

MASABA STANDARD TERMS & CONDITIONS OF SALE

1. Governing Terms. These Masaba Standard Terms and Conditions of Sale (“Terms”) apply to and govern the sale by Masaba, Inc. (“Masaba”) of all products (“Products”) and the performance by Masaba of all services (“Services”), except as otherwise stated in Masaba’s Proposal or Sales Order or as otherwise agreed in a writing signed by Masaba. Masaba offers to sell Products and Services solely pursuant to these Terms and any acceptance by Buyer is expressly limited to these Terms, except as otherwise agreed in a writing signed by Masaba. Any additional or different terms proposed by Buyer in any offer, acceptance, confirmation or other document are rejected by Masaba. For purposes of these Terms, “Buyer” means the person or entity purchasing new Products or Services directly from Masaba or from an authorized distributor of Masaba.

2. Prices. The prices for Products and Services are those contained in Masaba’s Proposal or Sales Order or, if there is no Proposal or Sales Order, in Masaba’s standard price list. If the costs of fuel, materials or other production items increase, Masaba may impose a surcharge for affected Products or Services. The prices for the Products and Services do not include any taxes, customs duties or charges, brokerage fees, or costs of freight, shipping, packaging, labeling, storage or insurance, which will be paid by Buyer in addition to the prices for Products and Services.

3. Payment. All payments for Products and Services are payable on the terms stated in Masaba’s Proposal or Sales Order. If a Proposal or Sales Order does not specify payment terms, all payments are due 30 days from the earlier of the date of invoice or delivery. All payments will be made in U.S. dollars. All amounts past due will be charged interest at a rate of 1.5% per month to be paid by Buyer. If requested by Masaba, Buyer will provide financial information of Buyer to enable Masaba to assess Buyer’s ability to perform its payment obligations. If Masaba reasonably believes Buyer may be unable to fulfill its payment obligations, Masaba, without prejudice to any other rights or remedies, may suspend or terminate its performance, require full or partial advanced payment from Buyer, or impose security or other arrangements to secure Buyer’s payment obligations.

4. Security Interest. Buyer grants Masaba a first priority purchase money security interest in all Products sold to Buyer, to secure Buyer’s payment for such Products. Masaba may file financing statements and any other documents necessary or appropriate to perfect or enforce its security interest.

5. Delivery; Title. All Products are sold FOB the location stated in Masaba’s Proposal or Sales Order. If a Proposal or Sales Order does not state a place of delivery, all Products are sold FOB Masaba’s Vermillion facility. Title to, and risk of loss of, Products will pass to Buyer upon delivery to the carrier at the FOB point. Any delivery date stated in a Proposal or Sales Order is an estimate of the date Masaba believes the Product or Services will be available for delivery; Masaba will not be responsible for any delays in delivery.

6. Cancellation. If you accept the quotation and offer (so long as it has not previously been rescinded by us) it becomes a legally binding agreement between us. Neither of us may cancel this agreement unless we both agree in writing to cancel it. If you decide to cancel this agreement without first reaching a new written agreement with us, or if you fail to pay us any money you owe us under this agreement, or if you fail to fulfill any of your promises you made by accepting this agreement, we may treat the order as having been wrongfully terminated by you, in which case the agreement is immediately terminated upon our providing written notice to you. If you terminate the order without reaching a new agreement with us first, you agree to pay us an amount to compensate us for the damages we incurred as a result of your having wrongfully terminated the order. You agree that our damages, for which you will be liable, will be calculated as of the greater of:

- a. Twenty (20%) percent of the original price you agreed to pay us; or
- b. The total of all labor and material costs we incurred in fulfilling your order before it was terminated, plus an allowance for our overhead expenses and our lost profits resulting in termination of the order.

If you refuse to pay us the damages for which you are liable or any amounts owed by you, you agree that we may collect from you any incidental expenses we may incur in recovering such amounts from you, including court costs, attorneys’ fees, and any other incidental expenses authorized under applicable law. You agree that we may cancel any order or require full or partial payment in advance by you if you file bankruptcy, if your solvency is in question, or if a trustee or receiver is appointed for you.

7. Breach. Any one of the following acts by Buyer will be a material breach of these Terms by Buyer: (a) Buyer fails to pay for any Products or Services when due; (b) Buyer fails to accept conforming Products or Services; (c) Buyer fails to perform any other obligation of Buyer under these Terms; (d) the filing of a voluntary or involuntary petition in bankruptcy against Buyer, Buyer’s insolvency, or an assignment for the benefit of creditors of Buyer. In the event of a breach, Masaba, in addition to all other rights and remedies hereunder or at law or in equity and without liability to Buyer, may terminate its obligations by written notice to Buyer. Buyer will pay all costs, including reasonable attorneys’ fees, incurred by Masaba as a result of Buyer’s breach.

