

**TERMS AND CONDITIONS**

**1. DEFINITIONS.** The parties agree that initially capitalized terms defined in the Agreement and each applicable Exhibit have the meanings assigned to them.

**2. PRODUCTS**

**2.1 Company Obligations.** Company will appoint an individual as a project manager to coordinate delivery of each Product to be supplied hereunder. Supplier will direct all performance inquiries relating to such items to such site McKinstry manager.

**2.2 Supplier Obligations.** Supplier will provide Products that strictly conform to the requirements of this Agreement in accordance with the schedule requirements of the Company. Products supplied shall be in compliance with all laws, rules, regulations, requirements, orders, notices, determinations and ordinances of any federal, state or municipal authority with jurisdiction over any Location in the Portfolio (collectively, "Applicable Laws"), all Company or Customer requirements and procedures, and the requirements of insurers, insurance rating organizations, Boards of Fire Underwriters or similar bodies which relate to any Location in the Portfolio (collectively, "Requirements").

**2.3 Change in Scope of Supply.** Any change in the scope of supply requires written agreement by both parties.

**3. TERMS, FEES AND PAYMENT**

**3.1 Terms.** Unless otherwise specifically provided in this Supply Agreement, the Products shall be delivered on an F.O.B. destination basis to locations designated by Company. Supplier shall bear all risk of loss or damage to the Products until actually delivered to and accepted by Customer.

**3.2 Submission of Invoices; Customer Payments.** Supplier shall submit invoices to Company for the fees for applicable Products in the amounts and on the purchase order. All payments will be made directly by Customer to Supplier in United States Dollars within 45 days after the date of the applicable invoice. Supplier acknowledges that Customer is solely responsible for payments and that it shall have no claim or legal recourse against Company in the event of non-payment by Customer. Notwithstanding the foregoing, if Company or Customer disputes in good faith any amounts invoiced by Supplier, Customer may withhold payment of any such amounts so long as, on or before the date such payment would otherwise be due, Customer or Company provides written notice to Supplier, describing the basis of Customer's withholding of payment, whereupon the parties shall resolve the matter pursuant to Article 6 below. In such event, pending settlement or final adjudication of any such dispute, no such withholding by Customer shall be a default hereunder and shall not affect Supplier's obligations to continue providing the Product or Products.

**3.2 Taxes.** The amounts payable to Supplier under this Agreement exclude taxes, however designated, levied or based on this Agreement (excluding taxes based on Supplier net income) including, without limitation, any sales, use and any other taxes (collectively "Taxes"). Supplier agrees to pay and be responsible for all Taxes and will indemnify Company or Customer (under Section 5.2) for any and all Taxes (including any associated penalties and interest) assessed against Company or Customer.

**4. INTELLECTUAL PROPERTY**

**4.1 Company Assets.** Except as licensed in this Agreement, Company retains all right, title and interest in and to its intellectual property, data and other materials ("**Company Assets**") provided to Supplier in connection with the Products.

**4.2 Confidentiality.** In the event that Company finds it necessary to share confidential information of Company or Customer with Supplier, Supplier agrees to be bound by the Confidentiality Agreement attached hereto as Exhibit A.

**5. WARRANTIES; INDEMNITY; SAFETY; LIMITATION OF LIABILITY**

**5.1 Relating to the Products.** Supplier warrants that its Products: (a) will be new, free of defects in design, workmanship or material, and in merchantable condition; (b) will be fit for their intended purpose; (c) will comply with all applicable laws and regulations; (d) will not violate any agreement between Supplier and any third party; and (e) will not infringe any patent, copyright, trade secret, trademark, privacy or other proprietary right of any third party. These warranties are conditions of this Agreement and shall survive delivery, inspection, acceptance or payment by Company. These warranties shall also survive the termination of this Agreement.

**5.2 Indemnity Obligations.** To the maximum extent permitted by Applicable Laws, Supplier shall defend (with counsel reasonably acceptable to Company and Customer), indemnify and hold Company, Customer and their respective officers, directors, permitted assigns, employees, and agents harmless from and against, and shall cause Company and Customer to be reimbursed for all losses, damages, liabilities, claims, judgments, settlements, fines, costs, and expenses (including attorneys' fees and expenses) incurred by reason of or arising out of or in connection with: (a) any breach or alleged breach of Supplier's obligations hereunder, including without limitation claims alleging defects in Supplier's Products; (b) any acts of Supplier beyond the scope of its authority under this Agreement; (c) any negligence or willful

misconduct of Supplier, its employees, agents and lower-tier suppliers or subcontractors; or (d) any property damage or bodily injury to the extent caused by any act or omission of Supplier, its employees, agents and subcontractors. The foregoing indemnity obligations shall not be exclusive and shall be in addition to such other rights and obligations as may otherwise be available under Applicable Laws.

