



City of Albuquerque

Aviation Department

Timothy M. Keller, Mayor

EC-19-454

Interoffice Memorandum

August 2, 2019

To: Klarissa J. Peña, President, City Council

From: Timothy M. Keller, Mayor *K*

Subject: Sole Source Purchase of two (2) HBI-120LC Handheld Backscatter X-Ray Imagers with Accessories, Warranty, Training and Support

The Aviation Department seeks approval of a sole-source agreement with Viken Detection (formerly Heuresis) to purchase two (2) HBI-120LC Handheld Backscatter X-Ray Imagers with Accessories, Warranty, Training and Support. The HBI-120LC x-ray imagers will be used to scan for explosives or other prohibited items in all supplies that will be entered or be used in the secure areas of the Albuquerque International Sunport as mandated by TSA-NA-16-01B.

This executive communications is forwarded to Council for consideration and action.

Recommended:

Approved as to Legal Form:

SN

 Sarita Nair
 Chief Administrative Officer

8/26/19

 Date

EAG

 Esteban A. Aguilar, Jr.
 City Attorney

8-15-19

 Date

Recommended:

Nyika A. Allen

 Nyika A. Allen, CM.
 Aviation Department Director

8/5/19

 Date

25

Cover Analysis

1. What is it?

Sole Source purchase of two (2) HBI-120LC Handheld Backscatter X-Ray Imagers with Accessories, Warranty, Training and Support.

2. What will this piece of legislation do?

If approved, the department will purchase two HBI-120LC Handheld Backscatter X-Ray Imagers plus accessories including: 6-000001 Single Trigger, 3-03952 A HBI-120 Backscatter Shields Full Accessory Kit; 3-100015 A Ruggedization Kit; 5-100115 A Tactical Back Pack, HBI; 1-100005 Large Area Detector; Warranty; Training and Support.

3. Why is the project needed?

These imagers will be used to scan for explosives or other prohibited items in all supplies that will enter or be used in the secure areas of the airport as mandated by TSA-NA-16-01B.

4. How much will it cost and what is the funding source?

The total cost for this purchase is estimated at \$126,766.00 and will be funded through existing monies in the Airline Coverage Account Project, Activity #1174010, in Fund 613.

5. Is there a revenue source associated with the project? If so, what level of income is projected?

There will be no revenue generated with this purchase.

SOLE SOURCE JUSTIFICATION

The Public Purchases Ordinance 5-5-32 provides that a contract may be awarded without a competitive solicitation regardless of the estimated cost when the City Purchasing Officer makes a determination, after conducting a good faith review of available sources and consulting the user department that there is only one source for the required goods, services, or construction. The City Purchasing Officer or designee shall conduct negotiations, as appropriate, as to price, delivery and quantity in order to obtain the price most advantageous to the city.

The end user department must justify each sole source procurement request by completing this form, attaching it to a requisition, and submitting the package to the Purchasing Division. The Chief Procurement Officer will review the submission and make the final determination as to whether a sole source purchase is justified under the Public Purchases Ordinance.

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- 1. Describe the goods, services or construction requested. Explain why the particular goods, services or construction requested is the only item that can satisfy your requirements, and explain why alternatives are unacceptable. Be specific with regard to specifications, features, characteristics, requirements, capabilities, and compatibility. Describe what steps have been undertaken to make the determination that the item identified is the only item that can satisfy your requirements.**

The Aviation Department is requesting the purchase of two (2) HBI-120 LC Handheld Backscatter X-Ray Imagers. These imagers will be used to scan for explosives or other prohibited items in all supplies that will enter or be used in the secure areas of the airport as mandated by TSA-NA-16-01B. Per this directive, Aviation Police are required to scan all deliveries for the airport concessionaires' consumable supplies which is currently done by unpacking each delivery pallet and inspecting boxes individually which is time consuming and increases the risk to the officers' safety. The ability to utilize an x-ray scanner to inspect all delivery items will greatly improve the safety, efficiency and accuracy of this security operation. The HBI-120 LC handheld scanner is able to scan objects and display x-ray images in real-time on an integrated high-resolution LCD touchscreen and the images are saved in the instruments on-board memory. The scanner's small size and on-board display can be used by a single person in confined spaces which will also enable law enforcement officers to scan items located inside vehicles, aircraft, shipping containers, steel drums and other confined space locations. Additionally, this scanner's small size and handheld design will allow law enforcement officers to quickly and safely inspect abandoned luggage, bags, backpacks or other items without the need to move the items. Our research identified two other handheld scanners, the AS&E MINI Z 70keV and the AS&E MINI Z 120keV, however these units require two people to operate due to the detached tablet used for the image display. The ability for one person to operate the HBI-120 LC scanner and the integrated features it has reduces the safety risk to law enforcement officers while improving inspection efficiencies and accuracy makes this the right unit to fulfill the obligation as mandated in the security directive.

