

**EMCORE PHOTOVOLTAICS  
A DIVISION OF EMCORE CORPORATION  
STANDARD TERMS AND CONDITIONS**

**REVISED OCTOBER 2012**

**THESE TERMS GOVERN ALL SALES OF PRODUCTS AND SERVICES BY EMCORE CORPORATION (“EMCORE”), WHETHER MADE PURSUANT TO ORAL OR WRITTEN PURCHASE ORDERS. NO PURCHASE ORDER SHALL CONSTITUTE A CONTRACT UNLESS AND UNTIL ACKNOWLEDGED IN WRITING BY EMCORE.**

**1. GOVERNING TERMS**

EMCORE’s acceptance of any purchase order from Buyer is subject to the express condition that Buyer agrees to these terms, which shall govern unless Buyer notifies EMCORE of any exceptions within five (5) days after their receipt. Failure to timely object, or acceptance of delivery, shall constitute Buyer’s agreement with these terms. Any contrary, inconsistent, or additional provisions contained in Buyer’s purchase order are expressly rejected.

**2. PRICING**

Unless otherwise agreed upon in writing, the pricing contained in EMCORE’s most recent price quote shall apply. Notwithstanding any contrary provision, EMCORE’s prices do not include any shipping, handling, insurance, taxes, duties, excises, gross receipts tax, or any other government-imposed charges. Buyer shall be responsible for all such additional charges, as applicable.

**3. SCHEDULE**

Any delivery and/or performance schedule milestones shall be jointly documented in Buyer’s purchase order and EMCORE’s order acknowledgment. In the event of any inconsistency, the schedule contained in EMCORE’s order acknowledgment shall govern. Delivery or performance within fifteen (15) days before or after a milestone date shall be considered timely.

**4. CANCELLATION**

Orders for off-the-shelf goods are non-cancelable within sixty (60) days of the original milestone date. Orders for custom goods or services may be canceled only upon mutual agreement of the parties; provided that Buyer shall be responsible for EMCORE’s incurred costs (including standard overhead rates and reasonable profit) through the date of cancellation.

**5. RESCHEDULING**

Milestone dates may not be rescheduled by Buyer within thirty (30) days of the original milestone date. Orders within sixty (60) days, but more than thirty (30) days, of the original milestone date may be rescheduled by Buyer for up to thirty (30) days after the original milestone date.

**6. CHANGES**

For custom work performed in accordance with an agreed-upon Statement of Work (“SOW”), including without limitation work performed pursuant to Buyer’s designs or technical specifications, any mutually agreeable changes to an SOW shall be documented in a written contract modification. EMCORE shall be entitled to an equitable price increase for all SOW changes, based upon any increased costs (including standard overhead rates and reasonable profit) incurred for such changed work.

**7. DELIVERY**

FCA, EMCORE’s manufacturing facility (Incoterms 2010). Title and risk of loss pass to Buyer upon delivery to the freight carrier.

**8. ACCEPTANCE**

Buyer shall accept goods or services purchased hereunder within ten (10) days after delivery or performance, unless Buyer provides a detailed, written rejection notice to EMCORE during such acceptance period. Buyer’s grounds for rejection shall be limited to: (a) excess quantity (except where due

to EMCORE's standard lot sizes); (b) deliveries made more than fifteen (15) days before a milestone date; and (c) non-compliance with EMCORE's specifications or the SOW, as applicable. All other claims by Buyer shall be addressed under the Warranty provision below.

## **9. PAYMENT**

All orders shall be paid by Buyer within thirty (30) days after receipt of an accurate invoice. Late payments shall be subject to a 1% monthly interest charge (or the maximum rate allowed by law, if less).

## **10. WARRANTY**

Subject to the qualifications below, EMCORE warrants that its goods and/or services shall comply with EMCORE's specifications or the SOW, as applicable, and shall be free from defects in title, material, and workmanship, for a period of twelve (12) months after delivery and/or performance.

**a. General Exceptions.** This warranty does not apply if EMCORE's reasonable examination determines that: (i) the goods or services have been modified or subjected to operating conditions or unapproved test protocols that are outside of, or inconsistent with, EMCORE's specifications or the SOW, as applicable; (ii) the non-conformity is the result of misuse, abuse, unauthorized alteration, accident, or improper testing, installation, use, storage, transportation or handling; (iii) any original identification markings have been removed, defaced, or altered; or (iv) the goods were designated by EMCORE as non-production units (e.g., design verification, sample, pre-production, developmental, prototype, incomplete, or fallout units). All warranty claims are subject to verification by EMCORE.

