

## Appendix H

# Export Sales Contract (Basic Clauses)

### *PRICES*

- A. Prices include the following costs:
  - i. Seller's usual inspection and factory tests
  - ii. Seller's usual packing (or containerizing if applicable) for export
  - iii. Freight by Seller's usual means to alongside vessel at the point of export designated by Seller (but not the cost of insurance or charges for pier handling, marshaling, lighterage, and heavy lifts). Insurance to cover the inland shipment shall be arranged by Seller at Buyer's expense if Seller is arranging for the export shipment pursuant to Article 3 of this contract.
- B. Unless otherwise stated, prices are quoted in Canadian funds.

### *TAXES, DUTIES, AND EXCHANGE RATES*

- A. Prices quoted include all applicable Canadian taxes except for sales, use, excise, value-added, and similar taxes. If sales, use, excise, value-added, or similar taxes are levied against the Seller, the Buyer shall reimburse the Seller upon presentation of invoices therefor. However, where a refund of such taxes may be applied for, the Seller, if promptly furnished by the Buyer with evidence of exportation, will apply for a refund. If the Buyer has reimbursed the Seller, the Buyer shall be credited with the refund.
- B. Prices quoted do not include Canadian import duties. All rights in drawback of customs duties paid by the Seller belong to and shall remain in the Seller. At the Seller's request, the Buyer shall provide documents and assistance necessary to process the Seller's drawback claims, failing which, the Buyer shall reimburse the Seller for such import duties. Such reimbursement shall be payable upon presentation of Seller's invoice therefor.

- C. Prices quoted herein are based upon the prevailing rates for taxes and freight at the date of the proposal and, with respect to the purchase price of goods to be bought by the Seller in foreign countries, on duty and exchange rates current at the date of the proposal. Any increase or decrease in these rates or the imposition of any new duties or taxes between the date of the proposal and the date of payment by the Seller will be paid by the Buyer, upon presentation of Seller's invoices therefore, or will be credited to the Buyer.
- D. Any taxes, duties, fees, charges, or assessments of any nature levied by any governmental authority other than of Canada in connection with this contract, whether levied against the Buyer, against the Seller or its employees, or against any of the Seller's subcontractors or their employees shall be for the Buyer's account and shall be paid directly by the Buyer to the governmental authority concerned. If the Seller, its subcontractors, or the employees of either are required to pay any such taxes, duties, fees, charges, or assessments in the first instance or as a result of the Buyer's failure to comply with any applicable laws or regulations governing the payment of such levies by the Buyer, the amount of any such payment so made shall be reimbursed by Buyer, payable upon presentation of Seller's invoice therefor.

### *PAYMENT*

- A. Payment shall be made in Canadian dollars at Toronto, Canada, as follows:
  - i. On all orders of ten thousand dollars (\$10,000) or less, payment in full shall be made simultaneously with the giving of the order.
  - ii. On orders of over ten thousand dollars (\$10,000), payment shall be made through a Letter of Credit to be established by the Buyer at its expense (including any bank confirmation charges). All Letters of Credit shall be in favor of and acceptable to the Seller, shall be maintained in sufficient amounts and for the period necessary to meet all payment obligations, shall be irrevocable and issued or confirmed by a Canadian chartered bank in Toronto within fifteen days after the date of this contract, shall permit partial deliveries, and shall provide for pro rata payments, payable upon presentation of Seller's invoices and Seller's certificate of delivery FOB factory or of delivery into storage with cause therefor.
- B. If the Buyer fails to fulfill any payment obligation, the Seller may suspend performance (and any costs incurred by the Seller as a result thereof shall be paid by the Buyer, payable upon presentation of

invoices therefor) or may complete performance if Seller deems it reasonable to do so. Seller shall be entitled to an extension of time for performance of its obligations equaling the period of Buyer's non-fulfilment, whether or not the Seller elects to suspend performance. If such nonfulfilment is not rectified by the Buyer promptly upon notice thereof, the Seller may, in addition to its other rights, terminate this contract, and the Buyer shall pay to the Seller its charges for termination, payable upon presentation of Seller's invoice therefor and determined according to the Termination Charges clause (Clause 6).

