

XLR8 SERVICES, INC

Standard Terms and Conditions - Manufacturing Agreement

These terms and conditions constitute the entire Agreement between XMR8 Services, Inc. and you ("Customer") under which XLR8 agrees to perform and you agree to procure manufacturing services, hereinafter further defined as "Work". Acceptance of your purchase orders is expressly conditional on your assent to these terms and conditions. Please advise XLR8 in writing of any specific objections to these terms and conditions within a reasonable time prior to scheduled delivery. Failure to do so or in any event your acceptance of delivery of the products ordered will constitute your assent hereto.

1.0 **WORK** XLR8 agrees to use reasonable commercial efforts to perform the work (hereinafter 'Work') pursuant to purchase orders or changes to purchase orders issued by Customer and accepted by XLR8. Work shall mean to procure components and other supplies and to manufacture, test, and assemble prototype products (hereinafter 'Products') pursuant to detailed, written specifications for each such Product which are provided by Customer and accepted by XLR8 and to deliver such Products to a Customer designated location. For each Product or revision thereof, written specifications shall include but are not limited to bill of materials, schematics, assembly drawings, test specifications, current revision number, fabrication documentation, gerber files, program device software and approved vendor list (hereinafter 'Specifications'), in electronic or other form as XLR8 may request. Customer shall timely provide such additional documentation as XLR8 may reasonably require from time to time.

2.0 REQUIREMENTS FOR PURCHASING

2.1 **Purchase Order Commitments** Upon receipt of the Specifications and Customer's written request for a price estimate specifying quantities and delivery times, XLR8 will provide Customer within approximately 48 hours with an estimated price for the manufacture of the Products ("quote"). The estimated price will normally be based on the material costs (including excess material), tooling, NRE, expediting charges and labor. If Customer desires to accept the quote, Customer must within two business days after receipt of XLR8 quote issue a written purchase order accepting the quote. The purchase order shall reference this Agreement and the applicable written Specifications as described in Section 1.0.

Customer's accepted purchase orders will constitute authorization for XLR8 to procure materials and supplies necessary for the manufacture of Products covered by such purchase orders including minimum lot sizes from the suppliers which are in excess of the build requirements. However, XLR8 will obtain Customer's prior written approval, which shall not be unreasonably withheld, of any material, tooling or expediting costs which are significantly in excess of the XLR8 estimate in the quote or which are in excess of any line item maximum overbuy limitation set forth in said estimate. Even if Customer designates a specific manufacturer XLR8 reserves the right to purchase passive components from any manufacturer as long as they are equal to or better than required. Customer will be responsible for all material purchased by XLR8 under this Section 2.1.

2.2 **Acceptance / Rejection** Purchase orders shall not be binding on XLR8 until accepted by XLR8 at its discretion. XLR8 shall notify Customer of rejection of any purchase order within five (5) working days of receipt of such order. Customer may use its standard purchase order form to request Products, quantities, estimated prices, schedules, change notices or other items as provided for hereunder. Unless delivery dates are expressly agreed to in writing by XLR8, deliveries are subject to XLR8 lead times. In all other respects, this Agreement shall govern, and no other terms and conditions, preprinted or otherwise, on such purchase orders shall be of effect.

2.3 **Implied License** XLR8 shall be deemed to have been granted by Customer a non-exclusive, royalty-free license during the term of this Agreement to use all of Customer's patents, trade secrets and other intellectual property only to the extent required to perform XLR8's obligations under this Agreement. All software which Customer provides to XLR8 is and shall remain the property of Customer. XLR8 shall have a license to copy, modify, and use this software but only for the purposes intended under this Agreement and then only while the Agreement is still in effect. All software and other processes developed by XLR8 to support and perform the Work including process tooling or otherwise shall be and remain the property of XLR8.

