



## TERMS AND CONDITIONS OF SALE

### 1. Definitions:

"Seller" shall mean Active Power Inc. whose registered office is at 2128 West Braker Lane, Austin, TX 78758. "Buyer" shall mean ..... (File Number .....) whose registered office is at.....

**2. Proposal Validity:** Subject to Seller's right to withdraw its proposal at any time, it will remain valid for thirty (30) days from the date thereof unless an alternative period of validity is specifically stated therein. These TERMS AND CONDITIONS OF SALE and the warranty document expressly referred to in clause 14 (the "WARRANTY") shall form an integral part of any proposal issued by Seller to Buyer.

**3. Buyer's Terms:** All orders placed pursuant to Seller's proposal must be in writing. Seller's proposal shall in all cases be deemed to form part of any resultant contract between Seller and Buyer. All contracts between Seller and Buyer shall be deemed to be subject to these TERMS AND CONDITIONS OF SALE and the WARRANTY, which shall comprise an integral part of the contract between Seller and Buyer. Buyer's general terms and conditions of purchase or other standard terms and conditions of Buyer are expressly excluded. No specific conditions issued by Buyer nor any document communicated by Buyer shall prevail over these TERMS AND CONDITIONS OF SALE or the WARRANTY unless expressly approved in writing by Seller. No amendments to these TERMS AND CONDITIONS OF SALE or the WARRANTY shall be permitted unless expressly agreed by Seller in writing.

**4. Payment Terms Subject to Credit Approval:** Payment terms are net 30 days for all invoices. Payments shall be made in US dollars. A finance charge of 1.5% per month (18% per year) will be charged on past due accounts. Buyer shall be solely responsible for the payment of all taxes that are applicable to the transaction, the property, its value, or service performed in connection therewith levied by any taxing authority having jurisdiction. In the event that payments are not received by the due date then Seller shall have the right to suspend work under the contract.

**5. Payment Schedule:** Unless otherwise agreed in writing by Seller, payment shall be as follows without retention or deduction unless agreed otherwise in writing by Seller and Buyer: 25% of equipment price to be invoiced upon receipt of purchase order; 50% of equipment price to be paid prior to dispatch of equipment; 25% of equipment price to be paid within 30 days of equipment shipment. Services price to be paid within 30 days of completion of start-up. If start-up does not occur within 90 days of delivery of equipment due to no fault of Seller, Seller shall invoice for Services. Invoicing on contracts involving only service work shall be as set out in the Seller's proposal or, where no such invoicing schedule is specified, invoicing shall occur upon completion of the service work.

**6. Delivery:** Delivery quoted in the Seller's proposal is based upon availability at the time of quote; actual delivery will be based upon availability at the time of Seller's order acceptance. Should Seller fail to deliver the equipment and/or perform the service by the contractual delivery date other than by reason of a Delay Event or a delay caused by Buyer, then Seller shall pay to Buyer as liquidated damages and not as a penalty a sum limited to and not to exceed 5% of the contract price relating to the delayed equipment or service accruing at a rate of 0.5% per week of delay. The payment by Seller of such liquidated damages shall be Buyer's sole remedy for delay and shall be in full and final settlement of Seller's liability for delay. Notwithstanding the foregoing provisions of this clause 6, Buyer's right to such damages shall not commence until four weeks have elapsed from the contractual delivery date. In the event Buyer cannot accept delivery on the contractual delivery date, written notification to Seller must be made prior to shipment. Buyer will be responsible for all Seller's costs, including storage, incurred by such delay. If a delay in shipment is caused by Buyer, Seller may invoice, and Buyer shall pay to Seller, such sum as would otherwise have been due on delivery of the equipment had such delay in shipment not occurred.

**7. Freight:** All equipment shall be delivered FOB Factory, Prepaid and Allowed, unless otherwise expressly agreed in writing by Seller. Risk of loss shall pass to Buyer on the completion of loading the equipment at Seller's premises.

**8. System Start-up:** Start-up (on projects including start-up) will commence only after ninety five percent of contract price has been received in good funds or cleared funds by Seller.

**9. Delay Event:** Seller shall not be liable for its failure to perform due to any event beyond its reasonable control, including but not limited to acts of God, fires, floods, wars, sabotage, accidents, labor disputes or shortages, acts of government authorities, adverse weather condition, government laws, regulations, ordinances or codes, inability to obtain material, equipment or transportation and any similar events (each a "Delay Event").

**10. Interpretation:** Where any inconsistency exists between these TERMS AND CONDITIONS OF SALE and any other provision of the contract between Seller and Buyer, the contract shall be interpreted and construed subject to and giving priority to these TERMS AND CONDITIONS OF SALE. Within these TERMS AND CONDITIONS OF SALE clause 16 shall take precedence.