### ***DELIVERY, TITLE, AND RISK OF LOSS***

- A. Except as stated in paragraph C below, Seller shall deliver the goods FOB factory. Partial delivery shall be allowed. Any delivery dates given are approximate and are based upon prompt receipt by Seller of all information necessary to permit Seller to proceed with work without interruption.
- B. Title and risk of loss and damage shall pass to the Buyer on delivery.
- C. If the goods or any part thereof cannot be delivered when ready due to any cause referred to in the EXCUSABLE DELAY clause, the Seller may place such goods into storage (which may be at the place of manufacture). In such event:
  - i. Seller's delivery obligations shall be deemed fulfilled and title and risk of loss and damage shall pass to Buyer,
  - ii. Any amounts payable to the Seller on delivery shall be payable upon presentation of Seller's invoices and its certification as to such cause, and
  - iii. All expenses incurred by the Seller, including, but not limited to, all expenses of preparation and shipment into storage, handling, storage, inspection, preservation, and insurance shall be for Buyer's account and shall be payable upon Seller's presentation of invoices therefor.

### ***EXCUSABLE DELAY***

- A. The Seller shall not be in breach of any of its obligations under this contract where failure to perform or delay in performing any obligation is due, wholly or in part, to:
  - i. a cause beyond its reasonable control;
  - ii. an act of God, an act or omission of the Buyer or of any governmental authority (de jure or de facto), wars (declared or undeclared),

- governmental priorities, port congestion, riots, revolutions, strikes or other labor disputes, fire, flood, sabotage, nuclear incidents, earthquake, storm, epidemic; or
- iii. inability due to a cause beyond the Seller's reasonable control to obtain necessary or proper labor, materials, components, facilities, energy, fuel, transportation, governmental authorizations or instructions, material or information required from the Buyer. The foregoing shall apply even though any such cause exists at the time of the order or occurs after the Seller's performance of its obligations is delayed by another cause.
- B. The Seller will notify the Buyer of any failure to perform or delay in performing due to a cause set out in paragraph A and shall specify, as soon as practicable, when the obligation will be performed. Subject to paragraph C, the time for performing the obligation shall be extended for the period lost due to such a cause.
  - C. Where the period lost is at least sixty days and the parties have not agreed upon a revised basis for performing the obligation, including the adjustment of the prices, then, either party may, upon thirty days' written notice, terminate this contract, whereupon the Buyer shall pay to the Seller termination charges determined in accordance with the Termination Charges clause (Clause 6).

### ***TERMINATION CHARGES***

- A. In the event that this contract is terminated by the Seller pursuant to any of its terms, the termination charges payable by the Buyer shall be calculated as follows:
  - i. material, labor, and indirect expenses committed or incurred to date of termination;
  - ii. all costs incurred in the execution of the termination;
  - iii. reasonable profit on (i) and (ii) herein above cited;
  - iv. the greater of 10 percent of the unbilled portion of the contract price or the unrecoverable, ongoing, fixed costs and expenses due to discontinuities in operation plus loss of reasonable anticipated profit; and
  - v. interest at the rate of 1.5 percent per month on the amount of the claim as cited in (i) to (iv) inclusive, if the termination charges are not paid as invoiced.
- B. The termination charges shall be payable upon presentation of Seller's invoice therefor.

### ***EXPORT SHIPMENT***

If the Seller agrees to make export shipment, all fees and expenses, including, but not limited to, those covering preparation of consular documents, consular fees, storage, marine insurance (including war risk, if available) and other insurance, ocean freight, and Seller's then current fees for such services shall be payable by the Buyer upon presentation of invoices therefor. Unless otherwise instructed by the Buyer, the Seller shall prepare consular documents according to its best judgment but without liability for fines or other charges due to error or incorrect declarations.