**5.3 Warranty Disclaimers.** Company makes no warranties, express or implied and expressly disclaims any implied warranties of title or non-infringement or accuracy of information.

**5.4 Site Safety.** In the event that it is necessary for Supplier's employees or agents to enter upon the project site to perform Supplier's obligations hereunder, Supplier agrees to comply with Company's General Safety Rules.

**5.5 Exclusion of Certain Damages.** Except for claims for indemnity as set forth in Section 5.2, above, in no event will either party be liable to the other party under this agreement for indirect, special, punitive, exemplary, or consequential damages of any kind, including without limitation, anticipated profits associated with unperformed Products after any early termination of this Agreement even if such party has been advised of the possibility of such damages. Notwithstanding the foregoing, Supplier agrees that, to the extent Customer is unable to operate any of the facilities due to a defect in Supplier's product or Supplier's negligence or breach of its obligations hereunder, any and all costs associated with Customer's use of substitute data center facilities as a result of any such defect, negligence, or breach shall be considered direct damages for the purposes of this Section 5.4.

**5.6 Essential Terms.** The parties agree that they are each entering into this Agreement in reliance on the warranty disclaimers and exclusions of liability set forth in Sections 5.3-5.4, (which limitations are independent of each other) and which limitations will survive any failure of the essential purpose of this agreement.

**6. DISPUTE RESOLUTION.** All disputes arising between the parties (including Customer) relating to the performance of the Products or otherwise relating to this Agreement shall be resolved in the following order of preference:

(a) The parties shall first try to negotiate a resolution of their dispute in good faith. If such negotiations fail, the parties shall endeavor to resolve the dispute by non-binding mediation under the Commercial Mediation rules of the American Arbitration Association ("AAA") existing at the time of such dispute, using a neutral mediator mutually acceptable to the parties and with the costs therefore shared equally

(b) In the event that the mediation provided by Section 6(a) fails to resolve the dispute, the dispute shall be resolved pursuant to Section 8.2.

(c) Notwithstanding anything to the contrary contained in this Section, the parties reserve the right to seek equitable remedies with respect to the enforcement of any provision of this Agreement.

## **7. TERMINATION**

**7.1 For Uncured Breach.** Company may terminate this Agreement upon five (5) business days' written notice for any uncured breach of this Agreement that has not been cured within ten (10) business days after receiving written notice setting forth the nature of the breach with reasonable specificity. In the event of such termination due to Supplier's default hereunder, Customer shall only be liable to pay for Products delivered up to the date of termination and may withhold such amounts pending resolution of any proceedings under Article 7 or any subsequent legal proceedings with such amounts to be used to be offset any settlement payments or damages awarded to Customer

**7.2 Bankruptcy.** Either party may terminate and without liability suspend all activity related to this Agreement immediately if the other party is adjudicated a bankrupt, ceases to do business as a going concern, makes an assignment for the benefit of creditors, permits the appointment of a receiver, or otherwise avails itself of or becomes subject to any bankruptcy or insolvency statute.

**7.3 Customer Termination for Convenience.** At any time during the Term of this Agreement, Customer or Company may terminate this Agreement with respect to one or more Facilities or in its entirety for its convenience or any other reason whatsoever, in its sole and absolute discretion, by providing thirty (30) days prior written notice to Supplier. Upon such termination, Customer will promptly pay Supplier all fees properly due and payable hereunder for Products delivered up to the effective date of termination, plus the following reasonable expenses incurred by Supplier as a direct result of such termination: cancellation charges or penalties incurred by Supplier under contracts to which it is a party in order to provide the Products, restocking charges, and demobilization costs; provided, however, that Supplier shall not be entitled to any other compensation, including without limitation anticipated profit on undelivered Products after the effective date of termination.

