

MemoryTen, Inc.

Terms & Conditions

Buyer expressly agrees that the following terms and conditions shall govern the purchase by Buyer and the sale of any goods or services by MemoryTen, Inc.

Acceptance & Cancellation of Orders

Each order for goods is subject to acceptance in writing by a duly authorized officer of MemoryTen, Inc. Any written acknowledgment of receipt of an order shipment in and of itself constitutes such acceptance. Orders accepted by MemoryTen, Inc. may be canceled by Buyer only upon written consent of MemoryTen, Inc. In the event of cancellation or other withdrawal of an order, without limiting any other remedy which MemoryTen, Inc. may have as a result of such cancellation or other withdrawal, reasonable cancellation or restocking charges and all expenses incurred and commitments made by MemoryTen, Inc. relating to the order shall be paid by Buyer to MemoryTen, Inc. Special orders for items normally not stocked are non-cancelable and non-refundable.

Delivery & Shipment

All prices quoted and goods shipped are F.O.B. MemoryTen, Inc.'s facility. Title and risk of loss of all goods shall pass upon MemoryTen, Inc.'s delivery to carrier for shipment to Buyer. Unless otherwise agreed by MemoryTen, Inc. in writing, Buyer shall pay all freight, handling, delivery and insurance charges for shipment of goods. Choice of carrier and shipping method and route shall be at the election of the MemoryTen, Inc. unless specifically designated by the Buyer. MemoryTen, Inc. shall not be liable for delays in delivery or for failure to perform due to causes beyond the reasonable control of the MemoryTen, Inc., which causes shall include without limitation, acts of God, acts or omissions of Buyer or civil or military authorities, fire, strikes, epidemics, quarantine restriction, floods, earthquakes, riot, war, delays in transportation or inability to obtain necessary labor materials or supplies. In the event of any delay, the contractual date of delivery, if any, shall be extended for a period equal to the time lost as a consequence of such delay without penalty to the MemoryTen, Inc. MemoryTen, Inc. shall be entitled to refuse or delay shipments for failure by Buyer to pay promptly any payments due MemoryTen, Inc., whether on this or any other contract between MemoryTen, Inc. and Buyer. MemoryTen, Inc. shall have the right to deliver all goods covered hereby at one time or in portions from time to time within the time for delivery provided in such order.

Terms & Payment

- a) Payment terms are subject to MemoryTen, Inc. credit approval. MemoryTen, Inc. may change credit or payment terms at any time when in MemoryTen, Inc.'s reasonable opinion Buyer's financial condition, payment record or the nature of Buyer's relationship with MemoryTen, Inc. so warrants. If requested by MemoryTen, Inc., Buyer will deliver to MemoryTen, Inc. within 45 days after the end of each fiscal quarter a detailed balance sheet and income statement for the Buyer's prior fiscal quarter which will have been prepared in accordance with generally accepted accounting principles.
- b) Unless otherwise specified by MemoryTen, Inc. in writing (refer to payment on face of the sales invoice) payment in full of the net amount owing without offset or deduction is due: 15 days from date of invoice for orders sent with Net 15 terms; 30 days from date of invoice for orders sent with Net 30 terms; 45 days from date of invoice for orders sent with Net 45 terms; and 1 day from date of invoice for orders sent with payment in advance, COD, Net Due terms. If payment is not received within the specified period, a late payment charge of 1.5% per month of the unpaid balance or the maximum amount allowed by law, whichever is less, shall be paid by Buyer.
- c) All checks are accepted subject to collection and Buyer agrees to pay all costs of collection, including reasonable attorney's fees and costs. Any checks received from Buyer may be applied by MemoryTen, Inc. against any obligation of Buyer to MemoryTen, Inc. under this or any other agreement, notwithstanding any statement appearing on or referring to such check. Acceptance of partial payment shall not constitute a waiver of MemoryTen, Inc.'s right to payment in full of all amounts owed from Buyer to MemoryTen, Inc.
- d) Buyer hereby grants MemoryTen, Inc. a security interest in any goods shipped under this agreement, including all accessions to and replacements of such goods and the process thereof to secure the payment of the purchase price for such goods and all other amounts owing under this agreement. Buyer agrees that this agreement may be used by MemoryTen, Inc. for facilitation of filing a financing statement in any location deemed necessary or advisable to perfect MemoryTen, Inc.'s security interest in the goods and their proceeds without the necessity to obtain an additional signature on the actual financing statement. Nonetheless Buyer agrees to cooperate fully with MemoryTen, Inc. in executing any additional documents, instruments, financing statements or amendments thereof as MemoryTen, Inc. may deem necessary or advisable to maintain and continue the security interest created by this agreement.