**b. Special Exceptions.** None.

**c. Remedies.** EMCORE's warranty liability is solely and exclusively limited to replacement, re-performance, repair, or purchase price credit (at EMCORE's option) for any defective goods or services during the warranty period. Buyer must provide EMCORE with written notice of any warranty claim within thirty (30) days after discovery, or such claim shall be waived. Any warranty claims hereunder shall be made by Buyer. All warranty returns shall be in accordance with EMCORE's standard RMA policy.

**d. Limitations.** These warranties are the only warranties made by EMCORE, and shall not be enlarged by representations, descriptions, course of dealing, trade usage, rendering of technical advice, service, samples, models, or otherwise. Buyer shall be responsible for any inconsistent warranty obligations made by Buyer to its customers or users. EMCORE MAKES NO OTHER WARRANTIES EXPRESS, IMPLIED, OR STATUTORY, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE OR MERCHANTABILITY.

## **11. RESERVATION OF IP RIGHTS**

The sale of goods or services hereunder does not convey any license under any patent, trademark or service mark, copyright, trade secret, or any other intellectual property ("IP") right of EMCORE. Any IP produced, conceived, or otherwise developed by EMCORE hereunder shall be the sole property of EMCORE, and Buyer shall have no ownership or other rights in such IP. EMCORE expressly reserves all of its IP rights.

## **12. IP INDEMNITY**

Subject to the qualifications below, EMCORE shall defend, indemnify, and hold harmless Buyer against any claim that the goods or services purchased and paid for hereunder infringe a third party's U.S. IP rights.

**a. Exceptions.** This indemnity shall not apply to any infringement arising out of EMCORE's compliance with Buyer's specifications, designs, or instructions, or use of Buyer's IP licensed to EMCORE (including without limitation any implied license of Buyer's IP regarding the goods or services purchased hereunder). Buyer shall defend, indemnify, and hold harmless EMCORE against any claim that Buyer's specifications, designs, or instructions, or Buyer's IP licensed to EMCORE, infringe a third party's U.S. IP rights.

**b. Limitations.** Buyer shall immediately provide EMCORE with written notice of any actual or threatened third party infringement claim regarding the goods or services purchased hereunder. Failure to timely provide such notice shall relieve EMCORE of any indemnity obligation hereunder. EMCORE shall have sole control over the defense to such third party infringement claim, and Buyer shall reasonably cooperate with EMCORE (at EMCORE's expense) in connection with such defense.

**c. Remedies.** In the event that the goods or services purchased hereunder are determined to be infringing, or in EMCORE's reasonable determination are likely to be found infringing by a court of competent jurisdiction, then EMCORE shall (at its sole discretion) modify or replace the goods, or re-perform the services, in a non-infringing (but otherwise conforming) manner, or procure any required license. If none of these alternatives are reasonably available, EMCORE will refund to Buyer the amounts actually paid for the infringing goods or services.

### **13. PRODUCT LIABILITY INDEMNITY**

Subject to the qualifications below, EMCORE shall defend, indemnify, and hold harmless Buyer against any claim that the goods or services purchased and paid for hereunder have caused physical damage to tangible property (excluding any indirect, special, consequential, punitive or incidental damages arising from such physical damage) or any personal injury (including death) due to EMCORE's negligent design or manufacture of such goods or performance of such services.

**a. Exceptions.** This indemnity shall not apply to any claim where EMCORE's goods or services: (i) have not been used in accordance with EMCORE's instructions for their intended purpose; (ii) have been altered or otherwise modified without EMCORE's approval; or (iii) are not the actual and proximate cause of the claimed injury.

**b. Limitations.** Buyer shall immediately provide EMCORE with written notice of any actual or threatened product liability claim regarding the goods or services purchased hereunder. Failure to timely provide such notice shall relieve EMCORE of any indemnify obligation hereunder. EMCORE shall have sole control over the defense to such third party product liability claim, and Buyer shall reasonably cooperate with EMCORE (at EMCORE's expense) in connection with such defense.

### **14. CONFIDENTIALITY.**

The parties' existing Non-Disclosure Agreement ("NDA") shall apply to the transactions and resulting work performed hereunder. The parties agree that the disclosure period of such NDA shall be automatically extended to cover any and all purchases hereunder. The parties shall jointly cooperate regarding any press releases or other publicity relating to the parties' business relationship or transactions hereunder.