### ***GOVERNMENT AUTHORIZATIONS***

The Seller shall, without any assumption of liability therefor, apply for an export permit on behalf of the Buyer where a permit is required by law. In the event that an export permit is denied or revoked, the Buyer shall have the right to elect to terminate the contract subject to the payment to the Seller of termination charges determined according to the Termination Charges clause (Clause 6). The Buyer shall be responsible for obtaining any import permit, exchange permit, or other governmental authorization required by the law of the country of importation.

### ***NUCLEAR USE***

The goods sold are not intended for nor shall they be used for or as any part of any activity or process involving any use or handling of any radioactive material, including any nuclear material (as that term is defined in the Nuclear Liability Act of Canada). If the goods or any part thereof are used by the Buyer contrary to the aforesaid, the Buyer shall provide, at its own expense, insurance and indemnity satisfactory to the Seller protecting the Seller and all of its subcontractors and suppliers from all loss, expense, damages, costs, or liability of every kind, whether in contract or in tort (including negligence), and the Seller may terminate this contract. Upon such termination, the Buyer shall pay to the Seller termination charges determined according to the Termination Charges clause (Clause 6).

### ***PATENTS***

- A. The Seller shall, if notified promptly in writing and given authority, information, and assistance, defend, at its own expense, any suit or

proceeding brought against the Buyer so far as based on a claim that the goods, or any part thereof, sold under this contract infringe any patent of Canada, and the Seller shall pay all damages and costs awarded therein against the Buyer. In the event that the goods, or part thereof, are in such a suit held to constitute an infringement and use of the goods, or part thereof, is enjoined for the intended use, the Seller shall, at its expense and option:

- i. procure for the Buyer the right to continue using the same;
  - ii. replace the same with noninfringing goods or part thereof;
  - iii. modify the same so as to eliminate infringement; or
  - iv. remove the same and refund the purchase price (less reasonable depreciation for any period of use) and any transportation costs and installation costs paid by the Buyer.
- B. The preceding paragraph shall not apply to any goods, or any part thereof, manufactured to the Buyer's design. As to such goods, or part, the Seller assumes no liability whatsoever for infringement.
- C. The rights and obligations of the parties with respect to patents or any other industrial property rights are solely and exclusively as stated herein, and the foregoing states the entire liability of the Seller for patent infringement.

### **WARRANTIES**

- A. The Seller warrants to the Buyer that the goods manufactured by the Seller will be free from defects in material, workmanship, and title and will be of the kind and quality described in the contract.
- B. If a failure to meet any of the foregoing warranties, except as to title, appears within one year from the date of shipment or within one year after completion of installation, if the latter is supervised by or performed by the Seller, and provided that completion of installation is not unreasonably delayed by the Buyer, then the Buyer shall not be entitled to terminate or rescind this contract, but the Seller shall correct any such failure by either, at its option, repairing any defective or damaged part or parts of the goods or by making available, FOB Seller's plant or other points of shipment, any necessary repaired or replacement part or parts. Where a failure cannot be corrected by the Seller's reasonable efforts, the parties shall negotiate an equitable adjustment in price. In the event of a failure to meet the warranty as to title, the Buyer shall not be entitled to elect to terminate or rescind this contract but the Seller shall correct such failure. The foregoing sets out the Seller's sole obligation for failure to comply with the foregoing warranties. The Seller shall have no obligation whatsoever and the Buyer

shall have no right to make a claim against the Seller in respect of the failure to meet any of the foregoing warranties, except as to title, which appears after the one-year period set out in this clause.

