

**General Terms and Conditions for the performance of  
Services by SMART Photonics BV  
(General Terms and Conditions)  
Version April 2014 1**

## 1 General

1.1. These General Terms and Conditions (a) apply to and form an integral part of all Offers to Customer, all orders of Customer to SMART Photonics, all Confirmations by SMART Photonics, and any Agreement, all as relating to the performance of Services or delivery of Deliverables by SMART Photonics to Customer, (b) are not applicable to the secondment of employees by SMART Photonics to Customer or any other third parties, and (c) shall constitute all of the terms and conditions of any Offer, Confirmation and Agreement between SMART Photonics and Customer relating to the performance of Services by SMART Photonics to Customer.

1.2. Any terms and conditions stated orally by Customer or set forth in any document issued by Customer either before or after issuance of any document by SMART Photonics setting forth or referring to these General Terms and Conditions are hereby explicitly rejected and disregarded by SMART Photonics, and any such terms and conditions shall be wholly inapplicable to any performance of Services by SMART Photonics and shall not be binding in any way on SMART Photonics, unless and to the extent expressly agreed to in writing by SMART Photonics.

1.3. Acceptance of any Offer is expressly conditional on Customer's acceptance of all of the terms contained in the Offer without deviation. Acceptance by Customer of an Offer may be evidenced by Customer's, or its representative's, written or verbal assent or Customer's or its Representative's acceptance of the Services or the Deliverables or payment of the (first installment of the) price for the Services.

1.4. SMART Photonics' Offers are open for acceptance within the period stated by SMART Photonics in the Offer or, when no period is stated, within thirty(30) days from the date of the Offer, but any Offer may be withdrawn or revoked by SMART Photonics at any time prior to the receipt by SMART Photonics of Customer's acceptance related thereto.

1.5. If SMART Photonics receives any order from Customer for the performance of Services and such order is not in response to an Offer by SMART Photonics, or if SMART Photonics receives an order or acceptance by Customer which deviates from SMART Photonics' Offer, such order or acceptance, respectively, will only be binding after SMART Photonics written Confirmation which may be given by post, fax or e-mail.

1.6. Changes to the Offer or Agreement, including but not limited to the scope of the Services, whether prior or during the performance of the Services, require prior written approval from SMART Photonics.

## 2 Definitions

Except as otherwise explicitly agreed to in writing, the following terms shall have the meaning set out below:

2.1 Affiliate shall mean an entity, which is directly or indirectly: (i) owned or controlled by a party, (ii) owning or controlling such party, or (iii) owned or controlled by the entity owning or controlling such party, but any such entity shall only be deemed an Affiliate for the period such ownership or control exists. For the purposes of this definition, an entity shall be deemed to own or to control another

entity if more than 50% (fifty per cent) of the voting stock of the latter entity, ordinarily entitled to vote in the election of directors (or, if there is no such stock, more than 50% (fifty per cent) of the ownership of or control in the latter entity) is held by and consolidated in the annual accounts of the owning or controlling entity.

2.2 Agreement shall mean any agreement resulting from an Offer or Confirmation and any agreement incorporating these General Terms and Conditions by reference.

2.3 Background shall mean any information which is owned or controlled by a party or any of its Affiliates prior to such party entering into the Agreement, as well as copyrights and any other intellectual property rights relating to such information, in respect of which ownership or control is acquired by such party or any of its Affiliates (a) before such party entering into the Agreement or (b) during the term of the Agreement as a result of activities conducted outside the framework of the Agreement, and which is technically indispensable for carrying out the Services or for using Foreground.

2.4 Confidential Information shall mean any information (i) that is marked or labelled Confidential, secrete or the like at the moment of disclosure or, in case of oral disclosure, is identified as confidential and confirmed in writing within 30 (thirty) days after disclosure; or (ii) of which the confidential nature is reasonably apparent under the circumstances.