- 2. Explain why the vendor/supplier or manufacturer is the only available source from which to obtain this product or service and describe the efforts that were made to verify and confirm whether or not, only one source for the product or service exists. Departments must obtain a letter from the manufacturer to confirm any claims made by distributors or exclusive distributorships regarding the product or service if that is cited as a reason for the sole source classification. A U.S. registered patent number with date of the patent expiration or exclusive ownership of a software license may suffice.**

Viken Detection is the manufacturer and sole US distributor of the HBI-120 LC handheld scanner. Attached is a sole source letter obtained from the manufacturer. An extensive internet search was completed and no other distributor was located for this scanner. Two other handheld scanners were found, the AS&E MINI Z 70keV and the AS&E MINI Z 120keV, however these devices do not meet our specific needs due to the detached tablet used for imaging and the resultant need for two people to operate the devices in confined spaces.

- 3. Will this purchase obligate the City to a particular vendor for future purchases (either in terms of maintenance that only this vendor will be able to perform and/or if the City purchases the goods or services, will more "like" items in the future be needed to match the original purchase)?**

Yes. The units come with a two (2) year extended warranty however any repair or maintenance needed would be done by the vendor. These units are self-contained and do not require the purchase of any additional parts or ongoing supplies to maintain functionality. Therefore, no additional, "like" items would be needed to match the original purchase.

4. Explain why the price for the goods or services is considered to be fair and reasonable?

With the purchase of the requested scanners, the required time needed to inspect all deliveries of supplies that will be used in the secure areas of the airport will be greatly reduced and could be done with fewer personnel which would provide a significant savings in officer wages. Additionally, the requested scanners are able to be used by one person versus the alternative handheld scanner which requires two people to operate which provides a 50% operational cost savings.

5. Explain the consequence(s) to the City, including a dollar estimate of the financial impact, if the Chief Procurement Officer determines this purchase sole source procurement is not approved.

Due to the requirement in TSA-NA-16-01B, if this sole source procurement is not approved the City will have to continue to pay the current number of staff required to inspect the deliveries indefinitely and would not be able to take advantage of the cost savings and added benefits that would be provided through utilizing the x-ray scanner technology. With the procurement of this technology, the city will save costs in paying APD overtime wages due to the fact that fewer officers will be needed to conduct these inspections and the inspections will be completed quicker. Another benefit is that with less APD officers doing the shipment checks that will allow for a better security posture at the airport by allowing more officers to patrol in the terminal and other areas of the airport. Additionally, the scanning technology would increase officer safety and the potential detection of explosives or other prohibited items thereby reducing the possibility of imposed fines by the Transportation Security Agency (TSA) or repercussions of an undetected threat that is carried out.

6. If federal funds will be involved in this procurement, please state and identify the federal agency. No federal funds will be used for this purchase.

By signing below, I certify that the above statements herein are true and correct, and that no other material fact or consideration offered or given not set forth herein has influenced this request for a sole source procurement determination.

Submitted By: Nyika Allen Department Aviation
Nyika Allen Director Printed Name Department Aviation
Nyika Allen Authorized Signature Date 6/14/2019 Phone Number _____

PURCHASING USE ONLY

Senior Buyer: René Diaz, Aviation Purchasing Coordinator Date: 6/11/2019

1. A good faith review of available sources has been undertaken (State results of review)

Aviation staff Jane Lucero, Associate Director of Aviation and John Stephens, Management Analyst II, have conducted a good faith review for the purchase of this product and services with from sources. In addition, I have done research online and had several discussions with the supplier. This product was purchased by the Department of US Customs and Border Protection. I inquired whether or not this product was available on an existing contract such as GSAdvantage or by another airport from an independent price agreement. Cathy Gilmer from Sales/Marketing for the supplier provided information that they did not have any price agreements with other entities, and US Customs and Border Protection purchased their product via a sole source agreement. I am a member of the Airport Purchasing Group which is chartered through NIGP. I also reached out on a mass email to the group to inquire whether or not they had a contract that we could use to purchase this product/services from. I received no feedback.