- C. The obligations set forth in this clause are conditional upon:
  - i. proper storage, installation (except where installation is supervised by or performed by the Seller), use, maintenance, and compliance with any applicable recommendations of the Seller; and
  - ii. the Buyer promptly notifying the Seller of any defect and, if required, promptly making the goods available for correction.
- D. There is no warranty whatsoever with respect to goods normally consumed in operation or that have a normal life shorter than the warranty period set out in this clause.
- E. With respect to goods not manufactured by the Seller (except for integral parts of the goods sold, to which the warranties given in this clause shall apply), the Seller gives no warranty whatsoever, and only the warranty, if any, given by the manufacturer shall apply.
- F. The foregoing is exclusive and in lieu of all other warranties and conditions, regardless of whether they be oral, written, express, or implied by statute, including the implied conditions of reasonable fitness for purpose, merchantability, and correspondence with description.

### ***LIMITATION OF LIABILITY***

- A. In no event, whether as a result of a breach of contract or a tort (including negligence), shall the Seller be liable to the Buyer for:
  - i. loss of profit or revenue, loss of use, cost of capital, downtime costs, cost of substitute goods, facilities, services, or replacement power;
  - ii. property damage external to the product and loss arising out of such damage;
  - iii. special or consequential damages; and
  - iv. any of the foregoing suffered by a customer of the Buyer.
- B. Except as may be provided in the Patents clause (Clause 10), in no event, whether as a result of a breach of contract or a tort (including negligence) shall the liability of the Seller to the Buyer exceed the price of the goods, or part thereof or to the service, which gives rise to the claim.
- C. If the Buyer transfers title to or leases the goods 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 suppliers the protection of paragraph A.

- D. If the Seller furnishes Buyer with advice or other assistance that concerns the goods supplied hereunder or any system or equipment in which any such goods may be installed and which is not required pursuant to an express term of this contract, the furnishing of such advice or assistance is done without any assumption of responsibility or liability therefore, and the Buyer shall not institute a claim in contract or in tort (including negligence) arising out of or in any way connected therewith.

### ***GENERAL***

- A. Unless otherwise stated in this contract, the goods shall be installed by and at the expense of the Buyer.
- B. The delegation or assignment by the Buyer of any or all of its duties or rights without the Seller's prior written consent shall be void.
- C. No waiver, alteration, or modification of any of the provisions of this contract shall be binding on the Seller unless it is in writing and signed by a duly authorized representative of the Seller.
- D. Any goods sold shall comply with federal and provincial laws and regulations applicable to the manufacture, packing, and shipment of such goods as of the date of the Seller's proposal and shall comply with any amendments thereto that may have come into effect prior to the time such goods are shipped, provided that the price and, if necessary, delivery shall be equitably adjusted to compensate the Seller for having to comply with such amendments.
- E. The invalidity, in whole or in part, of any of the foregoing clauses will not affect the remainder of such clauses or any other clauses in this contract.
- F. Any reference to "goods" in this contract shall, where the context requires, be a reference to a single chattel personal or to a part of such single chattel personal.
- G. No trade usage or course of dealing will be binding on the Seller unless specifically referred to in the contract.
- H. This contract and any amendments thereto shall be governed in all respects including, but not limited to, validity, interpretation, and effect, by the laws of the Province of Ontario and of Canada.

### ***EXHIBIT A. PRICE ADJUSTMENT CLAUSE (MANUFACTURING ONLY)***

All prices stated herein are subject to adjustments, upon completion of this agreement, for changes in labor and material costs. Such adjustments,

involving increases or decreases in the prices stated herein, are to be determined in accordance with the following.

### **Labor**

- A. For the purpose of adjustment, the proportion of the price representing labor is accepted as 50 percent thereof.
- B. The above amount accepted as representing labor will be adjusted for changes in labor cost. Such adjustment will be based upon the Index Numbers of the *Average Hourly Earnings in the Electrical Industrial Equipment Manufacturing Industry*, published monthly by Statistics Canada.

### **Material**

- A. For the purpose of adjustment, the proportion of the price representing material is accepted as 40 percent hereof.
- B. The above amount accepted as representing material will be adjusted for changes in material costs. Such adjustment will be based upon the *Combined Index of Wholesale Prices for Iron and Non-Ferrous Metals Groups* (excluding gold), or any similar mutually agreed-upon index published monthly by Statistics Canada.