**11. Invalidity:** The invalidity of any provision of these TERMS AND CONDITIONS OF SALE shall not affect the validity of the remaining provisions. If any provision of these TERMS AND CONDITIONS OF SALE proves to be invalid or inoperable then Seller and Buyer shall replace the invalid or inoperable clause with a new one having an effect as close as possible to the original provision.

**12. Assignment:** Buyer shall not assign the contract between Seller and Buyer or delegate the performance of its duties under the contract unless consent is given in writing by Seller.

**13. Applicable Law:** These TERMS AND CONDITIONS OF SALE and the contract between Seller and Buyer shall be subject to the laws of the State of Delaware without regard to its conflict of laws provisions.

**14. Warranty:** Subject to the terms of Seller's "WARRANTY", document reference Warranty APUSA/0121, which shall form an integral part of these TERMS AND CONDITIONS OF SALE.

**15. Remedies:** The remedies set forth in these TERMS AND CONDITIONS OF SALE are the sole and exclusive remedies available to Buyer.

**16. Limitation of Liability:**





(i) Seller shall not, to the fullest extent that it is permitted to exclude its liability under the applicable law, be responsible whether in contract or in tort (including negligence, economic tort or otherwise) or by operation of law or by way of any indemnity obligation arising under the contract between Seller and Buyer or howsoever arising for incidental, special, economic, indirect or consequential loss and/or damages of whatever nature (whether or not claimed or suffered by Buyer and/or any person, business or entity not a party to the contract between Seller and Buyer) including, but not limited to, loss of use or availability of equipment and/or systems, loss of production, downtime costs, loss of contract, loss of business opportunity, loss of data and/or information, loss of use of data and/or information, loss of profits (including overheads and fixed costs), and/or loss of revenue arising out of or in connection with the performance of Seller's obligations under the contract between Seller and Buyer and/or the performance, adequacy and/or suitability of the equipment and/or the service provided, including any such losses and/or damages as may be reasonably foreseeable at the time of entering into the contract, save as expressly provided by liquidated damages for delay (clause 6).

(ii) To the fullest extent that it is permitted to limit liability under the applicable law, the total cumulative liability of Seller to Buyer arising from the contract between Seller and Buyer for any acts or omissions whether in contract and/or in tort (including negligence, economic tort or otherwise) and/or by operation of law and/or by way of any indemnity obligation arising under the contract between Seller and Buyer or howsoever arising shall in all cases be limited to, and in no case exceed, the contract price or \$5,000,000 (five million US dollars), whichever is the lesser.

(iii) Nothing contained in this clause 16 is intended to, or shall be construed as, limiting and/or excluding Seller's liability for bodily injury and/or death, gross negligence, fraud and/or willful misconduct and/or any other liability which cannot be limited or excluded under the applicable law.

(iv) This clause 16 shall survive expiration, cancellation or termination of the contract between Seller and Buyer.

**17. Suspension of Work:** Any requests by Buyer to suspend work or delay delivery of equipment or services ("Suspension") must be made in writing. Any agreement to comply with this request is at the absolute discretion of Seller and subject to the following conditions: (i) any additional cost reasonably and necessarily incurred by Seller in complying with a request for Suspension will be to the account of Buyer and payable as a variation to the contract between Seller and Buyer, in full, with the next payment milestone; (ii) if, as a result of a Suspension, a contractual milestone for payment is not achieved, the Seller will be entitled, on the original milestone date, to payment for equipment or services that would otherwise have become due together with additional costs referred to in clause 17(i) above; (iii) title to the equipment proportionate to the amount paid will transfer to Buyer when payment is received by Seller; (iv) requests to resume work are to be made in writing; (v) following a request to resume work Seller will be entitled to an extension of time to complete all work and will notify Buyer of a revised delivery date; (vi) Seller will not be required to resume work if any payments are outstanding, and will be entitled to cease work if payments subsequently become overdue; (vii) if a request to resume work is not received by Seller within 60 days of receipt of a Suspension request then Seller is entitled at its discretion to consider the contract between Seller and Buyer as cancelled or agree with Buyer a further period of Suspension; (viii) if Seller decides pursuant to clause 17(vii) that the contract is cancelled, then the provisions of clause 18 (ii) will take effect; (ix) if after 60 days no extension period is agreed pursuant to clause 17(vii) then the Seller is entitled at its discretion to consider the contract between Seller and Buyer as cancelled and the provisions of clause 18 (ii) will take effect.

**18. Cancellation and Termination of Contract:**

(i) In the event of Buyer failing to pay any sum due to Seller within 30 days of the date the payment is due, or becoming bankrupt or (being a corporation) going into liquidation other than for the purpose of a scheme of reconstruction or amalgamation, or carrying on its business under an administrator, receiver, manager or liquidator for the benefit of its creditors or any of them, then Seller shall be entitled, to the extent permitted under the applicable law and without prejudice to any other rights and remedies under the contract between Seller and Buyer, to terminate the contract between Seller and Buyer by giving 14 days' notice to Buyer.