**a. Interim Coverage.** If the parties do not have an existing NDA, the parties shall negotiate in good faith to promptly establish such an NDA. In the interim, any pricing, specifications, documentation, data, or other technical or business information of EMCORE provided to Buyer shall be deemed proprietary to EMCORE, and shall be treated as confidential by Buyer. EMCORE retains all IP rights in such information, which Buyer shall not disclose to any third party or use for any purpose other than implementing transactions hereunder. Buyer shall return all such information to EMCORE upon written request.

**b. Protection of Trade Secrets.** Buyer acknowledges that EMCORE's products are based, in part, upon valuable trade secrets. Buyer shall not (directly or indirectly) reverse engineer, decompile, or disassemble EMCORE's products without EMCORE's prior written consent.

### **15. GOVERNING LAW**

These terms and any associated transactions shall be governed by the laws of the State of New Jersey, USA, without application of any conflict of laws provisions. The parties expressly disclaim any application of the U.N. Convention on the International Sale of Goods.

### **16. NO CONSEQUENTIAL DAMAGES**

EXCEPT FOR ANY CONFIDENTIALITY BREACH, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY PUNITIVE, EXEMPLARY, OR CONSEQUENTIAL DAMAGES, ANTICIPATED OR LOST PROFITS, INCIDENTAL DAMAGES, LOSS OF TIME, OR OTHER INDIRECT LOSSES OR EXPENSES THAT ARISE FROM ANY CAUSE HEREUNDER, REGARDLESS OF THE FORM OF THE ACTION, WHETHER IN TORT (INCLUDING NEGLIGENCE), CONTRACT, STRICT LIABILITY OR OTHERWISE, AND REGARDLESS OF WHETHER THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH CONSEQUENTIAL DAMAGES.

### **17. LIMITATION OF LIABILITY**

NOTWITHSTANDING ANY CONTRARY PROVISION, IN NO EVENT SHALL EMCORE'S TOTAL LIABILITY (TOGETHER WITH THE LIABILITY OF ITS OFFICERS, DIRECTORS, EMPLOYEES, AND

AGENTS) EXCEED THE PRICE ACTUALLY PAID BY BUYER FOR THE GOODS AND/OR SERVICES UNDER THE APPLICABLE PURCHASE ORDER THAT GIVES RISE TO SUCH LIABILITY.

#### **18. FORCE MAJEURE**

EMCORE shall not be responsible for any failure to achieve a milestone date due to events that are outside of EMCORE's reasonable control, including without limitation: (a) fires, floods, or other natural disasters or casualties; (b) wars, riots, civil commotion, embargoes, governmental regulations, or martial law; (c) inability to obtain raw materials or subcomponents from EMCORE's usual sources of supply; (d) transportation shortages or delays; (e) strikes or other labor troubles; or (f) Buyer's failure to cooperate or otherwise perform its obligations under the SOW, as applicable.

#### **19. EXPORT COMPLIANCE**

Each party shall: (a) comply with all applicable U.S. export laws and regulations; (b) cooperate with the other party in connection with any U.S. export compliance activities; and (c) indemnify and hold harmless the other party for any actual or alleged violation of applicable U.S. export laws and regulations.

#### **20. SECURITY**

EMCORE reserves the right to require advance payment, or other reasonable security, if the financial responsibility of Buyer is or becomes unsatisfactory to EMCORE. EMCORE shall retain a purchase money security interest in any goods purchased hereunder, including without limitation any resulting proceeds. Upon request, Buyer shall execute any financing statements and provide documentation reasonably required to perfect EMCORE's security interest, and authorizes EMCORE to sign and file such documents on Buyer's behalf.

#### **21. SEVERABILITY**

If any provision shall be found illegal or unenforceable by a court of competent jurisdiction, the validity of the remaining provisions shall not be affected thereby.

#### **22. DISPUTE RESOLUTION**

All disputes arising under this Agreement shall be submitted to binding arbitration in accordance with the Commercial Rules of the International Chamber of Commerce. The proceeding shall be heard in English and held in Albuquerque, New Mexico, USA and decided by one arbitrator mutually agreed upon by the parties in accordance with the aforementioned Rules. The costs of arbitration, including administrative and arbitrators' fees, shall be shared equally by the parties. The arbitration award shall be final and each party shall comply in good faith to the entry of the arbitrator's award in any court having jurisdiction. If judicial enforcement or review is sought, then the prevailing party shall be entitled to costs and reasonable attorney's fees.

#### **23. INTEGRATION**

These terms represent the final and complete agreement of the parties. No modification shall be binding on EMCORE unless made in writing and signed by an officer of EMCORE.