The averages of the monthly indices for labor and material referred to above for the period from a date six months preceding shipment to date of shipment of order under this agreement will be computed separately, and percentage increases or decreases will be established for labor and material by comparison with corresponding indices in effect at the time this proposal was made in the month of \_\_\_\_\_.

The adjustments for changes in labor and material will be obtained by applying the respective percentages of increase or decrease to the amounts covering labor and material as specified above, and the results will be accepted as an increase or decrease in the aforementioned price.

If Field Construction is involved, refer to Price Adjustment Clause for Field Labor.

## **EXHIBIT B. PRICE ADJUSTMENT PROVISIONS**

Upon completion of the work, the total contract price for the apparatus to be supplied under this contract shall be subject to an increase or decrease due to fluctuation in the cost of material and/or labor. Adjustments shall be

determined in accordance with the following, and the results shall be accepted as an increase or decrease in the contract price.

### **Labor**

- A. For the purpose of adjustment, the proportion of the contract price representing labor is accepted as 50 percent.
- B. The amount so accepted as representing labor will be adjusted for changes in labor costs. Such adjustment will be based upon Table 18 “Average Hourly Earnings, Machinery—Except Electrical, Canada” as shown in *Employment Earnings and Hours*, published monthly by Statistics Canada. An average of those published monthly/hourly earnings for the period from a date six months before complete shipment to the date complete shipment of the apparatus is made from the company’s works will be calculated, and the percentage increase or decrease will be calculated by a comparison with such published hourly earnings for the month during which the company’s tender was submitted. The adjustment for changes in labor costs will be obtained by applying such percentage of increase or decrease to the amount representing labor above mentioned.

### **Material**

- A. For the purpose of adjustment, the proportion of the contract price representing material is accepted as \_\_\_\_\_ percent hereof.
- B. The amount so accepted as representing material will be adjusted for changes in material costs. Such adjustment will be based upon Table 2 “General Wholesale Index—Iron Products (1,935 2 39 5 100)” as shown in *Industry Price Indexes*, published monthly by Statistics Canada. An average of those published indexes for the period from the date six months before complete shipment to the date complete shipment of the apparatus is made from the company’s works will be computed, and the percentage increase or decrease will be calculated by a comparison with such published index for the month during which the company’s tender was submitted. The adjustment for changes in material costs will be obtained by applying such percentage of increase or decrease to the amount representing material previously mentioned.

### **Subcontract**

To carry out this contract, the company will purchase the components or material listed below, which may increase or decrease in price due to

increases or decreases in the cost of labor or material. The Purchaser shall reimburse the company the amount of any increase and the company shall credit the Purchaser the amount of any decrease due to such adjustment from date of submission of the company's tender.

**EXHIBIT C. PRICE ADJUSTMENT CLAUSE  
(FIELD LABOR ONLY)**

Prices stated herein applicable to construction or assembly of the equipment provided, at the Purchaser's site, are subject to adjustments upon completion of this agreement for changes in labor costs. Such adjustments, involving increases or decreases in the prices stated herein, are to be determined in accordance with the following.

***Field Labor***

- A. For the purpose of adjustment, the proportion of the price representing labor is accepted as \_\_\_\_\_ percent thereof.
- B. The above amount accepted as representing labor will be adjusted for changes in labor cost. Such adjustment will be based upon the *Average Hourly Earnings in the Construction Industry, Other Engineering Group* published monthly by Statistics Canada, for the area of \_\_\_\_\_.

The monthly average hourly earnings for labor referred to above for the period of construction under this agreement will be computed separately, and percentage increases or decreases will be established for labor by comparison with corresponding average hourly earnings in effect at the time this proposal was made in the month of \_\_\_\_\_.

The adjustments for changes in labor will be obtained by applying the respective percentage of increase or decrease to the amounts covering labor as specified above, and the result will be accepted as an increase or decrease in the aforementioned price.