2. Describe negotiation efforts to obtain the price most advantageous to the City.

I discussed with Cathy Gilmer the possibility of affording the Sunport a better price. Cathy indicated that their Company only had one price and that was the same government price that is provided to the US Customs and Border Protection and other governmental entities. Negotiation of price is not negotiable per Robert Postle, VP of Marketing through Cathy Gilmer.

Approved By: Jesse Muniz Date: 6/17/2019

DocuSigned by: Jesse Muniz Date: 6/17/2019
Chief Procurement Officer

VIKEN

DETECTION
formerly HEURESIS

April 24, 2019

Re: Viken Detection HBI-120 Sole Source

To Whom It May Concern,

Viken Detection is the manufacturer and sole US distributor of the HBI-120 hand held backscatter x-ray imager. It is not offered domestically through distributors or dealers.

Our system is the only handheld backscatter x-ray imager on the market with dimensions that do not exceed 24 cm x 22 cm x 17 cm to facilitate operation in confined areas of motor vehicle interiors which would not be possible with a larger system. These dimensions also facilitate operation in confined areas beneath motor vehicles which would not be possible with a larger system. The Viken Detection instrument is the lowest weight handheld backscatter x-ray instrument available, with the display built into the body of the device; it therefore does not have the inconvenience of a clip-on attachable or detachable tablet. A detached display requires a second operator, while a clip-on attachable display adds additional bulk, weight and size to the exterior of the unit, could fall off, and also be difficult to see images while taking scans. With our smaller sized unit, the operator can view the display and see the image in real time during scanning. The user does not have to depend on Bluetooth or other wireless communications with a separate tablet to be working in order for the instrument to work. Our handheld x-ray unit is the only one that uses a flexible, fully-supported operating system that is integrated into the scanning unit - without the use of a separate, or attachable/detachable system-control tablet that requires a wireless connection to remain intact. Also, there is no proprietary software suite to learn in order to use the instrument.

While other x-ray backscatter imagers are available, the HBI-120 is the first ever handheld imager that can scan up to a square foot per second with only 5W of power, and still produce high-contrast backscatter x-ray images of concealed threats through steel vehicle fenders, steel doors, bumpers, exhaust manifolds, dashboards, seats and tires. It can also be used to find concealed threats behind walls, in shipping containers, and in boxes and packages. By producing high-quality images while operating at the lowest wattage available on the market, we provide the smallest, lightest, and safest unit on the market.

If your program should have any questions or require additional information or documentation, please don't hesitate to contact our VP of Sales, Mr. Robert Postle directly, either via email at rpostle@vikendetection.com, or cell phone number +1-978-325-2410.

Regards,

Peter J. Rothschild

Peter J. Rothschild, Ph.D.
Chief Technology Officer, Co-Founder



VIKEN

DETECTION
formerly HEURESIS

Quotation

Quote #: Q-00398-2
Date: 4/24/2019 1:10 PM
Expires On: 7/31/2019

Viken Detection

330 Nevada Street
Newton, Massachusetts 02460
United States

Phone: 617-467-5526
Fax: 617-467-5024
Email: sales@vikendetection.com

Ship To
John Stephens
City of Albuquerque Aviation Dept.
2200 Sunport Blvd. SE,
Attn: Jane Lucero
Albuquerque, New Mexico 87106
United States
505-244-7731
jpstephens@cabq.gov

Bill To
City of Albuquerque Aviation Dept.
PO Box 9948
Albuquerque, New Mexico 87119
United States

SALESPERSON	PHONE	EMAIL	LEAD TIME	PAYMENT TERMS
Rebecca Tamez		rtamez@vikendetection.com	Approx. 2-4 weeks ARO	Prepaid, Net 30 subject to credit approval

Handheld Backscatter Devices				
PRODUCT CODE	DESCRIPTION	QTY	UNIT PRICE	EXTENDED
1-100000	HBI-120 LC	2	\$42,000.00	\$84,000.00
Handheld Backscatter Devices Totals:				\$84,000.00

Configurations				
PRODUCT CODE	DESCRIPTION	QTY	UNIT PRICE	EXTENDED
6-000001	Single Trigger	2	\$0.00	\$0.00
Configurations Totals:				\$0.00

