remedies hereunder shall not be deemed a waiver.

## 32. Warranties

Seller warrants that all material, work product, and merchandise supplied under the Order (a) shall strictly conform to all specifications, drawings, samples, or other descriptions furnished to and approved by UND, (b) shall be fit and serviceable for the purpose intended, as agreed to by UND and Seller (c) shall be of good quality and free from defects in materials and workmanship, (d) shall be new and not refurbished or reconditioned, unless expressly agreed in writing by UND, and (e) subject to the provision of Section 25 above, shall not infringe any patent, copyright, mask work, trademark, trade secret or other intellectual property, proprietary or contractual right of any third party. In addition, Seller warrants that UND shall have good and marketable title to all goods (including all components thereof) purchased by UND pursuant to

the Order, free of all liens and encumbrances and that no licenses are required for UND to use such goods. With respect to services, Seller warrants that all services shall be provided in a professional and workmanlike manner, with a degree of skill and care consistent with current, good and sound professional procedures. Neither receipt of material, work product or merchandise nor payment therefore shall constitute a waiver of this provision. If a breach of warranty occurs, UND may, in its sole discretion, and without waiving any other rights, return for credit or require prompt correction or replacement of the nonconforming goods or services.

### 33. Safety Information

All chemicals, equipment and materials proposed and/or used in the performance of an Order shall conform to the requirements of the Occupational Safety and Health Act of 1970. Supplier shall furnish all Material Safety Data Sheets (MSDS) for any regulated chemicals, equipment or hazardous materials at the time of delivery.

### 34. Independent Contractor

Seller shall perform its duties hereunder as an independent contractor and not as an employee. Neither Seller nor any agent or employee of Seller shall be deemed to be an agent or employee of UND for any purpose. Seller and its employees and agents are not entitled to unemployment insurance or workers compensation benefits through UND and UND shall not pay for or otherwise provide such coverage for supplier or any of its agents or employees. Seller shall not have authorization, express or implied, to bind UND to any agreement, liability or understanding, except as expressly set forth herein.

### 35. Background Checks

Seller acknowledges that Seller's activities may involve heightened risks as a result of access or exposure by Seller's employees or agents to one or more Sensitive Environments. Seller expressly acknowledges that Seller shall take all commercially reasonable measures to mitigate any such risks, which measures may include but are not limited to conducting criminal history checks, financial background checks, or reference checks on employees or agents who will have access to one or more Sensitive Environments. For purposes of this provision, Sensitive Environment means any situation where Seller's employees or agents: (a) are engaged in supervision of or exposure to minors or other vulnerable populations; (b) have access to UND's Confidential Information; (c) have access to UND's information technology systems; or (d) are engaged in activities that involve unique or specialized risks.