3.0 SHIPMENTS, SCHEDULE CHANGE, CANCELLATION, AND EXCESS MATERIALS LIABILITY

3.1 **Shipments** All Products delivered pursuant to the terms of this Agreement shall be suitably packed for shipment in accordance with Customer's Specifications, marked for shipment to Customer's destination specified in the applicable purchase order, and delivered to a carrier or forwarding agent. Shipment will be F.O.B. Customer's facility in Los Angeles, Orange, or San Diego county office, or if Customer has no facilities in these counties, then F.O.B. XLR8 San Clemente facility, at which time risk of loss and title will pass to Customer. All freight, insurance, and other shipping expenses, as well as any special packing expenses not included in the original price quotation for the Products will be paid by Customer. Customer is directly responsible for all export/import requirements, charges and costs, including the processing and obtaining of permits, authorizations, and licenses and payment of duties, tariffs or any other fees or charges.

3.2 **Schedule Change** Customer may not change the delivery date as contained in any accepted purchase order.

3.3 **Cancellation** Customer may not cancel any portion of an accepted purchase order

3.4 **Excess Materials Liability** In addition to Customer's liability for the price for Products ordered under a purchase order Customer is liable for any excess materials or other costs procured or incurred by XLR8 for such purchase order which is not utilized in the production of said Products as follows: (i) 120% of the cost of all excess material in XLR8 possession or on order. Excess materials includes excess materials authorized by Customer and materials rendered obsolete (unusable in the Products) due to Customer's action or inaction.

4.0 **ENGINEERING CHANGES** Customer may request in writing that XLR8 incorporate an Engineering Change into the Product. Any such request must be issued through Customer's purchasing department to XLR8 Program Manager via a controlled engineering BOM release. Such request will include a description of the proposed change sufficient to permit XLR8 to evaluate its feasibility. XLR8 evaluation shall be in writing and shall state the impact on delivery schedule and cost. XLR8 will not be obligated to proceed with the Engineering Change until the parties have agreed in good faith on the changes to the Product, Specifications, Delivery Schedule, Pricing and upon the cost to be paid by Customer, including reassembly, retooling and cost of materials on hand and on order (not less than 120%) that becomes obsolete. If the parties are unable to agree on the Engineering Change within two days, XLR8 is not obligated to accept the Engineering Change request and Customer shall remain fully liable hereunder for the Products as originally ordered.

5.0 **TOOLING / NON-RECURRING EXPENSES** XLR8 shall provide non-Product specific tooling at its expense. Customer shall pay for or obtain and consign to XLR8 any Product specific tooling and shall prepay other reasonable necessary non-recurring expenses to be set forth in XLR8 quotation. Customer consigned tooling shall be returned to Customer upon termination of Agreement.

6.0 **ACCEPTANCE:** The Product shall be deemed accepted by Buyer when the Product has passed XLR8's inspection and conforms to Specifications and the applicable IPC-A-610 Workmanship Standard and is delivered to Buyer, namely, placed it in the hands of a common carrier. Buyer shall have [30] days to notify Manufacturer of Buyer's revocation of acceptance of Product based on non-conformance to specifications or to the workmanship standard. Buyer's revocation must be in writing.

7.0 **PRODUCT WARRANTY:** XLR8 warrants that Products supplied to Buyer hereunder will conform to Buyer's Specifications and will be free from defects in workmanship for a period of one year from the date of delivery of the Products to Buyer. Buyer shall notify XLR8 within [48] hours of Buyer's receipt of Products, in writing, of any Product defect, which notification shall describe the defect in sufficient detail to permit XLR8 to isolate the defect. Upon notification from Buyer, XLR8 will provide Buyer with instructions on returning the Product under a warranty claim. Upon receipt of any Products returned by Buyer pursuant to this Section 7.0, XLR8 shall inspect Products in accordance with the applicable IPC-A-610 Workmanship Standard. If XLR8 determines that the defect is not due to nonconformity with Specifications or the applicable IPC-A-610 Workmanship Standard or is unable to isolate any defect or malfunction in the Product, then Buyer is solely responsible for isolation of the defect or malfunction and XLR8 will seek instructions on whether XLR8 should return the Product to Buyer or dispose of it.

If any returned Product contains malfunctions due to nonconformity with the Specifications or the applicable IPC-A-610 Workmanship Standard, then Buyer's exclusive remedy and XLR8's sole liability under this warranty will be, at its sole option and expense, to correct or replace the nonconforming or defective Product or refund the Purchase Price to Buyer. This warranty does not apply to: any first articles, prototypes, pre-production units, test units of a Product, any Products which have been repaired by Buyer or a third party, any Products which have been altered or modified in any way by Buyer or third party; or any Products which have been subject to misuse, abnormal use or neglect or to components received from Buyer. XLR8 will not be held liable in the case of damage to a product that occurs during customer contracted rework.