2.5 Confirmation shall mean any acceptance, acknowledgement or confirmation by SMART Photonics of any order of Customer.

2.6 Customer shall mean the person or company addressed in any relevant Offer or identified as such in the Agreement.

2.7 Customer Supplies shall mean any and all documents, information, data, materials or tools provided by Customer.

2.8 Deliverable shall mean any hardware, software, report, document, material, product or any other deliverable as described in the Offer, excluding any intellectual property rights vested therein, arising thereof or resulting there from.

2.9 Delivery Date shall mean the date communicated and acknowledged by SMART Photonics for the delivery of the Services or the Deliverables.

2.10 Efforts shall mean commercially reasonable efforts consisting of having the Services performed by employees in the number set forth in the Agreement and applying the degree of care and skill ordinarily exercised by employees of the same profession in similar circumstances.

2.11 Force Majeure shall mean any circumstances or occurrences beyond a party's reasonable control - whether or not foreseeable at the time of the Order, Confirmation or Agreement - as a result of which a party cannot reasonably be required to execute its obligations. Such circumstances or occurrences include but are not restricted to: acts of God, war, civil war, insurrections, strikes, fires, floods, earthquakes, labour disputes, epidemics, governmental regulations and/or similar acts, freight embargoes, non-availability of any permits, licenses and/or authorizations required, defaults or delays

of suppliers or subcontractors and/or inability or impracticability to secure transportation, facilities, fuel, energy, labour, materials or components.

2.12 Foreground shall mean the results, including information, whether or not they can be protected, which are generated as a result of the activities conducted within the framework of the Services. Such results include any and all intellectual property rights vested therein, arising thereof or resulting therefrom, including without limitation copyrights, design rights, patent rights, or similar forms of protection, other than the Deliverables and Work Products.

2.13 Losses shall mean any and all fines, losses, damages, costs and expenses, such as but not limited to reasonable attorneys fees.

2.14 SMART Photonics shall mean SMART Photonics BV

2.15 SMART Photonics Indemnified Parties shall mean SMART Photonics and its Affiliates, their trustees, shareholders, officers, directors, agents and employees.

2.16 Offer shall mean any quotation or offer made by SMART Photonics to Customer.

2.17 Open Source Software shall mean any software that is licensed under Open License Terms.

2.18 Open License Terms shall mean terms in any license that require as a condition of use, modification and/or distribution of a work: (a) the making available of source code or other materials preferred for modification, or (b) the granting of permission for creating derivative works, or (c) the reproduction of certain notices or license terms in derivative works or accompanying documentation, or (d) the granting of a royalty-free license to any party under Intellectual Property regarding the work and/or any work that contains, is combined with, requires or otherwise is based on the work.

2.19 Services shall mean any rental of space or tools, technical support or consultancy or any other service as described in the Offer to Customer, including the supply of any Deliverable resulting therefrom or not and the making available of Work Products, as defined in the Agreement.

2.20 Taxes shall mean any and all value-added tax (VAT), sales tax or the like taxes, fees, levies, imposts, duties, assessments charges, customs duties or withholdings of whatever nature.

2.21 Third Party Claim shall mean any claim or suit brought directly or indirectly by any third party.

2.22 Work Product shall mean hardware, software, documents, manuals, materials, photographic slides, artwork, graphics, manufacturing or measurement methods and other products owned by SMART Photonics or created or developed by SMART Photonics in the course of performing the Services, but excluding the Deliverables.

### **3 Tariffs, prices and payment**

3.1 All tariffs and prices are in Euros, are net prices, do not include any applicable Taxes now or thereafter enacted and are based on delivery "Exworks" (Incoterms 2000).

3.2 Tariffs and prices apply to the Services. SMART Photonics has the right to adjust the tariffs by means of written notification at least one (1) month before they become effective. Prices as quoted in Offers are fixed until the Offer expires.

3.3 Payment shall be made according to the payment conditions mentioned in the Offer or, if not specified, within thirty(30) days after the invoice date. Payment shall be considered to have been made on the day the payable sum is received. If Customer is in payment default, (a) Customer will be automatically, without SMART Photonics notification being required, in default, and will owe interest over the outstanding balance payable on a monthly basis from the date due until payment in full at the official rate of interest set by the Dutch government from time to time, or at the rate of one percent (1%) per month, whichever is higher, and (b) SMART Photonics will be entitled to suspend the performance of all the Services rendered to Customer.