Inspection & Acceptance of Goods

Buyer shall be responsible for conducting any final acceptance tests on goods if necessary, which tests shall be completed promptly and in no event later than after delivery. The goods shall be deemed accepted by Buyer unless Buyer notifies MemoryTen, Inc. in writing of Buyer's rejection of the goods and the reason for such rejection within 30 days after delivery of the goods to the Buyer. MemoryTen, Inc. MemoryTen, Inc. agrees as MemoryTen, Inc. shall elect to credit the account of Buyer or replace without charge to Buyer all goods which at the time of delivery are not in accordance with their manufacturer's specifications, but only if Buyer provides MemoryTen, Inc. timely rejection of the goods and returns such goods to MemoryTen, Inc.'s facility within 30 days from date of delivery in original packaging and in good condition without their serial numbers or any part thereof altered, replaced or removed, and accompanied by a specification in writing of the defects involved. Buyer shall notify MemoryTen, Inc. in each instance when Buyer intends to return goods, which Buyer believes, are not in accordance with their manufacturer's specifications and MemoryTen, Inc. shall be entitled to examine such goods at Buyer's facilities prior to return. Final inspection and determination whether goods are in accordance with their manufacturer's specifications shall be made at MemoryTen, Inc.'s facility or may be based upon the manufacturer's actual test report. Other than the foregoing inspection and acceptance provisions, all sales are final and Buyer shall not have the right to cancel goods ordered prior to delivery of such goods without the prior consent of MemoryTen, Inc. Notwithstanding the foregoing, in no event shall MemoryTen, Inc. issue or cause to be issued a Return Manufacturer's Authorization ("RMA") beyond 90 days from the date of delivery to Buyer of any goods.

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Shipping Damage Or Loss

In the event of shipping damage or loss, Buyer must contact MemoryTen, Inc. and the shipping company immediately. If the Buyer has insured the merchandise or if the goods were shipping F.O.B. (meaning the Buyer is being billed for the shipping charges directly by the shipping company), then the insurance claim will be the sole responsibility of the Buyer. If MemoryTen, Inc. has shipped the merchandise C.I.F. then the Buyer must register a claim with MemoryTen, Inc. on the insurance claim form currently found on its Website.

MemoryTen, Inc. will credit the Buyer for the loss if and only if the insurance company has approved a claim for the loss with MemoryTen, Inc. MemoryTen, Inc. will not be responsible for issuing the Buyer a credit memo if the insurance company has denied the claim. MemoryTen, Inc. will not be responsible for any consequential or other damages for the loss or damage of merchandise during shipping. The Buyer will still be expected to pay for the shipment on the appropriate due date.

Return of Merchandise

No merchandise can be accepted for return by MemoryTen, Inc. without an RMA number. The Buyer will be solely responsible for loss or misplacement of goods returned without an RMA number.

Installation

Buyer shall be solely responsible for the installation and operation of the goods covered hereby, including without limitation the obtaining of all permits, licenses, or certificates required for the installation or use of such goods.

Offset of Amounts Owed to Buyer

If buyer is owed any monies by MemoryTen, Inc. because of goods purchased from Buyer, overpayment to MemoryTen, Inc. or because MemoryTen, Inc. has credited Buyer for returned goods or discounted a purchase to Buyer, MemoryTen, Inc. at its sole discretion may apply the owed amount to any other amounts owed by Buyer to MemoryTen, Inc. Any request for cash refund of credits to Buyer must be sent to MemoryTen, Inc. in writing. Any overpayments not requested to be refunded in writing and held by MemoryTen, Inc. for more than two years will be deemed forfeited. MemoryTen, Inc. may withhold payment of any amounts owed to Buyer if amounts owed by Buyer to MemoryTen, Inc. are past due.

Credit Memos

Buyer may not apply a credit to any open invoice without issuance of a credit memo by MemoryTen, Inc. Credit memos may be issued at the sole discretion of MemoryTen, Inc. for returned merchandise, payment in exchange and other reasons as determined by MemoryTen, Inc.

MemoryTen, Inc.'s Right To Increase Prices

Unless otherwise specified on a sales order, MemoryTen, Inc. reserves the right to increase the selling price of any and all goods by MemoryTen, Inc.'s supplier. The selling price quoted shall upon increase in price by MemoryTen, Inc.'s supplier be increased by a percentage equal to the percentage of increase in MemoryTen, Inc.'s cost for goods and Buyer agrees to pay any such increased price in accordance with the terms hereof.