(ii) In the event of cancellation under clause 17(vii) or clause 17(ix) or termination under clause 18(i), the Seller shall be paid by Buyer the valuation of the work undertaken (which valuation shall be conducted by Seller) as at the date of cancellation or termination as the case may be, any expenditure reasonably incurred by Seller in the expectation of the performance of, and in consequence of the cancellation or termination (including without limitation claims received from subcontractors and suppliers of Seller) of, the contract between Seller and Buyer, and Seller's loss of anticipated profit.

**19. Warranties and Representations:** Any warranties and guarantees intended to be provided to Buyer by Seller shall be those expressly included herein and in Seller's proposal and no additional warranties, guarantees or representations, whether written, direct, indirect or collateral, shall be implied into the contract between Seller and Buyer and to the fullest extent permitted under the applicable law are expressly and intentionally excluded. Buyer has not relied on any statement, representation, warranty, guarantee or agreement of Seller nor of any other person on Seller's behalf, including any representations, warranties or agreements arising from statute or otherwise in law, except for the representations, warranties, guarantees and agreements expressly contained in Seller's proposal, these TERMS AND CONDITIONS OF SALE and the WARRANTY.

**20. Buyer's Responsibility and Indemnity:** It shall be Buyer's responsibility to ensure that any equipment purchased from Seller is installed and operated in a proper and safe manner. Buyer agrees to defend, indemnify and hold harmless Seller from and against all suits, claims, costs and expenses, including reasonable attorney's fees, for personal injury, death or property damage arising from the purchase, ownership or use by Buyer, Buyer's customer or Buyer's agent, or any of their employees or independent contractors, of the equipment purchased.

**21. Passage of Title:** Buyer shall not acquire any title, property right, or ownership interest in any equipment invoiced by Seller to Buyer, except as provided under clause 17(iii), until such equipment has been paid for in full by Buyer, and Buyer shall not have any right to transfer, sell, pledge, or otherwise dispose of such equipment, or any interest therein, unless and until such equipment has been paid for in full by Buyer.

**22. Arbitration:** Any controversy or claim arising out of or relating to the contract between Seller and Buyer including without limitation any question of existence, validity, enforceability or termination thereof which cannot be resolved or concluded in a timely fashion through good-faith negotiations between Seller and Buyer shall be settled by arbitration before one (1) arbitrator in state of Delaware, in accordance with the rules of the American Arbitration Association. The language of the arbitration shall be the English language. The law of the arbitration shall be the law of the State of Delaware. The decision of the arbitrator shall be final and binding upon Seller and Buyer and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

**23. United Nations Convention:** The United Nations Convention on Contracts for the International Sale of Goods shall not apply to the contract between Seller and Buyer and is hereby expressly excluded.





**24. Survival:** Rights and obligations under the contract between Seller and Buyer which due to their nature and the intention of Seller and Buyer should naturally survive expiration, termination or cancellation of the contract shall survive such expiration, cancellation or termination. In particular clauses 4, 5, 6, 10, 11, 13, 14, 16, 18, 19, 20, 22, 23 and this clause 24 shall expressly survive expiration, termination or cancellation of the contract.

**25. Entire Agreement:** The contract between Seller and Buyer constitutes the sole and entire agreement as between Seller and Buyer with respect to its subject matter.

**26. Covid – 19:** Notwithstanding anything contained to the contrary elsewhere in the contract between Seller and Buyer, and irrespective of the fact that the covid-19 virus is known to Seller and Buyer at the date of the contract coming into force, where there is any delay, adverse impact, complication or impediment (of whatsoever nature) to the delivery of any equipment and/or the provision of any services arising out of or in connection with the covid-19 virus and/or its pandemic status then any date, time or period for delivery of equipment and/or completion of services, whether fixed or estimated, shall be extended by a reasonable period (taking into account the nature and extent of any such delay, adverse impact, complication or impediment). Any such extension of time under this clause shall be without any liability on the part of Seller and sufficient to permit Seller to deliver such equipment and/or perform such services (including without limitation any time as may be required to remobilise and/or reschedule resources as the case may be). In the event that any such delay, adverse impact, complication or impediment shall persist for a period exceeding thirty days then Seller shall have the right to suspend its performance of its obligations under the contract between Seller and Buyer without liability, provided that should any such delay, adverse impact, complication or impediment exceed 120 days then Seller and Buyer shall have the right to terminate the contract. In the event of any such suspension or termination then Seller shall be entitled to be compensated for its work in progress, including without limitation reasonable overheads and profit, as at the date of the suspension and/or termination together with its reasonable costs arising out of or in connection with the suspension and /or termination of related subcontracts or supply agreements.

**27. Third Party Rights:** No third party shall have any beneficial or implied rights and/or interest pursuant to the contract between Seller and Buyer.