#### **4 Obligations of customer**

4.1 The Agreement and the description of the Services are based on information provided by Customer. Customer shall (a) make available to SMART Photonics all Customer Supplies necessary for SMART Photonics to perform the Services, free of charge, in a timely fashion and sufficient quality, (b) make available such competent employees of its organization as are necessary to assist SMART Photonics in fulfilling its obligations under the Agreement, and (c) identify all healthcare and other regulatory and quality requirements applicable to the Services and specify them expressly to SMART Photonics, and obtain, if required by law or otherwise, all necessary approvals of the relevant governmental or regulatory bodies in connection with the performance of the SMART Photonics Services.

4.2 Customer Supplies shall comply with all legal requirements relating to safety and hazardous materials and Customer shall comply with any instructions or house rules provided by SMART Photonics.

#### **5 Ownership and licenses**

5.1 Title to Deliverables. Subject to clause 5.6, title to the Deliverables shall be transferred to the Customer upon full payment of all amounts due for such Deliverables.

5.2 Ownership of Background. Customer, SMART Photonics, their Affiliates or third party suppliers retain sole and exclusive ownership of their respective background. SMART Photonics General Terms and Conditions Version April 2014

5.3 Ownership of Foreground. Foreground created by Customer shall be the property of Customer. Foreground created by SMART Photonics shall be the property of SMART Photonics or its Affiliates.

5.4 Ownership of Work Products. Work Products and improvements thereto shall remain or become the exclusive ownership of SMART Photonics.

5.5 Licenses for Work Products. SMART Photonics hereby grants and shall cause its Affiliates to grant Customer a perpetual, non-exclusive, nontransferable, royalty-free and fully paid-up, worldwide license under SMART Photonics's and its Affiliates Foreground and Background to use the Work

Products, and improvements thereto, in Customer's business, provided however that the Work Products are used only by Customer's employees, and Customer may not reproduce, distribute, rent, communicate to the public, assign, transfer, lease or sublicense any of such Work Products to any other person or entity without SMART Photonics's prior written consent. Customer hereby grants and shall cause its Affiliates to grant SMART Photonics and its Affiliates a perpetual, non-exclusive, non-transferable, royalty-free and fully paid-up, worldwide license under Customer's Foreground to use the Work Products and improvements thereto.

5.6 Licenses for Deliverables. (a) Subject to (b), SMART Photonics hereby grants and shall cause its Affiliates to grant Customer a perpetual, nonexclusive, non-transferable, royalty-free and fully paid-up, worldwide license under SMART Photonics's and its Affiliates Foreground and Background to use, lease, sell, and otherwise dispose of the Deliverables, and (b) for any software that is part of a Deliverable, SMART Photonics hereby grants and shall cause its Affiliates to grant Customer a perpetual, non-exclusive, nontransferable, royalty-free and fully paid-up, world-wide license, without the right to grant sub-licenses, under SMART Photonics's and its Affiliates? Foreground and Background in as far as technically indispensable to use such software in Customer's business, provided however that the software is used only by Customer's employees, and Customer may not reproduce, distribute, rent, communicate to the public, assign, transfer, lease or sublicense any of such software to any other person or entity without SMART Photonics's prior written consent, subject to clauses 5.7(b) to 5.10 included.

5.7 Offer of license for manufacturing, disposing of, copying and distributing Deliverables. (a) Subject to (b), if so requested by Customer, SMART Photonics shall grant and shall cause its Affiliates to grant on reasonable terms and conditions to Customer, subject to any prior commitments to third parties as well as to the provisions of clause 5.12, a perpetual, non-exclusive, non-transferable, royalty-bearing, world-wide license under SMART Photonics's and its Affiliates? Foreground and Background to make Deliverables or to have Deliverables made by a third party acceptable to SMART Photonics, and to use, lease, sell or otherwise dispose of the Deliverables so made by or for Customer, and (b) for any software that is part of a Deliverable or that in itself is a Deliverable, if so requested by Customer, SMART Photonics shall grant and shall cause its Affiliates to grant on reasonable terms and conditions to Customer, subject to any prior commitments to third parties as well as to the provisions of clause 5.12, a perpetual, non-exclusive, non-transferable, royalty-bearing, world-wide license under SMART Photonics's and its Affiliates? Background and Foreground to make and distribute copies of such software.