8.0 **DISCLAIMER.** THE PRODUCT WARRANTY STATED ABOVE IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES AS TO QUALITY, FITNESS FOR PARTICULAR PURPOSE, MERCHANTABILITY OR OTHERWISE, WHETHER IMPLIED BY CUSTOM OR LAW. WITHOUT LIMITING THE FOREGOING DISCLAIMER, BUYER ACKNOWLEDGES AND AGREES THAT MANUFACTURER DOES NOT WARRANT ANY PARTS, COMPONENTS OR OTHER MATERIALS PROVIDED TO MANUFACTURER BY BUYER AND USED IN THE MANUFACTURE OF THE PRODUCTS.

9.0 PAYMENT TERMS, ADDITIONAL COSTS, AND PRICE CHANGES

9.1 **Payment Terms** Subject to XLR8 continuing credit approval including the requirement for other payment terms, payment for any Products, services, or other costs to be paid by Customer hereunder are due thirty (30) days net from the date of invoice and shall be made in lawful US currency. If Customer is late with payments or XLR8 believes Customer may not be able to pay when due, XLR8 in its absolute discretion may require prepayment and/or delay shipments and/or suspend work until payment and security arrangements satisfactory to XLR8 are completed. Late payments accrue interest at the rate of 0.8% per month not to exceed the maximum rate allowed by law.

9.2 Additional Costs

9.2.1 **Taxes** Prices are exclusive of federal, state, and local excise, sales, use, withholding, value added, duty and similar taxes and charges of any government or taxing authority, and Customer shall be responsible for all such items.

9.2.2 **Expediting Charges** Customer shall be responsible for any expediting charges reasonably necessary because of a change in Customer's requirements. XLR8 shall obtain approval from Customer for expediting charges prior to incurring any such charge.

9.2.3 **Overtime/Downtime Charges** Customer shall be responsible for overtime or downtime charges incurred as a result of delays in the normal production or interruption in the work flow process and caused by: (a) Customer's change in the Specifications; or (b) Customer's failure to provide sufficient quantities or a reasonable quality level of consigned materials where applicable to sustain the production schedule. Customer caused delays as a result of consigned inventory will result in a special charge to the Customer of 1% of the sales price of the delayed Product for each month delayed.