Accessories				
PRODUCT CODE	DESCRIPTION	QTY	UNIT PRICE	EXTENDED
3-003952 A	HBI-120 Backscatter Shield Full Accessory Kit	2	\$1,150.00	\$2,300.00
3-100015 A	HBI Ruggedization Kit	2	\$185.00	\$370.00
5-100115 A	Tactical Back Pack, HBI	2	\$375.00	\$750.00
1-100005	Large Area Detector	2	\$10,000.00	\$20,000.00
Accessories Totals:				\$23,420.00

Extended Warranty				
DESCRIPTION	PRODUCT CODE	QTY	UNIT PRICE	EXTENDED
Extended Warranty		4.00	\$6,000.00	\$12,000.00
Year 1	7-000001	2	\$3,000.00	\$6,000.00
Year 2	7-000001	2	\$3,000.00	\$6,000.00
Broadwing Extended Warranty		4.00	\$998.00	\$1,996.00
Year 1	7-000002	2	\$499.00	\$998.00
Year 2	7-000002	2	\$499.00	\$998.00
Extended Warranty Totals:				\$13,996.00

Training				
PRODUCT CODE	DESCRIPTION	QTY	UNIT PRICE	EXTENDED
9-000001	HBI Training	1	\$5,000.00	\$5,000.00
Training Totals:				\$5,000.00

Shipping and Handling				
PRODUCT CODE	DESCRIPTION	QTY	UNIT PRICE	EXTENDED
10-000001	Domestic Ground	2	\$100.00	\$200.00
10-000013	Accessory Shipping Charge	2	\$75.00	\$150.00
Shipping and Handling Totals:				\$350.00

Totals:				\$126,766.00
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Please note that applicable sales taxes have not been included in the total price. This will be the buyer's responsibility unless a copy of a tax exempt certificate has been provided.

Signature: _____

Effective Date: _____/_____/_____

Name (Print):	_____	Title:	_____
Purchase Order Number:	_____	Sales Tax Exempt?	Yes / No (If Yes, attach copy of sales tax exempt certificate)

THE FOLLOWING TERMS/CONDITIONS, TOGETHER WITH ANY OTHER TERMS/CONDITIONS SPECIFICALLY AGREED TO IN WRITING BY SELLER, SHALL APPLY TO ALL ORDERS ("Order(s)") FROM, AND SALES OF PRODUCTS ("Products") OR SERVICES ("Services") TO BUYER. ANY ACCEPTANCE OF ANY ORDER OF BUYER IS CONDITIONED UPON THESE TERMS/CONDITIONS. ANY ADDITIONAL OR DIFFERENT TERMS/CONDITIONS PROPOSED BY BUYER IN ANY DOCUMENT ARE OBJECTED TO AND SHALL NOT BE BINDING UPON SELLER. No Sales person is authorized to bind Seller to any promise or understanding not expressed herein.

TAXES

In sales transaction instances where Sales Prices do not include applicable taxes or duties, the Buyer is solely responsible for paying all applicable taxes and duties. Under these circumstances, where the VIKEN DETECTION Sales invoice excludes State, County, and/or Local Sales Tax, it should be inferred that either (1) VIKEN DETECTION has not attained NEXUS status in the State where the Buyer resides, and the Buyer is solely responsible for calculating, remitting and filing the appropriate tax and duties incurred, or (2) The Buyer has declared tax exemption status, and has forwarded the applicable Exempt certificates to VIKEN DETECTION, prior to the Sales invoicing transaction. VIKEN DETECTION will add sales taxes to the sales price where required by applicable law and Buyer will pay such taxes unless Buyer provides VIKEN DETECTION with a duly executed sales tax exemption certificate. If Buyer is required by law to withhold any amount of tax from its Payment to VIKEN DETECTION, Buyer will take all reasonable steps to minimize such withholding tax, provide VIKEN DETECTION with a receipt or certificate as evidence the tax has been paid, and reimburse VIKEN DETECTION for the amount of withholding so that VIKEN DETECTION receives Payment for the full value of the invoice.

PRICES

All prices are subject to change without notice in the event of any changes in cost of materials or labor, specifications, quantities, delivery schedules, customs duties, other factors beyond Seller's control, or in the event of delays caused by instructions of the Buyer, or failure of the Buyer to give Seller adequate information. Prices do not include taxes, including but not limited to Value Added Tax (VAT), or governmental charges.