5.8 All Customer's rights as laid down in clauses 5.5 to 5.7 are subject to Customer's fulfillment of all of its payment obligations in relation to the Services and Deliverables.

5.9 Open source limitation on all licenses. Customer warrants that it shall not perform any actions with regard to any software licensed under the Agreement in a manner that would require the licensed software or any derivative work thereof to be licensed under Open License Terms. These actions include but are not limited to (a) combining the licensed software or a derivative work thereof with Open Source Software, by means of incorporation or linking or otherwise or (b) using Open Source Software to create a derivative work of the licensed software.

5.10 Customer's covenant concerning software. Customer shall in no event, except as expressly stated in the above mentioned licenses or unless and only to the extent permitted by mandatory law applicable to the Agreement: (a) modify, adapt, alter, translate, or create derivative works from, any software provided by SMART Photonics under the Agreement; (b) assign, sublicense, lease, rent, loan, transfer, disclose, or otherwise make available such software; (c) merge or incorporate such software with or into any other software; or (d) reverse assemble, decompile, disassemble, or otherwise attempt to derive the source code for such software without written authorization from SMART Photonics. Customer shall reproduce, without any amendments or changes thereto, any proprietary rights legends of SMART Photonics or its Affiliates or its third party suppliers in any software or documentation provided by SMART Photonics under the Agreement.

5.11 No sale of software and no license to source code. Any software provided under the Agreement and any compilation or derivative thereof is the proprietary information of SMART Photonics or its Affiliates and is confidential in nature. The software provided under the Agreement is not sold and no ownership or assignment of any intellectual property rights is intended nor shall be implied. No rights or licenses with respect to any software source code are granted by SMART Photonics or its Affiliates to Customer.

5.12 Exceptions. No license, immunity or other right is granted to Customer, either directly or by implication, estoppel, operation of law or otherwise, under any of SMART Photonics's or its Affiliates' intellectual property rights that (i) would require payment of royalty or other consideration by SMART Photonics or its Affiliates to a third party, (ii) is necessarily infringed by implementing a standard adopted by a standard setting body or agreed between two or more companies, or (iii) is licensed as part of an industry wide licensing program.

5.13 No other licenses in relation to Work Products and Deliverables. The licenses granted to Customer pursuant to this clause 5 do not include a license, immunity or other right under any of SMART Photonics's or its Affiliates' intellectual property rights, either directly or by implication, estoppel, operation of law or otherwise, for any other purposes, including without limitation for (i) products manufactured by using Deliverables or by means of Deliverables if and to the extent such products infringe any of SMART Photonics's or its Affiliates' intellectual property rights other than SMART Photonics's and its Affiliates' Foreground and Background technically necessarily infringed by said Deliverables, (ii) processes or methods used in or with Deliverables or contained in Work Products, unless such processes or methods have been specifically defined as Deliverables in SMART Photonics's offer or quotation, or (iii) software used in or with Deliverables, even if embedded, or contained in Work Products, unless such software has been specifically defined as Deliverable in SMART Photonics's Offer.

5.14 No license. Except as expressly set forth in this clause 5, Customer acknowledges and agrees that nothing contained in the Agreement shall be construed as granting to Customer any license, immunity or other right under any Intellectual property rights, either directly or by implication, estoppel, operation of law or otherwise.