8. Limited Warranty. Masaba warrants its Products as described in this section. Except as expressly stated in this section, all Products and Services sold by Masaba are sold “AS-IS” and with no warranty.

a. Limited Warranty. Subject to the conditions and limitations of these Terms, Masaba warrants to Buyer that: (a) new Products (both equipment and components) will not fail to operate in accordance with their specifications due to defects in material or workmanship during the period which ends two years or (4,160 hours) after the date of delivery; and (b) new equipment Products will not experience a failure in their structural components (e.g. trusses) due to defects in material or workmanship during the period which ends five years or (10,400 hours) after the date of delivery (the foregoing periods are at times referred to as the “original warranty periods”). The foregoing limited warranty does not apply to any part, component or item of any Product which was manufactured by anyone other than Masaba (a “Third-Party Component”); Seller makes no warranty whatsoever with respect to any Third-Party Components, all of which are sold by Masaba “AS-IS” without any warranty whatsoever.

b. Limitations. The limited warranty set forth above does not apply to, and Masaba will have no liability for, the failure of a Product to conform to the limited warranty if: (a) the Product is not maintained in strict compliance with the Product maintenance manual or as otherwise directed by Masaba in writing, (b) any repairs are made to the Product which are not authorized by Masaba in writing, (c) the Product is not operated in strict compliance with the Product operating manual, including without limitation the Product’s load bearing capacity limitations, (d) the Product is used for any purpose other than the purpose for which it was manufactured, (e) any alterations or modifications are made to the Product, (f) the Product is abused or damaged, (g) the failure is the result of normal wear and tear, (h) the failure results from a failure of any Third-Party Component, or (i) the Product is operated after the failure first occurs.

c. Exclusive Remedy. The sole and exclusive remedy for any failure of a Product to comply with the limited warranty set forth above during the applicable warranty period will be, at the election of Masaba in its sole discretion, either: (a) repair of the Product or component thereof by Masaba, (b) replacement of the Product or component thereof by Masaba, or (c) refund of the purchase price of the Product. Unless otherwise agreed by Masaba in writing, all repairs will be performed at Masaba’s designated location and Buyer, at its cost, will be responsible for removing the Product and transporting the Product to and from such location. Any repaired or replaced Product will carry the same limited warranty as the original Product for the remainder of the original warranty period. The sole and exclusive remedy of Buyer for any claim arising out of or resulting from the failure of a Third-Party Component will be against the manufacturer of the Third-Party Component.

d. Claims. Any claims under the limited warranty set forth above must be submitted by Buyer to Masaba in writing not later than 30 days after the date the Product first failed to comply with the warranty but in no event later than the expiration of the applicable warranty period. Any claim made after such dates will be barred. After receipt of a written notice of claim, Masaba may require Buyer to return to Masaba for inspection

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the Product or part thereof which Buyer claims to be defective, at Buyer's cost. No Product or part may be returned to Masaba without Masaba's prior written authorization. If a Product is determined by Masaba in its sole discretion not to have failed to comply with the limited warranty, Masaba will have no warranty liability or be responsible for any costs associated with the Product. If a Product is determined by Masaba, in its sole discretion to have failed to comply with the limited warranty, Masaba will repair, replace or refund as elected by Masaba pursuant to subsection (c) above and will reimburse Buyer for the reasonable costs of shipping the Product or component to and from Masaba's designated location.

e. No Other Warranties. THIS LIMITED WARRANTY CONSTITUTES MASABA'S SOLE LIABILITY AND OBLIGATION, AND BUYER'S SOLE REMEDY, FOR ANY BREACH OF WARRANTY OR OTHER NONCONFORMITY OF PRODUCTS. THIS WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES. MASABA MAKES NO OTHER WARRANTY, EXPRESS IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT, OR THAT MAY ARISE FROM COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OR TRADE.

MASABA DOES NOT EXTEND THIS WARRANTY, AND BUYER MAY NOT TRANSFER IT, TO ANY THIRD PARTY.

9. Limitation of Liability. MASABA WILL IN NO EVENT BE LIABLE TO BUYER OR ANY THIRD PARTY FOR CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY OR SPECIAL DAMAGES, INCLUDING LOST PROFITS, WHETHER IN AN ACTION BASED ON CONTRACT, TORT OR OTHER LEGAL THEORY, ARISING FROM OR RELATED TO THE TRANSACTIONS CONTEMPLATED HEREUNDER, EVEN IF MASABA KNEW OR SHOULD HAVE KNOWN OF THE LIKELIHOOD OF SUCH DAMAGES. IN ADDITION, IN NO EVENT WILL MASABA'S TOTAL LIABILITY ARISING FROM OR RELATED TO THE TRANSACTIONS HEREUNDER (INCLUDING ANY WARRANTY CLAIMS), WHETHER BASED ON CONTRACT, TORT OR OTHER LEGAL THEORY, EXCEED THE TOTAL AMOUNT BUYER PAID TO MASABA FOR THE SPECIFIC PRODUCT OR SERVICES GIVING RISE TO SUCH LIABILITY. THE EXISTENCE OF MULTIPLE CLAIMS WILL NOT ENLARGE THIS LIMIT.