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- 9.3 **Price Changes** The price for Products to be manufactured will be set from time to time through purchase orders issued by Customer based on XLR8 estimates and accepted by XLR8, subject to increases as authorized hereunder.
- 9.3.1 **Other Charges** In addition to all other remedies, XLR8 shall be entitled to an equitable adjustment in the price for the Products affected by documentation clarification, shortages, or lack of attrition due to Customer supplied materials, or changes to orders or to the Products.
- 10.0 **TERMINATION** Either party may terminate this Agreement and/or any purchase order(s): (a) upon the material breach of any of the terms and conditions of this Agreement by the other party and such breach remains uncured for more than sixty (60) days following notice of breach from the terminating party (failure of Customer to make any payment when due is considered a material breach); or (b) upon notice if the other party becomes insolvent, petitions or is petitioned for liquidation or organization under any bankruptcy or insolvency proceedings, is adjudicated as bankrupt, has a receiver appointed for its business or makes an assignment for the benefit of creditors.
- 11.0 **LIABILITY LIMITATION**
- 11.1 **Patents, Copyrights, Trade Secrets, Other Proprietary Rights** Customer shall defend, indemnify, and hold harmless XLR8 from all claims, liabilities, actions, expenses, costs, damages, judgments, and attorney's fees resulting from or arising out of any alleged and/or actual infringement or other violation of any patents, patent rights, trademarks, trademark rights, trade names, trade name rights, copyrights, trade secrets, designs, proprietary rights and processes, or other intellectual property rights in connection with the performance by XLR8 of its obligations under this Agreement. XLR8 shall promptly notify Customer in writing of the initiation of any such claims. **THE FOREGOING STATES THE ENTIRE LIABILITY OF THE PARTIES TO EACH OTHER CONCERNING INFRINGEMENT OF PATENT, COPYRIGHT, TRADE SECRET, OR OTHER INTELLECTUAL PROPERTY RIGHTS.**
- 11.2 **INDEMNIFICATION:** Buyer shall defend, indemnify and hold XLR8 and its subsidiaries, officers, directors, employees, agents and representatives harmless from any and all claims, demands, liabilities, actions, suits, proceedings, losses, injuries, death, judgments, and/or costs (including without limitation reasonable attorneys' fees and related costs) based on or arising out of any claims or demands based on or relating to: XLR8's use of Buyer's Proprietary Information the design of the Products; Buyer's negligence, use, ownership, maintenance, transfer, transportation or disposal of the Products; Buyer's violation or alleged violation of any federal, state, or local laws or regulations, including the laws and regulations governing product safety, labeling, packaging and labor practices; or a breach by Buyer of any of these terms and conditions. XLR8 shall give written notice of any claim or potential claim to Buyer within a reasonable time following the time at which XLR8 first became aware of the claim for indemnification hereunder. Buyer may, at its option, have control of any litigation and appointment of counsel in defense of any third party claim for which XLR8 seeks indemnification. No suit or proceeding shall be settled or compromised without the prior written consent of XLR8. The obligation to indemnify under this shall survive the termination or expiration of the accepted Order.
- 11.3 **No Other Liability IN NO EVENT SHALL XLR8 BE LIABLE TO CUSTOMER FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES OF ANY KIND OR NATURE ARISING OUT OF THIS AGREEMENT OR THE SALE OF PRODUCTS BY CUSTOMER, WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT (INCLUDING THE POSSIBILITY OF NEGLIGENCE OF STRICT LIABILITY), OR OTHERWISE, EVEN IF XLR8 HAS BEEN WARNED OF THE POSSIBILITY OF ANY SUCH LOSS OR DAMAGE, AND EVEN IF ANY OF THE LIMITED REMEDIES IN THIS AGREEMENT FAIL OF THEIR ESSENTIAL PURPOSE, IT BEING ACKNOWLEDGED BY CUSTOMER THAT THIS LIMITATION OF LIABILITY IS ESSENTIAL CONSIDERATION TO XLR8 FOR ENTERING INTO AND PERFORMANCE OF THIS AGREEMENT. IF XLR8 SHOULD BE FOUND LIABLE TO CUSTOMER FOR ANY REASON, CUSTOMER AGREES THAT SUCH LIABILITY SHALL IN NO EVENT EXCEED THE AMOUNTS RECEIVED BY XLR8 FROM CUSTOMER FOR THE SPECIFIC PRODUCT RELATING TO SUCH LIABILITY.**
- 12.0 **MISCELLANEOUS**
- 12.1 **Entire Agreement** This Agreement constitutes the entire agreement between the parties with respect to the transactions contemplated hereby and supersedes all prior agreements and understandings between the parties relating to such transactions. Each party shall hold the existence and terms of this Agreement confidential, unless it obtains the other party's express written consent otherwise, provided that XLR8 may use Customer's name as a reference unless otherwise instructed in writing by Customer.
- 12.2 **Amendments** This Agreement may be amended only by a writing executed by authorized representatives of both parties.
- 12.3 **Independent Contractor** Neither party shall, for any purpose, be deemed to be an agent of the other party and the relationship between the parties shall only be that of independent contractors. Neither party shall have any right or authority to assume or create any obligations or to make any representations or warranties on behalf of any other party, whether express or implied, or to bind the other party in any respect whatsoever.