DELIVERY

Delivery dates are approximate and are dependent on prompt receipt by Seller of all necessary information. Seller may deliver all or any part of Products/ Services as early as 30 days in advance of agreed schedule. The point of delivery shall be "Ex#works" Seller's premises, unless otherwise specified by Seller. Upon delivery, title to Products and all risk of loss or damage thereto shall pass to Buyer. Where Buyer notifies Seller that it cannot take timely delivery of the Products, Seller may place such Products in storage, at the risk of Buyer, and Buyer shall reimburse Seller for all expenses incurred in connection with such storage. Buyer shall dispose of the packing materials for Products at its own expense, and shall defend, indemnify and hold harmless Seller from any legal obligations in connection with such packing waste.

PAYMENT

1. The term of payment shall be net 30 days from date of Seller's invoice, unless otherwise specified. Payments shall be made by Buyer without any deduction or set#off. Unless otherwise agreed, payment shall be made in U.S. dollars. Seller may charge late payment fees at the rate of 1.5% per month, or the highest rate permitted by law, whichever is less, accruing daily.
2. If the financial condition of Buyer is unsatisfactory to Seller, Seller may require full or partial payment in advance, or satisfactory security, in the form of a letter of credit or otherwise. In the event of bankruptcy or insolvency of Buyer, Seller may immediately cancel any Order then outstanding.
3. Buyer grants Seller a purchase money security interest in Products located in the United States, or Services, as well as any proceeds, for the purpose of securing the obligations of Buyer hereunder. Buyer authorizes Seller to execute on Buyer's behalf and file such financing statements as Seller deems appropriate to perfect and notify Buyer's creditors of Seller's security interest.

VARIATIONS IN QUANTITY; CHANGES

Buyer shall accept delivery of quantities greater or smaller than the quantity specified in Order(s), provided that any such variation shall not exceed 5% of the quantity originally specified. Seller shall not be required to give notice of any such variations other than in the applicable shipping notice and invoice. Seller reserves the option to make changes to Products or Services which do not affect form, fit, or function, and shall deliver Products to the latest configuration part number at the time of delivery.

EXPORT CONTROLS; FCPA; ANTI-BOYCOTT

1. Buyer shall not make any disposition of the Products, by way of transshipment, re#export, diversion or otherwise, except as applicable U.S. export laws and regulations may expressly permit, and other than in and to the ultimate country of destination specified on Order(s) or declared as the country of ultimate destination on Seller's invoices or in the End Use Statement that Buyer supplies Seller. Seller shall not be named as shipper or exporter of record or U.S. principal party#in#interest (USPPI) unless specifically agreed to in writing by Seller in which case, Buyer shall provide Seller with a copy of the documents filed by Buyer for Export clearance purposes. At Seller's request, Buyer shall supply end#use and end#user information to determine export license applicability. Failure of Buyer to comply with this section shall constitute a material default allowing Seller to cancel related Order(s) without liability.
2. Buyer warrants that it shall not violate or cause the Seller to violate the U.S. Foreign Corrupt Practices Act of 1977 (FCPA), as amended, the United Kingdom Bribery Act (UKBA) of 2010, as amended, or their respective implementing regulations in connection with Buyer's sale or distribution of

the Products and/or Services, and that Buyer does not know or have reason to believe that any consultant, agent, representative or other person retained by Buyer in connection with the sale and/or distribution of Products/Services has violated, nor caused Seller to violate the FPCA and/or the UKBA. Where Buyer learns of or has reason to know of any violation of FPCA and/or or UKBA in connection with the sale or distribution of Products/Services, Buyer shall immediately advise Seller.

3. Buyer further warrants that Buyer shall not violate or cause Seller to violate the U.S. Anti-boycott Provisions of the U.S. Export Administration Regulations issued pursuant to the U.S. Export Administration Act of 1979, as amended, in connection with Buyer's purchase of Products/Services and that Buyer shall not request or require Seller to make statements or certifications against countries that are not subject to boycott by the U.S.