## 6 Delivery, acceptance and limited warranties

6.1 Timely delivery. (a) Subject to (b), SMART Photonics shall use its Efforts to meet the Delivery Date set forth in the Agreement on the condition that Customer meets all obligations under clause 4 and provides all necessary order and delivery information sufficiently prior to the requested Delivery Date. Should SMART Photonics anticipate at any time its impossibility to achieve Efforts to meet the Delivery Date, SMART Photonics shall promptly notify the Customer by written notice. Such written notice shall contain the current state of the Services, the reasons for the foreseeable delay and the new reasonable period of time, to be agreed with Customer, with a minimum of thirty (30) days, within which SMART Photonics shall use such Efforts to perform the Services (New Delivery Date). If in spite of SMART Photonics using its Efforts, the New Delivery Date is not met, Customer may terminate the part of the Services not performed on the New Delivery Date. With respect to the breach of its delivery obligations, the foregoing states Customer's sole and exclusive remedy and, provided SMART Photonics complies with this clause, SMART Photonics shall not be bound by any further obligation nor be liable for any damage. (b) in case any or all of the conditions under clause 4 are not, not properly or not timely complied with, or if SMART Photonics has to suspend Services for reasons not attributable to gross negligence or wilful misconduct of SMART Photonics, the Delivery Date set forth in the Agreement shall be automatically extended for such additional time as shall be necessary to deliver the Services, and any and all additional costs resulting thereof shall be for Customer's account.

6.2 Acceptance procedure. In case any specific acceptance procedure has been agreed for the Deliverables, Customer agrees to execute such acceptance procedure with respect to such relevant Deliverables within the period agreed or, if not specified, within a period of thirty(30) days after delivery thereof. Such Deliverables will be deemed accepted on the date of delivery unless rejected in writing within said period. Should acceptance be rejected for nonconformity of the Deliverables with the agreed acceptance criteria, SMART Photonics shall use its Efforts to correct the part of the Services not conforming to the acceptance criteria, within a reasonable period of time to be agreed with Customer, with a minimum of thirty (30) days. The obligations of SMART Photonics described above are SMART Photonics's only obligations and Customer's sole and exclusive remedy for non-conformities of the Deliverables to the acceptance criteria.

6.3 Limited warranty. SMART Photonics solely warrants that it will use its Efforts to perform the Services as per the requirements specified in the Agreement. In case SMART Photonics does not comply with the above warranty and as a result thereof the Services have not been properly performed, Customer shall give written notice thereof and a reasonable timeframe with a minimum of thirty (30) days within which SMART Photonics shall take the necessary actions to achieve such Efforts for the part of the Services or Deliverables affected by the breach of SMART Photonics's above warranty, without charging for the costs thereof. The obligations of SMART Photonics described above are SMART Photonics's sole obligations and the Customer's sole and exclusive remedy for the breach of such warranty.

6.4 Disclaimer. EXCEPT AS EXPRESSLY SET FORTH IN THE AGREEMENT, AND TO THE FULLEST EXTENT PERMITTED BY LAW, NOTHING IN THE AGREEMENT SHALL BE CONSTRUED AS AND SMART PHOTONICS EXPRESSLY DISCLAIMS ALL CONDITIONS, OBLIGATIONS, REPRESENTATIONS OR WARRANTIES, WHETHER STATUTORY OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, (A) ANY WARRANTY RELATED



TO MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, COURSE OF DEALING, USE OF TRADE, ABSENCE OF ERRORS OR BUGS, UNINTERRUPTED OPERATION, ACCURACY OR COMPLETENESS OF RESULTS ARISING FROM THE PERFORMANCE OR USE OF THE SERVICES AND/OR SUPPLY OR USE OF THE DELIVERABLES OR ANYTHING ELSE PROVIDED BY SMART PHOTONICS UNDER THE AGREEMENT, AND (B) ANY WARRANTY OR REPRESENTATION AS TO THE VALIDITY OR SCOPE OF ANY APPLICABLE INTELLECTUAL PROPERTY RIGHT, AND (C) ANY WARRANTY OR REPRESENTATION THAT ANYTHING MADE, USED, SOLD, OR OTHERWISE DISPOSED OF UNDER ANY LICENSE GRANTED IN THE AGREEMENT OR ANYTHING PROVIDED BY SMART PHOTONICS UNDER THE AGREEMENT IS OR WILL BE FREE FROM INFRINGEMENT OF ANY THIRD PARTY INTELLECTUAL PROPERTY RIGHT, AND (D) ANY OBLIGATION TO BRING OR PROSECUTE ACTIONS OR SUITS AGAINST THIRD PARTIES FOR INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS. SMART PHOTONICS DOES NOT WARRANT THAT THE MEDIA USED ON THE DESIGNATED HARDWARE WILL BE COMPATIBLE WITH OR PERFORM ON ANY OTHER HARDWARE COMPONENT. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY SMART PHOTONICS, ITS AFFILIATES, DISTRIBUTORS, DEALERS, AGENTS OR ITS OR THEIR EMPLOYEES, SHALL CREATE ANY WARRANTY. THIS DISCLAIMER OF WARRANTY CONSTITUTES AN ESSENTIAL PART OF THESE GENERAL TERMS AND CONDITIONS AND THE AGREEMENT.