10. Product Selection. The selection of Products and Services by Buyer, and any custom design requirements of Buyer with respect to any Products, are Buyer's sole responsibility. Masaba will not be liable for: (a) any technical advice or assistance provided in connection with Buyer's purchase of Products or Services, or (b) any custom design requirements of Buyer, including any defects therein or any infringement caused thereby.

11. Acknowledgment. Buyer acknowledges that Masaba has set its prices and fees, and has agreed to sell Products and Services to Buyer, in reliance on the limitations of liability, disclaimer of warranties and exclusive remedies set forth in these Terms, and that such provisions form an essential basis of the bargain between the parties, without which Masaba would not have agreed to sell Products and Services to Buyer.

12. Indemnity. Buyer will defend, indemnify and hold harmless Masaba, its affiliates, and their respective shareholders, directors, officers, agents and employees from and against any losses, damages, claims, liabilities and expenses, including reasonable attorneys' fees, arising from or related to the purchase, ownership, use or operation of the Products or Services by Buyer or any third party, except in the event such losses, damages, claims, liabilities or expenses are caused solely by a breach of Masaba's limited warranty under Section 8 above, in which case Masaba's liability, if any, will be only to Buyer and will be limited as set forth in Sections 8 and 9.

13. Software. To the extent a Products contain any software, the following terms apply: (a) Masaba or Masaba's licensor retains full ownership, including all patents, copyrights, trade secrets, trademarks and other rights, in such software; (b) Masaba grants to Buyer a non-exclusive, nontransferable, non-sub-licensable, limited license to use internally such software solely in connection with the Product. Buyer will not engage in unauthorized use of the software, including any reverse engineering, disassembling, de-compiling, copying, modifying, selling or otherwise exploiting the software.

14. Intellectual Property. All products, designs, devices, software, firmware, documents, data, processes, methods and other items that are designed, developed or produced by Masaba in connection with any Products or Services are the sole property of Masaba and are not "works made for hire" or "commissioned works." Masaba retains all patents, copyrights, trade secrets and other intellectual property rights with respect to any design, process, manufacturing and other technologies used in or resulting from the development or production of Products or Services. Neither Buyer nor any third party will have any right or license in or to any patent, copyright, trade secret or other intellectual property right not expressly granted by Masaba in these Terms.

15. Confidential Information. All information Buyer obtains from Masaba that Buyer knows or should know is confidential to Masaba, including pricing and trade secret information, will remain Masaba's confidential information and Buyer may not disclose such information to any third party.

16. Legal Compliance. Buyer will comply with all applicable laws, regulations and administrative rules governing the purchase and sale of Products, including export and import laws.

17. Assignment. Buyer may not assign any of its rights or delegate any of its obligations under these Terms, whether voluntarily, by operation of law or otherwise, without Masaba's prior written consent, and any purported assignment or delegation without consent will be null and void. If Buyer is a corporation or other legal entity, a prohibited assignment will be deemed to have occurred upon the transfer of a majority of shares or other ownership interests in Buyer, whether such transfer takes place in one transfer or successive transfers over time. Masaba may assign its rights and/or delegate its obligations under these Terms upon written notice to Buyer. Subject to the foregoing, these Terms will bind each party and its respective successors and permitted assigns.

18. No Third-Party Beneficiary. Nothing in these Terms is intended to, or will, create any third-party beneficiaries, whether intended or incidental, and neither party may make any representation to the contrary.

19. Force Majeure. Masaba will not be liable for any delay or failure by Masaba to furnish Products or Services due to causes beyond its control, such as acts of God, fires, epidemics, floods, riots, wars, terrorism, labor disputes, governmental actions or the inability to obtain on commercially reasonable terms sufficient materials, labor, components, energy, services, facilities or transportation.

20. Waiver. Masaba's waiver of any right it may have or any default by Buyer will not be a continuing waiver of such right or default or a waiver of any other right Masaba may have under these Terms. No waiver by Masaba will be effective except pursuant to a writing signed by Masaba.

21. Severability. If any provision of these Terms is determined to be invalid or unenforceable, such provision will be enforced to the extent possible and the remaining provisions will remain in full force and effect.

22. Governing Law; Venue. The laws of South Dakota will govern the validity, performance and construction of these Terms and any disputes arising from or relating to these Terms or the transactions contemplated hereunder. All disputes will be subject to the exclusive jurisdiction of the state or federal courts of South Dakota, and Buyer consents to the personal and exclusive jurisdiction and venue of these courts. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply to any Products or Services sold by Masaba to Buyer.

23. Entire Agreement. These Terms, along with any other written agreement relating to the Products or Services signed by Masaba, constitute the entire agreement between Buyer and Masaba with regard to the Products or Services and expressly supersede and replace any prior or contemporaneous agreements relating thereto. In the event any provision of these Terms conflicts with a provision of any Proposal, Sales Order or other written agreement signed by Masaba, the provision of such Proposal, Sales Order or other written agreement will control. These Terms may not be superseded, cancelled or amended except in a writing signed by each party.