- 12.4 **Expenses** In the event a dispute between the parties hereunder with respect to this Agreement must be resolved by litigation or other proceeding or a party must engage an attorney to enforce its right hereunder, the prevailing party shall be entitled to receive reimbursement for all associated reasonable costs and expenses (including, without limitation, attorney's fees) from the other party.
- 12.5 **Security Interest** Until the purchase price and all other charges payable to XLR8 hereunder have been received in full, XLR8 hereby retains and Customer hereby grants to XLR8 a security interest in the Products delivered to Customer and any proceeds therefrom; a security interest in any material and equipment consigned to XLR8; without prejudice to XLR8 ownership or other rights thereto, a security interest in undelivered Products, components thereof, material procured or produced for Customer's account and work in process. Customer agrees to promptly execute any documents requested by XLR8 to perfect and protect such security interest and hereby authorizes XLR8 to file this Agreement as a financing statement.
- 12.6 **Governing Law** This Agreement shall be governed by and construed under the laws of the State of California, excluding its choice of law principles. The parties consent to the exclusive jurisdiction of the state and federal courts in San Diego County, California.
- 12.7 **Assignment** Neither party shall assign or transfer this Agreement, except as expressly provided herein, without the prior written consent of the other party; provided, however, that XLR8 may transfer or assign its rights and obligations under this Agreement in connection with a merger, reorganization, consolidation or sale of all or substantially all of its assets; and provided further, that XLR8 may assign its rights to receive payment hereunder. This Agreement shall be binding upon and inure to the benefit of the parties' successors and assigns as permitted herein. Any purchaser of all or substantially all of the assets of Customer, shall at XLR8 election be deemed bound by the terms and conditions of this Agreement whether or not an assignment is requested by XLR8.
- 12.8 **Customer's Confidential Information** XLR8 agrees that it will hold in confidence and use only for purposes of this Agreement all confidential information received from Customer which Customer clearly marks as such. This obligation shall not apply to information which is independently known to XLR8 or which becomes publicly known through no fault of XLR8 or which is disclosed to another by Customer without similar restrictions.
- 12.9 **Notice** Any notice or other communication required or permitted hereunder shall, unless otherwise provided herein, be made in writing and shall be delivered personally or sent by an overnight delivery or courier service, by certified or registered mail (postage prepaid), by telex or by facsimile transmission to the address first specified in this Agreement or to such other address as either party may designate and notice in accordance with this Section. Such notice or other communication shall be deemed given when delivered personally, telegraphed, telexed or sent by facsimile transmission, or, if sent by overnight delivery or courier service, the day after sent, or if mailed, (3) days after the date of deposit in the mails.
- 12.10 **Records and Documentation** - Unless otherwise approved in writing by XLR8, XLR8 and Subcontractors of XLR8 will retain records and documentation related to the fulfillment of this purchase for all manufacturing and fabrication processes completed by the XLR8 or by a 3rd party on the behalf of XLR8 for a minimum of 10 years from the date of manufacture.
- 12.11 **Other** If any term or provision of the Agreement is declared to be invalid or unenforceable, it shall be deemed to be omitted or modified to the extent necessary to render it valid or enforceable, and the remainder of this Agreement shall continue in full force and effect. Failure of either party to enforce any provision hereof shall not be construed as a waiver thereof or prevent enforcement on any other occasion or of any other provisions. Headings are for reference only; and the use of the singular and plural number shall each be deemed to include the other as indicated by the context. All provisions in this Agreement which by their language, nature or context are intended to survive, such as without limitation, payment limitation of liability and indemnification provisions, shall survive any termination of this Agreement.
- 12.12 **Delivery Commitments & Dates** For turnkey builds XLR8 is dependent on raw material suppliers to perform and deliver on time. From time to time, on rare occasions, raw material deliveries are delayed. XLR8 will not be liable whatsoever for late deliveries of finished product to customers for items that are out of their control (i.e. late material delivery of suppliers), acts of God, or natural disasters.
- 13.0 **FORCE MAJEURE** In the event that either party is prevented from performing or is unable to perform any of its obligations under this Agreement (other than a payment obligation) due to any Act of God, fire, casualty, flood, earthquake, war, strike, lockout, epidemic, destruction of production facilities, riot, insurrection, material unavailability, rolling blackouts, power outages and other utility failures, or any other cause beyond the reasonable control of the party invoking this section, such party shall give prompt written notice to the other party, its performance shall be excused, and the time for the performance shall be extended for the period of delay or inability to perform due to such occurrences. Regardless of the excuse of Force Majeure, if such party is not able to perform within forty-five (45) days after such event, the other party may terminate the affected purchase order(s).