6.5 SUBJECT TO THE EXCLUSIONS AND LIMITATIONS SET FORTH IN CLAUSE 7 OF THESE GENERAL TERMS AND CONDITIONS, THE FOREGOING STATES SMART PHOTONICS'S ENTIRE LIABILITY AND OBLIGATION TO CUSTOMER AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY WITH RESPECT TO THE BREACH OF ANY WARRANTY.

## **7 Limitation of liability**

7.1 SMART Photonics Indemnified Parties shall not be liable for any Losses and Customer shall defend, indemnify and hold SMART Photonics Indemnified Parties harmless against any and all Third Party Claims against SMART Photonics Indemnified Parties and any Losses related to such Third Party Claims, arising out of or relating to (i) the death of or injury to any person or any damage to property or any other damage directly or indirectly resulting from the Customer Supplies, (ii) any acts or omissions of Customer's or any of its Affiliates' employees, officers, agents or representatives, (iii) Customer's breach of any of its warranties or obligations under the Agreement, (iv) the development, manufacture, delivery, sale, use or any other disposition of any Deliverables or the performance, use or any other disposition of the Services or anything else provided under the Agreement, or (vi) the infringement of any third party intellectual property rights, except to the extent such Losses or Third Party Claim arises from SMART Photonics's gross negligence or wilful misconduct.

7.2 Except as specifically provided otherwise in an Offer, SMART Photonics's Deliverables and Work Products are not designed, authorized or warranted to be suitable for use in medical, military, air craft, space or life support equipment nor in application where failure or malfunction of a SMART Photonics's Deliverable or Work Product can reasonably be expected to result in a personal injury, death or severe property or environmental damage. Inclusion and /or use of the Deliverable or Work Product in such equipment or applications, without prior authorization in writing of SMART Photonics, is not permitted and for Customer's own risk. Customer agrees to fully indemnify SMART Photonics for any Losses resulting from such inclusion or use.

7.3 IN NO EVENT SHALL SMART PHOTONICS OR ANY OF ITS AFFILIATES BE LIABLE FOR INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES, WHICH INCLUDES WITHOUT LIMITATION, LOSS OF PROFITS, SAVINGS, TURNOVER, GOODWILL, REPUTATION OR DATA, WHETHER OR NOT SUCH DAMAGES ARE BASED ON TORT, WARRANTY, CONTRACT OR ANY OTHER LEGAL THEORY AND EVEN IF SMART PHOTONICS OR ANY OF ITS AFFILIATES WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NO CLAIM OR RECOVERY OF ANY KIND OF LOSS OR DAMAGE AGAINST SMART PHOTONICS SHALL IN THE AGGREGATE BE GREATER IN AMOUNT THAN THE TOTAL PRICE PAID UNDER THE AGREEMENT THAT GIVES RISE TO THE CLAIM OR RECOVERY WITH A MAXIMUM OF FIFTY THOUSAND (50,000) EUROS.

7.4 Any Customer's claim for Losses must be brought by Customer within ninety (90) days of the date of the event giving rise to any such claim, and any lawsuit relative to any such claim must be filed within one (1) year of the date of the claim. Any claims that have been brought or filed in conflict with the preceding sentence are null and void.