WARRANTIES

1. Seller warrants that Products manufactured by Seller, when delivered, shall be free from defects in material/workmanship. Seller's obligations under this warranty shall be limited exclusively to repairing or replacing, at Seller's option, any part of Products which, if properly installed, used and maintained, proved to have been defective in material or workmanship within 1 year from the date of shipment. Seller warrants that Services shall be performed in accordance with generally accepted industry practice. Seller warrants for a period of 1 year from the date of shipment that software or firmware, when used with Products, shall perform in accordance with Seller's published specifications. Seller makes no warranty, express or implied, that the operations of the software or firmware shall be uninterrupted or error-free, or that functions contained therein shall meet or satisfy the Buyer's intended use/requirements. Buyer shall notify Seller of any defect in the quality or condition of Products (including software/firmware) or Services within 7 days of the date of delivery or performance, unless the defect was not apparent on reasonable inspection, in which case, within 7 days after discovery of the defect. If Buyer does not provide such timely notification, it shall not be entitled to reject Products (including software/firmware) or Services, and Seller shall have no liability for such defect.
2. Seller's warranty obligations shall not apply to Products which (1) have been altered or repaired by someone other than Seller, or (2) have been subjected to misuse, neglect, or improper use or application, or (3) are normally consumed in operation, or (4) have a normal life inherently shorter than the warranty period stated therein.
3. No Products may be returned unless authorized in advance by Seller, and then only upon such conditions to which Seller may agree. Buyer must obtain a Return Material Authorization (RMA) number from Seller prior to any return shipment, and such RMA number must appear on the shipping label and packing slip. Buyer shall be responsible for returned Products until such time as Seller receives the same at its facility, and for all charges for packing, inspection, shipping, transportation or insurance associated with returned Products.
4. This section VI sets forth the exclusive remedies and obligations for claims based upon defects in or nonconformity of Products/Services, whether the claim is in contract, warranty, tort (including negligence of any degree or strict liability) or otherwise. **THE FOREGOING WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES, WHETHER ORAL, WRITTEN, EXPRESS, IMPLIED OR STATUTORY. NO IMPLIED OR STATUTORY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE SHALL APPLY.**

PATENTS/INDEMNITY

If Buyer receives a claim that Products, or part thereof manufactured by Seller infringes a patent, Buyer shall notify Seller promptly in writing and give Seller information, assistance and exclusive authority to evaluate, defend and settle such claim. Where Buyer has furnished specifications/designs for the manufacture of the allegedly infringing Products, Buyer shall defend, indemnify and hold harmless Seller against third-party claims for infringement arising out of Seller's use of such specifications/designs.

LIMITATION OF LIABILITY

The total liability of Seller on any claim, whether in contract, tort (including negligence of any degree and strict liability) or otherwise arising out of, connected with, or resulting from the manufacture, sale, delivery, resale, repair, replacement or use of any Products/Services, shall not exceed the price allocable to the Products/Services or part thereof which gives rise to the claim. **IN NO EVENT, WHETHER AS A RESULT OF BREACH OF CONTRACT, WARRANTY, TORT, (INCLUDING NEGLIGENCE OF ANY DEGREE, STRICT LIABILITY OR PATENT INFRINGEMENT) OR OTHERWISE, SHALL SELLER, ITS AFFILIATES, SUBCONTRACTORS, OR SUPPLIERS BE LIABLE FOR ANY LOSS OF PROFIT OR REVENUES, LOSS OF USE OF THE PRODUCTS OR SERVICES, OR ANY ASSOCIATED EQUIPMENT, COST OF CAPITAL, COST OF SUBSTITUTE GOODS, FACILITIES, SERVICES OR REPLACEMENT POWER, DOWNTIME COSTS OR CLAIMS OF BUYER'S CUSTOMERS FOR DAMAGES OR FOR ANY SPECIAL, PROXIMATE, CONSEQUENTIAL, INCIDENTAL, INDIRECT OR EXEMPLARY DAMAGES.** If Buyer transfers title to, or leases Products sold hereunder to, or otherwise permits or suffers use by, any third party, Buyer shall obtain from such third party a provision affording Seller and its subcontractors/suppliers the protection of the preceding sentence. Any action against Seller must be brought within 18 months after cause of action accrues.