Taxes

MemoryTen, Inc.'s prices do not include any applicable sales, use or other similar taxes. Accordingly, in addition to prices specified by MemoryTen, Inc., Buyer shall also be responsible for payment of any sales, use, excise or similar tax attributable to the sale of goods covered hereby or, in lieu thereof, provide MemoryTen, Inc. with tax exemption certificates acceptable to the taxing authorities.

Product Warranty

Any warranty, which may be applicable to products purchased by Buyer pursuant to this agreement, will be listed in the product description on MemoryTen, Inc.'s Website. Please refer to the individual product for warranty information. Third party product warranty information is as specified in the third party documentation accompanying the product and, to the extent permitted by local law, MemoryTen, Inc. does not warrant a third party product. Other than as may be set forth as a warranty in the product description, MemoryTen, Inc. makes no express or implied warranties of any kind relating to any goods or products.

Disclaimer

The warranties set forth in this agreement are in lieu of and Buyer hereby expressly waives all other warranties of any kind, whether express, implied or statutory, including without limitation any other warranties of merchantability or fitness for a particular purpose, and all such other warranties are hereby disclaimed and excluded by MemoryTen, Inc. In no event shall MemoryTen, Inc. be liable for any indirect, special, incidental, punitive or consequential damages in connection with or arising out of the sale, installation, use, operation, service or repair of any product whether based on breach of warranty or contract, strict liability, negligence or otherwise, whether or not MemoryTen, Inc. shall have been advised as to the possibility or reason for any such potential loss or damage. The sole and exclusive remedy for breach of MemoryTen, Inc.'s warranty of the products is stated herein. In all other cases (exclusive of MemoryTen, Inc.'s liability stated herein) MemoryTen, Inc.'s sole and exclusive liability with respect to any matter arising from or connected with the sale, installation, use, operation, service or repair of any products or MemoryTen, Inc.'s performance under this agreement, whether based on breach of warranty, contract, strict liability, negligence, or otherwise, shall not exceed the original cost to Buyer of the products sold or provided.

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Insurance

Buyer agrees to insure all shipments. If Buyer has an insurance policy, Buyer must fax the insurance policy to MemoryTen, Inc. If Buyer does not have an insurance policy, MemoryTen, Inc. will insure any package and charge the insurance to Buyer. Buyer must notify MemoryTen, Inc. immediately of any change or expiration in its insurance policy. The Federal Express insurance rate is 0.5% and the UPS insurance rate is 0.33% of the total value of the shipment. If buyer insures its own shipment and the shipment is lost or damaged, Buyer will need to claim the insurance with its insurance provider. Buyer will still be expected to pay for the shipment on the appropriate due date.

Proprietary Rights

MemoryTen, Inc. shall have no liability of any kind with respect to any actual or alleged infringement of any United States or foreign patent, trademark, copyright, deskwork right, trade secret or other intellectual property or proprietary right. Buyer agrees to look solely to the manufacturer or licensor of the products with respect to any claim of infringement. Furthermore Buyer agrees to protect, defend, indemnify, and hold harmless MemoryTen, Inc. from all sums, costs, expenses, and attorney's fees, which MemoryTen, Inc. may incur or be obligated to pay as a result of any and all claims, demands, causes or action, or judgments arising out of or relating to any use, modification, or enhancement of the goods purchased by the Buyer unless such use, modification, or enhancement is approved in writing by the manufacturer or licensor of the goods.

Use of Products In Life Support Applications

Goods sold by MemoryTen, Inc. are not authorized to be used as life support equipment or for applications in which the failure or malfunction of the goods would create a situation in which personal injury or death is likely to occur. Any such use or sale of goods is at the sole risk of the Buyer, and Buyer agrees to indemnify and defend MemoryTen, Inc. against and hold MemoryTen, Inc. harmless from all damages, costs and expenses, including attorney's fees and costs, relating to any claim, lawsuit or threatened lawsuit arising out of such use or sale.

Technical Advice & Data

Any technical advice offered or given in connection with the use of any goods is an accommodation to Buyer without charge and MemoryTen, Inc. shall have no responsibility or liability whatsoever for the content or use of such advise. Without MemoryTen, Inc.'s prior written consent, Buyer shall not use, duplicate or disclose any technical data delivered or disclosed by MemoryTen, Inc. to Buyer for any purposes other than for installation, operation or maintenance of goods purchased by Buyer.