## **8 Confidential information**

8.1 The parties acknowledge that in connection with the Services and Deliverables, they may want to disclose valuable information, know-how and trade secrets that the discloser considers to be confidential.

8.2 For a period of three (3) years from the date of receipt of any Confidential Information from the other Party, the receiving Party shall not disclose such Confidential Information to any third party except to the extent necessary to implement the Agreement and in such case, subject to the prior written approval of SMART Photonics - and shall keep such Confidential Information strictly confidential by employing adequate procedures for safeguarding Confidential Information at least as rigorous as the receiving Party employs for its own confidential information. Unless explicitly mentioned in the Agreement, these confidentiality obligations shall apply only to Confidential Information of which the disclosing party can produce dated documentation proving that such Confidential Information was disclosed after approval thereof by the receiving party. The provisions of this clause 8 shall retroactively be in full force and effect from the date first contacts were established with respect to the subject matter of the Agreement.

8.3 The confidentiality obligations under clause 8.2 shall not apply to information for which the receiving party can demonstrate by means of dated documentation that such information: (i) was already in the public domain at the time it was disclosed or subsequently enters the public domain through no fault of the receiving party; (ii) was known to the receiving party or in its possession prior to receipt of such information, (iii) was developed by the receiving party independently and without use of Confidential Information provided by the disclosing party under the Agreement and without any breach of the Agreement; or (iv) was lawfully received by the receiving party on a non-confidential basis from a third party who was not bound by a similar obligation of confidentiality in relation to such information.

8.4 Immediately following the termination or expiration of the Agreement, upon request of the disclosing party, the receiving party will return all media containing Confidential Information and will make no further use thereof.

## **9 Termination**

9.1 The Agreement will remain in force until the completion of the Services or for the term as specified in the Agreement, if any. If the Agreement has been entered into for an indefinite period, the Agreement may be terminated by giving three (3) months written notice, without compensation to the other party, subject to clause 10.1.

9.2 In the event a party fails to comply with its material obligations under the Agreement, the other party may terminate the Agreement with immediate effect if the party in default has failed to remedy such default within thirty (30) days or a longer period if indicated in the notice - as from the receipt of a written notice of default detailing in a reasonable manner the nature of the default.

9.3 Either party may, by written notice to the other party, terminate with immediate effect the Agreement or any part thereof, without any liability whatsoever, if (a) the other party does not comply with its payment obligations under the Agreement, or if (b) any proceedings in insolvency, bankruptcy, liquidation or winding up - including through merger or reorganization - are instituted against the other party, voluntary or involuntary, or a trustee or receiver is appointed over the other party, or any assignment is made for the benefit of creditors of the other party.

## **10 Effects of termination**

10.1 If at the time of the termination or expiration of the Agreement, Customer has received the benefit of any part of the performance of the Agreement, Customer shall pay (a) immediately upon such termination or expiration, the amounts invoiced by SMART Photonics for the Services performed under the Agreement before the termination or expiration or (b) the pro rata amounts invoiced by SMART Photonics for partial performance, as the case may be.

10.2 If SMART Photonics reasonably assumes that Customer has failed, will fail, or enters in a position in which it is likely to fail to comply with its payment obligations, SMART Photonics will be entitled to suspend its obligations under the Agreement and to set further requirements as security for the amount that is due and future payment obligations.

10.3 If Customer desires early termination of the Agreement irrespective of default by SMART Photonics or Force Majeure and SMART Photonics agrees at its sole discretion to such early termination, Customer shall pay SMART Photonics 10%(ten per cent) of the remaining amount that would have been invoiced if the Agreement had been fully performed.

10.4 In the event of termination or expiration of the Agreement, the terms 1010and conditions destined û whether expressed or not - to survive such termination or expiration shall survive.

## **11 Force majeure**

11.1 Neither party will be bound to comply with any obligation under the 1010Agreement if the party is prevented from doing so through Force Majeure.