EXCUSABLE DELAYS

1. Seller shall not be liable for delays in delivery or failure to perform due directly or indirectly to causes beyond Seller's reasonable control including but not limited to: acts of God; war; terrorism; civil commotion; riots; embargoes; government regulations, orders, instructions or priorities; port congestion; acts of or failure to act on the part of Buyer or its agents/employees; fires; floods; sabotage; nuclear incidents; earthquakes; storms; epidemics; strikes; lockouts or other labor difficulties; shortages of or inability to timely obtain proper labor, materials,

- components, shipping space or transportation, fuel, supplies or power at current prices; or due to limitations imposed by the extent of availability of Seller's normal manufacturing facilities.
2. If a delay excused per the above extends for more than 90 days and the parties have not agreed upon a revised basis for continuing providing Products/Services at the end of the delay, including adjustment of the price, then either party (except where delay is caused by Buyer, in which event only Seller) upon thirty (30) days' notice may terminate the Order with respect to the unexecuted portion of the Products/Services, whereupon Buyer shall promptly pay Seller its reasonable termination charges upon submission of Seller's invoices thereof.

SOFTWARE/TECHNICAL/PROPRIETARY INFORMATION

1. Buyer shall not acquire any rights to any software which may be delivered with Products, except as granted in Seller's standard software license. Any software license granted in connection with Products shall be an interim license, which may be withdrawn, pending payment for Products in full.
2. The purchase of Products shall not include any right to supply of technical information such as drawings or specifications.
3. Proprietary information, including drawings, documents, technical data, reports, software, designs, inventions and other technical information supplied by Seller in connection herewith (hereinafter called "Data"), shall remain Seller's sole property and shall be held in confidence by Buyer. Data shall not be reproduced, used or disclosed to others by Buyer without Seller's prior written consent. Upon completion of Order, Buyer shall promptly return all Data to Seller together with all copies or reprints thereof then in Buyer's possession or control, and Buyer shall thereafter make no future use, either directly or indirectly, of any Data or any information derived therefrom without Seller's prior written consent. The foregoing shall in no way obligate Seller to provide or supply Data.

DIES, TOOLS, PATTERNS

Seller's charges for dies, molds, patterns and the like represent the Buyer's proportionate cost thereof, it being expressly understood that they remain the property of Seller. Modifications made to dies, molds, patterns and the like in order to manufacture Products shall be at the discretion of Seller.

GENERAL

1. The rights and obligations of the Buyer and Seller hereunder shall be governed in all respects by the law of the Commonwealth of Massachusetts, U.S.A. The exclusive forum for adjudication of any disputes shall be the federal or state courts of the Commonwealth of Massachusetts, and Buyer/Seller hereby consent to personal jurisdiction and venue in such courts in any proceeding. The United Nations Convention on the International Sale of Goods shall not apply.
2. These Terms and Conditions of Sale together with any other terms specifically agreed to in writing by Seller constitute the entire agreement between Buyer and Seller and supersede any prior or contemporaneous representations, agreements, proposals, warranties, or understandings, oral or written, express or implied. No waiver, modification, amendment, rescission or other change to these Terms and Conditions of Sale shall be binding unless specifically agreed to in writing by an authorized representative of Seller.
3. The invalidity, of any part hereof shall not affect the validity of the remainder. The failure of Seller to assert any right at any time hereunder shall not prevent Seller's subsequent assertion of the same or different rights.
4. Buyer may not assign this contract without the prior written approval of the Seller.

PROHIBITION FOR HAZARDOUS USE

Products sold hereunder are not intended for application in, and shall not be used by Buyer in construction or application of a nuclear installation or in connection with use or handling of nuclear material or for any hazardous activity or critical application, where failure of a single component could cause substantial harm to persons or property, unless Products have been specifically approved for such activity or application. Seller disclaims all liability for loss or damage resulting from such unauthorized use and Buyer shall defend, hold harmless and indemnify Seller against any such liability, whether arising under breach of contract, warranty, tort (regardless of the degree of fault or negligence), strict liability or otherwise.

Where Seller approves the application of the Products in a nuclear facility, the Buyer shall, before such use or provision, arrange for insurance or governmental indemnity protecting the Seller against liability and hereby releases and agrees to indemnify the Seller and its suppliers for any nuclear damage, including loss of use, in any manner arising out of a nuclear incident, whether alleged to be due, in whole or in part to the negligence or otherwise of the Seller or its suppliers.

STATUTORY REQUIREMENTS

Seller reserves the right to make any changes in the general specifications of the Products which are required for the Products to conform to any statutory requirement.

GOVERNMENT CONTRACTS

Only Federal Acquisition Regulation ("FAR") supplement clauses expressly accepted in writing by Seller shall be included or incorporated by reference herein. Seller shall not be bound by and makes no representation of compliance with any FAR or FAR supplement clauses that Seller shall not have expressly accepted in writing.