Software

All computer software delivered by MemoryTen, Inc. to Buyer is licensed pursuant to separate licensing agreements or other arrangements directly to Buyer from the owner of the software or other third party. Buyer acknowledges receipt of a separate agreement pursuant to which software delivered to Buyer is licensed. Buyer acknowledges that MemoryTen, Inc. is not a party to such license with respect to software supplied hereunder. Buyer agrees to look only and directly to the licensing party in connection with all maintenance, support, infringement and warranty claims relating to software delivered by MemoryTen, Inc.

Default

In the event of any default, the Buyer shall pay all costs incurred by MemoryTen, Inc. in collecting any amounts due under this agreement, including reasonable attorney's fees and costs. The waiver by MemoryTen, Inc. of any breach hereof or default in any payment shall not be deemed to constitute a waiver of any succeeding breach or default. MemoryTen, Inc. shall have all the remedies provided under the Uniform Commercial Code, which shall be cumulative with any other remedies, which MemoryTen, Inc. may have at law, in equity, under any agreement of any type or otherwise. The exercise or failure to exercise any remedy shall not preclude the exercise of the remedy at another time or of any other remedy at any time. No action regardless of form arising out of or in any way relating to the goods furnished or services rendered by MemoryTen, Inc. may be brought by Buyer more than one year after the cause of action has accrued.

Entire Agreement & Assignment

This agreement sets forth the only terms and conditions and is the entire agreement between the parties with regard to the subject matter hereof and supersedes any and all prior or contemporaneous oral or written negotiations, communications and agreements with respect thereto. No terms or conditions in any order or other writing by Buyer, course of prior dealings between the parties or usage of the trade shall amend, vary, supplement or explain any term used in this agreement. Acceptance or acquiescence in a course of performance rendered under this agreement shall not be relevant to determine the meaning of this agreement even though the accepting or acquiescing party had knowledge of the nature of the performance and opportunity for objection. No subsequent modification of this agreement shall be binding upon MemoryTen, Inc. unless reduced to writing and signed by both MemoryTen, Inc. and Buyer. No agent, employee, or representative of the MemoryTen, Inc. has any authority to bind the MemoryTen, Inc. to any affirmation, representation or warranty covering the materials sold under this agreement. Unless an affirmation, representation or warranty made by an agent, employee, or representative is specifically included within this agreement; it has not formed a part of this agreement and shall not in any way be enforceable against the MemoryTen, Inc. Any assignment of this agreement or any rights hereunder by Buyer shall be void without MemoryTen, Inc.'s written consent.

Non-Applicability of Buyer Terms

Notwithstanding any terms or conditions on Buyer's order, the terms and conditions on this agreement control all dealings between Buyer and MemoryTen, Inc. Any conflicting statements or terms on Buyer's purchase orders, invoices, confirmation or other Buyer generated documents ("Buyer Documents") are negated by submission of this agreement and the issuance of credit by MemoryTen, Inc. MemoryTen, Inc.'s performance of any contract is expressly made conditional on Buyer's agreement to MemoryTen, Inc.'s terms and conditions of sale unless otherwise specifically agreed to in writing by MemoryTen, Inc. In the absence of such agreement, commencement of performance and/or delivery shall be for Buyer's convenience only and shall not be deemed or construed to be acceptance of Buyer's terms and conditions or any of them. If a contract is not earlier formed by mutual agreement in writing, acceptance of any goods or services shall be deemed acceptance of the terms and conditions stated herein.

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General

This agreement and performance by the parties hereunder shall be governed and construed in accordance with the laws of the State of California, including the provisions of the California Uniform Commercial Code but excluding its conflict of laws provisions. The parties expressly exclude the applicability of the United Nations Convention on International Sale of Goods. Any and all actions or proceedings arising out of or relating to this agreement or the goods or transactions shall be exclusively filed and resolved by the Superior Court of California, County of Santa Clara. All agreements, covenants, conditions and provisions contained herein shall apply to and bind the assignees and successors in interest of Buyer. If any provision or part of this agreement is held to be invalid, illegal, unconscionable or unenforceable, the other provisions and portions hereof shall not be affected. The captions used herein are for the convenience of the parties only and shall not affect its construction or interpretation.

Buyer's name

Title

Company

Signature

Date

***** Please be sure to initial the first three pages, fill out and sign this page. Fax all pages to 1-408-350-0355 *****