11.2 If the Force Majeure has lasted for more than sixty (60) days, the other party will be entitled to terminate the Agreement or part thereof by written notification, without prejudice to SMART Photonics's right to compensation for what it has already performed under the Agreement.

## **12 Export control**

12.1 Customer represents that, with respect to its performance under the Agreement, it will comply with all applicable laws and regulations, including but not limited to those pertaining to U.S. Export Administration or the export or import controls or restrictions of other applicable jurisdictions.

12.2 If the delivery of a Deliverable or a Service under the Agreement is subject to the granting of an export or import license by a government and/or any governmental authority under any applicable law or regulation, or otherwise restricted or prohibited due to export or import control laws or regulations, SMART Photonics may suspend its obligations and Customer's rights regarding such delivery until such license is granted or for the duration of such restriction and/or prohibition, respectively, and SMART Photonics may even terminate the Agreement, without incurring any liability towards Customer. Furthermore, if an end-user statement is required, SMART Photonics shall inform Customer immediately thereof and Customer shall provide SMART Photonics with such document upon SMART Photonics first written request; if an import license is required, Customer shall inform SMART Photonics immediately thereof and Customer shall provide SMART Photonics with such document as soon as it is available. Customer warrants that it will not deal with the Services in violation of any applicable export or import control laws and regulations.

## **13 Publicity**

Any reference to the name SMART Photonics BV on trademarks in connection with any advertisement, publication or sales literature requires SMART Photonics prior written permission. Copies of proposed press releases or advertisements or other communications for which permission is requested shall be submitted to SMART Photonics for SMART Photonics's prior approval in writing.

## **14 Applicable law and disputes**

14.1 All Offers, Confirmations and Agreements are governed by and shall be construed in accordance with the laws of the Netherlands, without giving regard to its conflict of law principles. The UN Convention on Contracts for the International Sale of Goods shall not apply to any Offer, Confirmation or Agreement.

14.2 All disputes arising out of or in connection with any Offer, Confirmation or Agreement shall first be attempted by Customer and SMART Photonics to be settled through consultation and negotiations in good faith and a spirit of mutual cooperation.

14.3 All disputes that have not been settled as per clause 14.2 shall be submitted to the competent court in s'Hertogenbosch, the Netherlands, provided that SMART Photonics shall always be permitted to bring any action or proceedings against Customer in any other court of competent jurisdiction. Nothing in this Agreement shall be construed or interpreted as a limitation of SMART Photonics's right under applicable law for injunctive or other equitable relief or to take any action to safeguard its possibility to have recourse on Customer.

## 15 Miscellaneous

15.1 Customer shall not assign any rights or obligations under the Agreement without the prior written consent of SMART Photonics. Customer acknowledges and agrees that SMART Photonics may delegate and/or formally assign all or part of its rights and obligations under the Agreement to any other SMART Photonics's Affiliate or to any third party to which it has outsourced its activities in whole or in part.

15.2 In the event that any provision of the Agreement or these General Terms and Conditions shall be held invalid or unenforceable by a court of competent jurisdiction or by any future legislative or administrative action, the validity and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired, provided that, in such case, the Parties shall use all reasonable efforts to achieve the purpose of the invalid or unenforceable provision.

15.3 Either party's failure to exercise or delay in exercising any right or remedy arising from any Agreement, shall not operate as a waiver thereof; nor shall any single or partial exercise of any right or remedy arising therefrom preclude any other or future exercise thereof or the exercise of any other right or remedy arising from any Offer, Confirmation or Agreement or from any related document or by law.

15.4 All notices and communications to be given under the Agreement shall be in writing and shall be deemed delivered upon hand delivery, confirmed facsimile communication, or three (3) days after deposit in the mail of the home country of the party, postage prepaid, by certified, registered, first class or equivalent mail, addressed to the parties at their addresses set forth in the Offer, Confirmation or Agreement.

15.5 SMART Photonics reserves the right to make any amendments or modifications to these General Terms and Conditions at any time. Such amendments and modifications shall have effect on all Offers, Confirmations and Agreements referring to such amended or modified General Terms and Conditions as from the date of such Offer, Confirmation or Agreement.

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