**8. GENERAL**

**8.1 Assignment.** Supplier may not assign or delegate its rights or obligations under this Agreement without the prior written consent of Company. This Agreement will be binding upon and inure to the benefit of Company, its successors and assigns, and Supplier's permitted successors and assigns.

**8.2 Governing Law.** This Agreement will be governed by and construed according to the laws of the States of California without regard to its conflicts of laws principles. The parties irrevocably consent to venue in and the jurisdiction of the state and federal courts located in Santa Clara County, California with respect to any matter arising out of this Agreement. In any dispute or litigation involving this Agreement, the prevailing party will be entitled to its reasonable costs and attorneys' fees in resolving that dispute or action.

**8.3 Waiver.** No term or condition of this Agreement will be deemed waived, and no breach or omission excused, unless in writing and signed by the party against whom enforcement of such waiver or consent is sought. A waiver of any condition or term of this Agreement will not constitute a waiver of any subsequent breach or omission.

**8.4 Severability.** If any provision of this Agreement is held to be void, illegal, unenforceable, or otherwise in conflict with the law governing this Agreement, such provision will be deemed to be restated to reflect as nearly as possible the original intentions of the parties in accordance with applicable law, and the other provisions will remain in full force and effect.

**8.5 Order of Precedence.** If any supplier is under a current Facility Services Vendor Agreement with the Customer or Contractor, and it is signed by all applicable parties, the terms and conditions of that agreement take precedence over these terms.

**8.6 Notices.** Any notices required or permitted to be sent under this Agreement will be given in writing, sent by certified or registered mail, or by reputable national overnight courier service, postage prepaid, by hand delivery to the address of the party as set forth on the signature page for this Agreement. Any notices sent hereunder will be deemed to have been given on the earlier of actual delivery or three (3) business days after posting in the United States mail in the case of registered or certified mails, and one business day in the case of any overnight courier who provides written delivery confirmation. Either party may change its address and/or recipient for notices by notifying the other party in accordance with this Section 10.65.

**8.7 Insurance.** If supplier will be performing services at site location, the supplier will provide insurance coverage during the term of this Agreement as follows, and shall provide proof of such coverage to Company upon request:

COMMERCIAL GENERAL LIABILITY

General Aggregate	\$ 2,000,000
Products/Completed Operations Aggregate	\$ 2,000,000
Bodily Injury & Property Damage	\$ 1,000,000
Each Occurrence	\$ 1,000,000
AUTOMOBILE LIABILITY - Per Occurrence	\$ 1,000,000 (Owned, Non-Owned & Hired)

**8.8 Independent Contractors.** The relationship between Company and Supplier is that of independent contractors and nothing in this Agreement is intended to create or imply an agency, joint venture, franchise or partnership relationship between the parties.

**Exhibit A**  
**Confidentiality Agreement**

**1. Confidentiality.** Supplier shall treat as confidential, and shall not disclose, except as provided below, the terms and conditions of this Agreement, the Facilities themselves (i.e., location, layout, manner of construction and operation, etc.), all information received from Company or Customer, whether or not labeled "Confidential" or "Proprietary" and any other tangible or intangible information of Customer or its affiliates or that otherwise should (based on the circumstances surrounding the disclosure or the nature of the information) be treated as confidential. In no event shall Supplier publish or otherwise distribute photos or other information regarding the location, layout, manner of construction and operation of the Facilities other than as necessary to perform the Services, regardless of whether such information is deemed confidential hereunder. Company shall treat as confidential and shall not disclose any Supplier Proprietary Information without Supplier's prior written consent, not to be unreasonably withheld. Each party further agrees to use at least the same degree of care to protect the other party's confidential information as it uses to protect its own confidential information, but not less than a reasonable degree of care.

**2. Use of Confidential Information.** The receiving party will not use the confidential information of the other party for any purpose other than to perform its obligations under this Agreement. Neither party will be liable to the other party for money damages resulting from or disclosure of confidential information received from the other party if the same: (i) is in the public domain at the time of disclosure; (ii) becomes known to the other party from a third-party source under no obligation to maintain confidentiality; (iii) becomes publicly available through no fault or failure to act by the receiving party in breach of this Agreement; (iv) is already known by the receiving party when received, or is independently developed by the receiving party without reference to the information provided by the other party, as established by written evidence; or (v) is required by a court or other governmental authority to be disclosed.